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April 15, 2014

Wisconsin Department of Justice  
Attn: Attorney General J.B. Van Hollen  
P.O. Box 7857  
Madison, WI 53707-7857

Re: Informal Opinion Request

Dear Attorney General Van Hollen:

I am writing as General Counsel for the University Wisconsin System on behalf of University of Wisconsin System President Ray Cross to request an informal Attorney General's opinion on two questions. First, whether concurrent enrollment courses offered by UW institutions in high schools fall within the scope of Wis. Stats., Section 118.52, entitled "Course options" (s.118.52). Based on the facts and analysis provided below, it is our belief that concurrent enrollment courses are not governed by s.118.52.

The second question is whether requiring a high school student enrolled in such a course to pay tuition to receive college credit for the course violates Article 10, Section 3 of the Wisconsin Constitution, which states in relevant part, "The legislature shall provide by law for the establishment of district schools . . . which shall be free and without charge for tuition for all children between the ages of 4 and 20 years." Again, based on the facts and analysis below, we believe that payment of tuition in this instance to gain college credit does not violate the state constitution.

Facts Relating to the First Question Presented

Concurrent enrollment courses are college courses offered by UW institutions in high schools. The courses are taught at the high schools by UW-approved high school teachers who have been given adjunct instructor status by a UW institution. A student may take concurrent enrollment courses for high school credit only, or for both college and high school credit. If a student takes a course only for high school credit, there is no tuition associated with the course. If a student chooses to gain college credit for the course, tuition is paid by the student or the student's family. The tuition is at a significantly reduced cost.

Concurrent enrollment courses have been offered by UW institutions in Wisconsin high schools since 1974-75. Examples include the Cooperative Academic Partnership Program (CAPP) offered by UW-Oshkosh, as well as similar programs offered by UW-Green Bay, UW-Colleges, and UW-Whitewater, along with other UW institutions. Concurrent enrollment programs are not statutorily based or mandated, but rather were developed by UW institutions in cooperation with

local school districts to allow high school students increased access to college courses and credit at a greatly reduced cost. Concurrent enrollment programs permit students to accumulate college credits without leaving their school district.

#### Law Relating to the First Question Presented

Prior to being amended in the 2013-15 budget bill, s.118.52 was entitled “Part-time open enrollment.” The part-time open enrollment program described in the former s.118.52 had been in place since the 1998-99 school year and involved enrollment of high school students in up to two courses at a high school that was not in the high school student’s school district, i.e., in a non-resident school district. The part-time open enrollment program described in the former statute did not include higher education institutions, and did not encompass concurrent enrollment programs. The statute stated that transportation to the non-resident school district where the course was taken was the responsibility of the student’s parents. The statute also provided for payment of costs by the student’s resident school district to the non-resident school district where the courses were taken.

Section 118.52 was amended in the 2013-15 budget bill, changing the title of the law to “Course options.” Other changes involved adding a definition of “educational institution” and systematically replacing most references to “nonresident school district” with “educational institution.” The amended s.118.52 specifies that any pupil enrolled in a public school in any grade may attend an “educational institution” to take courses offered at that educational institution. Educational institution is defined to include the “University of Wisconsin System, a technical college, a nonprofit institution of higher education, [and] a tribal college,” as well as public K-12 schools. The majority of the text of s.118.52 remained unchanged by the amendments.

We are not aware of any case law interpreting the former or current s.118.52.

#### Analysis

The 2013 amendments to s.118.52 expanded<sup>1</sup> the existing, part-time enrollment program to permit students to take courses, not only at non-resident school districts as was the case previously, but also at higher education institutions and other institutions included within the statutory definition of “educational institution.” Educational institutions are essentially the successors to “non-resident school districts.” Most of s.118.52’s text was unchanged by the 2013 amendments, in effect allowing a larger group of K-12 students to take courses at a larger group of institutions outside their resident school district, while leaving all other aspects of the program in place. Thus, as was the case prior to the 2013 amendments, a student must receive instruction outside of his resident school district for that instruction to come under s.118.52. Therefore, we interpret s.118.52 to apply only to courses taken by K-12 students at other

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<sup>1</sup> The Legislative Fiscal Bureau Budget Summary (<http://legis.wisconsin.gov/lfb/publications/budget/2013-15%20Budget/Documents/Budget%20Papers/523.pdf>) described the amendments to s.118.52 as an expansion of the part-time enrollment program. The Legislative Reference Bureau’s Analysis of AB40, the 2013-15 Executive Budget Bill (<http://docs.legis.wi.gov/2013/related/proposals/ab40>), also viewed the amendments in this light.

educational institutions, including UW institutions, i.e., courses taken outside of their resident school district, and not to apply to concurrent enrollment courses taught within their resident school district by the district's own teachers.

