

Clearinghouse Rule 14-021

PROPOSED ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION ADOPTING PERMANENT RULES

The scope statement for this rule, SS 074-13, was published in Register No. 691, on July 14, 2013, and approved by State Superintendent Tony Evers, on July 24, 2013. Per the Dane County Circuit Court order issued in Coyne, et al. v. Walker, et al., Case No. 11-CV-4573, the Department of Public Instruction (DPI) is not required to obtain the Governor's approval for the statement of scope or this rule.

The State Superintendent of Public Instruction hereby proposes to renumber Subchapter III of PI 36 and PI 36.06 to PI 36.09; to repeal and recreate Subchapters I, II, and IV of PI 36; and to create Subchapter III of PI 36; relating to the full-time open enrollment program.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

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

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

Explanation of agency authority:

Under s. 227.11(2)(a)(intro), Stats., "Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation." Under s. 118.51, Stats., the DPI requires rules to effectively implement the Full-Time Open Enrollment Program.

Related statute or rule: N/A.

Plain language analysis:

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.

Summary of, and comparison with, existing or proposed federal regulations: N/A.

Comparison with rules in adjacent states: No information.

Summary of factual data and analytical methodologies:

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 students; transportation for open enrolled students; 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 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 issues 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.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

PI 36 currently addresses full-time open enrollment in the context of parent and pupil responsibilities, nonresident school board responsibilities, and resident school board responsibilities. Currently, these areas reflect the law as it existed prior to the enactment of 2011 Wisconsin Act 114, as well a number of other acts and court decisions. The DPI is proposing to update the full-time open enrollment portion of PI 36 so that it reflects the current state of the law. The alternative to not promulgating this rule is to have an administrative rules chapter that is outdated. School districts, parents and pupils will be affected by this rule.

Anticipated costs incurred by private sector:

There is not expected to be a cost to the private sector.

Effect on small business:

The proposed rules will have no economic impact on small businesses, as defined in s. 227.114 (1), Stats.

Agency contact person: (including email and telephone)

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Place where comments are to be submitted and deadline for submission:

Comments should be submitted to Katie Schumacher, Department of Public Instruction, 125 S. Webster Street, P.O. Box 7841, Madison, WI 53707-7841 or at Katie.Schumacher@dpi.wi.gov. The department will publish a hearing notice in the *Administrative Register* which will provide information on the deadline for the submission of comments.

SECTION 1. Subchapter I and II of PI 36 are repealed and recreated to read:

SUBCHAPTER I
GENERAL PROVISIONS

PI 36.01 Authority and intent.

(1) This chapter is adopted under ss. 227.11 (2) (a) (intro.) and 118.51, Stats., and interprets ss. 118.40 (8), 118.51, and 121.05 (1) (a), Stats.

(2) This chapter establishes procedures and requirements relating to applying for the full-time open enrollment program, including: timely notification to school boards, parents and the department; accepting and rejecting applications; and filing and deciding appeals.

PI 36.02 Definitions. In subchs. I to IV:

- (1) “Alternative application” means an application submitted under the alternative application procedure.
- (2) “Alternative application procedure” means the application procedure for the parent of a pupil who wishes to attend a public school in a nonresident school district during the current school year, as prescribed under s. 118.51 (3m), Stats.
- (3) “Application” means a paper or Internet-based form developed by the department under s. 118.51 (15) (a), Stats., for the full-time open enrollment program.
- (4) “Approved by the resident school board” means the application was either approved by the resident school board or was not denied by the resident school board.
- (5) “Basic and special education cost” means the basic open enrollment payment plus the special education cost for the pupil.
- (6) “Basic open enrollment payment” means one of the following:
 - (a) For pupils in grades 1 to 12, the amount calculated under s. 118.51 (16) (a) 3., Stats.
 - (b) For pupils in preschool and kindergarten, the amount calculated under s. 118.51 (16) (a) 3., Stats., multiplied by the pupil count, as determined under ss. 121.004 (7) (c) 1., (cm) and (d), Stats.
- (7) “Charter school” means a school under contract with a school board under s. 118.40, Stats.
- (8) “Best interests of the pupil” means the pupil’s educational, physical and emotional well-being, and includes family and other circumstances that affect the pupil’s educational, physical or emotional well-being.
- (9) “Child with a disability” has the meaning given in s. 115.76 (5), Stats.
- (10) “Currently-attending pupil” means a pupil who is currently enrolled in a school district, and it includes an eighth grade pupil who is attending an underlying elementary school of a union high school district.
- (11) “Department” means the Wisconsin department of public instruction.
- (12) “Free, appropriate public education” means special education and related services that are provided at public expense and under public supervision and direction, meet the standards of the department, include an appropriate preschool, elementary or secondary school education and are provided in conformity with an individualized education program.
- (13) “Full-time open enrollment program” means the program under s. 118.51, Stats.
- (14) “Guaranteed approval” means that a pupil is included by the nonresident school district in its count of occupied spaces and is therefore guaranteed to attend the nonresident school district.
- (15) “Habitual truant” has the meaning given in s. 118.16 (1) (a), Stats.
- (16) “Homeless pupil” means an individual who is included in the category of homeless children and youths, as defined in 42 USC 11434a (2).
- (17) “IEP” means an individualized education program developed under s. 115.787, Stats.
- (18) “Kindergarten” means 5-year-old kindergarten.

