



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

June 8, 2007

OAG – 1 – 07

Mr. David A. Bretl
Walworth County
Corporation Counsel
Post Office Box 1001
Elkhorn, WI 53121-1001

Dear Mr. Bretl:

You ask whether the chairperson of a county board may be removed from that position only for cause by a two-thirds vote of the board under Wis. Stat. § 17.10 (2005-06), or whether the chairperson may be removed at the will of a simple majority of the board under Wis. Stat. § 59.12 (2005-06). I have concluded that the less demanding procedures of Wis. Stat. § 59.12 apply to the removal of the chairperson from that position on the county board.

Wisconsin Stat. § 17.10(2) provides that “[c]ounty officers appointed by the county board may be removed by the county board for cause. All removals may be made by an affirmative vote of two-thirds of the supervisors entitled to seats on the county board.”

This section does not apply to the removal of the chairperson of a county board for two reasons. First, the chairperson of a county board is not a county officer by virtue of that position. Second, the chairperson of a county board is not appointed by the board.

Wisconsin Stat. § 17.10(2) applies only to persons who are removed from a position that makes them a county officer or, arguably in some cases, a county employee.

All members of a county board are county officers. Wis. Stat. § 59.10(3)(d) (2005-06). As a member of the county board, Wis. Stat. § 59.12(1), the chairperson of the board is a county officer by virtue of his or her membership on the board.

However, ending the tenure of a member of the county board as chair of the board does not oust that member from the board but only from a particular position on the board. The member loses the chair but not their seat on the board. So Wis. Stat. § 17.10(2) would apply to the removal of the chairperson of a county board only if the chairperson was a county officer, separately and distinctly from being a member of the board, solely by virtue of being the chairperson of the board.

The Legislature has expressly identified the principal officers of a county, in addition to members of the county board, in Wis. Stat. ch. 59. However, the chairperson of a county board

is not identified anywhere in this chapter as a county officer separate and distinct from being a member of the board. Nor is there any other provision regarding county offices which suggests that the chairperson of a county board is county officer separate and distinct from being a member of the board.

The Legislature's failure to include the chairperson of the county board among those identified as county officers is itself strong evidence that the chairperson is not a county officer in his or her own right under the principle that the express inclusion of some in the statutes implies the exclusion of all others. *See generally Northwest Airlines, Inc. v. DOR*, 2006 WI 88, ¶ 50, 293 Wis. 2d 202, 717 N.W.2d 280. This inference is confirmed by the judicially-established criteria for determining who is a public officer.

Whether a person who holds a government position is a public officer, including a county officer, depends primarily on the nature of the power instilled in the position by legislative delegation. *Wis. Law Enforcement Stds. Bd. v. Vill. of Lyndon Station*, 98 Wis. 2d 229, 240-41, 295 N.W.2d 818 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981); *Burton v. State Appeal Bd.*, 38 Wis. 2d 294, 300, 303, 156 N.W.2d 386 (1968). Persons cannot be public officers, however chosen, unless they have been given authority to exercise some of the sovereign power of government. *Law Enforcement Stds. Bd.*, 98 Wis. 2d at 240; *Burton*, 38 Wis. 2d at 300-01.

The chairperson of a county board has not been delegated any sovereign power above and beyond the power given to other members of the board and the board as a whole.

The chairperson has been delegated power to administer oaths to persons required to be sworn concerning matters before the board, to countersign all ordinances enacted by the board and to preside at meetings of the board. Wis. Stat. § 59.12(1). If directed by an ordinance enacted by the board, the chairperson may also countersign county orders, transact board business with local and county officers, expedite measures resolved upon by the board or take care that all laws pertaining to county government are enforced. *Id.*

These are mostly administrative and ministerial powers directed at facilitating decisions made by the board in the exercise of the board's powers of government. Moreover, the powers in addition to those given by Wis. Stat. § 59.12(1) are not delegated to the chairperson by the Legislature but by the county board.

Furthermore, public officers must be able to exercise their powers independently, without the control of a superior officer or body. *Law Enforcement Stds. Bd.*, 98 Wis. 2d at 240; *Burton*, 38 Wis. 2d at 300.

But the powers of a county as a body corporate can only be exercised by the county board, or pursuant to a resolution adopted or ordinance enacted by the board. Wis. Stat.

Mr. David A. Bretl

Page 3

§ 59.02(1) (2005-06). So whatever power the chairperson of a county board exercises is subject to the ultimate control of the board.

Finally, a public officer must hold office by virtue of a commission or other written authority, must take an oath of office and give an official bond. *Law Enforcement Stds. Bd.*, 98 Wis. 2d at 240; *Burton*, 38 Wis. 2d at 300.

The chairperson of a county board does not hold office by virtue of any written authority but is simply elected by the members of the board. Wis. Stat. § 59.12(1). And there is no requirement that the chairperson take an oath or give a bond to hold that position, apart from the oath required as a member of the board. *See* Wis. Stat. § 59.21(1) (2005-06).

Therefore, the chairperson of a county board is not a county officer by virtue of holding the position of chair.

The chairperson of a county board is obviously not a county employee either.

An employee is someone who works for someone else, *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 604 (3d ed. 1996); *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 743 (unabridged ed. 1986), something a county board chair does not do.

Moreover, statutory definitions of "public employee" indicate that a public employee is someone who is not a public officer. Wis. Stat. §§ 19.32(1bg) and 939.22(30) (2005-06). And while the chairperson of a county board is not a public officer by virtue of being the chairperson of the board, he or she is a public officer by virtue of being a member of the board.

So Wis. Stat. § 17.10 does not apply to the removal of the chairperson of a county board because the chairperson is not a county officer or employee, apart from being a member of the board, separately by virtue of holding the position of chair of the board.

Furthermore, Wis. Stat. § 17.10 does not apply to the removal of the chairperson of a county board because the chairperson is not appointed, but is elected, by the board.

Wisconsin Stat. § 59.12(1) provides that the county board, "at the first meeting after each regular election at which members are elected for full terms, shall elect a member chairperson."

The literal language of this statute is not necessarily controlling because in some circumstances "elect" must be construed to mean "appoint." 63 Op. Att'y Gen. 286, 288 (1974); 61 Op. Att'y Gen. 116, 118-19 (1972). The meaning which "elect" is intended to convey in a statute must be determined by the circumstances in which it is used. 61 Op. Att'y Gen. at 118. *See also Orion Flight Services v. Basler Flight Service*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421,

714 N.W.2d 130 (meaning of provision must be determined by considering words in context in which they are used including related statutes).

However, the circumstances in which the word “elect” is used in Wis. Stat. § 59.12(1) demonstrate that it is used in the literal sense of elect instead of appoint.

