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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAMIE SCHAEFER, Plaintiffs, -v- MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No: DV-15-1152A *Hon. David M. Ortley* **AFFIDAVIT OF DIANNE BURKE IN SUPPORT OF MQEC'S MOTION TO INTERVENE**

STATE OF MONTANA)
ss
County of Lewis & Clark)

Dianne Burke, after being duly sworn, deposes and says as follows:

1) I am Dianne Burke, Executive Director of the Montana Quality Education Coalition ("MQEC"). I am over the age of 18 and competent to testify if called upon to do so.

2) I have been the Executive Director of MQEC for approximately two and one-half years. As part of my professional duties with MQEC, I help oversee the group's legislative efforts, and I was involved in legislative efforts in 2015 concerning SB410. I have direct knowledge regarding both MQEC and the efforts made concerning SB410 and the promulgation of administrative rules that followed its passage. I also have knowledge of past legal efforts taken by MQEC and its members regarding public education issues in Montana.

3) MQEC was formed in 2001 by K-12 public school superintendents and education organizations frustrated with what they believed was the State's lack of compliance with constitutional guarantees afforded Montana students and citizens under Article X of the Montana Constitution. MQEC was established to serve as the "constitutional guardian" of Article X of the Montana Constitution by working for public school students and their communities. MQEC advocates for, pursues, and defends the need for adequate funding to provide quality education for each of Montana's public school students.

4) Approximately 90 AA, A, B, C and independent elementary school districts and six public education advocacy organizations are members of MQEC. The member school districts include large and small districts, urban and rural districts and districts in both Eastern and Western Montana. Examples of member school districts include the Kalispell and Evergreen School Districts, the Billings School District, the West Valley Elementary School District and the Kila School District.

5) Member school districts and educational organizations have joined together to ensure the State's compliance with its constitutional duties under Article X of the Constitution.

6) The public advocacy organization members of MQEC include the MEA-MFT, the Montana School Boards Association, the School Administrators of Montana, the Montana Association of School Business Officials, and the Montana Rural Education Association. These groups in turn represent over 10,000 public school teachers (who work to develop the educational potential of children in Montana's public schools as envisioned in Article X, Section 1 of the Montana State Constitution), 1,400+ community-elected school trustees (who serve on a volunteer basis exercising supervision and control over Montana's public schools pursuant to Article X, Section 8 of the Constitution), 300+ business officials, and over 1,000 public school administrators (who provide instructional leadership for the students served in Montana's public schools).

7) MQEC members including the Helena and East Helena School Districts, the Billings School District, MEA-MFT, the Montana School Boards Association, the School Administrators of Montana and the Montana Rural Education Association were named plaintiffs in *Columbia Falls Elementary School District No. 6 v. State of Montana*, 2005 MT 69, 326 Mont. 304, 109 P. 257. *Columbia Falls* was an action contending that the State acted unconstitutionally in administering and funding Montana's public school system which resulted in a landmark decision holding that Montana's then-current funding system for public education was not grounded in principles of quality, and was not constitutionally

sufficient under the Public Schools Clause of Article X, Section 1(3), and the Indian Education Clause of Article X, Section 1(2).

8) MQEC's members were the plaintiffs in a successor action seeking supplemental relief filed against the State of Montana in the First Judicial District, Lewis & Clark County, Cause No. BDV-2002-528, which contended that the State had failed to comply with the Court's order in *Columbia Falls*.

9) MQEC itself was the named plaintiff in *Montana Quality Education Coalition v. State of Montana,* Montana First District Judicial District Court Cause No. ADV-2011-1076, which resulted in a consent decree in which the State agreed to increase the inflationary adjustment in Montana's school funding formula.

10) Since its founding and continuing to date, MQEC and its members actively monitor the State's compliance with the constitutional guarantees of Article X of the Montana Constitution and also lobby the legislature in furtherance of MQEC's core purpose as a guardian of constitutional guarantees of Article X for adequate funding for public education and in opposition to proposed legislation which would have the effect of diverting funding from public to private schools or otherwise cause Montana to revert back to its historical pattern of neglect of the constitutional guarantees of Article X.

11) MQEC was active in the 2015 Montana legislature's consideration of SB 410 and sought to insure that public money was not diverted to sectarian schools in violation of Montana's constitutional prohibition against the direct or indirect appropriation of any public fund or monies for any sectarian purpose or to aid any sectarian school under the Aid Prohibited to Sectarian Schools Clause of Article X, Section 6(1).

