

Wisconsin Private School Choice Programs and Special Needs Scholarship Program

Department of Public Instruction Authority
Executive Summary

Under Wisconsin’s Private School Choice Programs (“PSCP”), the state pays participating schools on behalf of the parents of students enrolled in one of three programs: the Milwaukee Parental Choice Program (“MPCP”), the Wisconsin Parental Choice Program (“WPCP”) or the Racine Parental Choice Program (“RPCP”). These payments are frequently referred to as vouchers.¹ Under the Special Needs Scholarship Program (“SNSP”), the state pays scholarships to participating schools on behalf of parents of students with disabilities who enroll in the program.

To enroll PSCP or SNSP students, schools must meet initial eligibility requirements and fulfill ongoing obligations. To participate in PSCP, students must meet residency and income requirements, and prior year attendance requirements for RPCP and WPCP.² To participate in SNSP, a student with a disability must reside in Wisconsin and have an individualized education program (“IEP”) or services plan in effect.³ There is no income requirement to participate in SNSP. Once enrolled in either program or placed on a waiting list, a student’s residency is confirmed each year, but the income eligibility of PSCP students is not.⁴ The Department of Public Instruction (“DPI”) has interpreted, specified and expanded these statutory requirements in administrative rules and in policies contained in bulletins, memos, FAQs, training materials and audit guides to establish a complex and often confusing program structure for schools and applicants.

PROGRAM REQUIREMENTS

Eligibility and compliance requirements for PSCP and SNSP schools and families are established in statutes and properly promulgated administrative rules. DPI has established additional requirements in policy documents and warns schools that it will withhold payments or bar them from participation for a failure to comply. DPI has also established application deficiencies that render a student ineligible for either program. DPI collectively refers to the statutory and rule requirements and its own policies as “program requirements.” But DPI policies are program requirements upon which student eligibility and school compliance may be assessed only if explicitly required or permitted by a statute or a previously promulgated rule.⁵

¹ The voucher amount is not the tuition charged by the school, but an amount calculated under a statutory formula.

² Wis. Stat. §§ 118.60(2)(a), (2)(a)1.a., (2)(a)2., (2)(bm), 119.23(2)(a), (2)(a)1.a.

³ Wis. Stat. § 115.7915(2), (2)(d).

⁴ Wis. Stat. §§ 118.60(2)(a)1.a., (3)(b), (c), 119.23(2)(a)1.a., (3)(b).

⁵ See *Papa v. Wisconsin Department of Health Services*, 2020 WI 66; Wis. Stat. § 227.10(2m).

According to the Wisconsin Supreme Court (the “Supreme Court” or “the Court”), explicit does not mean specific and a broad statutory grant of authority can be explicit.⁶ DPI’s explicit authority to enforce “program requirements” found only in its policy documents has two potential sources: first, a statute or rule that directs DPI to take regulatory action but omits specifics and second, a statute that contains statements of legislative intent, purpose or policy or findings or descriptions of general powers or duties.⁷ The PSCP and SNSP statutes are precise as to school qualifications and obligations and student eligibility. The legislature did not direct DPI to establish additional requirements or conditions or provide general authority to regulate schools or applicants. Further, there are no statements of legislative intent, purpose or policy or descriptions of general DPI powers or duties in the PSCP and SNSP statutes. Notably, the broad authority granted to the Superintendent of Public Instruction (“superintendent”) in Chapter 115 of the Wisconsin Statutes applies to public schools. The superintendent has limited authority over private schools.

Yet when a school notifies DPI of its intent to participate (“ITP”) in SNSP or PSCP, DPI requires a PSCP school’s choice administrator or the head of an SNSP school’s governing board to agree to comply with “program requirements.” By signing the SNSP ITP, the board agrees the school will “comply with all of the requirements...as set forth in [statutes], [administrative rules] and the department’s trainings, guidance and bulletins.”⁸ While language in the PSCP ITC is not as broad, the cover memo states that “by electronically signing the form, you agree that compliance with program requirements constitutes a condition of receipt of funds and that in the event of failure to comply, your school’s participation in the program can be terminated and/or PSCP payments withheld.”⁹ In both cases, the agreement referenced is open-ended and undefined since DPI is continually changing “program requirements” by adding and revising guidance and trainings for PSCP and SNSP.

With the ITP acknowledgement language, DPI claims that its authority exceeds that granted by statute. Accordingly, revising statutes may not prevent continued overreach by DPI unless there is also a change in DPI’s approach to regulation. Still, DPI’s statutory authority to withhold payments may benefit from clarifying language that more closely mirrors the authority to bar schools from participating in PSCP and SNSP. Statutes establish specific acts or omissions that may lead to barring by the superintendent¹⁰ but allow DPI to withhold payments for any violation of PSCP or SNSP statutory requirements.¹¹ DPI relies on this broad language to

⁶ See *Clean Wisconsin v. Kinnard Farms*, 2021 WI 71; *Clean Wisconsin, Inc. vs. Wisconsin Department of Natural Resources*, 2021 WI 72.

⁷ *Id.*

⁸ DPI Training: New SNSP Schools Notice of Intent to Participate; <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>; DPI Training: Schools New to the Private School Choice Program in the 2021-22 School Year.

⁹ DPI Training: Schools New to the Private School Choice Program in the 2021-22 School Year; PSCP 2021-22 Registration Form and Information for New Schools, Memorandum to New Schools Interested in Participating the Private School Choice Programs (PSCP or Choice) from the Private School Choice Programs Staff, Nov. 16, 2020.

¹⁰ Wis. Stat. §§ 115.7915(8)(b), 118.60(10)(a), (am), (ar), (b), 119.23(10)(a), (am), (ar), (b).

¹¹ Wis. Stat. §§ 115.7915(8)(c), 118.60(10)(d), 119.23(10)(d).

incorporate its own policies. Regardless of whether statutes are amended, the ITP and any other documents containing similar language should be revised.

In some instances, DPI also weaves into “program requirements” statutory requirements for public school districts. Some rules and policies appear to be rooted in those statutes rather than the ones that govern PSCP and SNSP, but DPI has authority to enforce only those requirements explicitly required or permitted by statute.¹² For example, statutes require a PSCP school to provide the same hours of instruction as a public school¹³ and to adopt criteria for promoting students from grade 4 to grade 5 and from grade 8 to grade 9.¹⁴ They also require both PSCP and SNSP schools to comply with all health and safety laws or codes that apply to public schools.¹⁵ PSCP and SNSP schools must also comply with statutory requirements applicable to all private schools like reporting threats of school violence,¹⁶ filing an annual report, PI-1207, detailing hours of instruction, among other things,¹⁷ and complying with work-based learning program rules.¹⁸ DPI may not apply other public school district governance and finance requirements to PSCP and SNSP schools unless explicitly required or permitted by statute.

APPLICATION REQUIREMENTS AND DOCUMENTATION

DPI has established PSCP and SNSP application processes in administrative rules and department policies that are complex and often confusing. Rule requirements that are not explicitly required or permitted by statute should be repealed and those that are unnecessarily complex and confusing should be revised. DPI policies adopted to implement administrative rule application requirements establish exhaustive procedures for submission and review. To provide proper proof of residency and income documentation, parents and schools must review multiple bulletins, FAQs and training materials containing hundreds of pages of instructions and requirements. A DPI policy must be promulgated as a rule if the following five elements are present:

1. It is a regulation, standard, statement of policy or general order;
2. It is of general application;
3. It has the effect of law;
4. It is issued by an agency; and,
5. It is issued either:
 - To implement, interpret or make specific legislation enforced or administered by the agency; or,

¹² Wis. Stat. §§ 227.10(2m), 227.11(2)(a).

¹³ Wis. Stat. §§ 118.60(2)(a)8., 119.23(2)(a)8.

¹⁴ Wis. Stat. § 118.33(6)(c), (cr).

¹⁵ Wis. Stat. §§ 118.60(2)(a)5., 119.23(2)(a)5.

¹⁶ Wis. Stat. § 175.32(2)(3).

¹⁷ Wis. Stat. §§ 115.30(2), 118.16(3), 120.18.

¹⁸ Wis. Stat. § 118.56.

- To govern the organization or procedure of the agency.¹⁹

Many of the DPI application policies may be reasonable. But when they contain these five elements and establish the basis for eligibility determinations, they should be promulgated in a rule. Until they are, DPI can make changes to these “program requirements” or create new ones by simply releasing updated materials or making an announcement to schools and parents. Rule promulgation provides for stakeholder input and legislative review, and it ensures notice and comment before requirements are revised.²⁰

Other policies should be eliminated entirely. Specifically, DPI declares certain application errors or documentation deficiencies to be fatal. But DPI policies do not always differentiate between an error or deficiency that prevents an accurate eligibility determination and one that relates to form. The Supreme Court recently reviewed a similar approach by the Wisconsin Department of Health Services (“DHS”) and concluded that since statutes did not authorize DHS to recoup payments to healthcare providers for documentation shortcomings, payment could not be recouped when provider forms were not perfect (as perfection was defined by DHS).²¹ Statutes did not explicitly require or permit a perfection policy since it was not linked to verification of covered services, claim appropriateness or claim accuracy, all which could impact recoupment under the statutes.²² The broad definition of explicit recently adopted by the Court does not undermine this conclusion. Like DHS, DPI does not have statutory authority to declare a student ineligible for PSCP or SNSP for document shortcomings when the student is eligible under the statutory criteria.

Following are application requirements that should be reviewed to determine whether rule revision or promulgation, or policy elimination is appropriate:

- DPI policies establish allowable proof of residency and allowable means of school district verification for a finding of PSCP or SNSP eligibility.²³ Only the residency documents on the DPI list are permitted and the list may be unnecessarily narrow.²⁴ Voters have access to significantly more documents when proving residency for voting purposes.²⁵

¹⁹ Wis. Stat. § 227.01(13); *see also*, *Wisconsin Legislature v. Palm*, 2020 WI 42.

²⁰ *See e.g.*, Wis. Stat. §§ 227.16, 227.135, 227.136, 227.137, 227.19, 227.29.

²¹ *Papa v. Wisconsin Department of Health Services*, 2020 WI 66.

²² *Id.*, ¶41.

²³ Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021; Residency Documentation, Special Needs Scholarship Program Informational Bulletin 01-03, rev. June 2020.

²⁴ Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021; Residency Documentation, Special Needs Scholarship Program Informational Bulletin 01-03, rev. June 2020.

²⁵ *See* Wis. Stat. § 6.34; Proof of Residence for Voter Registration, Information provided by the Wisconsin Elections Commission, July 2020. Proof of residency for voter registration includes a driver’s licenses, state identification card, college, university or technical college identification card, employer identification card, property tax bill or receipt, bank or credit card statement, paycheck or paystub, any identification card or license issued by Wisconsin state or local government including hunting or fishing license or vehicle registration, and a check or other document issued by a unit of government including federal student loan correspondence and notices, billing statements and

- DPI policies implement administrative rule requirements that a PSCP or SNSP family’s proof of residency document contain “the name of the parent” and “match the address” on the application²⁶ and that the income documentation for PSCP families “match the information provided on the application.”²⁷ DPI has released dozens of pages of explanations on the required matching components of names and addresses (e.g., street direction must match but not unit number), when corrections are or are not required, when corrections require additional documentation, and the allowable processes for corrections.²⁸
- DPI policies set requirements and procedures for documenting a parent name change.²⁹
- Administrative rules allow corrections to residency and income documentation through the due date of the enrollment audits, while DPI policies allow corrections only through the eligibility determination if a school discovers the documentation error.³⁰ Administrative rules set eligibility determination deadlines that may occur much sooner than notifications of acceptance or rejection made no later than 60 days after the end of the application period. In some cases, DPI sets the end of the open application period as the deadline for correcting specific errors. These brief correction windows established in DPI’s policies can have a significant impact on an applicant’s eligibility.³¹
- Statutes require a student or parent to submit an SNSP application on a form prepared by DPI.³² The form must include a document comparing the rights of a child with a disability and his or her parents in a public school versus the rights under SNSP.³³ DPI policies require SNSP parents to complete a paper application and sign it by hand, but

collection notices from a government entity or correspondence from a federal recognized Native American Tribe in Wisconsin and public high school, technical college and public university correspondence and documents such as admissions correspondence, financial aid notices and report cards.

²⁶ Wis. Admin. Code §§ PI 35.05(2), 48.05(2), 49.05(4)(a)2.

²⁷ Wis. Admin. Code §§ PI 35.05(4)(b)1., 48.05(4)(b)1.

²⁸ Processing and Verifying Applications, Private School Choice Programs, Application Verification and Corrections FAQ, 2021-22 School Year; Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021; Income Documentation, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

²⁹ Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021, Appendix C; Residency Documentation, Special Needs Scholarship Program Informational Bulletin 01-03, rev. June 2020, Appendix C.

³⁰ Processing and Verifying Applications, Private School Choice Programs, Application Verification and Corrections FAQ, 2021-22 School Year; Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021, pg. 7; Income Documentation, Private School Choice Program Informational Bulletin 04-02, rev. Jan. 2021, pg. 9; Wis. Admin. Code §§ PI 35.05(8), 48.05(8).

³¹ Wis. Stat. §§ 118.60(3)(a); 119.23(3)(a); Wis. Admin. Code §§ 35.06(2), 48.06(2)(a), (b).

³² Wis. Stat. § 115.7915(4).

³³ Wis. Stat. § 115.7915(2)(f), (4)(bm).

statutes require only that parents acknowledge the receipt of the comparison document.³⁴ If the application is not signed by the parent or marked as received by the school by a date certain, the student is ineligible under DPI policies.³⁵ In addition, if a school makes any corrections to an application with whiteout rather than strikethrough, the student is ineligible.³⁶

- DPI sets policies and procedures for, and limits on, rerunning income determinations due to a parent error, new tax information or Department of Revenue errors. In one instance, it requires DPI approval before a correction can be made and in another it requires a school to notify DPI but places no obligation on DPI to act or a deadline for doing so.³⁷
- DPI has established policies for the use of the DPI income eligibility determination method when a parent is recently separated, divorced or widowed that require documents that conflict with those required for corrections. The conflict could result in an eligible student being found ineligible due to paperwork inconsistencies.³⁸
- To attend an SNSP school, a student with a disability must reside in Wisconsin and have an IEP or services plan in effect³⁹ and the school must request verification from the local education agency (“LEA”) that developed the child’s IEP or services plan.⁴⁰ DPI policies establish requirements and procedures when there is a dispute as to whether either is in effect. Under them, a student may be determined ineligible because the LEA did not act promptly to help resolve the dispute.⁴¹
- Statutes allow DPI to transfer the application of a WPCP student who moves after the end of the open application period when certain conditions are met.⁴² DPI policies that set the required procedures for transferring the application are vague as to DPI’s authority to reject a transfer.⁴³

ADMINISTRATIVE RULES LACKING STATUTORY AUTHORITY

³⁴ *See Id.*

³⁵ Student Application and Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02 (ver. 2), rev. June 2020.

³⁶ *Id.*

³⁷ Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021, pg. 6-7.

³⁸ *Id.* at pg. 15.

³⁹ Wis. Stat. § 115.7915(2), (2)(d).

⁴⁰ Wis. Stat. § 115.7915(3)(bm).

⁴¹ Student Application & Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02 (ver. 2), rev. June 2020.

⁴² Wis. Stat. § 118.60(3)(ar)6.

⁴³ Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021, Appendix C.

Each requirement or standard promulgated in a rule must be explicitly authorized or explicitly permitted by statute.⁴⁴ DPI may not rely on statements of legislative intent, purpose or policy or findings or on descriptions of general agency powers or duties on broad statutes describing its general duties for regulatory authority.⁴⁵ Although the Supreme Court's analysis of explicit authority addressed regulatory authority generally, its decision is applicable to rulemaking. According to the Court's reasoning, DPI has explicit authority for an administrative rule requirement if a statute directs DPI to take broad regulatory action even if the statute omits specifics. As noted above, the PSCP and SNSP statutes are narrowly drafted without broad directives or grants of authority to DPI.

It is worth noting however is that the Attorney General recently opined that a statute granting general rulemaking authority does confer explicit authority.⁴⁶ Administrative agencies or Wisconsin courts may view this as a rational extension of the Court's reasoning. If the AG's interpretation is adopted by agencies or the courts, DPI could argue broad authority to regulate applicants and schools participating in PSCP and SNSP under existing statutes. Those statutes currently direct DPI to promulgate rules to implement and administer the PSCP statutory requirements and to implement and administer SNSP statutory requirements including school eligibility and participation, application and approval procedures for students and schools, and the calculation and distribution of scholarships.⁴⁷

Count Reports and Enrollment Audits

Statutes direct DPI to make payments to PSCP and SNSP schools on behalf of the student's parent or guardian.⁴⁸ Parents of PSCP students must provide DPI proof of the student's enrollment in the school during the school term.⁴⁹ Yet administrative rules and DPI policies condition payments to schools on compliance with complex regulations that require pupil count reports and biannual enrollment audits.⁵⁰ Statutes require count reports and enrollment audits to verify enrollment in public school districts but do not extend these requirements to PSCP or SNSP schools.⁵¹ Public school district equalization aid is based on a statutory formula that includes enrollment averages⁵² while PSCP and SNSP schools receive a set voucher payment or scholarship for each student enrolled during the current school term. PSCP and SNSP enrollment verification should be streamlined since payments are made in real time for the year

⁴⁴ Wis. Stat. § 227.11(2)(a)1., 2. Explicit authority cannot be supplemented either by statements of legislative intent, purpose, policy or findings or by descriptions of general powers or duties.

⁴⁵ *Palm*, ¶ 52 (citations omitted). See also Wis. Stat. § 227.11(2)(a)1., 2.

⁴⁶ AOG-04-20

⁴⁷ Wis. Stat. §§ 115.7915(10), 118.60(11)(a), 119.23(11)(a).

⁴⁸ Wis. Stat. §§ 115.7915(4m)(a), 118.60(4)(bg)3.-5., 119.23(4)(bg)3.-5.

⁴⁹ Wis. Stat. §§ 118.60(4)(bg)3.-5., 119.23(4)(bg)3.-5. Statutes also require WPCP and RPCP parents to, by the third Friday in September, notify DPI (on a DPI form) that their child is currently participating in the program. See Wis. Stat. § 118.60(3)(d).

⁵⁰ Wis. Admin Code §§ PI 35.06(8), (9), 35.07, 48.06(8), (9), 48.07, 49.06(5), (6), 49.07.

⁵¹ Wis. Stat. §§ 115.28(18), 120.24(1), 121.004(5), 121.07.

⁵² State Aid to School Districts, Informational Paper, Legislative Fiscal Bureau, 2021, pgs. 7-8.

of enrollment. If count reports and enrollment audits are to continue, they should be established in statute with specific requirements and limitations.

- **Revised Frequency:** While PSCP and SNSP schools must submit two enrollment audits each school term, only 25% of public schools do so each year.⁵³ In addition, each PSCP or SNSP enrollment audit and the annual financial audit must include a fraud risk assessment.⁵⁴ If the number of enrollment audits is reduced and perhaps combined with the financial audit (as is done for public school districts), a fraud risk assessment would not be required three times per year. There may be a benefit to two enrollment audits per year however so that application corrections can be made quickly and payment amounts are consistent. But if the application and correction process is simplified, this issue may be insignificant.
- **Count Reports vs. Attendance Records:** Administrative rules require schools to submit accepted applications and class lists (referred to as a preliminary enrollment report), count reports, official attendance records, original classroom records and the PI-1207 annual private school report to verify enrollment and determine payment amounts.⁵⁵ Auditors must review and test this information. Duplicative records and reports should be addressed.
- **Audit Limits:** The audit must be conducted using agreed upon procedures and auditors must perform procedures included in rules and others agreed to by the auditor and DPI.⁵⁶ DPI requires an auditor to submit an Independent Auditor’s Report on Applying Agreed Upon Procedures set by DPI.⁵⁷ DPI has applied these procedures to require control testing by auditors that is not required by administrative rules. There may be a need to clarify that the agreed upon procedures may not establish new auditing requirements.
- **DPI Audit Review:** DPI must review the enrollment audits and certify an amount due from or to a school.⁵⁸ DPI indicates that once it has “reviewed and made any necessary

⁵³ Wis. Admin. Code §§ PI 35.07(1)(a), (b), 48.07(1)(a), (b), 49.07(1)(a), (b); Wis. Stat. § 115.28 (18).