- (19) “Nonresident school board” means a school district, other than a pupil’s resident school district, that the pupil is attending or has applied to attend under the full-time open enrollment program.
- (20) “Nonresident school district” means a school district, other than a pupil’s resident school district, that the pupil is attending or has applied to attend under the full-time open enrollment program.
- (21) “Open enrollment” means a pupil’s participation in the full-time open enrollment program.
- (22) “Parent” includes a guardian.
- (23) “Parental notification date” means the date by which parents are required under either s. 118.51 (3) (a) 6., Stats., or s. 118.51 (3m) (c), Stats., to notify the nonresident school board whether the pupil will attend the nonresident school district.
- (24) “Preference” means that an eligible pupil is considered by a nonresident school district for an available space before other pupils, but after pupils who are guaranteed approval.
- (25) “Regular application period” means the time period in which applications may be submitted under s. 118.51 (3), Stats., for the following school year.
- (26) “Regular application procedure” means the procedures provided under s. 118.51 (3), Stats.
- (27) “Resident school board” means the school board of a resident school district.
- (28) “Resident school district” means the school district in which a pupil resides.
- (29) “School term” means the time commencing with the first school day and ending with the last school day that the schools of a school district are in operation for attendance of pupils in a school year, other than for the operation of summer classes.
- (30) “School year” means the time commencing with July 1 and ending with the next succeeding June 30.
- (31) “Siblings” means children who share at least one parent by birth, marriage, or adoption.
- (32) “Special education” means the special education, as defined in s. 115.76 (15), Stats., and any related services, as defined in s. 115.76 (14), Stats., that are required in the IEP for a child with a disability.
- (33) “Special education cost” means the actual, additional cost to provide special education to a specific nonresident pupil that the nonresident school board would not incur if the pupil were not enrolled in the nonresident school district, and it excludes any averaged or prorated costs.
- (34) “State superintendent” means the state superintendent of public instruction.
- (35) “Truancy” means any absence of part or all of one or more days from school during which the school attendance officer, principal, or teacher has not been notified of the legal cause of such absence by the parent or guardian of the absent pupil, and also means intermittent attendance carried on for the purpose of defeating the intent of s. 118.15, Stats.
- (36) “Truancy and attendance policy” means the policy required under s. 118.16 (4) (a), Stats.
- (37) “Virtual charter school” means a charter school under contract with a school board under s. 118.40, Stats., in which all or a portion of the instruction is provided through means of the Internet, and the pupils enrolled in and instruction staff employed by the school are geographically remote from each other.

PI 36.03 Applicability

- (1) Except as provided under sub. (2), a pupil may attend a public school, including a charter school, in a nonresident school district under the full-time open enrollment program.

(2) A pupil may attend a prekindergarten, 4-year-old kindergarten, early childhood or school-operated day care program in a nonresident school district only if all of the following apply:

(a) The pupil's resident school district offers the same type of program that the pupil wishes to attend, as determined by sub. (3).

(b) The pupil is eligible to attend that program in the pupil's resident school district.

(3) The resident and nonresident school district programs are the same type of program if pupils in both the resident and nonresident school district programs can be included in the number of pupils enrolled under ss. 121.004 (7) (c) 1. or (cm), Stats, regardless of whether the pupil is counted as one-half under s. 121.004 (7) (c) 1., Stats., or as .6 under s. 121.004 (7) (cm), Stats. For a preschool-aged pupil with a disability, the same type of program is the pupil's special education.

(4) A pupil who has reached the age of 18, acting on the pupil's own behalf, may take any action authorized to or required of a parent.

SUBCHAPTER II

SCHOOL BOARD POLICIES AND DESIGNATION OF SPACES

PI 36.04 Nonresident school board.

(1) **DESIGNEE.** The nonresident school board may appoint a designee to act on applications for the full-time open enrollment program, subject to any policies and criteria adopted by the school board.

(2) **BOARD POLICIES.** The nonresident school board shall adopt policies to administer the full-time open enrollment program, as required under s. 118.51 (4) (a), Stats. If the nonresident school board wishes to amend its policies under s. 118.51 (4) (b), Stats., it shall do so prior to the first day of the regular application period to which the policy will first apply. The policy shall include all of the provisions required in s. 118.51 (4) (a), Stats., and the following:

(a) Which pupils, if any, will be guaranteed approval under sub. (3).

(b) The method of random selection used to determine which applications will be approved when there are more applications than spaces. If the policy provides for the board to conduct a separate random selection for each grade, the board shall first randomize the order in which each grade is drawn.

(c) If the nonresident school board establishes a waiting list under s. 115.51 (5) (d), Stats., the procedure required under sub. (5).

(d) If required under sub. (6), a habitual truant policy.

(e) A procedure to receive and date applications that are received during the regular application period.

(3) GUARANTEED APPROVAL.

(a) The nonresident school board may guarantee approval of currently-attending pupils by including such pupils in the count of occupied spaces required under s. 118.51 (5) (a) 1., Stats. Any spaces designated by the nonresident school board under s. 118.51 (5) (a), Stats. shall be in addition to these already occupied spaces.

(b) If the policy authorizes, but does not require, the board to grant the guarantees described in par. (a), the board shall specify at the January board meeting whether approval will be guaranteed to either or both of the following:

1. Pupils who apply during the immediately following regular application period.
2. Pupils who apply using the alternative application procedure.