12) Attached as Exhibit A to this Affidavit is a true and correct copy of the final version of the Legislature's fiscal note accompanying SB410. I reviewed this document during the 2015 legislative session and I printed this off the Legislature's website.

13) After the passage of SB 410, MQEC and its members wrote a letter to the Governor and urged that in the administration's implementation of the new law the revenue replacement programs created in Senate Bill 410 be administered in compliance with the Montana Constitution under Article V, Section 11(5) and Article X, Section 6.

14) In November 2015, MQEC, and its members including the MEA-MFT, the Montana School Boards Association, and the School Administrators of Montana, testified before the Department of Revenue in its rulemaking process in support of the Department's draft Rule 1 which is the subject of this action.

15) Further affiant sayeth not.

Dated this 20th day of May, 2016.

Dianne Burke

Dianne Burke

STATE OF MONTANA)
ss
COUNTY OF LEWIS & CLARK)

On this 20th day of May, 2016, before me, the undersigned, a Notary Public for the State of Montana, personally appeared Dianne Burke, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

Kristi K. Reed

Notary Signature

Kristi K Reed

Printed Name

Notary Public for the State of Montana

Commission expires: March 07, 2019

KRISTI K. REED
NOTARY PUBLIC for the
State of Montana
Residing at East Helena, Montana
My Commission Expires
March 07, 2019

SEAL
KRISTI K. REED
NOTARIAL
STATE OF MONTANA

CERTIFICATE OF SERVICE:

This is to certify that on this 20 day May, 2016, a copy of the foregoing was served upon the following by U.S. Mail, postage prepaid and addressed as following:

William A. Mercer
Holland & Hart
401 N. 31st Street, Ste. 1500
P.O. Box 639
Billings, MT 59103-0639

Daniel J. Whyte
Brendan Beatty
Montana Department of Revenue
P.O. Box 7701
Helena, MT 59604-7701

Richard D. Komer
Erica Smith
Institute for Justice
901 North Glebe Rd, Ste. 900
Arlington, VA 22203

GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2017 Biennium

Bill #	SB0410	**Title:**	Provide for tax credits for contributions to public and private schools
Primary Sponsor:	Jones, Llew	**Status:**	As Amended in House Committee

✓Significant Local Gov Impact ✓Needs to be included in HB 2 ☐Technical Concerns

☐Included in the Executive Budget ✓Significant Long-Term Impacts ✓Dedicated Revenue Form Attached

FISCAL SUMMARY

	FY 2016 Difference	FY 2017 Difference	FY 2018 Difference	FY 2019 Difference
Expenditures:				
General Fund	$588,529	$167,596	$170,110	$172,662
State Special Revenue	$1,500,000	$2,250,000	$3,000,000	$3,300,000
Revenue:				
General Fund	($4,449,375)	($5,474,063)	($6,528,750)	($7,181,625)
State Special Revenue	$1,500,000	$2,250,000	$3,000,000	$3,300,000
Net Impact-General Fund Balance:	($5,037,904)	($5,641,659)	($6,698,860)	($7,354,287)

Description of fiscal impact: SB 410, as amended, would create two new tax credits, one for contributing to a new educational improvement special revenue account for distribution to school districts for new programs, and one for making donations to organizations that would give scholarships to students in private schools. This would reduce general fund revenue by $4.4 million in FY 2016, with the general fund revenue reduction growing to $7.2 million by FY 2019.

EXHIBIT
A

FISCAL ANALYSIS

Assumptions:

Department of Revenue (DOR)

1. This bill would create two new tax credits, one for making a donation to a new educational improvement special revenue account for distribution to school districts for new programs, and one for making donations to organizations that would give scholarships to students in private schools.
2. Both credits would first be available for tax year 2015, which is FY 2016, and would sunset after tax year 2021.

3. Both credits would be limited to $150 per taxpayer and each would be subject to an aggregate limit. The aggregate limits would be $3 million for 2015, and would increase by 10% each time the limit was reached.

