

## LEGAL REVIEW NOTE

**Bill No.:** HB 549

**LC#:** LC 1257, To Legal Review Copy, as  
of January 30, 2023

**Short Title:** Authorizing establishment of  
public choice schools

**Attorney Reviewer:** Todd Everts  
Laura Sankey Keip

**Date:** February 16, 2023

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

#### Legal Reviewer Comments:

Article X, section 8, provides that the "supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law." "A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote, and, presumably, are chosen by reason of their standing in the community, sound judgment, and their interest in the educational development of the young generation...." Kelsey v. School District No. 25, 84 Mont. 453, 458 (1929).

Sections 4, 5, and 7 of HB 549 as drafted provides two avenues for the creation of a public charter school within an existing school district on approval by the Board of Public Education: first, by petitioning the local board of trustees to pursue creation of a public charter school and second, if the first avenue fails, by creating an independent governing board separate from the local board of trustees to oversee the public charter school. Section 7 further provides that the independent governing board would be elected in the same manner as, but separately from, the local board of trustees.

To the extent that HB 549 as drafted allows for the creation of a governing board other than the local school board to oversee a public charter school within a school district. HB 549 may raise a potential constitutional question as to whether this legislative direction conflicts with the local boards of trustees' constitutional responsibility to supervise and control the schools in each district as prescribed by Article X, section 8, of the Montana Constitution.

**Requester Comments:**

**The local school board has the first opportunity to meet the educational needs addressed by the applicants. It is only after the local school board declines to offer a program meeting those needs that the applicant can apply to the Board of Public Education to create a public charter school. That public charter school is then governed by a locally elected board.**