Report From Agency

FINAL REPORT
CLEARINGHOUSE RULE 14-021
CHAPTER PI 36
Full-Time Open Enrollment Program

Analysis by the Department of Public Instruction

Statutory authority: ss. 227.11(2)(a)(intro) and 118.51, Stats.

Statute interpreted: ss. 118.40(8), 118.51, and 121.05(1)(a), Stats.

The basis and purpose of the proposed rule, including how the proposed rule advances relevant statutory goals or purpose:

The Full-Time Open Enrollment Program was created by 1997 Wisconsin Act 27. Since then, the statute has been amended or affected by ten legislative enactments, including: changes to 4-year-old kindergarten eligibility for open enrollment; limiting the number of districts a pupil can apply to; waiting lists; preferences and guarantees for certain pupils; transportation for open enrolled pupils; open enrollment to virtual charter schools; and habitual truancy. The program has been affected by a number of court decisions. Nearly 3,000 appeals have been filed with the Department.

The most recent change to full-time open enrollment occurred with 2011 Wisconsin Act 114, which changed the timing of the application process under the Open Enrollment Program and permitted certain pupils to submit open enrollment applications outside the regular application period, thus changing the nature of the Open Enrollment Program from a once-a-year time-limited application period to a year-round opportunity to apply. Specifically, 2011 Wisconsin Act 114 changes s. 118.51, Stats., by requiring pupils to submit an enrollment application no later than the last weekday in April, rather than no later than the 3rd Friday following the first Monday in February. As a result of this change, subsequent deadlines are adjusted accordingly. 2011 Act 114 also changes s. 118.51, Stats., by allowing alternative open enrollment procedures under certain circumstances.

The proposed changes include: designation of open enrollment spaces and approval and denial of applications; handling of applications submitted under the regular and alternative application procedures; procedures for terminating open enrollment due to habitual truancy; procedures for considering whether a special education cost is an undue financial burden; confidentiality of pupil records as they relate to open enrollment; procedures and standards for open enrollment appeals; administrative and aid transfer procedures; and procedures for filing claims and making payments to parents for open enrollment transportation reimbursement.

The rules have only been amended three times since they were first promulgated in July 1998 including: addressing the number of districts a pupil may apply to, and establishing wait lists, and modifying the method of serving notices of denial. The rule amendments do not incorporate all of the statutory changes that have occurred.

The objective of the proposed rule-making is to update the full-time enrollment portion of PI 36 to address the statutory changes and questions that have arisen over the past 14 years. Finally, this rule change will also include any changes to the Full-Time Open Enrollment Program stemming from the passage of the 2013-15 biennial budget.

A list of the persons who appeared or registered for or against the proposed rule at a public hearing:

The hearing notice was published in the February 28, 2014 edition of the Wisconsin Administrative Register. A public hearing was held on March 25, 2014.

The following persons testified at the March 25, 2014 hearing (some also provided written testimony as well):

NAME	ORGANIZATION
Shana Lewis	School District of McFarland
Leslye Erickson	Wisconsin Virtual Academy
John Roll	Parent
Chan Stroman	Representing Self

The following persons submitted written testimony:

NAME	ORGANIZATION
Jeff Mahoney	McFarland School District
Michelle Langenfeld and Kim Pahlow	Green Bay Area Public School District
Chris VanderHeyden	Menasha Joint School District
Joanne Juhnke, Paula Buege, and Pam DeLap	Stop Special Needs Vouchers
Hugh Davis	Wisconsin Family Ties
Matt Bell	Madison Metropolitan School District
Lisa Pugh	Survival Coalition of Wisconsin Disability Organizations
Dan Rossmiller	Wisconsin Association of School Boards

Summary of public comments relative to the rule, the agency's response to those comments, and changes made as a result of those comments:

Open Enrollment Application Procedures

1. The change in the definition of siblings seems to exclude step-siblings who reside in the same household. This change will be significant in connection with application approval guarantees and in connection with applying sibling preferences for open enrollment.
2. The expanded information on the notice of denial is an improvement and it is useful that the notice of denial must now include a copy of the special education cost estimate. The requirement to provide "information about the board's decision" would be more useful to parents if the requirement were more specific.
3. If a resident district that denies an open enrollment application has to provide additional information to the special education cost estimate and invoice form and then send the form to the parent, this requirement should be incorporated into rule.
4. The proposed rules result in automatic approval of the application in too many situations when school districts commit procedural errors.
5. By defining the best interests of the pupil, there is concern that the definition will be interpreted to prevent districts from establishing their own criteria to evaluate the best interests of the pupil. Thus, the department should clarify that districts are allowed to adopt and apply such criteria.

6. When a verbal notice is provided to accept a pupil from the wait list, provide for documentation beyond the verbal notice to ensure there is a record for a parent to refer to if there is a discrepancy.

Agency Response and Changes Made:

1. The change in the definition of siblings does not exclude step-siblings because they share a parent. Rather, the rule no longer requires that step-siblings reside in the same household. (Addresses comment 1 above.)
2. The DPI has created a new form (PI 9414) to be used when a pupil is denied open enrollment due to undue financial burden. This form is referenced in the rule and provides the additional detail concerning the requirement for the notice of denial to include "information about the decision." (Addresses comments 2 and 3 above.)
3. The rules require that school boards must send notices of denial by the deadline, or the application is considered approved. If this were not the case, parents might not know if their application could be denied at some future date. (Addresses comment 4 above.)
4. The DPI has defined "best interests of the pupil" to ensure that the pupil's physical, emotional and educational well being is considered. If a school board wishes to adopt policies to use in considering a pupil's best interests, they may do so, as long as they consider the pupil's well being as it relates to these factors. (Addresses comment 5 above.)
5. A verbal notice from the wait list is permitted because written notices made close to the 3rd Friday in September would not arrive in time for the pupil to attend on that date. The rule requires that verbal notice must be given to the parent who submitted the application, to avoid a situation where a message may be given to some other party and may not reach the parent in time. There is no appeal of a school board's action on a waiting list. (Addresses comment 6 above.)

Determination and Designation of Open Enrollment Spaces

1. The decision to prevent a school board that did not approve all applications during the regular application period from approving alternative applications provides necessary clarity and is equitable.
2. A district should be permitted to decrease the number of spaces available for open enrollment pupils after January in limited circumstances. There should be permitted unique circumstances in which a district could petition the Department for authorization to decrease the number of open seats based upon a demonstration that the identified need is not arbitrary or unreasonable.
3. The proposed rules fail to expressly state that school boards may adopt class size limits or pupil-teacher ratios solely for the purposes of open enrollment
4. The rule doesn't specify when to count siblings. The rule seems to imply that a sibling takes up one of a district's spaces, but does not say so explicitly.
5. Allow all pupils including pupils who are only receiving special education services to be included in any random open enrollment selection for the pupil's grade.
6. School districts are not permitted to manage space availability for open enrollment on the basis of the "schools, programs, classes or grades," as required by s. 118.51(5)(a)1., Stats. Setting spaces by grade level does not accommodate open enrollment requests to a district's customized education programs.
7. Wait lists should be established by school instead of by grade.
8. The clarification to the waiting list requirements is an important change for pupils with disabilities. The rule should specifically mention approving pupils with disabilities on the wait list when it states that when additional spaces become available, the nonresident district shall first approve pupils from the wait list.

Agency Response and Changes Made:

1. The statute requires that school boards must "determine" the number of available spaces in January. Once the spaces are "determined," they must be filled if there are applications for those spaces. If the number of spaces can be reduced, then "determine" has no meaning. Parents rely on school board space determinations to decide which school districts to apply to. (Addresses comment 2 above.)
2. The recommendations in comments 3, 4 and 5 were adopted.

3. The rule has been amended to clarify that a school board may consider the availability of spaces in the schools, programs, classes or grades in the district, but must aggregate the spaces by grade for the purpose of designating spaces in January. Further, guarantees, preferences and random selections must be by grade (the rules permit school boards to combine grades for these purposes). However, once a pupil's application is approved, the pupil may be assigned to schools, programs, classes or grades and may be placed on wait lists for schools, programs, classes and grades. Aggregating spaces by grade and approving applications into the district by grade provides school boards the greatest flexibility in managing applications and pupil assignments. (Addresses comments 6 and 7 above.)
4. The rules have been amended to clarify the management of wait lists when a pupil is on a wait list for both regular and special education. (Addresses comment 8 above.)

Undue Financial Burden and Pupils with Disabilities

1. The Department's efforts to update forms and notices to provide more comprehensive information to parents, including a statement and link to the department's website to explain rights if there is a disagreement with the resident school district over the child's IEP, is helpful.
2. The proposed rules currently prohibit a resident school district from denying any otherwise valid alternative application on the basis of an undue financial burden. This limitation conflicts with s. 118.51(3m)(d), Stats.
3. "Sufficient" is a better term to use than "sole" when determining a list of things that cannot constitute "sole" evidence of undue financial burden.
4. More time is needed to review an application from a pupil with a disability and nonresident districts must be allowed to review a pupil's IEP as part of determining the financial burden question. The proposed rules interfere with district determinations of "undue financial burden" by establishing unrealistic deadlines for school board decisions and by unnecessarily limiting school districts' access to information and records that are highly relevant to the analysis of a nonresident school district's estimate of special education costs.
5. If the nonresident school district must do a special education cost calculation, the resident school district should be required to do a cost calculation as well.
6. The proposed rules do not establish any procedure allowing for a resident district to challenge a nonresident district's cost estimate.
7. It would be beneficial to have a definition of undue financial burden. The factors for undue financial burden should be better articulated as well as how an appeal of undue financial burden is related to a district's total economic circumstances and per pupil revenue limit
8. The proposed rules interpret "undue financial burden" in an unclear manner that may signal an unwarranted shift in the department's approach to deciding open enrollment appeals.
9. In numerous prior decisions of the Department as to whether there is an undue financial burden, the Department has explicitly relied on evidence that the resident school district would experience no savings as a result of the pupil's transfer. The proposed rule is directly contrary to past precedent and inappropriately establishes a new substantive standard without revised legislation prompting such a change.
10. The proposed rules should be amended to expressly recognize that, in order to be consistent and non-arbitrary, it is reasonable for a school district making an undue financial burden decision to consider the cumulative effect of applying similar decision-making criteria to multiple, similarly-situated applications. That is, if the decision in the individual case is not sustainable when generalized to other similarly-situated applicants, all such applications can be reasonably denied.
11. The rules should specify what to do in cases where a pupil has been referred for an IEP evaluation but has not been evaluated yet.
12. The changes to the rule that address concerns about pupils being denied open enrollment simply because an IEP had expired or because the resident district neglected to send an IEP are good changes. When referencing the information to be used in a determination, the rule should include "other information as provided about the child's disability and special education needs as supplied by the parent."

Agency Response and Changes Made:

1. The error referred to in comment 2 has been corrected.
2. The recommendation in comment 3 has been adopted.
3. The 5 days for the resident district to consider whether the cost of an alternative application is an undue financial burden has been extended to 10 days. The rules have been amended to allow a resident school district to receive a copy of an IEP used to develop a cost estimate. (Addresses comment 4 above.)
4. The rules are amended to require the resident school board to estimate its own cost to provide the same or comparable special education or related services for which the nonresident school board proposed to charge. A new form for the denial of open enrollment due to undue financial burden (PI 9424) has been created to incorporate this cost information as well as data and an explanation of how the resident school board determined the cost is an undue financial burden. (Addresses comment 5 above.)
5. The open enrollment statute provides for a parent to appeal a school board's denial of open enrollment. There is no statutory authority for the DPI to create an appeal procedure for resident school boards. A resident school board can request that the nonresident school board explain its estimate before making a determination that a cost is an undue financial burden. If either a parent or resident school board question the nonresident school district's estimate in an appeal of the resident school board's denial, the DPI writes to the nonresident district and requires the nonresident district to explain the estimate. The DPI may also, on its own, require the nonresident school district to explain an estimate. (Addresses comment 6 above.)
6. "Undue financial burden" is defined in statute. (Addresses comment 7 above.)
7. The proposed rules do not limit the factors the school board can consider in determining whether a cost is an undue financial burden. The rules specify that all factors must be considered in light of the district's total economic circumstances. This is a standard the DPI has consistently applied in appeals and for which the DPI has provided numerous training sessions. (Addresses comments 8 and 9 above.)
8. The statute requires the school board to consider whether the cost to provide a specific pupil's special education in a nonresident school district is an undue financial burden. There is no authority in statute for a school board to lump all the costs together and decide if it can't afford to allow all pupils to leave, then it will not allow any pupils to leave. (Addresses comment 10 above.)
9. The rules have been amended to address this situation. (Addresses comment 11 above.)
10. A school board can only base its decision on an IEP and/or evaluation of the pupil. (Addresses comment 12 above.)

<u>Attendance Requirements and Open Enrollment</u>

1. The department should further clarify its "physical attendance" requirement for nonresident pupils as applied to specific circumstances.
2. The proposed rules overly complicate the process of revoking open enrollment based on habitual truancy.
3. The proposed rule provides a good start to ensure that school boards have policies in place before denying or rescinding a pupil's open enrollment due to truancy. It would be improved further by requiring that the notice of acceptance provided by the nonresident school district include the existence of unique truancy policies that may affect termination of a pupil's open enrollment status.

Agency Response and Changes Made:

1. The pupil cannot "attend" school while at home unless the pupil is enrolled in a virtual charter school, the pupil must physically travel to school. Once there, pupils who are open enrolled have the same rights and responsibilities as resident pupils, including the ability to participate in various programs such as work study, etc. (Addresses comment 1 above.)
2. The provisions in the rule are intended to ensure than an unexcused absence is the same for open enrolled pupil as for resident pupils, that open enrolled pupils understand the severe consequences of habitual truancy and that the pupil is notified of unexcused absences in time to correct the behavior. The rules have been amended to specify that a decision will not be overturned solely because the school board did not exactly follow the prescribed

procedures as long as the board can provide evidence that the pupil knew or should have known the open enrollment could be terminated and that the pupil had at least one notice and chance to correct the truant behavior before open enrollment is terminated. (Addresses comment 2 above.)

3. The rule has been amended to require that this information be provided upon enrollment. (Addresses comment 3 above.)

Open Enrollment Appeals Procedures

1. Procedures under the rule make it very difficult to appeal a school board's denial.
2. Significant burden is placed on parents in the appeals process. The following things would help make the appeal process easier for parents:
    a. The provisions permitting the Department to reject an appeal if the appellant does not include the required documents or does not allege the decision was arbitrary or unreasonable should be removed.
    b. The rule specifies that an appeal must include a copy of the notice of denial and that the Department may reject an appeal for not including all the required documents. These requirements should be included in the notice of denial form. Denial notices should list the information necessary for an appeal and notify recipients that they are required to retain the postmarked envelope in which the notice of denial was received.
    c. To help parents navigate the appeals process, the denial notice should contain contact information for advocacy organizations that can provide assistance and information regarding the appeals process.
    d. The appeal notice and decision should include information to the parent about the ability to appeal the decision to circuit court
    e. Within the 30 day time limit for filing an appeal, the burden of proof regarding the timeline should rest with the denying school district and that district should include the postmarked envelope from the original appeals notice.
3. The denial notice should require more specificity so parents can articulate their view of an "arbitrary and unreasonable" decision in an appeal.
4. The department should make appeals decisions widely available to school districts and their legal counsel.
5. The department should include a timeline for how long the Department has to rule on an open enrollment appeal for the benefit of both parents and districts.
6. The rule should be amended to clarify that a parent does not have the right to appeal a nonresident district's decision to deny an alternative application.

Agency Response and Changes Made:

1. Significant changes have been made in the rules and forms to make the appeal process simpler and more accessible to parents, including:
    a. An open enrollment appeal is a legal procedure, subject to judicial review, and there must be an allegation that the school district unlawfully denied the open enrollment. The DPI has amended its appeal form to provide more specific information about the requirements to file an appeal and will be creating new documents for parents (such as an explanation of undue financial burden) to help them better understand the open enrollment laws.
    b. Once the DPI accepts an appeal, there is no requirement for the parent to submit anything more, although the parent is given an opportunity to do so. The DPI will require the school board to submit the record of the decision and DPI will make its decision based on a review of the entire record. (Addresses comments 2a and 3 above.)
    c. The rule was amended to no longer require the parent to include a copy of the notice of denial and the postmarked envelope. The appeal form will continue to request this information, if it is available (because it streamlines the processing of the appeals), but will state that the appeal will not be rejected if the notice and envelope are not included. (Addresses comment 2b above.)

d. Denial forms include an address of the appeals page of the open enrollment web site. This page contains the appeal form and bulletins to explain the appeal to parents and school districts. Information about resources and advocacy groups can be found on a special education web site and a link to this information will be on appeals page, as well. (Addresses comment 2c above.)
e. The DPI's decision can be appealed to circuit court and these appeal rights are included in the DPI's order. The school board's decision cannot be appealed to circuit court. Including information about circuit court appeals on the school board's denial form will be confusing. (Addresses comment 2d above.)
f. When the parent can provide a copy of the envelope, the appeal can be processed more expeditiously. If the parent cannot provide a copy of the envelope, the DPI will obtain proof of service from the school district. (Addresses comment 2e above.)

2. The DPI will take the request in comment 4 under consideration, but this does not need to be addressed in rule.
3. The DPI will receive between 200 and 300 appeals in a 30-day period. The DPI makes every effort to decide every appeal as quickly as possible and before the beginning of the school year. The DPI remains committed to making all decisions as quickly and thoroughly as possible and does not believe the imposition of a deadline will improve the procedure. (Addresses comment 5 above.)
4. Statutes govern specific appeal rights. There is no reason to list them in rule. (Addresses comment 6 above.)

Administrative and Technical Issues

1. Section 36.06 and 36.07 are insufficiently coordinated and highly confusing. There needs to be a clearer difference regarding whether the reference in those sections is to the regular application procedure or the alternative application procedure.
2. The department should select an effective date for these rules that gives school boards adequate time to amend their local policies and procedures prior to the first regular open enrollment period to which the final rules will apply.
3. When a nonresident open enrollment pupil with a disability moves to a new school district and the financially-responsible school district changes, the rules should provide a procedure and adequate time for the new resident school district to complete an undue financial burden analysis, during which time period the pupil should be permitted to continue attending school in the nonresident school district if the pupil's application had previously been approved by both the nonresident and former resident district.
4. Open enrollment pupils who move to a new resident district while applying or while attending a nonresident school district should be required to notify both the nonresident district and the new and old resident districts.
5. The nonresident school board should be allowed to receive special education evaluations, not just the IEP and disciplinary records.

Agency Response and Changes Made:

1. PI 36.06 and 36.07 have been reorganized for greater clarity. (Addresses comment 1 above)
2. As indicated in the comment, the extended application period and alternative application procedure were enacted several years ago. The DPI has advised school board to adopt such policies and most school boards will have already adopted policies to address them. (Addresses comment 2 above.)
3. The recommendation in comments 3 and 5 are accepted.
4. The DPI's OE system permits whichever district receives an address change to notify the other electronically. (Addresses comment 4 above.)

Comments on Statute:

1. The alternative application procedure that allows pupils who experience severe bullying to apply for open enrollment does not work as intended since it is extremely difficult to prove or provide documentation of bullying. The rule should clearly articulate the requirement under state law that a district must have a bullying policy in place and provide guidance to parents for how a bullying allegation can be properly articulated to qualify under an alternative application.

2. The proposed rule would codify the existing procedures of the Department which prevent pupils with disabilities, solely on account of their disability, from participating in public school open enrollment, when their open enrollment applications are denied when a school district claims "undue financial burden."
3. The plain language analysis of the rule should reference several federal regulations that address the right of pupils with disabilities to participate in Wisconsin's public school full-time open enrollment program without discrimination on the basis of disability and other states' open enrollment rules that expressly affirm the right of pupils with disabilities to participate in those state's open enrollment programs and do not allow exclusion of pupils with disabilities on account of "undue financial burden."
4. The proposed rule would codify the existing procedures of the Department which prevent pupils with disabilities, solely on account of their disability, from participating in public school open enrollment, when their open enrollment applications are denied when a school district claims "undue financial burden."
5. Presently each nonresident district must invoice the resident district for the basic open enrollment amount and any additional amount for extra special education services. Many nonresident districts do not have extra costs so the extra step of billing the basic amount is a waste of time and resources for both nonresident and resident districts. The basic open enrollment amount that applies to each child should be transferred between each school district similar to how non-special education pupils are handled.
6. No pupils who applied for open enrollment on a date after a pupil with a disability should be granted random or other guaranteed assignment until the status of a special education applicant has been determined and is final, even if appealed.
7. The department should continue to look at alternative strategies including establishing a minimum average caseload or requiring a percentage of open enrollment slots in a district be allocated for special education pupils, to ensure that the most vulnerable pupils are not discriminated against.
8. The nonresident school board should not be prohibited from requesting pupil records in addition to the pupil's Individualized Education Program (IEP), expulsion order, and pending disciplinary procedures, without the written consent of the parent's pupil. The district should also not be prohibited from denying an open enrollment application based on the parent's refusal to consent to the release of records. Nonresident school districts need access to these records to confirm the veracity of the information provided on the open enrollment application and evaluate whether open enrollment is truly in the best interests of the pupil. For example, virtual schools have a very different learning environment that would not be in the best interest of all pupils.
9. A definition for "arbitrary and unreasonable" is needed since it is a jargon-like legal term that is difficult for many families to understand.

Agency Response and Changes Made:

The DPI must administer state law.

1. Problems with the bullying provision of the statute need to be addressed legislatively. In the meantime, parents may apply based on "best interests of the pupil." (Addresses comment 1 above.)
2. State law permits resident school boards to deny open enrollment due to the "undue financial burden" of the cost of the pupil's special education in the nonresident school district. DPI does not have authority to ignore or overturn a state law through rule. (Addresses comments 2, 3 and 4 above.)
3. Other states have open enrollment laws that have different provisions than Wisconsin's laws. However, these proposed rules must implement Wisconsin's laws. Since the laws are different, there are no rules in other states to compare. (Addresses comment 3 above.)
4. The statute provides that the DPI must transfer aid from the resident to the nonresident school district for non-disabled pupils and that the resident school district must pay the nonresident school district directly for the costs of pupils with disabilities. (Addresses comment 5 above.)
5. The open enrollment statute requires that spaces in the district be filled by random selection, after granting certain preferences or guarantees. (Addresses comment 6 above.)
6. Establishing rules for special education caseloads is beyond the purview of this rule. (Addresses comment 7 above.)

7. The DPI believes it is a violation of the Family Educational Records Privacy Act (FERPA) to allow nonresident school boards to request these types of records without parental consent. (Addresses comment 8 above.)
8. "Arbitrary and unreasonable" is the legal standard required in the open enrollment statute for the DPI to overturn a school board's decision and DPI's decision can be appealed to circuit court. It has been defined over time by court decisions. (Addresses comment 9 above.)

Changes to the plain language analysis or the fiscal estimate:
Technical corrections to the plain language analysis were made.

Responses to Clearinghouse Report:

2. Form, Style and Placement in Administrative Code:
All of the recommendations under this section were accepted.

4. Adequacy of References to Related Statutes, Rules and Forms
All of the recommendations under this section were accepted.

5. Clarity, Grammar, Punctuation and Use of Plain Language:
All of the recommendations under this section were accepted.