Educational Improvement Account

4. This bill, as amended, would allow individuals and corporations a credit of up to $150 for making a donation to the new educational improvement special revenue account. Total credits would be limited to $3 million for tax year 2015 and would increase by 10% each year as long as the total was at least $3 million.
5. Total credits could be limited by the limit on aggregate credits or by the number of taxpayers willing and able to claim the credit. Montana has two tax credits for specific types of charitable contributions and allows an itemized deduction for contributions to a tax-exempt non-profit. For 2013, 3,850 taxpayers claimed $2.41 million in credits and 171,000 taxpayers claimed the itemized deduction. There were 375,000 taxpayers with tax liability of at least $150. To reach the aggregate limit of $3 million, credits of $150 each would need to be claimed by 20,000 taxpayers. Since the credit is for the full amount of the donation, it is likely that this level would eventually be reached. However, it is likely that it will take time for taxpayers to become aware of the credit and figure out how to use it to direct funding to schools or projects that they are interested in. Therefore, it is assumed that donations will be half the limit for 2015, three-fourths of the limit for 2016, and at the limit for 2017 and 2018.
6. Taxpayers would claim credits for donations in a calendar year when they file their returns the following spring, which is in the next higher numbered fiscal year. For example, credits for donations in 2015 will reduce revenue in FY 2016. Taxpayers who claim the credit would not be able to take an itemized deduction for the amount of the donation used for the credit.
7. It is assumed that half of the amount used to claim the credit represents funds that would have been donated to another charity and used to claim an itemized deduction and that taxpayers who claim the credit, on average, have a marginal tax rate of 6.75%. The following table shows the direct revenue reduction from the credit, the offset from reduced itemized deductions for charitable donations, and the net effect on general fund revenue:

	FY 2016	FY 2017	FY 2018	FY 2019
Credits for Donations to Educational Improvement Acct	($1,500,000)	($2,250,000)	($3,000,000)	($3,300,000)
Charitable Deduction Offsets	$50,625	$75,938	$101,250	$111,375
Net Effect	($1,449,375)	($2,174,063)	($2,898,750)	($3,188,625)

Student Scholarship Organizations

8. This bill, as amended, would allow individuals and corporations to claim a credit of up to $150 for contributing to organizations that would grant scholarships to students in private schools. Total credits would be limited to $3 million for tax year 2015, and would increase by 10% each year as long as the total was at least $3 million. Based on experience in other states with similar credits, it is assumed that credits would be at the limit each year through at least 2018.
9. Credits would be claimed on tax returns filed in the spring following each tax year. The following table shows credits for FY 2016 through FY 2019. Donations used as the basis for credits would come primarily from student's families and would primarily represent funds that would have been used to pay tuition directly rather than for other charitable donations. Thus, no offset for reduced itemized deductions is assumed.

	FY 2016	FY 2017	FY 2018	FY 2019
Tax Credits	$3,000,000	$3,300,000	$3,630,000	$3,993,000

10. The credits allowed by this bill would reduce the net price of attending private school (tuition less discounts or scholarships and credits) for students who receive scholarships and whose families claim the credit. Some families who are not willing and able to send a child to a private school at current net prices would be

willing with the lower net price. Recent research indicates that a 10% reduction in the net price of private school results in about a 2% increase in children whose families are willing and able to pay the net price to send them to a private school - (See, for example, Susan Dynarski, Jonathan Gruber and Danielle Li: Cheaper by the Dozen: Using Sibling Discounts at Catholic Schools to Estimate the Price Elasticity of Private School Attendance, Center for Economic Studies, U.S. Census Bureau paper CES 11-34, 2011, and Richard Blundell, Lorraine Dearden and Luke Sibieta: The Demand for Private Schooling in England: the Impact of Price and Quality, Institute for Fiscal Studies working paper 10/21, 2010).

11. Private schools would be willing to accept additional students only if they receive additional funding to pay the costs of serving them. On average, full tuition appears to cover about 60% of private school costs in Montana. Since many students receive some kind of discount, actual tuition payments cover less than 60% of costs. Spending per student is about $9,500, and non-tuition revenue per student is about $3,800. (Based on tuition and fees reported on private school websites, average cost per student in public schools from OPI and ratios of private school costs to public school costs estimated in Bruce Baker: Private Schooling in the U.S.: Expenditures, Supply, and Policy Implications, Boulder and Tempe: Education and the Public Interest Center, University of Colorado & Education Policy Research Unit, Arizona State University, 2009). The remaining expenses are paid from donations, subsidies from a supporting organization, such as a church, and other non-tuition sources. Additional students attending private schools would pay tuition less than the cost of serving them. Private schools can accept these additional students and continue to meet all their expenses only if they raise tuition to capture part of the value of the tax credits and use these funds to subsidize the additional students.

