



122 C St N.W., Suite 700
Washington, DC 20001
October 12, 2023

Oklahoma Tax Commission
Oklahoma City, OK 73194
By email to parentalchoice@tax.ok.gov

Re: Comment on Proposed Rule 710:50-15-118 Parental Choice Tax Credit

Dear Oklahoma Tax Commission,

On behalf of National Taxpayers Union (NTU), we write with comments on the Commission's request for public comment on proposed regulations relating to the Parental Choice Tax Credit.

Introduction

NTU is the voice of America's taxpayers, founded in 1969 to achieve favorable policy outcomes for taxpayers with Congress and the executive branch. We work for a simple and fair tax system that enables prosperity for all and respects taxpayers' rights, for lean and efficient government services and regulations, and for sustainable fiscal policies to avoid national bankruptcy. Our experts and advocates engage policymakers on everything that affects taxpayers.

The proposed regulations would violate the spirit and letter of the underlying statute by establishing a grant program rather than a refundable tax credit. A grant program may be more familiar and easier to administer, but the decision of the form of the program should be left to the Legislature. By altering what the Legislature directed, the regulations would (1) be at odds with similar programs in other states, (2) introduce unneeded legal uncertainty, and (3) inflict negative tax consequences on Oklahoma parents who participate in the program. The Commission should rewrite or significantly alter the proposed regulations to align with a refundable tax credit that avoids legal challenges and tax consequences to parents.

The Proposed Regulations Improperly Establishes a Grant Program, Not an Income Tax Credit Similar to Programs In Other States

The Oklahoma Legislature directed the creation of "the Oklahoma Parental Choice Tax Credit Program to provide an income tax credit to a taxpayer for qualified expenses to support the education of eligible students in this state." Okla. Stat. tit. 70 § 28-101(B). The statute envisions taxpayers (1) retaining receipts of qualified expenses, (2) claiming the credit, (3) submitting

information to the Commission upon request, and (4) applying by a deadline with an affidavit from the private school, and in reviewing applications the Commission shall give first preference to lower-income individuals. *See* Okla. Stat. tit. 70 § 28-101(C)(3) & (E).

An income tax credit is “a dollar-for-dollar amount taxpayers can claim on their tax return to reduce the income tax they owe.” IRS, “Tax credits for individuals,” Apr. 2023, <https://www.irs.gov/newsroom/tax-credits-for-individuals-what-they-mean-and-how-they-can-help-refunds>; *see also* Black’s Law Dictionary 10th ed., “Tax credit” (“An amount subtracted directly from one’s total tax liability, dollar for dollar, as opposed to a deduction from gross income.”); Black’s Law Dictionary 10th ed.; Tax Foundation, “Tax Credit,” <https://taxfoundation.org/taxedu/glossary/tax-credit/> (“A tax credit reduces a taxpayer’s final tax bill, dollar-for-dollar...directly.”).

The proposed regulations, by contrast, direct that the “tax credit shall be exclusively claimed through the submission of an application” and “cannot be claimed on the Oklahoma income tax return.” Proposed 710:50-15-118(c)(3)(B). Instead, those wishing to use the credit must submit an application between December 8 and January 22 each year, and “*if* the application is approved,” Proposed 710:50-15-118(c)(3)(B)(ii) (emphasis added), the Tax Commission shall mail a payment warrant to the school in the taxpayer’s name. (As a side note, the Commission should align its application deadlines with the tax filing season – it’s obviously not an income tax credit if it is totally divorced from that process and only available for an alarmingly abbreviated six week period each year which includes busy holidays – and ensure the award process is aligned with the school year application process.) Except for the total dollar cap and first preference for lower-income individuals, the statute did not envisage administrative discretion to decide which applications should be approved or not, and the posture of discretion and many of the additional requirements beyond those specified in the statute (including “documentation of the school’s compliance with all relevant state and local regulations,” which should be clarified to be less broad and vaguely worded) is inappropriate and imposes needless compliance burdens on the taxpayers. Discretion in *allocating* the tax credit does not amount to discretion in *deciding each applicant*. The Commission should consider deleting the discretionary posture of approvals, instead acknowledging that a tax credit definitely “grants a tax credit to anyone” who meets the statutory criteria, without additional discretionary obligations. *Espinoza v. Montana Dep’t of Rev.*, 591 U.S. ----, 140 S. Ct. 2246, 2251 (2020); *see also Tax & Accounting Software Corp. v. U.S.*, 301 F.3d 1254, 1261 (10th Cir. 2002), *citing New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934) (“Where there is clear provision in the statute for a particular credit, however, the credit is allowable.”). The eligibility for tax credits are a matter of legislative grace, not administrative discretion.

The proposed regulations do not describe an income tax credit. Income tax forms are not a part of the envisaged process at all, except for income verification purposes; taxpayers are directed to provide an income tax form from *two years earlier* with their application. An income tax credit would allow taxpayers to file at the same time they file their individual income tax return that same year. For other income tax credits, the Commission has placed them on the income tax form. *See* Instructions for Oklahoma Individual Income Tax Return (describing Oklahoma child tax credit, credit for tax paid to another state, investment/new jobs credit, credit for verified blood donation, credit for investment in clean-burning motor vehicle fuel property, credit for

qualified software or cybersecurity employees, credit for tourism development or qualified media production facility, local development and enterprise zone incentive leverage act credit, credit for qualified rehabilitation expenditures, credit for electricity generated by zero-emission facilities, credit for financial institutions making loans under the Rural Economic Development Act, credit for manufacturers of small wind turbines, volunteer firefighter credit, credit for railroad modernization, research and development new jobs credit, credit for biomedical research contribution, credit for employees in the aerospace sector, credit for employers in the aerospace sector, wire transfer fee credit, credit for cancer research contribution, capital investment board tax credit, credit for contribution to a scholarship-granting organization, credit for contributions to an education improvement grant organization, credit for venture capital investment, affordable housing tax credit, credit for employees in the vehicle manufacturing industry, credit for contribution to an eligible public school foundation, and credit for rural jobs). The proposed regulation treats this income tax credit differently from each of those tax credits, to the degree of making it not a credit at all, with no explanation as to why. The Commission should either conform this income tax credit to how all other income tax credits are treated in Oklahoma and elsewhere – claimed on the return – or give a satisfactory explanation as to why this tax credit should depart.

Although portrayed as a tax credit program, the proposed regulations are more akin to a scholarship grant program; for instance, Oklahoma’s proposed Parental Choice Tax Credit program is nearly identical to North Carolina’s Scholarship Grant program. *See* N.C. Gen. Stat. §§ 115C-562.1-562.8. First, both Oklahoma’s and North Carolina’s programs set limits on the amount of funds awarded to eligible students. *See* Proposed 710:50-15-118(c)(1) (“The maximum credit amount allowed is \$7,500 if the eligible student is a member of a household in which the total federal adjusted gross income (AGI) during the second preceding tax year does not exceed \$75,000; . . . (E) The maximum credit amount allowed is \$5,000 if the eligible student is a member of a household in which the total federal AGI during the second preceding tax year is more than \$250,000.”); N.C. Gen. Stat. § 115C-562.2 (“Scholarship grants awarded to eligible students residing in households with income level not in excess of the amount required for the student to qualify for federal free or reduced-price lunch programs shall be . . . in an amount of up to ninety percent (90%) as a full-time student Scholarship grants awarded to eligible students residing in households with an income level in excess of the amount required for the student to qualify for the federal free or reduced-price lunch program shall be for amounts of not more than ninety percent (90%)”).

Second, neither program dispenses the funds directly to the parents; rather, both send the funds to the designated school and require parents to endorse the funds at the school. The relevant statutory texts for these processes are strikingly similar. N.C. Gen. Stat. § 115C-562.6, entitled “Scholarship endorsement[,]” provides:

[t]he Authority shall remit, at least two times each school year, scholarship grant funds to eligible students to the nonpublic school for endorsement by at least one of the student’s parents or guardians. The parent or guardian shall restrictively endorse the scholarship grant funds awarded to the eligible student for deposit into the account of the nonpublic school to the credit of the eligible student.

N.C. Gen. Stat. § 115C-562.6 (emphasis added). The proposed Oklahoma regulations, entitled “Claiming the private school tax credit[.]” states,

If the application is approved, the credit will be paid in two installments. Each installment will be half of the amount of the anticipated private school tuition and fees the taxpayer expects to incur during the tax year based on the private school's Affidavit of Enrollment, or half the amount of the allowable credit, whichever is less.

...

Payment of the credit shall be made by the Tax Commission with an individual warrant made payable to the taxpayer and *mailed to the private school where the eligible student is enrolled or expected to enroll. The taxpayer shall restrictively endorse the warrant to the private school for deposit into the account of the school,* unless the tuition and fees for the eligible student have already been paid by the taxpayer.

Proposed 710:50-15-118(3)(B)(ii), (D) (emphasis added).

An analysis of North Carolina's statute and Oklahoma's proposed statute reveals North Carolina's scholarship program and the proposed Oklahoma tax credit program are similar in their application and functionality. Both aim to decrease the financial burden of education, do not dispense funds directly to the parents, and contain guidelines for funding eligibility. Given these similarities, Oklahoma's proposed regulations are more akin to a grant program, such as that of N.C. Gen. Stat. §§ 115C-562.1-562.8, than to a tax credit program not only in purpose, but also in application. Thus, the Commission should amend the language of the proposed regulations to more closely reflect that of a tax credit program.

The Proposed Regulations Introduce Unneeded Legal Uncertainty

Whether this program operates as a grant program or a tax credit is no mere issue of semantics. In 2011, the U.S. Supreme Court narrowly ruled 5 to 4 that a tax credit for contributions to school tuition organizations was valid, with each side arguing whether or not it resembled a presumably less constitutionally certain grant program. *See Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 142 (2011) ("The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers."); *id.* at 148 (Kagan, J., dissenting) ("Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations."). *See also Espinoza*, 591 U.S. ----, 140 S. Ct. at 2261 ("[T]his Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices.").

By introducing steps between the parental choice to take the credit and the payment being made beyond those ministerial tasks specifically outlined in the statute, the proposed regulations sever this link and reintroduce government discretion into what should be private decisions. The Legislature deliberately structured this as a tax credit to minimize such discretion, in line with court decisions that see constitutional significance in this not being a discretionary grant

program. While what the regulations envisage is probably still constitutional, it would, to be blunt, be a closer case than if it was a true tax credit. Given that the Legislature directed that this be an income tax credit, the unnecessary legal uncertainty that this proposed regulation introduces is a reason for reconsideration and revision of these proposed regulations.

The Commission should therefore recast its proposed regulations to align with a tax credit involving no non-ministerial discretion between the taxpayer taking the credit on their tax return (in accordance with statutory eligibility requirements) and the funds being awarded. Alternatively, the Commission should commission an expert legal analysis as to what extent operating it as a grant program threatens its legal defense if challenged under existing precedents.

The Proposed Regulations Would Inflict Negative Tax Consequences on Oklahoma Parents Who Participate in the Program

The “FAQ” page on the proposed regulations states that any tax credit amount “will also be included in your Oklahoma taxable income” and the Commission “will issue Form 1099-G to taxpayers who receive a Parental Choice Tax Credit payment.” Oklahoma Tax Commission, “Parental Choice Tax Credit – Private School FAQs,” https://oklahoma.gov/tax/individuals/parental_choice_tax_credit.html. This would be proper compliance for a grant program, but is improper for a tax credit program. *See, e.g.*, IRS, “About Form 1099-G, Certain Government Payments,” <https://www.irs.gov/forms-pubs/about-form-1099-g> (stating that Form 1099-G should be used for payments of unemployment compensation, tax refunds, trade assistance payments, taxable grants, agricultural payments). 1099-G should be issued only if this is a refund or grant, and not if it is a tax credit.

As stated above, tax credits *reduce* income tax owed; they definitionally should not *increase* state taxable income. This is in contrast to exclusions which are not included in income, deductions which reduce gross income, and receipt of payments which increase income. Generally, receipt of an Oklahoma tax credit does not increase Oklahoma taxable income. *See, e.g., Stillwater Housing Associates v. Rose*, 254 P.3d 726, 729 (Okla. Ct. Civ. App. 2011), *citing Randall v. Loftsgaarden*, 478 U.S. 647, 656 (1986) (“At issue was whether tax deductions and tax credits were income.... The Court held tax credits were not income, stating they had no value in themselves but the economic benefit to the investor arose because the investor could use tax credits to reduce the taxes otherwise payable on account of income. The receipt of tax credits was not a taxable event because the investor had received no income within the meaning of the Internal Revenue Code.”). Indeed, just this year, the IRS held that even special *direct state government payments to taxpayers* should not be included in taxable income. *See* IRS, “IRS issues guidance on state tax payments to help taxpayers,” Feb. 10, 2023, <https://www.irs.gov/newsroom/irs-issues-guidance-on-state-tax-payments-to-help-taxpayers>.

Issuing 1099-Gs to taxpayers and directing them to include their tax credits in their taxable income would be anomalous with other state income tax credits in Oklahoma and elsewhere, incompatible with federal law, and could also endanger state tax credits for taxpayers paying in multiple states. The Commission should rescind its FAQ stating that the credit will be included in taxable income and a 1099-G will be issued, and not issue 1099-Gs unless directed by statute or

regulation; or explain why this program requires the issuance of 1099-Gs when no other Oklahoma tax credit does so, including whether it is the Commission's position that the tax credit is actually a tax refund, agricultural or trade assistance payment, or taxable grant (the categories in the IRS guidelines about 1099-G Forms).

Conclusion

The Commission's proposed regulations would transform what the Legislature designed as a straightforward income tax credit into something that is quite different from existing tax credits, less certain under legal precedents, and administratively cumbersome. The Commission should consider alternatives that would remedy these major observations, as well as address or explain the basis for other issues such as issuing 1099-Gs, the enormous temporal limitation on the application period, and the scope of anticipated discretion in awarding tax credits and what materials taxpayer applicants will need to submit.

Thank you for your consideration,

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