This section uses variants of the word “elect” three times in the same sentence. It states that after each “election” in which members of the county board are “elected” the board members shall “elect” a chairperson. Wis. Stat. § 59.12(1).

The same word appearing several times in the same statute should be given the same meaning each time it appears. *State v. Charles*, 180 Wis. 2d 155, 159-60, 509 N.W.2d 85 (Ct. App. 1993); *In Interest of R.H.L.*, 159 Wis. 2d 653, 659, 464 N.W.2d 848 (Ct. App. 1990). And since there is no question that “elect” is used in the sense of elect instead of appoint the first two times it is used, since it refers to the process by which the members of a county board are chosen, it follows that “elect” is used in the sense of elect instead of appoint the third time it is used in rapid succession.

Moreover, after just providing that a county board should “elect” one of its members as chairperson, the Legislature went on to provide that a county board could “appoint” some of its members to committees. Wis. Stat. § 59.13(1) (2005-06).

The use of different words denotes a different intent. *R.H.L.*, 159 Wis. 2d at 660. So the use of “elect” in one statute and “appoint” in the following statute dealing with a related subject further evidences a legislative intent to use “elect” in the commonly understood sense of elect instead of the artificially understood sense of appoint in Wis. Stat. § 59.12(1).

My predecessor suggested in 63 Op. Att’y Gen. 286 that “elect” should be construed to mean “appoint” in a statute authorizing a county board to select a county officer to avoid a possible conflict with Wis. Const. art. XIII, § 9, which states that “[a]ll county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct.”

However, there is no potential constitutional problem in the present situation since, as discussed above, the chairperson of a county board is not a county officer by virtue of being the chairperson of the board. Therefore, there is no need to give the word “elect” a meaning different from the meaning plainly intended by the Legislature only to avoid an arguable invalidation of the statute.

Further, a seventy-six year old opinion of the Attorney General should not be misunderstood to state that the chairperson of a county board is an appointed officer. That

opinion merely stated that the statute which authorized a county board to fill vacancies in appointive county offices also authorized a county board to fill a vacancy in the office of chairperson of the board. 20 Op. Att’y Gen. 85, 89 (1931). The opinion recognized that the chairperson of a county board is elected, and acknowledged that a vacant chair position was to be filled by election rather than appointment. 20 Op. Att’y Gen. at 86-87, 90.

The fact that the chairperson of a county board is elected does not mean that the provisions for removal of an elective county officer in Wis. Stat. § 17.09(1) (2005-06) apply when the chairperson is removed. An elective officer is one who holds an elective office, Wis. Stat. § 13.62(6) (2005-06), which is an office that is filled by the vote of the people. Wis. Stat. § 19.42(5m) (2005-06). Since the chairperson of a county board is elected by the board rather than the people, the chairperson is not an elective officer.

The position of chairperson of a county board is distinctively different from the positions of town chairperson and village president, both of whom are directly elected to those specific positions by vote of the people. Wis. Stat. §§ 60.30(1)(a)1. and 61.19 (2005-06).

Therefore, neither of the provisions that permit removal of a county officer only by a supermajority vote for cause apply to the removal of the chairperson of a county board.

Instead, the removal of the chairperson of a county board is governed by Wis. Stat. § 59.12(1), which provides that the chairperson serves in that position “until the board elects a successor.”

There is nothing in this statute that requires the county board to have any particular reason for removing its chairperson. So applying the rule that the plain language of a statute is controlling, *State ex rel. Kalal v. Cir. Ct.*, 2004 WI 58, ¶¶ 44-51, 271 Wis. 2d 633, 681 N.W.2d 110, an incumbent chairperson may be removed at will by the county board simply by voting to elect someone else to that position.

Unless otherwise provided, a county board may determine all questions by the vote of a majority of the supervisors who are present when the vote is taken, as long as those present constitute a quorum. Wis. Stat. § 59.02(3) (2003-04). Since there is no other applicable provision, the board may replace its chairperson by a simple majority vote.

Finally, Wis. Stat. § 59.12(1) contains no limitation on the time when the board may choose to terminate the tenure of the incumbent chairperson by electing a successor. Indeed, the history of this provision shows that the Legislature intended to permit a county board to change chairpersons whenever it chooses to do so.

An early statute dealing with the replacement of a chairperson read much as the present statute does, providing that the chairperson should “hold this office until his successor is

Mr. David A. Bretl

Page 6

elected.” Wis. Stat. ch. 13, § 43 (1871). This statute was changed to provide that a successor to a chairperson elected at the beginning of a term of the county board could be replaced only at the beginning of the next term. Wis. Stat. § 667 (1878). But this limitation has long since been repealed, leaving no restriction on the replacement of a chairperson at any time during the term.

The omission from a later version of a statute of a provision which was contained in an earlier version is indicative of a legislative intent to alter the statute so that the omitted provision is no longer part of the law. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 633, 547 N.W.2d 602 (1996); *R.W.S. v. State*, 162 Wis. 2d 862, 879, 471 N.W.2d 16 (1991). This principle gains strength where, as here, the Legislature adds a provision to a statute, then later deletes the added provision, indicating that on second thought they believed they made a mistake by adding the provision to the law.

Thus, a county board may remove its chairperson at will by a simple majority vote at any time.

There may be some who believe that as a matter of policy it should be more difficult to replace the chairperson of a county board, that the chairperson should be subject to removal only for cause by a two-thirds vote of the entire board. But it is the province of the Legislature, not the Attorney General, to determine the rules for removing the chairperson. The Attorney General can only discern what rule the Legislature has determined to apply.

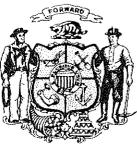
And in this respect it should be noted that the Legislature has simply applied to county boards the same rule it has applied to itself. Officers elected by either House of the Legislature may be removed by the House that elected them “at pleasure.” Wis. Stat. § 17.07(1) (2005-06).

Sincerely,



J.B. Van Hollen
Attorney General

JBVH:TJB:ajw



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

June 8, 2007

OAG – 2 – 07

Mr. Richard J. Summerfield
Corporation Counsel
Rusk County
311 East Miner Avenue, Suite L361
Ladysmith, WI 54848

Dear Mr. Summerfield:

In your letter dated March 8, 2007, you ask whether a county can exercise its home rule authority in such a way as to appoint one regular member and one alternate member who reside in the same town to a county board of adjustment.

In my opinion, the answer is no.

Wisconsin Stat. § 59.03 provides in part as follows:

(1) ADMINISTRATIVE HOME RULE. Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

Wisconsin Stat. § 59.04 provides as follows:

Construction of powers. To give counties the largest measure of self-government under the administrative home rule authority granted to counties in s. 59.03(1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power.

Wisconsin Stat. § 59.51(1) provides as follows:

Board powers. (1) ORGANIZATIONAL OR ADMINISTRATIVE POWERS. The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or

administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

Wisconsin Stat. § 59.694(2) provides in part:

(am) The chairperson of the county board to which par. (a) applies shall appoint, for staggered 3-year terms, 2 alternate members of the board of adjustment, who are subject to the approval of the county board. Annually, the chairperson of the county board shall designate one of the alternate members as the first alternate and the other as 2nd alternate. The first alternate shall act, with full power, only when a member of the board of adjustment refuses to vote because of a conflict of interest or when a member is absent. The 2nd alternate shall act only when the first alternate refuses to vote because of a conflict of interest or is absent, or if more than one member of the board of adjustment refuses to vote because of a conflict of interest or is absent.

....

(c) The members of the board of adjustment, including alternate members, shall all reside within the county and outside of the limits of incorporated cities and villages; **provided however, that no 2 members shall reside in the same town.**

In *Jackson County v. State*, 2006 WI 96, ¶¶ 19-20, 293 Wis. 2d 497, 717 N.W.2d 713, the court described the home rule authority of counties:

The County correctly asserts that Wis. Stat. § 59.03 is a broad grant of power to counties. . . . When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern. *Mommsen v. Schueller*, 228 Wis. 2d 627, 635, 599 N.W.2d 21 (Ct. App. 1999). Wisconsin courts have previously recognized that while some subjects are exclusively a statewide concern, others may be entirely a local concern and some subjects are not exclusively within the purview of either the state or of a county. *Id.* at 636. For those subjects where both the state and a county may act, the county's actions must "complement rather than conflict with the state legislation." *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 37, 269 Wis. 2d 549, 676 N.W.2d 401.

Four factors assist us in determining how a county's action is to be analyzed:

(1) whether the legislature has expressly withdrawn the power of municipalities to act;

(2) whether the ordinance logically conflicts with the state legislation;

(3) whether the ordinance defeats the purpose of the state legislation;

or

(4) whether the ordinance goes against the spirit of the state legislation.

Mommsen, 228 Wis. 2d at 636-37 (citing *Anchor Sav. & Loan Ass'n v. EOC*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984); *U.S. Oil, Inc. v. City of Fond Du Lac*, 199 Wis. 2d 333, 345, 544 N.W.2d 589 (Ct. App. 1996)). If any one of the four factors set out in *Mommsen* is met by a county's action, that action is without legal effect. *Ziervogel*, 269 Wis. 2d 549, ¶ 38 (citation omitted).

Wisconsin Stat. § 59.51(1) requires that a county's home rule authority be exercised by the county board. The materials you have provided contain no indication that the county board has enacted an ordinance providing that one regular member and one alternate member of a county board of adjustment can reside in the same town.

The residency requirement in Wis. Stat. § 59.694(2)(c) also uniformly applies to every county with a population of under 500,000, thus indicating that it involves a matter of statewide concern. *Jackson County*, 293 Wis. 2d 497, ¶ 19. To the extent that the residency requirement provisions in Wis. Stat. § 59.694(2) are "an[] enactment of the legislature which is of statewide concern and which uniformly affects every county" within the meaning of Wis. Stat. §§ 59.03(1) and 59.51(1), counties may not utilize their home rule powers to appoint two members from the same town to the county board of adjustment.

Whether the enactment of an ordinance permitting two members of a board of adjustment to be from the same town logically conflicts with, defeats the purpose of, or is contrary to the spirit of state legislation depends upon the meaning of the residency language in Wis. Stat. § 59.694(2)(c). Statutory language is construed according to its plain meaning. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Wisconsin Stat. § 59.694(2)(c) unambiguously provides that "no 2 members [of the board of adjustment] shall reside in the same town." The "structure of the statute in which the operative language appears" is also important in ascertaining its meaning. *Kalal*, 271 Wis. 2d 633, ¶ 46. Wisconsin Stat. § 59.694(2)(am) provides that the county board chair shall appoint "2 alternate members of the

board of adjustment[.]” Wisconsin Stat. § 59.694(2)(c) refers to the “[t]he members of the board of adjustment, including alternate members” Both provisions indicate that the two alternates are members of the board.

Prior versions of a statute may be consulted in order to ascertain its meaning. *Kalal*, 271 Wis. 2d 633, ¶¶ 48-49 and n.8. The statutory provision requiring the appointment of two alternate members to the board of adjustment in what is now Wis. Stat. § 59.694(2)(am) was enacted in 1993 Wisconsin Act 177, sec. 1. Wisconsin Stat. § 59.694(2)(am) provides that “[t]he first alternate shall act, with full power, only when a member of the board of adjustment refuses to vote because of a conflict of interest or when a member is absent.” Wisconsin Stat. § 59.694(2)(am) similarly provides that “[t]he 2nd alternate shall act only when the first alternate refuses to vote because of a conflict of interest or is absent, or if more than one member of the board of adjustment refuses to vote because of a conflict of interest or is absent.” These provisions grant an alternate member the power to act regardless of whether a regular member of the board is from the same town as that alternate. In addition, 1993 Wisconsin Act 177, sec. 2, simply inserted the phrase “including alternate members” into the first sentence of what is now Wis. Stat. § 59.694(2)(c) without changing the basic requirement that no two members of the board of adjustment can reside in the same town. If the Legislature had intended to permit alternate members and regular members of the board of adjustment to reside in the same town, it would have been a simple matter to include a provision permitting them to do so when 1993 Wisconsin Act 71 was enacted.

The question that must be resolved is not whether the variation by your county from the residency requirement provisions in Wis. Stat. § 59.694(2) is minimal. The question is whether, in enacting the residency requirement provisions in Wis. Stat. § 59.694(2), the Legislature intended to allow counties with populations under 500,000 to deviate from those provisions at all. *See* 81 Op. Att’y Gen. 145, 150 (1994). If counties with populations under 500,000 are not bound by the residency requirement provisions contained in Wis. Stat. § 59.694(2), then they may deviate from those provisions in any way they choose and an individual county could conceivably go so far as to appoint all members who are residents of the same town to the board of adjustment. I am not persuaded that the Legislature intended to relinquish to counties with populations under 500,000 the power to elect against the residency requirement provisions in Wis. Stat. § 59.694(2) by selecting any number of residents they might choose from the same town. Granting counties the authority to do so would logically conflict with, defeat the purpose of and be contrary to the spirit of the state legislation by granting potentially disproportionate influence over decisions of the board of adjustment to the viewpoint of residents of a particular town.