12. The change in private school enrollment that could result if schools increased tuition to capture part of the credits was calculated using the following formulas describing the tuition-setting actions of affected private schools, and enrollment decisions of families of current and potential private school students:

$$tuition = \frac{total\ expenditures - nontuition\ revenue}{students}$$

$$\frac{additional\ students}{2014\ students} = -0.2\frac{change\ in\ net\ price}{2014\ tuition}$$

$$change\ in\ net\ price = tuition\ increase - average\ credits\ per\ student$$

13. The following table shows increases in private school enrollments that would occur if schools raise tuition to the point where the number of students wanting to attend with the higher tuition and average scholarship just equals the number of places that private schools are willing to provide. It is assumed that, on average, administrative costs of student scholarship organizations would be 5% of donations.

	2015	**2016**	**2017**	**2018**
Average Scholarship	$449	$495	$543	$596
Average Tuition Increase	$52	$57	$63	$69
Enrollment Increase	87	95	105	116

Department of Revenue (DOR) costs

14. This bill, as amended, would require the DOR to develop and maintain a registry of student scholarship organizations and to compile and make public information from their annual reports. It also would require the department to maintain systems for taxpayers to apply to receive the two credits. One-time costs to develop new forms and add the new credits to the department's data processing systems would be $420,325 in FY 2016. Processing and verifying credit applications and annual reports from scholarship organizations

would require an additional 1.00 FTE beginning in FY 2016. Verifying and auditing two additional credits also will require an additional 1.00 FTE beginning in FY 2016.

Office of Public Instruction

15. SB 410, as amended, establishes an educational improvement account in the state special revenue fund. Taxpayer-directed donations must be paid into the account. The Office of Public Instruction (OPI) is required to distribute 95% of the revenue from the educational improvement account for supplemental funding to eligible public schools.
16. SB 410 defines student scholarship organizations as entities which provide scholarships to eligible students to attend instruction offered by a qualified education provider. The scholarship organization delivers scholarship funds directly to the qualified education provider selected by a parent or legal guardian. The organization may not provide a scholarship that exceeds 50% of the per-pupil average of total public school expenditures. Furthermore, the organization's average scholarship may not exceed 30% of the per-pupil average.
17. A qualified education provider may not be a public school nor a home school. If the provider is not accredited, has not applied for accreditation, or is not provisionally accredited by a state, regional, or national accreditation organization, the provider or tutor must inform the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation.
18. The OPI is responsible for:
    a. Making recommendations to adjust the geographic regions and large districts over time as necessary to preserve equity and fairness;
    b. Determining the ratio of a school's quality educators to the total number of quality educators in the school's geographic region or large district;
    c. Obligating at least 95% of its annual revenue from the educational improvement account for supplemental funding to eligible public schools for innovative educational programs and technology deficiencies; and
    d. Calculating the statewide average per-pupil spending as defined in Section 22.
19. SB 410 allows the agency to use 5% of the funding in the educational improvement account for administrative expenses which is assumed to cover all such costs. The additional workload for OPI will be associated with allocating individual donations among eleven geographic regions or seven large districts based on the taxpayer's residential address. This would require 1.00 FTE for OPI. The DOR will need to provide taxpayer addresses to OPI. It is likely that OPI will need to contract for GIS services to assist with this effort.
20. Using the calculation required by SB 410, Section 22, the per-pupil average of total public school expenditures was $10,418 for the FY 2013-14 school year. The average was $9,551 for elementary programs and $11,272 for high school programs. The funds that must be included in the calculation of the per-pupil average include general fund; transportation; bus depreciation; food services; tuition; retirement; miscellaneous programs; traffic education; non-operating; lease rental agreement; compensated absence fund; metal mines tax reserve; state mining impact; impact aid; litigation reserve; technology acquisition; flexibility fund; debt service; building reserve; and inter-local agreement.
21. School districts will deposit the supplemental funding received under SB 410, as amended, in the school flexibility fund. There is also no deadline for a school district to expend the donated monies.
22. SB 410, as amended, does not provide a timeline for when OPI will distribute funds to districts. OPI will determine the timeline through the rulemaking process.
23. SB 410, as amended, statutorily appropriates the funding in the newly created state special revenue educational improvement account.
24. SB 410, as amended, is effective on passage and approval and terminates December 31, 2021.