(c) Except as provided under par. (e), if the nonresident school board guarantees approval to currently-attending pupils, the nonresident school board shall guarantee approval to all currently-attending pupils.

(d) Except as provided under par. (e), if the nonresident school board guarantees approval to siblings of currently-attending pupils, the nonresident school board shall guarantee approval to all siblings of currently-attending pupils.

(e) Paragraphs (c) and (d) do not apply if the special education or related services required in the IEP for a child with a disability are not available in the nonresident school district.

(4) PREFERENCE.

(a) The nonresident school board shall grant preference to currently-attending pupils or currently attending pupils and siblings of currently-attending pupils who are not guaranteed approval. If there are more pupils who are entitled to preference than there are designated available spaces, the nonresident school board shall fill the spaces by a random selection of pupils entitled to preference. A pupil who is a child with a disability shall be included in any random selection for the pupil's grade, unless the pupil is receiving only special education.

(b) If neither currently-attending pupils nor siblings of currently-attending pupils are guaranteed approval, both shall be granted equal preference to available spaces.

(c) If a pupil is drawn in the random selection, siblings of that pupil shall be granted preference to any spaces remaining in the sibling's grade. A sibling may not be approved if there are no remaining seats in the sibling's grade.

(5) WAITING LIST.

(a) If a nonresident school board creates a waiting list under s. 118.51 (5) (d), Stats., it shall do the following:

1. Establish a procedure to create a numbered waiting list of all applicants which meets the nonresident school board's approval and denial criteria under s. 118.51 (5) (a) and (b), Stats., and the procedures required by s. 118.51 (3) (a) 2., Stats., and the school board's policy.

2. Notify a pupil's parents if the pupil has been accepted from the waiting list. The notification may be written or verbal. Any verbal notice shall be given directly to the parent who submitted the open enrollment application. The notification shall include all of the following:

a. The school or program to which the pupil will be assigned.

b. The date by which the parent must notify the nonresident school board whether the pupil will attend the nonresident school district and the procedures the parent must follow to do so.

3. Provide at least 10 calendar days from the date the notice was mailed or verbally provided for the parent to respond to the notification. If the parent does not respond within the specified time period, the nonresident school board may rescind approval and offer the space to the next pupil on the waiting list.

(b) The nonresident school board may establish waiting lists for regular education by grade or for special education or both. If the pupil's name is reached for the pupil's grade list but has not been reached for special education list, the pupil shall remain at the top of the pupil's grade list and the pupil shall be offered a space if space becomes available in both the pupil's grade and special education or if the pupil is no longer a child with a disability.

(6) HABITUAL TRUANCY. A nonresident school board may not prohibit a pupil from attendance in the nonresident school district under s. 118.51 (11), Stats., unless the nonresident school board has adopted a policy that meets the following:

- (a)** Clearly defines “excused absences,” “unexcused absences,” “tardiness,” “part of a school day,” “truancy,” “habitual truancy,” and any other term or concept that will be used for the purposes of denying or terminating open enrollment.
- (b)** Is consistent with the school board’s truancy and attendance policy.
- (c)** Specifies the criteria that will be used to terminate open enrollment, including the number of unexcused absences that may result in termination of the pupil’s open enrollment.
- (d)** Provides a process a parent or pupil may follow if they believe the pupil was erroneously marked as truant.

(7) ALTERNATIVE APPLICATIONS. A nonresident school board may not approve an alternative application submitted prior to the 3rd Friday in September if the board did not approve all applications for the pupil’s grade that were submitted in the regular application period for the same school year. A nonresident school board may not approve an alternative application submitted after the January school board meeting for a current school year if the board limited the number of spaces available for applications submitted under the regular application procedure for the following school year.

PI 36.05 Resident school board.

The resident school board may appoint a designee to act on applications for the full-time open enrollment program, subject to the policies and administrative rules adopted by the school board.

SECTION 2. Subchapter III of PI 36 is renumbered to be Subchapter V of PI 36.

SECTION 3. PI 36.06 to PI 36.09 are renumbered to be PI 36.15 to PI 36.18.

SECTION 4. Subchapter III of PI 36 is created to read:

SUBCHAPTER III
FULL-TIME OPEN ENROLLMENT

PI 36.06 Application and notification procedures.

(1) SUBMISSION. The parent of a pupil who wishes to attend a public school in a nonresident school district shall do the following:

- (a)** Submit an application to the nonresident school board. In order to be considered by the nonresident school board, the application shall be received by the nonresident school district no earlier than the first day of the regular application period and no later than 4:00 p.m. on the last day of the regular application period.
- (b)** Submit a separate application to the board of each nonresident school district to which the pupil is applying. Applications, including alternative applications, may be submitted to no more than 3 nonresident school boards for any pupil in any school year.

(c) Answer all applicable questions on the application completely and accurately. If the application submitted by the parent is incomplete, the nonresident or resident school board may request the missing information. Except as provided under s. 118.51 (3) (a) 1m and (8), the nonresident school board may not request from the parent or the resident school board any information that is not required to be provided on the application form.

(2) RECORDS.

(a) By the date specified in ss. 118.51 (3) (a) 1m and (8), Stats, the resident school board shall notify the nonresident school board if any of the following apply:

1. The pupil is not a child with a disability.
2. The pupil has not been expelled and does not have a pending disciplinary proceeding.
5. The pupil does not attend school in the resident school district named on the application.

(b) If the pupil is not attending the resident school district named on the application, the nonresident school board may request the records from a school the pupil attends.

(3) APPLICATION.

(a) A nonresident or resident school board shall, upon the request of a parent or pupil, provide an application.

(b) Except as provided in par. (d), the grade level on the application shall be the grade immediately following the grade the pupil is enrolled in at the time of application. If the pupil is not enrolled in school at the time of application, the parent shall indicate the appropriate grade for the child's age. Except as provided in par. (c), if the application is approved and, upon the pupil's enrollment in school, the nonresident school board determines that the pupil should be placed in a different grade, the nonresident school board shall permit the pupil to attend the nonresident school district in the appropriate grade.

(c) If the nonresident school board approves an application that indicated a grade other than the grade specified in par. (b), the nonresident school board is not required to permit the pupil to attend the grade in par. (b) if any of the following apply:

1. The nonresident school board denied applicants for that grade.
2. The nonresident school district no longer has space in that grade.
3. The nonresident school board determines that the grade indicated on the application is not appropriate for the pupil.

(d)

1. A parent may request early admission to 4-year-old or 5-year-old kindergarten for a pupil who does not meet the age requirement under s. 118.14 (1), Stats. A nonresident school board may evaluate the pupil in accordance with its policy developed under s. 120.12 (25), Stats.

2. If the nonresident school board determines the pupil is eligible for early admission to 5-year-old kindergarten, the nonresident school board may approve the application and may assign the pupil to 5-year-old kindergarten. If the nonresident school board refuses to evaluate the pupil or if the pupil is evaluated and found not eligible for early admission to 5-year-old kindergarten, the pupil may attend 4-year-old kindergarten in the nonresident school district only as provided under s. 118.51 (2), Stats.

3. If the nonresident school board determines that the pupil is eligible for early admission to 4-year-old kindergarten, the pupil may attend the nonresident school district for 4-year-old kindergarten only if the pupil is evaluated and found eligible for early admission by the pupil's resident school board, in accordance with the resident school board's policy under s. 120.12 (25), Stats.

(e) The application shall indicate the resident school district in which the pupil will reside on the 3rd Friday in September in the first school term in which the pupil first wishes to attend a nonresident school district. If the resident school district named on the application changes, the parent shall notify the nonresident school board.

(f) If the application is approved by the nonresident school board, the parent shall notify the nonresident school board, on or before the parental notification date, whether the pupil will attend school in the nonresident school district. If the parent does not notify the board by the parental notification date that the pupil will attend the nonresident school district, the nonresident school board may determine that the pupil may not attend the nonresident school district and it may offer the pupil's space to the next pupil on the waiting list, if applicable.

(4) NOTICES.

(a)

1. If the nonresident school board does not make timely notification as required in s. 118.51 (3) (a) 3., Stats., an application submitted under the regular application procedure shall be considered approved by the nonresident school board.

2. If the nonresident school board has not notified the parent on or before the 20th day after an alternative application was submitted that the application is approved, the application shall be considered denied by the nonresident school board.

(b) If the resident school board has not notified the parent that the application is denied on or before the 20th day after the application was submitted, or the 5th day after receiving an estimate of basic and special education cost, whichever is later, the application shall be considered approved by the resident school board.

(c) If an application is denied by a nonresident or resident school board, or a parent is notified that a pupil is required to return to the resident school district under s. 118.51 (12) (a) or (b), the notice of denial shall include the following:

1. The reason for the denial.

2. Notice of the parent's right to file an appeal with the state superintendent under s. 118.51 (9), Stats., within 30 days of the date the notice of denial is postmarked or personally delivered to the parent, whichever occurs first. The notice shall also include the following:

a. The department's address to which the appeal shall be sent.

b. Where the parent may obtain a form to file an appeal.

Note: PI 9418, Form for Filing an Open Enrollment Appeal maybe obtained free of charge from the Department of Public Instruction, P.O. Box 7841, Madison, WI or by contacting the department at 888-245-2732 or openenrollment@dpi.wi.gov or from the Department's web site at <http://oe.dpi.wi.gov>.

3. If the application was denied by the nonresident school board because space is not available in regular or special education, the pupil's number on the waiting list, if applicable.

4. If the application was denied by the resident school board because the special education cost is an undue financial burden, a copy of the special education cost estimate provided under s. PI 36.10 (1) and information about the board's decision in a format specified by the department.

(d) If the nonresident school board has adopted a policy requiring reapplication under s. 118.51 (3) (c) 1., Stats., it shall notify the parent of the reapplication requirement prior to the beginning of the regular application period in which the pupil is required to reapply.

(5) NONRESIDENT SCHOOL BOARD.

(a) At the January board meeting, the nonresident school board shall designate the number of regular and special education spaces in the district, by grade, using the criteria specified in its policy under PI 36.04(2).

(b) The nonresident school board may not, on or after the first Monday in February, reduce the number of spaces designated under par. (a).

(c) The nonresident school board may not approve more applications than the number of spaces it designated under par. (a), except that a nonresident school board may approve additional applications for pupils who are guaranteed approval.

(d) After the date specified in s. 118.51 (3) (a) 3., Stats., the nonresident school board may approve applications it had initially denied if any of the following cause spaces to become available:

1. A parent notifies the nonresident school board under sub. (2) (e) that the pupil will not attend the nonresident school district.
2. A parent fails to provide the notification required in sub. (2) (e).
3. The school board determines that additional spaces have become available since its determination at the January board meeting.

(e) Applications approved under par. (d) shall be approved as follows:

1. The nonresident school board shall first approve pupils from the waiting list.
2. Subject to s. PI 36.04 (7), if the nonresident school board has offered spaces to all pupils on the waiting list, the nonresident school board may approve alternative applications.

(f)

The nonresident school board shall deny any application received after 4:00 p.m. on the last day of the regular application period.

(6) RESIDENT SCHOOL BOARD. A resident school board may not act on any application submitted to the nonresident school board pursuant to the nonresident school board's requirement to reapply under s. 118.51 (3) (c) 1., Stats.

PI 36.07 Alternative application procedures.

(1) APPLICABILITY. An alternative application may be submitted no earlier than July 1 and no later than the last day of the school term during which the pupil will first attend.

(2) APPLICATION.

(a) Sections PI 36.06 (1) (b) and (c) and PI 36.06 (2) apply to alternative applications.

(b) The parent shall describe one or more of the criteria under s. 118.51 (3m) (b), Stats. that are the basis for the application.

(c) A pupil is a victim of a violent criminal offense under s. 118.51 (3m) (b) 1., Stats., if the resident school board determines that the pupil has been a victim of a violent crime, as defined in PI 23.03, under either of the following circumstances and reports the incident to the appropriate law enforcement agency and to the building principal:

1. The pupil has been a victim of a violent criminal offense while on the school grounds of the school that the pupil attends during school hours or during a school-sponsored event at the school the school attends that does not occur during school hours.

2. The pupil has been a victim of a violent criminal offense while being transported to school for the purposes of attending curricular programs during school hours or from school to home immediately following school hours on a school bus owned, leased, or contracted by the school district or by a motor vehicle operated as an alternative method of transportation under s. 121.555, Stats.

(3) NONRESIDENT SCHOOL BOARD.

(a) In considering an alternative application, the nonresident school board may not request any pupil records from any public school district or private school without written consent from the pupil's parent, except records described in s. 118.51 (3) 1m. and (8), Stats. The nonresident school board may not deny the alternative application based on a parent's refusal to consent to release of the additional records.

(b)

1. If the application is approved by the nonresident school board, the pupil may attend by the date specified in s. 118.51 (3m) (e) or by a date agreed to by the pupil's parent and the nonresident school board. If the pupil has not attended the nonresident school district by the date specified in this paragraph, the board may notify the parent, in writing, that the pupil is no longer authorized to attend school in the nonresident school district.

2. A pupil may begin attending the nonresident school district if the nonresident school board has approved the pupil's application and the resident school board has either approved the application or not acted upon the application. If the nonresident school board has approved the application and the resident school board denies the application, the pupil may not attend the nonresident school district or shall cease attending the nonresident school district.

3. Notwithstanding subd. 2., if the parent intends to file an appeal of the resident school board's denial, the pupil may attend the nonresident school district pending the outcome of the appeal. If the parent fails to file a timely appeal or if the department affirms the resident school board's decision, the pupil shall cease attending the nonresident school district.

(4) RESIDENT SCHOOL BOARD.

(a) Except for the records described in s. 118.51 (3) (a) 1m. and (8), Stats., the resident school board may not provide any pupil records to a nonresident school board, during the nonresident school board's consideration of the pupil's application, without written consent of the pupil's parent.

(b) The resident school board may not deny an application based on the criteria specified in s. 118.51 (3m) (b) 3. or 8., Stats., because the parent did not provide an explanation or did not provide enough information for the board to consider the application, unless the board has offered the parent an opportunity to provide additional information.

(c) A resident school board may not deny a pupil's application if the pupil meets at least one of the criteria specified in s. 118.51 (3m) (b).

PI 36.08 Administrative and aid transfer procedures.

(1) PUPILS ENROLLED. In calculating the count of pupils enrolled under s. 121.1004 (7), Stats., for pupils in kindergarten and 4-year-old kindergarten, the count shall be based on the program the pupil attends in the nonresident school district.

(2) CHANGE OF ADDRESS. The parent of a pupil enrolled in a nonresident school district shall notify the nonresident school district of any change of address. If the pupil moves to a Wisconsin school district other than the nonresident school district, the pupil may continue open enrollment without reapplication, except as provided in s. 118.51 (3) (c), Stats., and the nonresident school board's policy. The school district in which the pupil resided on the 3rd Friday in September in any school year shall be the resident school district for purposes of the full-time open enrollment program in that school year.

(3) CALCULATION OF OPEN ENROLLMENT PAYMENT.

(a)

1. The basic open enrollment payment applies to each pupil who attends a nonresident school district under the full-time open enrollment program.

2. The nonresident school board may add any special education cost to the basic open enrollment payment.

(b) If the pupil attended the nonresident school district for less than a full school year under the full-time open enrollment program, the payment shall be equal to the prorated basic open enrollment payment divided by 180 and multiplied by the number of days the pupil was enrolled in the nonresident school district in the school year. The days of enrollment are calculated as follows:

1. The number of days, not to exceed 180, school was in session from the first day of the school term to the last day the pupil attended the nonresident school district under open enrollment, inclusive of both the first and last days, if one of the following applies:

a. The pupil was in attendance in the nonresident school district on the 3rd Friday in September.

b. The pupil was in attendance in the nonresident school district at least one day before and one day after the 3rd Friday in September.

2. If the pupil's first day of attendance was after the 3rd Friday in September, the number of days, not to exceed 180, the pupil was enrolled in the nonresident school district from the first day of the pupil's attendance to the last day the pupil attended the nonresident school district under the open enrollment program, inclusive of both first and last days.

(4) MAINTENANCE OF RECORDS. The nonresident school board shall maintain all completed applications for 3 years or until the pupil is no longer enrolled in the nonresident school district, whichever is later.

PI 36.09 Termination of open enrollment.

(1) EXPULSION.

(a) If a pupil is expelled by the nonresident school board, the nonresident school board may terminate the pupil's open enrollment. If the nonresident school board does not terminate the expelled pupil's open enrollment, the following provisions apply:

1. If the pupil is a child with a disability, the nonresident school board shall provide services in accordance with 34 CFR 300.530 (d).
2. The nonresident school board may assign the pupil to an alternative school in the school district.

(2) HABITUAL TRUANCY.

(a) Before a nonresident school board may prohibit a pupil's attendance in a succeeding semester or school year under s. 118.51 (11), Stats., the nonresident school board shall do all of the following:

1. Provide the following notifications to the parent and the pupil at the beginning of each school year:
 - a. The school board's truancy and attendance policy.
 - b. The open enrollment consequences of habitual truancy.
 - c. A clear explanation of what constitutes truancy, including what constitutes "part of a school day."
 - d. A description of the notifications, including the manner of delivery, a parent will receive when a pupil is absent, is truant or is habitually truant. Each notification shall inform the parent that the pupil's open enrollment may be terminated if the pupil is habitually truant.
 - e. How and where the parent can view the pupil's attendance record.
2. Each notification provided under s. 118.16 (2), Stats., shall remind the parent or pupil of the consequences of habitual truancy on open enrollment.
3. Provide the parent and pupil with a list of all unexcused absences and trancies that resulted in the board's proposed action to prohibit the pupil's attendance in a succeeding semester or school year.
4. Allow the parent or pupil to explain why they believe there was any error in marking an absence as truancy, using the process described in the board's policy under s. PI 36.04 (6).

(3) FAILURE TO PARTICIPATE. If a nonresident school board returns a pupil to the pupil's resident school district under s. 118.40 (8) (g), Stats., the open enrollment is terminated on the last day of attendance in the virtual charter school.

(4) OTHER CIRCUMSTANCES. A pupil's open enrollment is terminated when:

- (a) The pupil withdraws from the nonresident school district.
- (b) The pupil moves into the nonresident school district.
- (c) The pupil enrolls in and attends any other public school, private school or home-based private educational program in or out of this state.
- (d) The pupil ceases to be a resident of this state.
- (e) The pupil was not in attendance on or before the 3rd Friday in September.

(f) If, after a pupil's application under the alternative application process has been approved by a nonresident school board, the pupil has not attended the nonresident school district on or before the 15th day following the notice of approval. This paragraph does not apply if the nonresident school board has approved a later start date.

(g) The pupil has been returned to the resident school district under s. 118.51 (12), Stats.

(5) REQUIREMENT TO REAPPLY. If the pupil's open enrollment is terminated because of circumstances described in sub. (4), the pupil shall submit a new regular or alternative application in order to be reinstated in the nonresident school district.

PI 36.10 Special education.

(1) SPECIAL EDUCATION RECORDS AND COST ESTIMATE. By the date specified in s. 118.51 (3) or (3m), Stats., or within 10 days of receiving an IEP from a school board under sub (2) (b) or within 10 days of developing or revising an IEP for a pupil attending the nonresident school district under the full-time open enrollment program, the nonresident school board shall provide to the resident school board an estimate of the basic and special education cost on a form provided by the department.

Note: PI 9423, Open Enrollment Special Education Cost Estimate and Invoice may be obtained free of charge from the Department of Public Instruction, P.O. Box 7841, Madison, WI or by contacting the department at 888-245-2732 or openenrollment@dpi.wi.gov or from the Department's web site at oe.dpi.wi.gov.

(2) NOT CURRENT OR MISSING IEP.

(a)

1. If an application is submitted by a child with a disability who does not have a current IEP, the nonresident school board shall use the following records to determine whether it has the special education program or space and to estimate the amount of the basic and special education cost for the pupil:

a. The most recent IEP that was developed for the pupil.

b. If the pupil does not have an IEP or an IEP cannot be located, the most recent special education evaluation conducted for the pupil.

2. If neither an IEP nor an evaluation is available to review, the nonresident school board shall treat the application as an application from a child who is not disabled.

(b) If a nonresident school board approves an application for a pupil without an IEP and it subsequently determines that the pupil is a child with a disability, the board shall review the pupil's most recent IEP or, if no IEP is available for the pupil, the most recent evaluation. The board shall also do one of the following:

1. Adopt the IEP or provide comparable services until the nonresident school district develops and implements a new IEP.

2. Determine that the special education required in the most recent IEP is not available in the nonresident school district or there is no space to provide the special education. If no IEP is available to review, the board may make a determination based on the special education presumed to be required in the most recent evaluation of the pupil. If the nonresident school board makes such a determination, the nonresident school board may return the pupil to the resident school district pursuant to s. 118.51 (12) (a), Stats.

(3) CHILDREN WHO ARE NOT YET THREE.

(a)

1. A child who is not yet 3 years old may submit an application during the regular application period if all of the following apply:

a. The child will be 3 years old on or before the 3rd Friday in September.

b. The child has been found to be eligible for the early intervention program for infants and toddlers with disabilities under 34 CFR 303, or has been referred for a special education evaluation under s. 115.777 (1), Stats.

2. A child who will not be 3 years old on or before the 3rd Friday in September may submit an application under the alternative application procedure when the child reaches the age of 3, has been evaluated under s. 115.78 (1), Stats., and has been found eligible for special education.

(b) A nonresident school board that receives an application from a child who meets the criteria in par. (a) 1. may do one of the following:

1. The nonresident school board may approve the application.

2. The board may deny the application. If the child is subsequently evaluated under s. 115.78 (1), Stats. and found eligible for special education under subch. V of ch. 115, Stats., the board may then review the IEP and may approve the application. Although the parent may file an appeal of the original denial, the parent may not appeal a board's refusal to review a new IEP or, upon reviewing the IEP, to reverse its decision.

(4) UNDUE FINANCIAL BURDEN. None of the following, alone or in combination, constitutes sole evidence of undue financial burden:

(a) The resident school board can provide special education to the pupil.

(b) The resident school board can provide special education to the pupil at a lower cost than the estimated basic and special education cost for the pupil.

(c) The resident school board would implement the pupil's IEP in a manner different than that proposed by the nonresident school board.

(d) The special education cost estimate is a large amount.

(5) REQUIREMENT TO RETURN TO RESIDENT SCHOOL DISTRICT.

If notice is provided under s. 118.51 (12) (a) or (b) the pupil shall be immediately transferred to the resident school district, which shall provide special education to the pupil. If the nonresident and resident school boards agree, they may set a date in the future to transfer the pupil to the resident school district. The nonresident school board shall provide special education to the pupil until the pupil is transferred to the resident school district.

PI 36.11 Virtual charter schools.

(1) LOCATION OF SCHOOL ATTENDANCE.

(a) Except as provided in par. (b), attendance within a school district means the pupil physically attends a school located within the physical boundaries of the nonresident school district.

(b) A pupil attending a virtual charter school is considered to be attending a school located within the nonresident school district specified in this subsection, regardless of the physical location of any component of the virtual charter school or of the pupil.

(c) A pupil participating in an online course or program that is not offered through a virtual charter school is not considered to be attending a school located within the nonresident school district, unless the pupil is in physical attendance as described in par. (a).

(2) IDENTIFICATION OF VIRTUAL CHARTER SCHOOLS AND OPEN ENROLLMENT PAYMENTS.

(a) Prior to enrolling any pupils through the full-time open enrollment program, each virtual charter school shall submit the following to the department:

1. The contract between the school board and the virtual charter school that identifies the charter school as a virtual charter school.

2. Assurance that the virtual charter school meets all of the requirements of s. 118.40 (8), Stats.

(b) The department may not transfer any state aids under s. 118.51 (16) (b), Stats., until the information required in par. (a) has been provided and the department has determined that the charter school is a virtual charter school that meets the requirements of s. 118.40 (8), Stats. The department, as it determines is appropriate, may require additional information or assurances or it may conduct an audit to ensure that open enrollment payments are properly made.

PI 36.12 Confidentiality of pupil records.

(1) DURING THE APPLICATION PROCESS. The following pupil records may be provided to the nonresident school board by the resident school board during the application process:

(a) The most recent IEP.

(b) The most recent special education evaluation.

(c) Any expulsion findings and orders pertaining to the pupil, records of any pending disciplinary proceeding involving the pupil, a written explanation of the reasons for the expulsion or pending disciplinary proceeding and the length of the term of the expulsion or the possible outcomes of the pending disciplinary proceeding.

(2) WHILE THE PUPIL IS ATTENDING THE NONRESIDENT SCHOOL DISTRICT.

(a) Notwithstanding par. (b) and (c), the following pupil records may be provided, to the resident school district by the nonresident school district for a child with a disability who is attending the nonresident school district under the full-time open enrollment program:

1. Estimate of the special education cost.

2. Invoice for the basic and special education cost.

3. Information needed to justify the cost estimate or billing, including a description of the special education provided and an explanation of how the cost was calculated. However, no part of the IEP may be provided to the resident school district without the written consent of the parent.

(b) Except as specified in par. (a) and (c), the nonresident school board may not provide any pupil records to the resident school board, including but not limited to the following:

1. Any part of an IEP developed or revised for the pupil while the pupil is attending the nonresident school district.
2. Updated evaluation reports.
3. Discipline records.
4. Attendance records.
5. Report cards.
6. IEP progress reports.

(c) The nonresident school board may provide pupil records to the resident school board if the pupil's parent provides written consent.

SECTION 5. Subchapter IV of PI 36 is repealed and recreated to read:

SUBCHAPTER IV
TRANSPORTATION AND APPEALS

PI 36.13 Transportation.

(1) In this section, "maximum reimbursement per pupil" means 3 times the statewide average per pupil transportation cost.