Mr. Richard J. Summerfield
Page 5

I therefore conclude that a county cannot exercise its home rule authority in such a way as to appoint one regular member and one alternate member who reside in the same town to a county board of adjustment.

Sincerely,

A handwritten signature in cursive script, appearing to read "J.B. Van Hollen".

J.B. Van Hollen
Attorney General

JBVH:FTC:cla



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

October 25, 2007

OAG – 3 – 07

Ms. Celia Jackson
Secretary
Department of Regulation & Licensing
1400 East Washington Avenue
Madison, WI 53708

Dear Secretary Jackson:

Through the Department of Regulation & Licensing's interim general counsel, you ask whether the Department of Regulation & Licensing and its affiliated licensing and credentialing boards (collectively "DRL") are required to comply with 8 U.S.C. § 1621(a) and (c)(1)(A), which provide that an alien who is not in the United States in compliance with applicable federal law is not eligible for any state public benefit including a professional license or credential.

I have concluded, notwithstanding the absence of any Wisconsin statute limiting eligibility for professional licenses or credentials to persons who are in the country legally, that federal law is controlling so that DRL is prohibited from granting any professional license or credential to an alien who is present in the United States illegally. And because DRL is prohibited from issuing professional licenses or credentials to illegal aliens, it must put in place some kind of procedure practicably designed to reasonably insure that it does not issue licenses or credentials in violation of federal law.

Regulation of immigration is exclusively a federal power. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). The federal government has broad power to determine which aliens should be admitted to the United States and to regulate their conduct while they are here. *Id.*, 424 U.S. at 358. The states, having no such power, can neither add to nor take from the conditions lawfully imposed by Congress on the admission and residence of aliens in the United States or the several states. *Id.*

Exercising its plenary power over immigration, Congress enacted the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, codified in 8 U.S.C. § 1601, *et seq.*

The governing principle of this Act is that

an alien who is not—

- (1) a qualified alien . . .
- (2) a nonimmigrant under the Immigration and Nationality Act . . . , or
- (3) an alien who is paroled into the United States . . . for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

8 U.S.C. § 1621(a). Under the relevant definition, a state or local public benefit includes “any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government[.]” 8 U.S.C. § 1621(c)(1)(A).

In enacting this legislation, Congress expressly declared a national policy to remove the incentive for illegal immigration provided by the availability of public benefits. *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 607-08 (E.D. Va. 2004); *Doe v. Wilson*, 67 Cal. Rptr. 2d 187, 191 (1997) (quoting 8 U.S.C. § 1601(6)). Thus, Congress intended to preempt existing state laws dealing with the eligibility of aliens for public benefits, *Equal Access Education*, 305 F. Supp. 2d at 605, and eliminate any eligibility illegal aliens had under those laws. *Doe*, 67 Cal. Rptr. 2d at 189.

Any state that wants to act contrary to federal policy has to make an affirmative legislative determination to do so. *Equal Access Education*, 305 F. Supp. 2d at 605. “A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.” 8 U.S.C. § 1621(d).

Illegal aliens can only become eligible for state public benefits, therefore, through the enactment of a new state law expressly making them eligible. *Doe*, 67 Cal. Rptr. 2d at 190. In the absence of any such law, states are prohibited from providing illegal aliens with any public benefits other than those few benefits specifically excepted under the federal law. *Equal Access Education*, 305 F. Supp. 2d at 605 n.18; *Doe*, 67 Cal. Rptr. 2d at 190. *See generally Derby v. Brenner Tank, Inc.*, 187 Wis. 2d 244, 247, 522 N.W.2d 274 (Ct. App. 1994) (Supremacy Clause mandates that any conflicts between state and federal law be resolved in favor of federal law).

Wisconsin has not enacted any law affirmatively providing that an alien who is not lawfully present in the United States would be eligible for a public benefit for which the alien would not otherwise be eligible under federal law. Indeed, the Wisconsin Legislature has enacted some laws denying benefits to illegal aliens. *See, e.g.*, Wis. Stat. § 108.04(18) (2005-06) (unemployment benefits); Wis. Stat. § 49.45(27) (2005-06) (medical assistance benefits). So DRL may not issue a professional license or credential to any person who is not in this country legally.

Because DRL is prohibited from issuing professional licenses or credentials to illegal aliens, it must put in place some kind of procedure practicably designed to reasonably insure that it does not issue licenses or credentials in violation of federal law.

Federal law does not dictate what the states must do to insure that applicants for state public benefits are lawfully present in the country so as to be eligible for these benefits. However, Congress has authorized the states to “require an applicant for State and local public benefits (as defined in section 1621(c) of this title) to provide proof of eligibility,” which would include proof that they are qualified legal aliens. 8 U.S.C. § 1625.

Asking applicants for a professional license or credential to supply evidence substantiating their legal immigration status would be consistent with existing state procedures. Wisconsin law requires applicants for professional licenses or credentials to provide their respective examining board with evidence that they meet qualifications necessary to obtain the license or credential. *E.g.*, Wis. Stat. § 448.05(2) (2005-06) (license to practice medicine); Wis. Stat. § 452.09(2) (2005-06) (license to practice real estate); Wis. Stat. § 470.04(2) (2005-06) (license to practice geology). The preemptive federal law regarding immigration status essentially creates an additional qualification for obtaining a state professional license or credential, *i.e.*, that the applicant be in the country legally. So requiring an applicant to provide evidence of legal immigration status simply adds one more qualification to the list of those the applicant must establish to obtain the license or credential.

Finally, although federal law requires the states to verify the immigration status of a person who applies for federal public benefits, it does not require, but permits, the states to verify the immigration status of a person who applies for state public benefits. *See* 8 U.S.C. § 1642(b). Similarly, although state law does not require DRL to verify the qualifications of an applicant for a professional license or credential, it does not prohibit DRL from verifying these qualifications.

However, I recommend that DRL verify the immigration status of all applicants for state professional licenses and credentials to be certain that it is not issuing them in violation of federal law.

Secretary Celia Jackson
Page 4

This leads to your second question which is what practical steps DRL should take to implement a screening process so that it does not issue professional licenses or credentials to illegal aliens in violation of federal law.

I suggest that you contact the Systematic Alien Verification for Entitlements ("SAVE") Program operated by the U.S. Citizenship and Immigration Services in the Department of Homeland Security. As stated on the SAVE internet home page, the SAVE program enables federal, state, and local government agencies and licensing bureaus to obtain the immigration information they need to determine a non-citizen applicant's eligibility for public benefits. More information about the SAVE program is available on the program website or by calling (202) 272-8720.

Additionally, pursuant to 8 U.S.C. § 1642(a)(1), the Attorney General of the United States has issued interim guidance to determine who is a qualified alien eligible to receive federal public benefits. The interim rules are printed in 62 Fed. Reg. 61344-02 (Nov. 17, 1997), and a copy is enclosed.

I hope that this information is useful to the Department of Regulation & Licensing and its affiliated licensing and credentialing boards.

Sincerely,



J.B. Van Hollen
Attorney General

JBVH:TJB:ajw:lkw

Enclosure



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

December 20, 2007

OAG – 4 – 07

Mr. Anthony S. Evers
Deputy State Superintendent
Department of Public Instruction
125 South Webster
Madison, WI 53707

Dear Mr. Evers:

On behalf of the Department of Public Instruction, you have asked for my opinion about the effect of the United States Supreme Court's decision in *Parents Involved in Community Schools, et al. v. Seattle School Dist. No. 1, et al.*, ___ U.S. ___, 127 S. Ct. 2738 (June 28, 2007), on section 118.51(7) of the Wisconsin Statutes. Based on subsequent conversation with your staff, I understand that your concern is specifically related to subsection (a) of that statute. For the reasons that follow, it is my opinion that section 118.51(7)(a) cannot be applied in a manner that is consistent with the equal protection guarantee of the United States Constitution.

Section 118.51(7)(a) provides:

The school board of a school district that is eligible for aid under subch. VI of ch. 121 shall reject any application for transfer into or out of the school district made under this section if the transfer would increase racial imbalance in the school district. A pupil who transfers out of a school district under subch. VI of ch. 121 shall not be counted in that school district's membership, as defined in s. 121.004(5), for the purpose of determining the school district's racial balance under this paragraph.

In effect, it requires each Wisconsin school district that is eligible for special transfer aid under subchapter VI of chapter 121 of the Wisconsin Statutes to reject a student's request to transfer into or out of that district under the full-time open enrollment program if the requested transfer would increase the district's racial imbalance. The effect of subsection (7)(a) is that a student's race becomes a mandatory, threshold requirement when determining whether a student will be allowed to transfer into an available space in a school district that is eligible for special transfer aid, or out of such a district into another school district that has space for the student.

In order to comprehensively respond to your question, it is necessary to explain the basic operation of the special transfer aid program, the basic operation of the open enrollment program, and the U.S. Supreme Court's decision in *Seattle School Dist. No. 1*.

Historical background: special transfer aid. The special transfer aid program contained in chapter 121, subchapter VI, was enacted by chapter 220, Laws of 1975, and first went into effect in the 1976-77 school year. The purpose of the program, sometimes referred to as the "school integration aid program" and sometimes as the "Chapter 220 aid program," is stated in section 1 of chapter 220, Laws of 1975:

The state of Wisconsin hereby declares that it is the announced policy of the state to facilitate the transfer of students between schools and between school districts to promote cultural and racial integration in education where students and their parents desire such transfer and where schools and school districts determine that such transfers serve educational interests. The state further declares that it is a proper state expense to encourage such transfers through the provision of special aids.

The history of the Chapter 220 aid program is closely associated with two federal lawsuits involving Milwaukee Public Schools ("MPS"). In 1976, the Federal District Court for the Eastern District of Wisconsin determined that MPS created and maintained a system of racial segregation in its schools. *Amos v. Board of Directors of City of Milwaukee*, 408 F. Supp. 765 (E.D. Wis. 1976). Although that determination was reversed by the United States Supreme Court and remanded to the district court for reconsideration in light of the Court's more recent precedent, *Brennan v. Armstrong*, 433 U.S. 672 (1977), the district court on remand reaffirmed its essential finding that MPS violated the equal protection rights of the plaintiff class by acting with segregative intent against them. *Armstrong v. O'Connell*, 451 F. Supp. 817 (E.D. Wis. 1978). In 1979, the district court approved an agreed-upon desegregation plan to ensure that at least 75% of MPS students would be enrolled in racially balanced schools. *Armstrong v. Board of Sch. Directors, etc.*, 471 F. Supp. 800 (E.D. Wis. 1979). The approved settlement plan defined the parameters of the range of allowable black enrollment at elementary, middle, and high schools, and remained in effect until July 1, 1984. See Wisconsin Legislative Fiscal Bureau, *School Integration (Chapter 220) Aid*, (Informational Paper 28, January 2007) ("LFB Informational Paper 28") at 1.¹

In 1984, MPS filed a lawsuit against 24 suburban school districts and the State of Wisconsin, alleging the defendants unlawfully cooperated to isolate and confine Milwaukee area black students within the City of Milwaukee in order to foster and maintain segregated schools in the metropolitan area. *Board of School Directors v. State of Wis.*, 649 F. Supp. 82 (E.D. Wis. 1985). The district court approved a settlement agreement in October 1987, which

¹This Informational Paper is available on the Legislative Fiscal Bureau's website, <http://www.legis.state.wi.us/lfb/Informationalpapers/28.pdf> (last accessed, December 20, 2007).

was dependent on the Chapter 220 program to facilitate and finance increases in the number of voluntary pupil transfers between MPS and suburban Milwaukee school districts. LFB Informational Paper 28 at 1. Until an extension of the settlement agreement that expired in 1995, the participating suburban school districts agreed to make a good faith effort to fill a certain number or percentage of their seats or enrollments with Chapter 220 minority student transfers. LFB Informational Paper 28 at 9-10. MPS agreed to make a percentage of its seats available for transfer by students from the participating suburban districts. LFB Informational Paper 28 at 10. Since the expiration of the settlement agreement, MPS has entered into individual interdistrict transfer agreements with participating suburban school districts. LFB Informational Paper 28 at 12.

Special transfer aid: basic program features. Chapter 220 aid is available for certain interdistrict pupil transfers between districts with relatively high and relatively low minority enrollments. Chapter 220 aid is also available for certain intradistrict pupil transfers in school districts where some attendance areas have relatively high minority populations, and some have relatively low minority populations. *See generally* sec. 121.85(2), (3), and (6), Wis. Stats. The Chapter 220 aid received by a district is distributed through the equalization aid formula. Aid distributed through that formula reduces the amount that the aided school district can raise the property tax levy in the district, and is included when calculating an aided district's revenue limit. LFB Informational Paper 28 at 2.

Section 121.845(2) defines "minority group pupil" for both interdistrict and intradistrict transfers to mean "a pupil who is Black or African American, Hispanic, American Indian, an Alaskan native, or a person of Asian or Pacific Island origin, and who has reached the age of 4 on or before September 1 of the year he or she enters school." State aid under both the interdistrict and intradistrict aspects of the program is provided for each minority group pupil who transfers from an attendance area where minority group pupils comprise 30% or more of the enrollment of the school that serves the attendance area to a school which has less than a 30% minority enrollment. Sec. 121.85(2)(a)1. and (b)1., Wis. Stats. Aid is also provided for each nonminority group pupil who transfers from an attendance area where nonminority group pupils comprise less than 30% of the school's enrollment to a school which has a minority enrollment of 30% or more. Sec. 121.85(2)(a)2. and (b)2., Wis. Stats. Information from the Department of Public Instruction's website indicates that, as of the third Friday in September 2007, MPS's minority group enrollment, using the racial classifications identified in section 121.485(2), was 84%, and its nonminority enrollment was 16%.²

²District ethnicity data is from DPI's website, <http://dpi.wi.gov/lbstat/pubdata2.html>, and in the Microsoft Excel spreadsheet for Public Enrollment by District by Ethnicity, <http://dpi.wi.gov/lbstat.xls/pede07.xls> (last accessed, December 20, 2007). As of the third Friday in September 2007, the date on which enrollments must be reported to DPI, 4.5% of MPS students were of Asian or Pacific Island origin, 57.5% were non-Hispanic black, 21% were Hispanic, 0.8% were Native American or Alaskan Native, and 16% were white. *Id.*, row 225 (MPS).

School districts receive aid under the Chapter 220 program for a particular year based on the number of pupils transferred in the prior school year. Under the intradistrict transfer aspect of the program, the participating district currently receives an additional 25% of its state equalization aid for each eligible intradistrict transfer. LFB Informational Paper 28 at 3. Under the interdistrict transfer aspect of the program, the receiving district is paid an amount equal to its average net cost per pupil multiplied by the number of transfer pupils accepted by the district. Under the interdistrict transfer aspect of the program, the sending district also financially benefits, because it is permitted to count each student transferred out of the district as three-quarters of a pupil for membership purposes. LFB Informational Paper 28 at 4. A district's membership is one of the principal factors on which the district's state equalization aid is based. Sec. 121.07(1)(a), Wis. Stats.

In 2006-07, 3,075 MPS students attended schools in suburban districts and 382 students from suburban schools attended in MPS under the interdistrict pupil transfer program. LFB Informational Paper 28 at 6; *id.* at 7, Table 2. Chapter 220 interdistrict aid payments to suburban school districts in 2006-07 totaled \$31,229,441; MPS received \$2,995,890 in Chapter 220 interdistrict aid payments. Pursuant to section 121.85(8), students who transfer schools under the special transfer aid program have the right to complete their education at the elementary, middle, or high school to which the student transferred, so long as full funding under the program remains available. MPS makes information available to parents about the application process and available seats in suburban school districts under the Chapter 220 interdistrict transfer program. The program guide for the 2007-08 school year, *Suburban School Opportunities*, reflects MPS's agreement with 23 suburban districts.³ Transfer opportunities in those districts range from a low of zero available seats in one district to 39 available seats in the district with the greatest number of available seats. Most districts participating during the 2007-08 school year limit the grades for which transfers are available. Many more seats are available for elementary students than for middle or high school students. *Suburban School Opportunities* at 7. MPS's agreement with the suburban districts requires the suburban districts to use a random selection method to pick transfer students where there are more applicants for transfer to a suburban district than there are available seats. *Id.* at 5.

Full-time open enrollment: basic program features. The full-time open enrollment program was created by 1997 Wisconsin Act 27, sec. 2843g. Since the 1998-99 school year, a pupil has been able to attend any public school located outside the pupil's school district or residence if the pupil's parent or guardian complies with certain application dates and procedures. Sec. 118.51, Wis. Stats. In general, a nonresident district may reject a pupil's application to transfer into the district only on the basis of a limited number of criteria, relating primarily to school, space, or program availability, a student's disciplinary history, and the availability of special education programs for the child. Sec. 118.51(5), Wis. Stats. In general,

³MPS's *Suburban School Opportunities* for the 2007-08 school year is available on the MPS website, <http://www2.milwaukee.k12.wi.us/supt/portal/220-07.pdf> (last accessed, December 20, 2007).

a resident district may reject a pupil's application to transfer out of the district if the pupil is a child with disabilities and the costs of the special education program in the nonresident district would impose an undue financial burden on the resident school district. Sec. 118.51(12)(b), Wis. Stats. In addition, school districts that are eligible for Chapter 220 aid are required by statute to reject any application for transfer into or out of the district if the transfer would increase racial imbalance in the district. Sec. 118.51(7)(a), Wis. Stats.

Under the full-time open enrollment program, the Department of Public Instruction is required to determine a per-pupil transfer amount, based on the statewide average of selected costs categories. The 2006-07 per-pupil amount was approximately \$5,900. Legislative Fiscal Bureau, *Interdistrict Public School Open Enrollment* (Informational Paper 30, January 2007) ("LFB Informational Paper 30") at 5. Basically, a school district's equalization aid is increased or decreased by an amount equal to the per-pupil transfer amount multiplied by the school district's net gain or loss of pupils under the open enrollment program. LFB Informational Paper 30 at 5-6. The state aid adjustments resulting from the open enrollment program are not considered in determining a school district's revenue limits. Thus, if a district has a net gain of students, the aid payment is not included in the district's revenue limit; *i.e.*, the payment represents an amount that the district can spend over and above its revenue limit. However, if a district has a net loss of students, it may not increase the tax levy to compensate for the loss of state aid. LFB Informational Paper 30 at 6.

Seattle School Dist. No. 1 case: facts and legal principles. On June 28, 2007, the Supreme Court decided *Seattle School Dist. No. 1*, 127 S. Ct. 2738. The Court reviewed school assignment plans in the public school districts that serve Seattle, Washington and Louisville, Kentucky. Specifically, a group of parents alleged that the Seattle district's use of race as a factor to determine the assignment of ninth graders to the district's ten high schools violated equal protection. *Id.* at 2747-48. In the second case, the parent of a Louisville student challenged on equal protection grounds the Louisville district's use of race to assign elementary school students to schools in the district, and the Louisville district's policy that disallowed requests to transfer from an assigned school to a different school where the transfer would have an adverse effect on the racial balance of either school. *Id.* at 2749-50.

In the Louisville case, the school district was operating under a student assignment plan it adopted in 2001, which required all non-magnet schools to maintain a minimum black enrollment of 15% and a maximum black enrollment of 50%. The district as a whole is approximately 34% black, and 66% white. *Id.* at 2749. Louisville's plan was adopted after a federal district court in 2000 dissolved a desegregation decree that had been in effect since 1975, after concluding that the district had eliminated the vestiges of its prior segregation policy to the greatest extent practicable. *Id.* In August 2002, Meredith Crystal moved into the school district and sought to enroll her son Joshua in kindergarten at Breckenridge-Franklin, the school that Joshua would normally attend because of the location of his new residence. Breckenridge-Franklin was only a mile from his new home, but had no space available for Joshua. The Louisville district assigned Joshua to another school in the cluster of schools to

which Breckenridge-Franklin belonged, Young Elementary. Young Elementary was ten miles away from Joshua's new home. Joshua's mother applied to transfer Joshua to a school in a different cluster, Bloom Elementary—which, like Breckenridge-Franklin, was only a mile from his home. Transfers between schools in different clusters was permitted under Louisville's policy, and space was available at Bloom Elementary, but Joshua's transfer request was denied because the transfer would have an adverse effect on desegregation compliance. *Id.* at 2750.

The Court began its discussion of the Seattle and Louisville school assignment plans by observing that “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny,” *id.* at 2751, because “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” *Id.* at 2752 (internal quotations omitted). To satisfy the “strict scrutiny” standard, each school district had the burden to demonstrate that its use of individual racial classifications in its school assignment plan was “narrowly tailored” to achieve a “compelling” government interest. *Id.*

The Court first considered the policy justifications offered by the school districts for their plans, in light of the two interests that the Court had previously qualified as “compelling.” The Court acknowledged that remedying the effects of past intentional discrimination was a compelling governmental interest, but concluded that neither school district could rely on that justification for its school assignment program. Seattle had never segregated its schools by law, and the district was never subject to a court-ordered desegregation decree. And although Louisville had operated segregated schools and was subject to a desegregation decree for many years, that decree was dissolved in 2000 because the district court found that the district had eliminated the effects of its past discrimination. *Id.* at 2752.

The Court acknowledged that it had also held that the interest in diversity in higher education was a compelling governmental interest, but noted that the diversity interest there was not focused on race alone, but encompassed all factors that contributed to student body diversity. *Id.* at 2753. In the higher education cases, the elements of the desired diversity were so broad that the educational institution conducted an individualized review of each application. *Id.* Without addressing whether that same kind of interest in diversity was compelling in the context of public elementary and secondary education, the Court determined that in both the Seattle and Louisville plans,

[R]ace is not considered as part of a broader effort to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints”; . . . race, for some students, is determinative standing alone. . . . [U]nder each plan when race comes into play, it

is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter v. Bollinger*, 539 U.S. 306 (2003)]; it is *the* factor.

Id. (internal citation omitted, emphasis in original). In addition, the Court was critical of the “limited notion of [racial] diversity” in the Seattle and Louisville policies. *Id.* at 2754. The Seattle plan viewed the racial categories of its students exclusively in terms of “white/nonwhite,” and Louisville categorized its students simply as “black/other.” *Id.* The Court observed that “[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals.” *Id.*, quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting). As an example of the limited concept of racial diversity reflected in the districts’ plans, the Court observed that “under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not.” *Id.*

The Court rejected the districts’ arguments that the “diversity” interest they sought to achieve by their school assignment plans justified the means they chose to achieve that end; *i.e.*, assigning a racial classification to each student and making school assignments on the basis of each student’s race. *Id.* at 2751-55, 2759-61. The four-Justice plurality and Justice Kennedy reached that conclusion for different reasons, however. The plurality rejected the proposition that a school assignment plan designed to approximate in each school the racial demographics of the community could ever state a compelling government interest. *Id.* at 2755-59. The plurality found authority for that view in the Court’s earlier cases, *e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“[r]acial balance is not to be achieved for its own sake”); *Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid”); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“outright racial balancing” is “patently unconstitutional”). *Seattle School Dist. No. 1*, 127 S. Ct. at 2757 (plurality opinion). Justice Kennedy agreed with the general conclusion that the two school districts before the Court had not demonstrated that the racial classifications they used were narrowly-tailored to achieve the districts’ governmental interest in diversity, and focused on the districts’ failure to “establish, in detail, how decisions based on an individual student’s race are made in a challenged governmental program.” *Id.* at 2789 (Kennedy, J., concurring). However, Justice Kennedy rejected the plurality’s position that diversity could never be a compelling educational goal, *id.* at 2790-91, and left open the possibility that, upon “a showing of necessity not made here, [the government might be permitted] . . . to classify every student on the basis of race and to assign each of them to schools based on that classification.” *Id.* at 2797 (Kennedy, J., concurring).

A majority of the members of the Court agree that public school districts have a compelling interest in achieving a racially diverse student population. *Seattle School Dist. No. 1*,

127 S. Ct. at 2796-97 (Kennedy, J., concurring); *Id.* at 2820-23 (Breyer, J., dissenting, joined by Justices Stevens, Souter, and Ginsburg). A different majority of the members of the Court conclude that binary racial classifications of the sort employed by Seattle and Louisville are not narrowly tailored to achieve that interest, because the districts' definitions of diversity are too narrowly drawn, *id.* at 2753-54 (plurality), 2790-91 (Kennedy, J., concurring), and because the use of race as a factor in the districts' decisionmaking, when race comes into play, is the sole determinant of the decision. *Id.* at 2273-54 (plurality), 2797 (Kennedy, J., concurring).

Application of *Seattle School Dist. No. 1* decision to section 118.51(7)(a).
Section 118.51(7)(a) limits the ability of some students to participate in the open enrollment program if the school district into which or out of which they want to transfer is a district that is eligible to participate in the Chapter 220 integration aid program. The statute directs the school board of the Chapter 220-eligible district to "reject any application for transfer into or out of the school district . . . if the transfer would increase racial imbalance in the school district." Sec. 118.51(7)(a), Wis. Stats.

"Racial imbalance in the school district" is not defined in subchapter VI of chapter 121. Since the purpose of Chapter 220 aid is to encourage transfers between school districts to "promote cultural and racial integration in education," chapter 220, section 1, Laws of 1975, and since Chapter 220 aid is available only for interdistrict transfers of minority group and nonminority group students that satisfy the conditions set by the Legislature, it is reasonable to infer that the Legislature intended that "racial imbalance" would be defined by reference to the circumstances under which state aid is available. Chapter 220 aid is paid for an interdistrict transfer, and "racial imbalance" exists, where a minority group pupil transfers from an attendance area in the student's district of residence where minority group pupils comprise 30% or more of the enrollment of the school that serves the attendance area to a school in an attendance area in another district which has less than a 30% minority enrollment. Sec. 121.85(2)(a)1., Wis. Stats. Similarly, Chapter 220 aid is paid for an interdistrict transfer, and "racial imbalance" exists, where a nonminority group pupil transfers from an attendance area in the student's district of residence where nonminority group pupils comprise less than 30% of the school's enrollment to a school in an attendance area in another district which has a minority enrollment of 30% or more. Sec. 121.85(2)(a)2., Wis. Stats.