	FY 2016 Difference	FY 2017 Difference	FY 2018 Difference	FY 2019 Difference
Fiscal Impact:				
FTE (DOR)	2.00	2.00	2.00	2.00
FTE (OPI)	1.00	1.00	1.00	1.00
Expenditures:				
Personal Services (DOR)	$154,188	$154,188	$156,501	$158,848
Operating Expenses (DOR)	$434,341	$13,408	$13,609	$13,813
Personal Services (OPI)	$49,345	$49,345	$50,085	$50,836
Operating Expenses (OPI)	$25,655	$63,155	$99,915	$114,164
Grants to Schools (OPI)	$1,425,000	$2,137,500	$2,850,000	$3,135,000
TOTAL Expenditures	$2,088,529	$2,417,596	$3,170,110	$3,472,662
Funding of Expenditures:				
General Fund (01)	$588,529	$167,596	$170,110	$172,662
State Special Revenue (02)	$1,500,000	$2,250,000	$3,000,000	$3,300,000
TOTAL Funding of Exp.	$2,088,529	$2,417,596	$3,170,110	$3,472,662
Revenues:				
General Fund (01)	($4,449,375)	($5,474,063)	($6,528,750)	($7,181,625)
State Special Revenue (02)	$1,500,000	$2,250,000	$3,000,000	$3,300,000
TOTAL Revenues	($2,949,375)	($3,224,063)	($3,528,750)	($3,881,625)
Net Impact to Fund Balance (Revenue minus Funding of Expenditures):				
General Fund (01)	($5,037,904)	($5,641,659)	($6,698,860)	($7,354,287)
State Special Revenue (02)	$0	$0	$0	$0

Effect on County or Other Local Revenues or Expenditures:

Office of Public Instruction (OPI)

1. SB 410 creates a new state-sanctioned revenue source that generates funding for some districts that is not available to other districts.

Long-Term Impacts:

Department of Revenue (DOR)

1. This bill would sunset December 31, 2021. Credits for tax years 2019 through 2021 would be claimed in FY 2020 through FY 2022. Continued growth in the credits after FY 2019 is uncertain. If total credits continue to be at the limit, general fund revenue would be reduced by $9.6 million in FY 2022. However, reaching this level of credits would require about 65,000 taxpayers to make donations, and total credits may level off at a lower amount.

Sponsor's Initials	*Date*	*Budget Director's Initials*	*Date*

GOVERNOR'S OFFICE OF BUDGET AND PROGRAM PLANNING

Dedication of Revenue 2017 Biennium

17-1-507-509, MCA.

a) **Are there persons or entities that benefit from this dedicated revenue that do not pay? (please explain)**

Yes, taxpayers contribute and school districts receive the funds for innovative programs. It also provides taxpayer relief of paying the expenses.

b) **What special information or other advantages exist as a result of using a state special revenue fund that could not be obtained if the revenue were allocated to the general fund?**

It is easier to track the funding both revenue and expenditures when not included in the general fund.

c) **Is the source of revenue relevant to current use of the funds and adequate to fund the program activity that is intended? Yes / No (if no, explain)**

Yes, there are no current funds being used for this purpose and the amount of funds are limited for both revenue and thus expenditure.

d) **Does the need for this state special revenue provision still exist? ___Yes ___No (Explain)**

If SB 410 passes this fund will be necessary.

e) **Does the dedicated revenue affect the legislature's ability to scrutinize budgets, control expenditures, or establish priorities for state spending? (Please Explain)**

The restricted state special revenue fund allows the legislature to clearly see revenue, expenditures, and fund usage.

f) **Does the dedicated revenue fulfill a continuing, legislatively recognized need? (Please Explain)**

If SB 410 passes, the legislature has recognized a need for a state special revenue fund. This fund allows OPI to appropriately account for the funds.

g) **How does the dedicated revenue provision result in accounting/auditing efficiencies or inefficiencies in your agency? (Please Explain. Also, if the program/activity were general funded, could you adequately account for the program/activity?)**

The dedicated revenue provision ensures OPI will utilize the dedicated revenue as the legislature intended with the passage of SB 410.

GOVERNOR'S OFFICE OF BUDGET AND PROGRAM PLANNING

Statutory Appropriation 2017 Biennium

17-1-508(2), MCA.

1. 17-1-508, MCA, requires analysis of the statutory appropriation relative to the guidance in 17-1-508(3), MCA, to be published in the fiscal note. In reviewing and establishing statutory appropriations, the legislature shall consider the following guidelines. Answer yes or no to each of the following guidelines regarding the statutory appropriation:

	YES	NO
a. The money is from a continuing, reliable, and estimable source.	X	
b. The use of the appropriation or the expenditure occurrence is predictable and reliable.	X	
c. The authority exists elsewhere.		X
d. An alternative appropriation method is available, practical, or effective.	X	
e. It appropriates state general fund money for purposes other than paying for emergency services.	X	
f. The money is used for general purposes.		X
g. The legislature wishes to review expenditure and appropriation levels each biennium.	X	
h. An expenditure cap and sunset date are excluded.		X

Comments: