

ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION ADOPTING EMERGENCY RULES

The scope statement for this rule, SS 038-19, was published in Register No. 760B, on April 29, 2019, and approved by State Superintendent Carolyn Stanford Taylor on May 10, 2019. Pursuant to *Coyne v. Walker*, the Department of Public Instruction is not required to obtain the Governor's approval for the statement of scope for this rule. *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444.

The State Superintendent of Public Instruction hereby adopts an order to amend s. PI 36.08 (3) (a), (b) (intro.), and (c) 1.; and to create s. PI 36.08 (3m), relating to financial statements for special education services under open enrollment.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

Statute interpreted: s. 118.51, Stats.

Statutory authority: s. 227.11 (2) (a) (intro.), Stats.

Explanation of agency authority:

The Department is required to implement and administer the payment of state aid pursuant to s. 118.51, Stats. Under s. 227.11 (2) (a) (intro.), Stats., “[e]ach 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.” See also, *Wisconsin Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶ 42 (“statutory mandates are also statutory authorizations, and authorization of an act also authorizes a necessary predicate act.”) (internal quotation marks omitted). As such, the proposed rule is necessary for the Department to effectively implement and administer the open enrollment program under s. 118.51, Stats.

Related statute or rule: None.

Plain language analysis:

The objective of the emergency and proposed permanent rule under this statement of scope will describe the eligible special education costs that may be reported on the financial statement, as well as provide timelines for the submission of the financial statement to the department.

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

Summary of any public comments and feedback on the statement of scope for the proposed rule that the agency received at a preliminary public hearing and comment period held and a description of how and to what extent the agency took those comments into account and drafting the proposed rule:

The Department held a preliminary public hearing and comment period on May 6th, 2019, and did not receive any comments on the statement of scope for the proposed rule.

Comparison with rules in adjacent states:

- **Illinois:** Illinois rules and statutes are silent as it relates to procedures for transferring pupils via interdistrict open enrollment.
- **Iowa** (Iowa Admin. Code r. 281-17.11(282)): The district of residence shall pay to the receiving district on a quarterly basis the actual costs incurred by the receiving district in providing the appropriate special education program. These costs shall be based on the current year expenditures with needed adjustments made in the fourth

quarter payment. The responsibility for ensuring that an appropriate program is maintained for an open enrollment special education pupil shall rest with the resident district. For an open enrolled special education pupil where the receiving district is located in an area education agency other than the area education agency within which the resident district is located, any moneys received by the area education agency of the resident district for an approved open enrollment special education pupil shall be forwarded to the receiving district's area education agency.

- **Michigan** (Mich. Comp. Laws Ann. § 388.1705 sec. 105 or 105c): Each local school district must decide whether it will participate in schools of choice, whereby local school districts may enroll nonresident students and count them in membership without approval from the district of residence. If a student is eligible for special education programs and services, a district may not refuse enrollment to a student eligible for special education programs unless there is no written agreement with the district of residence. If the student resides in a contiguous intermediate school district, the enrolling district and district of residence must have a written agreement regarding the payment of added costs of special education programs and services. If a student is eligible or becomes eligible for special education services and relocates to a resident district outside of the boundaries of the intermediate school district, then the enrolling district and the district of residence must have a written agreement regarding the payment of added costs of special education programs and services in order for the student to continue to be counted in membership by the enrolling district. If a student relocates to another resident district outside of the boundaries of the intermediate school district in which the enrolling district is located, then the enrolling district and the district of residence must have a written agreement regarding the payment of added costs of special education programs and services in order for the student to continue to be counted in membership by the enrolling district. School districts that enroll nonresident students receive the lesser of their own foundation allowance or the foundation allowance of the district of residence.
- **Minnesota** (Minn. Stat. Ann. § 127A.47 subd. 7): Minnesota statutes require that the general education aid and special education aid for resident school districts must be adjusted for each pupil attending a nonresident district and paid to the serving district under the enrollment options program. Special education aid paid to the resident district must be reduced by an amount equal to 90 percent of the unreimbursed cost of providing special education and services, which is the difference between the actual cost of providing special education services minus the amount of general education revenue attributable to a pupil for the portion of time the pupil receives special education services outside of the classroom, minus special education aid attributable to a pupil that is received by the district providing special education services.

Summary of factual data and analytical methodologies:

2017 Wisconsin Act 59 (the 2017-19 biennial budget) made several changes related to open enrollment. Starting in the 2019-20 school year, for pupils who are open enrolled for the second or subsequent year, the open enrollment payment could be either the per pupil payment amount under the indexing method or the actual costs to the nonresident district, up to \$30,000, if the nonresident school district had submitted to the Department a financial statement indicating the actual cost to the school district of providing a free and appropriate education to the pupil in the previous school year. Under these changes, districts that wish to use the actual cost option must submit a financial statement to the Department. As such, a rule is needed to specify components of the open enrollment financial statement that nonresident districts can use to submit their information. Without a rule change, the Department will be required to implement rules governing the open enrollment program as they currently exist in PI 36, and school boards may be faced with unclear guidance around the financial reporting requirements for special education services under the open enrollment program.

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

Anticipated costs incurred by private sector: N/A

Effect on small business:

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

Agency contact person: (including email and telephone)

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Wisconsin Department of Public Instruction
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Place where comments are to be submitted and deadline for submission:

Comments should be submitted to Carl Bryan, Department of Public Instruction, 125 S. Webster Street, P.O. Box 7841, Madison, WI 53707-7841 or at adminrules@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. PI 36.08 (3) (a), (b) (intro.), and (c) 1. are amended to read:

PI 36.08 (3) (a) The open enrollment ~~payment~~ payments under s. 118.51 (16) and (17) (b) and (bm), Stats., ~~applies~~ apply to each pupil who attends a nonresident school district under the full-time open enrollment program.

(b) If the pupil attended the nonresident school district for less than a full school year under the full-time open enrollment program, the amount under s. 118.51 (16) or (17) (b) and (bm), Stats., shall be equal to the 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:

(c) 1. The amount under s. 118.51 (17) (b) or (bm), Stats., divided by 180 and multiplied by the number of days the pupil was receiving special education services in the nonresident district.

SECTION 2. PI 36.08 (3m) is created to read:

PI 36.08 (3m) NONRESIDENT SCHOOL DISTRICT FINANCIAL STATEMENT OF ACTUAL COST — SPECIAL EDUCATION OR RELATED SERVICES.

(a) Starting the first weekday in August and no later than the last weekday in September, the nonresident school board may submit to the department, in the online open enrollment system or other manner provided by the department, a financial statement under s. 118.51 (12) (a), Stats., that shows the actual cost the nonresident school board incurred to provide a free appropriate public education to the child during that school year. The statement of actual costs shall calculate the actual cost for the child as the cost for the child under par. (b) less any costs reimbursed under s. 115.88, 115.93 or 118.255, Stats., 20 USC 1400 et. seq, or federal medicaid.

(b) The financial statement of actual cost may only include actual costs that would not otherwise exist for the nonresident school district but for the need to provide a free appropriate public education to the child during that school year.

(c) No later than the second Monday in October, the nonresident school board may withdraw a financial statement of actual cost submitted under par. (a).

(d) Only the nonresident school board that submitted the financial statement of actual cost under par. (a) may receive the per pupil payment based on the actual cost in the statement in the subsequent school year under sub. (3).

(e) A nonresident school board that submits and does not withdraw a financial statement of actual cost will not receive the transfer amount under s. 118.51 (17) (b), Stats., for a student with a disability.

SECTION 3. STATEMENT OF EMERGENCY

The Department of Public Instruction finds an emergency exists and that a rule is necessary for the immediate preservation of the public welfare. A statement of the facts constituting the emergency is:

The financial statement is to be made available to nonresident districts at the end of the 2018-19 school year, in order to impact open enrollment transfer payments for the 2019-20 school year. Thus, the Department requires an emergency rule to comply with this timeline.

SECTION 4. EFFECTIVE DATE:

The rules contained in this order shall take effect upon publication as emergency rules pursuant to the authority granted by s. 227.24, Stats.

Dated this _____ day of _____, 2019

Carolyn Stanford Taylor
State Superintendent