



INSTITUTE FOR REFORMING GOVERNMENT

K-12 EDUCATIONAL OPPORTUNITIES DEBATE AT ISSUE IN WISCONSIN SUPREME COURT RACE

OVERVIEW

Liberal activists have continually tried to destroy School Choice through lawsuits. If successful today, that would put the education of nearly 59,000 Wisconsin children in jeopardy. These efforts would leave children and parents throughout the state without options. That includes approximately 30,000 students in Milwaukee who currently use the parental choice program to flee failing public schools in Milwaukee. School Choice opens up the ability for parents to find the best education for their child, giving them new opportunities for success in school and beyond.

WHAT YOU SHOULD KNOW

- » The ability of disadvantaged parents to send their kids to a private school using state assistance was first enacted by Gov. Tommy Thompson and bipartisan lawmakers in 1990.
- » Originally only serving a couple hundred kids in Milwaukee, now parents of nearly 59,000 Wisconsin children statewide use School Choice to send their children to preferred schools, oftentimes allowing the kids to escape failing schools in a variety of areas across the state.
- » For decades, activist groups on the left have attempted to use the courts to declare School Choice unconstitutional in Wisconsin.
- » Conservative majorities in the Wisconsin Supreme Court have stopped previous attempts to declare Wisconsin's School Choice program unconstitutional. Liberal majorities have signaled openness to overturning the program, pulling the upcoming fight for the majority of the court into focus for School Choice advocates.

WHAT COULD HAPPEN

Without a conservative majority that believes in the constitutionality of School Choice, Wisconsin's School Choice students are at risk of losing access to their schools. Opponents to parental options could file a new lawsuit against the program if they believe the new liberal justices would take the drastic step of ruling it unconstitutional—even though the Wisconsin Supreme Court in the past concluded that school choice was constitutional.

If School Choice goes away, there would also be a crisis in the public school systems as public schools do not have the space or teachers to take on nearly 59,000 new students.

WHAT'S NEXT

There is an election in April for a Supreme Court seat that will decide if the majority of the Court is liberal or conservative leaning. Liberal majorities have signaled openness to declare School Choice unconstitutional while conservative majorities have ruled to protect it. Here are the candidates running for Supreme Court.



Brad Schimel
Current Waukesha
County Judge



Susan Crawford
Current Dane
County Judge

LEGAL BACKGROUND

Despite the widespread use of School Choice by the parents of nearly 59,000 students, left-wing groups – such as the teachers unions, ACLU, Americans United for Separation of Church & State, the NAACP – have attempted to challenge the constitutionality of School Choice through the courts throughout its existence. The Wisconsin Supreme Court first upheld the Milwaukee Parental Choice Program (“MPCP”) in 1992 in *Davis v. Grover*, 166 Wis.2d 501 (1992). The Court held the MPCP was not a private or local bill and, thus, was not subject to the procedural requirements of Wis. Const. art. IV, sec. 18, did not violate art. X, sec. 3 of the Wisconsin Constitution because the participating private schools did not constitute “district schools,” even though they received some public monies to educate students participating in the program, and not violate the public purpose doctrine. The majority noted the MPCP “represents another illustration of Wisconsin’s innovation and willingness to lead the nation in its attempts to further improve the quality of education and life.”

Six years later the Court reaffirmed the MPCP’s lawfulness in *Jackson v. Benson*, 218 Wis. 2d 835 (1998), that challenged the choice program based on the participation of religious schools. Once again, the conservative majority upheld the lawfulness of the program. There, the majority held the program did not violate the Establishment Clause of the First Amendment to the United States Constitution, did not violate the religious establishment provisions of Wisconsin Constitution art. I, § 18, was not a private or local bill enacted in violation of the procedural requirements mandated by Wis. Const. art. IV, § 18, did not violate the uniformity provision of Wis. Const. art. X, § 3, and did not violate Wisconsin’s public purpose doctrine. In its key holding relating to established clause, the majority held the amended MPCP “does not violate the Establishment Clause because it has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive entanglement between the State and participating sectarian private schools.”

Both of the above cases were decided along ideological lines, with the conservative court majorities finding the programs constitutional and the liberal justices in dissent. But for these conservative majorities, the ability of parents to choose a school that worked best for their child would not exist as we know it.

ZOOM IN

The education establishment in Wisconsin has repeatedly resurrected claims against Wisconsin's parental choice program. Most recently, in 2023 the liberal activist political action committee, Minocqua Brewing Company PAC, raised thousands of dollars to launch a renewed attack on Wisconsin's School Choice program, filing a lawsuit at the state highest court. The Wisconsin Supreme Court declined the petition without comment, but activists could revisit the claim at any time, or start in trial court and force a decision. If successful, the nearly 59,000 students in the choice program would have their education upended. Across the country, these same special interests are using the courts to attack and kill School Choice programs, from Alaska to Arizona to South Carolina.

Another legal line of attack focuses on faith-based schools. These schools have long had concern about the danger of participating in a government-funded program. If faith-based schools perceive that they will have to give up their religious beliefs and values in order to participate in government-funded programs like School Choice, many will choose to forgo participating in the choice program in order to retain their religious mission and identity. Decisions negatively impacting religious schools could substantially decrease the number of seats available for School Choice students. The Wisconsin Supreme Court previously has been protective of faith-based schools participating in the choice program. See *Coulee Catholic Schools v. LIRC*, 2009 WI 88. More recently, however, the new majority has ruled against religious liberty, paving the way for the state to tax religious charities. One such case is now being appealed to the United States Supreme Court. See *Catholic Charities v. LIRC*, 2024 WI 13. With a majority of Wisconsin choice schools being faith based, attacks on religious liberty are another path to destroy Education Freedom in Wisconsin as we know it.

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