The continuity in language between the former "part-time open enrollment" statute and new "course options" version of s.118.52 supports this interpretation. The language in the part-time open enrollment statute stating that students would apply to a non-resident school district, and would travel from their high school to "attend" a non-resident school district to take courses in that non-resident school district remained unchanged by the 2013 amendments. The current course options statutory language is basically the same, stating that students apply to and may be accepted into up to two courses that are taken at other educational institutions outside their resident school district, including on the campuses of higher education institutions.

The statutory language in the various sections of s.118.52 continues to provide, as it did previously under the part-time open enrollment statute, that students will "submit an application" to an educational institution and will travel from their high school to "attend" another educational institution by taking courses "at" the educational institution. See, for example, s.118.52(3) (directing the parents of a student "who wishes to attend an educational institution for purposes of taking a course under this section" to "submit an application . . . to the educational institution at which the pupil wishes to attend a course"); s.118.52(8) ("If an application is rejected . . . or a pupil is prohibited from attending a course at an educational institution," the student's parent may appeal); s.118.52(9) ("A pupil attending a course at an educational institution under this section has all of the rights and privileges of other pupils attending the educational institution and is subject to the same rules and regulations as those pupils."); s.118.52(11) ("The parent of a pupil attending a course at an educational institution under this section is responsible for transporting the pupil to and from the course that the pupil is attending."); s.118.52(12) ("The resident school board shall pay to the educational institution, for each resident pupil attending a course at the educational institution under this section, an amount equal to the cost of providing the course to the pupil.")

The overall statutory scheme outlined in s.118.52, as described in the previous paragraph, contemplates a student applying to an educational institution, being accepted into that institution, traveling to attend courses at that educational institution, being responsible for any related travel costs,<sup>2</sup> and having the same privileges as students who are residents at that educational institution, with the student's resident school district paying the educational institution for the cost of the courses. Concurrent enrollment courses do not fit, and were not intended to fit, within amended s.118.52.

Concurrent enrollment courses were not included under s.118.52 prior to its amendment in 2013, or within any other statutory framework. We believe the course options program is correctly viewed as an extension of the part-time open enrollment program. In effect, the 2013 amendment expanded the program to allow a larger group of K-12 students to take courses from a larger universe of institutions outside of their own school district, and does not impact

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<sup>2</sup> Another provision in the 2013-15 budget provided funding to cover student travel costs in certain circumstances.

concurrent enrollment courses taught in their own high school by their own teachers. Because students take concurrent enrollment courses at their resident school districts, those courses do not fall within the ambit of s.118.52

Facts Relating to the Second Question Presented

See facts relating to first question presented.

Law Relating to the Second Question Presented

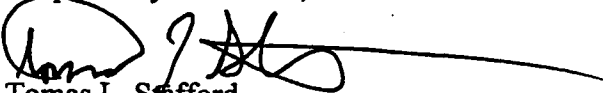
Article 10, Section 3 of the Wisconsin Constitution states in relevant part, "The legislature shall provide by law for the establishment of district schools . . . which shall be free and without charge for tuition for all children between the ages of 4 and 20 years." In construing this section, the Wisconsin Supreme Court has held that "If a course is credited toward graduation, even though not a required course in the curriculum, it comes within the purview of the constitutional requirement that fees, other than books or similar items, may not be charged." *Board of Education v. Sinclair*, 65 Wis.2d 179, 187, 222 N.W.2d 143, 148 (1974); *see also, State ex rel Comstock v. Joint School District No. 1*, 65 Wis. 61, 27 N.W. 829 (1886); *Maxcy v. City of Oshkosh*, 144 Wis. 238, 128 N.W. 899 (1910); *City of Wauwatosa v. Union Free School District of Town and City of Wauwatosa*, 214 Wis. 35, 252 N.W. 351 (1934).

Analysis

Based on the constitutional language and relevant case law, it would not be appropriate to charge tuition to a high school student for a course only credited toward high school graduation. However, high school students enrolled in concurrent enrollment courses are only required to pay tuition for the course if they want to receive college credit in addition to high school credit. A high school student who elects not to receive college credit for the concurrent enrollment course takes the course for "free and without charge for tuition" as mandated by the state constitution. Students only pay tuition if they want to receive the added value of college credit. Our interpretation is that the payment of tuition to receive college (not high school) credit for a concurrent enrollment course does not violate the state constitution.

We would appreciate receiving an informal opinion answering these two questions at your earliest convenience. Please let me know if we can provide additional information.

Respectfully submitted,



Tomas L. Stafford  
General Counsel  
University of Wisconsin System

Cc: President Cross  
Senior Vice President Nook

April 18, 2014

Attorney General J.B. Van Hollen  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857

RE: Request for an Informal Opinion Regarding Wis. Stat. § 118.52, "Course Options"

Dear Attorney General Van Hollen:

I am writing on behalf of State Superintendent Tony Evers to request an informal opinion on whether the recreated Wis. Stat. § 118.52 applies to an established, but non-statutory, program of concurrent enrollment between the University of Wisconsin System (UW) and Wisconsin school districts. A cooperative program known as concurrent enrollment or dual enrollment exists in many Wisconsin high schools. Under this program, high school students may take courses at their high schools that qualify for UW credit. The UW System calls this program, "College Credit in High School". A similar program exists for students who take courses at the Wisconsin Technical College System, but the State Superintendent's request for an opinion relates only to the program involving the University of Wisconsin System.

Facts:

Many concurrent enrollment courses are taught at a high school by a high school teacher. Historically, these courses have satisfied a high school graduation requirement under Wis. Stat. § 118.33. A UW institution that offers a concurrent enrollment course reviews the syllabus and materials and certifies that the courses meet the requirements to receive college credits at that institution. In addition, the UW institution classifies those who teach the course as an adjunct instructor of the UW institution. The student taking the course is enrolled at the UW institution as a special student.

Pupils taking concurrent enrollment courses can generally receive high school credit, college credit or both for the course. Historically, in order to receive college credit for the course, the UW System required pupils to pay UW tuition for those credits that has been discounted from the full per credit tuition. This arrangement operated outside of any statutory or administrative code framework.

Law Related to the Questions Presented:

Prior to July 2, 2013, Wis. Stat. § 118.52, entitled "Part-time open enrollment", was a program under which public school pupils could attend a non-resident school district for the purpose of taking up to two courses. (Exhibit 1) Sections 1811-1827 of 2013 Wisconsin Act 20, the 2013-2015 biennial budget, (Exhibit 2) repealed Wis. Stat. § 118.52 and recreated it as "Course options" (Exhibit 3). Much of the part-time open enrollment language remained in the new

statute, but its applicability was expanded to include “the University of Wisconsin System, a technical college, a nonprofit institution of higher education, a tribal college, a charter school, and any nonprofit organization that has been approved by the Department of Public Instruction.” The new statute also added the provision that the resident school district may reject an application for “course options” if the course does not satisfy a high school graduation requirement under Wis. Stat. § 118.33 or did not conform to the pupil’s academic and career plan. It removed, however, the resident school district’s ability to reject an application due to an undue financial burden on the resident school district.

There have been no administrative rules enacted under “course options”, and the department is repealing Wisconsin Administrative Code §§ PI 36.06 through 36.09 that previously applied to part-time open enrollment.

Another program similar to “course options” is “Youth options program” set forth in Wis. Stat. §118.55. “Youth options” permits a pupil to take a course at an institution of higher education for college or high school credit or both. In addressing the question posed herein, the department believes “Youth options” program must also be considered.

The department knows of no case law addressing either “Part-time open Enrollment”, “Youth options” or “Course options”.

Question Posed:

Does Wis. Stat. § 118.52 apply to the concurrent enrollment courses currently offered by the University of Wisconsin System to pupils attending Wisconsin public schools?

Analysis:

The former part-time enrollment statute generally covered situations in which one school district did not offer a course to high school students but a neighboring district did. The part-time open enrollment program mirrored the full-time open enrollment program under Wis. Stat. § 118.51 that permits public school pupils to attend a non-resident school district on a full-time basis.

State Superintendent Evers has been concerned with the disparate opportunity the UW System concurrent enrollment program provides to economically disadvantaged pupils. While the state superintendent completely supports the opportunity this program provides, only pupils who can afford to pay the UW tuition can avail themselves of this opportunity. Governor Walker also wanted to provide to all pupils an opportunity to participate in programs for which they can earn college credits while still in high school. As a result, the Governor drafted and included sections 1811 through 1827 in AB 40, the 2013-2015 biennial budget bill which the legislature subsequently enacted as 2013 Wisconsin Act 20. These sections thus became the new Wis. Stat. § 118.52 “Course options” program.

Both the Legislative Fiscal Bureau (LFB) and the Legislative Reference Bureau (LRB) described the biennial budget bill as expanding part-time open enrollment. (Exhibits 4 and 5) This description clearly evidenced the intent of the governor and the state superintendent to enact a

law that makes concurrent enrollment available to all pupils, including economically disadvantaged pupils.

In its budget paper regarding “course options”, the LFB described the UW System’s concurrent enrollment program as “a current program that is separate from the part-time open enrollment and youth options programs.” The LFB further stated, “The proposed course options program under the bill would contain elements of both the part-time open enrollment and other current programs allowing high school pupils to take postsecondary courses.” The LFB also indicated that an argument in favor of the proposed language creating “course options” is that the program “would be provided at no cost to students, because the educational institutions would not be able to charge any additional payment beyond the DPI-determined amount to pupils participating in the program.” (LFB, Paper #523 page 4)

In its discussion of the arguments that could be made against creating “Course options” the LFB states:

To the extent that school districts would be paying for courses that pupils would pay for under current programs, it could be viewed as an additional mandate on districts, especially since the ability to reject an application based on undue financial burden would be removed under the bill. *Id.*

The LFB continued, “Depending on the procedure DPI uses to determine the cost of a course, it could have an adverse impact on the operating budgets of the educational institutions that accept pupils.” *Id. at 5.*

The legislature made no change to the proposed language and adopted it in its entirety.

The UW System argues Wis. Stat. §118.52 does not apply to its concurrent enrollment program because pupils are taking the college at their high school, instead of a UW institution. Thus, argues UW, the pupils are not “attending” another institution as required under the statute. Put another way, the UW System argues that a pupil is not “attending” a UW institution unless the pupil is physically present at a brick-and-mortar facility owned and operated by the UW System or one of its campuses. In the state superintendent’s opinion, this argument fails because the UW System schools participating in the concurrent enrollment program enroll the student as a special pupil, certify the teacher as adjunct faculty, certify the course for college credit and oversee the course curriculum and the way it is taught.

Historically, “attend” might have meant being physically present at a physical location. However, that meaning is outdated by the advent of technology in general and virtual courses and schools, in particular. The UW System, itself, has an “ecampus” that enables individuals to earn an associate, bachelor’s, master’s, and even doctorate degree at various UW campuses without necessarily having to appear on the campus.<sup>1</sup> The UW System views “ecampus” students as “attending” a UW institution, and counts them as enrolled students.<sup>2</sup> In the same way,

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<sup>1</sup> See <http://ecampus.wisconsin.edu/online-degree-programs/>

<sup>2</sup> The manner of enrolling students, granting them campus access to libraries, giving them UW email accounts etc.

pupils taking a course at their high school under Wis. Stat. § 118.52 are also “attending” a UW institution.

This conclusion does not eliminate the UW System’s concurrent enrollment program altogether. Under “course options”, a pupil is entitled to take only two courses at any one time. If a pupil wished to take additional courses, the concurrent enrollment program requirements could apply to the additional courses.

Although 2013 Wisconsin Act 20 created “course options”, it did not modify Wis. Stat. § 118.55, the “Youth options program”. (Exhibit 6) The “Youth options program” allows a pupil to take courses at an institution of higher education, but only if the pupil’s school district does not offer comparable courses. Clearly, Wis. Stat. § 118.55 is not a concurrent enrollment program. Accordingly, one must interpret Wis. Stat. § 118.52 to apply to situations that are different from those covered by the Youth Options Program.

For all these reasons, the state superintendent respectfully submits that the “course options” program under Wis. Stat. § 118.52, does encompass the UW System’s concurrent enrollment program.

Thank you for your consideration of this request. If you need additional information, please do not hesitate to contact me.

Respectfully,



Janet A. Jenkins  
Chief Legal Counsel

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appears to be substantially the same as students taking an online degree program. See UW Whitewater: <http://www.uww.edu/conteduc/pie/docs/PIE%20Student%20Checklist%203.pdf>, UW Oshkosh: <http://www.uwosh.edu/capp/students> and <http://www.uwosh.edu/capp/students/first-apply-then-register>, and UW Green Bay: <http://www.uwgb.edu/ccih/html/studentInfo.asp>.