(2)

(a) The parent of a pupil who is eligible for a free or reduced-price meal under 42 USC 1758 (b) may apply for reimbursement of costs incurred by the parent for transportation of the pupil to and from the pupil's residence and the school the pupil will be attending. The parent shall file a claim with the department by July 15 following the school year in which the transportation was provided. The amount of reimbursement shall be calculated as follows:

1. Multiply the maximum reimbursement per pupil by the number of pupils transported.
2. Determine the sum of transportation costs for each mode of transportation as follows:
 - a. When a family vehicle is used, the mileage cost is equal to the number of miles in a round trip from home to school times the number of round trips made per day times the total number of days transportation was provided times the mileage rate specified in s. 20.916 (4) (e), Stats. The mileage cost may be calculated separately for each pupil who is transported separately, but may not be calculated separately for pupils who are transported at the same time.
 - b. When public transportation is used, the actual cost is equal to the number of daily, weekly or monthly bus passes purchased for the sole use of transporting the pupil to and from school times the cost of the daily, weekly or monthly bus pass. The cost of public transportation is calculated per pupil transported.
 - c. When another mode of transportation is used, the parent shall submit a receipt for payments made to a private transit company, a taxi, or to a school board for transportation provided pursuant to s. 121.545, Stats.
3. The amount of eligible reimbursement is equal to the lesser of the amounts in subd. 1. or 2.

4. If the sum of eligible reimbursement for all parents who submit a claim is less than the amount appropriated, the payments shall be prorated among the parents eligible for reimbursement.

(b)

1. For the purposes of this paragraph, “alternative site” means a location other than the pupil’s residence including the following:

a. A day care provider.

b. The home of a relative or friend.

c. A location outside the boundaries of the pupil’s resident school district from which the pupil is then transported to school by the nonresident school district.

2. Reimbursement may be made for transportation to or from alternative sites, as long as the amount of reimbursement based on transportation to or from alternative sites does not exceed the amount of reimbursement from home to school. No reimbursement may be made for any portion of transportation that is provided without charge to the parent by either the resident or nonresident school district.

(3) The parent shall provide, by July 15, one of the following as evidence of eligibility for reimbursement:

(a) Verification that the school district the pupil attends has determined the pupil is eligible for free or reduced prices meals under 42 USC 1758 (b).

(b) Income information for all household members. The parent shall provide verification of income at the department’s request.

(4) Payment may be made for claims submitted after July 15 if funds remain in the appropriation.

PI 36.14 Appeals.

(1) RECEIPT AND FILING OF APPEALS.

(a) The parent of a pupil whose application for open enrollment has been denied by a school board may file an appeal of the decision with the state superintendent. The appeal shall be filed within 30 days after the decision is delivered to the parent or postmarked, whichever occurs first.

(b) The appeal shall meet the requirements of s. PI 1.03.

(c) The appeal shall include a copy of the notice of denial. The appeal shall specify what decision is being appealed, the specific reasons for the appeal, including why the appellant believes that the decision was arbitrary or unreasonable, and any other facts relevant to the appeal.

(d) The state superintendent may reject an appeal if it does not include the documents required in par. (c), or if the appellant does not allege that the decision was arbitrary or unreasonable as it relates to the reason for denial. The state superintendent may require the appellant to provide any missing information or explanation.

(2) **RECORD OF THE DECISION.** Upon receipt of a written appeal filed under sub. (1), the state superintendent shall acknowledge receipt of the appeal in writing to the appellant and to the resident and nonresident school boards. Upon receipt of the notice of appeal from the state superintendent, the respondent shall deliver to the state superintendent the record of the school board’s decision. The respondent shall provide any information requested by the state superintendent.

(3) EVIDENCE AND ARGUMENT. Each party shall be provided an opportunity to submit written evidence and argument into the record. Each party shall be provided at least one opportunity to respond to evidence and argument submitted by the other party.

(4) PROCEDURES. The state superintendent may use any or all of the following procedures which the state superintendent determines to be appropriate in the appeal process:

- (a)** Provide technical assistance and information and attempt to resolve the matter informally.
- (b)** Conduct an investigation. If the state superintendent decides to conduct an investigation, the investigation may include an on-site review or any other activity which the state superintendent deems appropriate.
- (c)** Issue a decision based on a review of the record of the school board, argument from the parties and any other matter the state superintendent deems appropriate.

(5) DECISION.

(a) The decision of the state superintendent shall be in writing stating separate findings of fact and conclusions of law. Decisions shall be served on all parties by mailing a copy to each party's last known address.

(b)

- 1.** The state superintendent shall affirm the school board's decision unless the state superintendent finds that the decision was arbitrary or unreasonable. Except as provided in subd. 2., the appellant must show by a preponderance of the evidence that the respondent's decision was arbitrary or unreasonable.
- 2.** If the resident school board denied an application submitted under the alternative application procedure based on the best interests of the pupil, the resident school board must show by a preponderance of the evidence that the requested transfer is not in the pupil's best interest.
- 3.** Only reasons specified in the written notice may be defended in an appeal filed under s. 118.51 (9), Stats., and s. PI 36.13.

SECTION 6. EFFECTIVE DATE:

The proposed rules contained in this order shall take effect on the first day of the month commencing after the date of publication in the Wisconsin Administrative Register, as provided in s. 227.22(2)(intro.), Stats.

Dated this ____ day of _____, 201_

Tony Evers, PhD
State Superintendent