Although the focus of "racial imbalance" in subchapter VI of chapter 121 is on the minority and nonminority group enrollment at the school that serves an attendance area in the affected sending or receiving school district, the focus of the "racial imbalance" addressed by section 118.51(7)(a) is on the school district as a whole. Thus, an open enrollment request to attend a particular school in a district eligible for Chapter 220 aid might decrease the racial imbalance of that school's enrollment because the racial composition of the student body is substantially different than the racial composition of the student body of the entire district, but increase the overall racial imbalance of the district as a whole. In such a case, section 118.51(7)(a) would require the school board to deny the open enrollment application.

Racial imbalance in a school district eligible for Chapter 220 aid that already had a district-wide minority group enrollment of 30% or more would increase if the school board were to allow a minority group student to transfer into that district through open enrollment. If a nonminority group member sought to transfer into that district through open enrollment, however, section 118.51(7)(a) would not prohibit the transfer.

Similarly, racial imbalance in a school district eligible for Chapter 220 aid that already had a district-wide minority group enrollment of less than 30% would increase if the school board were to allow a nonminority group student to transfer into that district through open enrollment. If a minority group member sought to transfer into that district through open enrollment, however, section 118.51(7)(a) would not prohibit the transfer.

In addition, racial imbalance in a school district eligible for Chapter 220 aid that already had a district-wide nonminority group enrollment of less than 30% would increase if the school board were to allow a minority group student to transfer out of that district through open enrollment. If a nonminority group member sought to transfer out of that district through open enrollment, however, section 118.51(7)(a) would not prohibit the transfer.

Moreover, racial imbalance in a school district eligible for Chapter 220 aid that already had a district-wide minority group enrollment of 30% or more would increase if the school board were to allow a nonminority group student to transfer out of that district through open enrollment. If a minority group member sought to transfer out of the district through open enrollment, however, section 118.51(7)(a) would not prohibit the transfer.

As illustrated above, the effect of section 118.51(7)(a) upon an otherwise eligible open enrollment applicant who resides in or applies to a school district eligible for Chapter 220 aid is to make the applicant's racial classification the only factor in determining whether the applicant will be permitted to transfer to fill an available space in the receiving district.

The transfer limitation in section 118.51(7)(a) has all of the essential features of the Louisville school assignment policy invalidated in the *Seattle School Dist. No. 1* case. First, in Louisville, after a student was assigned to a school based on the location of the student's residence, school district policy allowed the student to request a transfer to a school in a different location, which request could be denied because of a lack of available space or because the transfer would adversely affect the district's racial balance policy, which required a 15% minimum and 50% maximum black enrollment at the district's non-magnet schools. 127 S. Ct. at 2749-50. Under Wisconsin's open enrollment program, a student may request an open enrollment transfer to a different school district, and such requests may be denied because of a lack of space in the receiving district, or for school districts eligible for Chapter 220 aid, because the transfer would increase the racial imbalance of the Chapter 220 district.

Second, the Louisville school district defined racial diversity in a binary way; as "black" and "other"—a category that included primarily white students, but also included a small

percentage of Asian and non-black Hispanic students. *Id.* at 2754. Section 121.845(2) similarly employs a binary racial classification system; *i.e.*, nonminority and “minority”—a category that includes black, African American, Hispanic, American Indian, Alaskan native, and persons of Asian or Pacific Island origin.

Third, under the Louisville school assignment plan, the race of a student seeking a transfer to another school was not a factor unless the school reached “the extremes of the racial guidelines,” *id.* at 2749-50; *i.e.*, reached either the 15% minimum or 50% maximum enrollment thresholds. For most of the state’s 425 school districts, race is not a factor in making decisions about open enrollment transfer applications. For residents of the 28 school districts eligible for Chapter 220 interdistrict or intradistrict transfer aid, however, the racial classification (*i.e.*, minority or nonminority) of an otherwise-qualified resident determines whether the school board may approve the application for open enrollment transfer out of the district. In addition, otherwise-qualified residents of school districts not eligible for Chapter 220 aid who apply for open enrollment transfer into one of the 28 Chapter 220-eligible districts can be approved or denied exclusively because of the effect the applicant’s minority or nonminority racial classification would have on the receiving district’s racial imbalance.

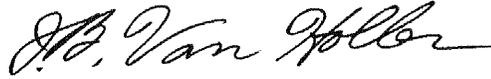
It is my opinion that the portion of section 118.51(7)(a) that requires a school district eligible for Chapter 220 aid to reject an open enrollment application if the requested transfer into or out of the district would increase the district’s racial imbalance is inconsistent with the equal protection guarantee of the United States Constitution, as those guarantees were applied in the *Seattle School Dist. No. 1* case. The binary racial classification system of section 121.845(2) and the provision of section 118.51(7)(a) that conditions the approval of an open enrollment application for transfer into or out of a school district eligible for Chapter 220 aid on the individual applicant’s race are not narrowly tailored to achieve a compelling government interest, under the Court’s holding in the *Seattle School Dist. No. 1* case. 127 S. Ct. 2751-54, 2759-61.

I note that legislation was recently introduced in the Wisconsin Legislature that would repeal section 118.51(7)(a). 2007 Assembly Bill 517 (introduced October 2, 2007). The history and text of the bill can be located on the Legislature’s website, <http://www.legis.state.wi.us/2007/data/AB517hst.html> (last accessed December 20, 2007).

Mr. Anthony S. Evers
Page 11

Because this opinion may have a bearing on legislative action on AB 517, I am sharing it with the bill's authors and Assembly leadership for their information.

Sincerely,



J.B. Van Hollen
Attorney General

JBVH:BAO:ajw

c: The Honorable Stephen Nass
The Honorable Scott Suder
The Honorable Gary Tauchen
The Honorable John Nygren
The Honorable Garey Bies
The Honorable Robin Vos
The Honorable Eugene Hahn
The Honorable Carol Owens
The Honorable Daniel LeMahieu
The Honorable Jeffrey Mursau
The Honorable Don Pridemore
The Honorable Alvin Ott
The Honorable Suzanne Jeskewitz
The Honorable Sheryl Albers
The Honorable Michael Huebsch
The Honorable James Kreuser