⁵⁴ Wis. Admin. Code §§ PI 35.07(3)(c), 48.07(3)(c), 49.07(3)(c); Private School Choice Programs & Special Needs Scholarship Program, Fraud Risk Guide, For the Year Ending June 30, 2021, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/auditor/september-enrollment-audit>. An auditor must comply with the standards of the American Institute of Certified Public Accountants (“AICPA”) when conducting the annual financial audit. See Wis. Admin. Code §§ PI 35.12(1), 48.12(1), 49.10(1). DPI notes that these standards include identifying and assessing the risks of fraud that may result in material misstatement of financial statements due to fraud..

⁵⁵ Wis. Admin. Code §§ PI 35.06(7), (8), 35.07(2), 35.07(3)(m), 48.06(7), (8), 48.07(2), 48.07(3)(m), 49.06(4), (5), 49.07(2), 49.07(3)(L).

⁵⁶ Wis. Admin. Code §§ PI 35.07(1), 35.07(3)(q), 48.07(1), 48.07(3)(q), 49.07(1), 49.07(3)(q).

⁵⁷ 2020-21 September Enrollment Agreed Upon Procedures Report, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>.

⁵⁸ Wis. Admin. Code §§ PI 35.07(4)(a), 48.07(4)(a), 49.07(4)(a).

changes to the enrollment audit, certification letters are mailed.”⁵⁹ Upon submission of the audit, the school’s choice administrator can indicate disagreement with some or all of the auditor’s required corrections. If the school successfully makes its case, DPI will revise the audit findings. Presumably, DPI will also revise the audit if it believes applications are ineligible even if not identified as such by the auditor. Administrative rules allow DPI to make inquiries to ascertain the accuracy and completeness of information contained in the enrollment audit,⁶⁰ but rules do not establish a process for making changes to the audit. DPI’s authority to review and revise the audits should be clarified.

- **Audit Guide Limits:** An auditor must complete all of the procedures specified in the DPI audit guide, including those listed in rules.⁶¹ Since the DPI audit guide is not subject to any oversight, its procedures for determining eligibility or payment revisions should not include any substantive requirements or rely on DPI policies containing substantive requirements. There is likely a benefit to clarifying that the guide may incorporate by reference statutes and administrative rules only.
- **Age Requirements:** Administrative rules set the requirement that a PSCP or SNSP student be 4-, 5- or 6-years-old by September 1 to be eligible for 4-year-old kindergarten (“4K”), 5-year-old kindergarten (“5K”) or first grade, respectively.⁶² Statutes establish these age requirements for public school students and also require school boards to adopt procedures, conditions and standards for early admission to kindergarten and first grade.⁶³ According to DPI, because the early admission exception does not reference private schools, PSCP and SNSP schools may not include students on count reports if admitted early.⁶⁴ But none of these statutes apply to private schools and the only statutory requirements for enrolling in SNSP or PSCP are residency and income as well as prior year attendance for WPCP and RPCP. While the question of whether PSCP and SNSP may admit students at an earlier age may not be a pressing one, it is an example of DPI applying public school district statutes to PSCP and SNSP schools.
- **Penalties:** DPI may determine that all PSCP or SNSP students are ineligible for voucher payments or scholarships if a school fails to submit an enrollment audit.⁶⁵ Payments may be withheld for a violation of statutory requirements and there is currently no requirement

⁵⁹ DPI Training 9-1: Payment Process, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>; Payment Process, Pupil Count Report & Audit Overview, June 2020 SNSP Training, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>.

⁶⁰ Wis. Admin. Code §§ PI 35.20(1), 48.20(1).

⁶¹ Wis. Admin. Code §§ PI 35.07(3), 48.07(3), 49.07(3).

⁶² Wis. Admin. Code §§ PI 35.05(5), 48.05(5), 49.05(2).

⁶³ Wis. Stat. §§ 118.14(1), 120.12(25).

⁶⁴ Early Admission for Kindergarten and First Grade, Informational Bulletin; *see also* Wis. Stat. §§ 118.14(1), 120.12(25).

⁶⁵ Wis. Admin. Code §§ PI 35.07(4), 48.07(4), 49.07(4).

to complete an enrollment audit.⁶⁶ If enrollment audits are established in statute, the associated penalties for errors or omissions should also be addressed.

Hours of Instruction

Administrative rules require continuing PSCP schools to report their hours of instruction and school term start and end dates to DPI each year.⁶⁷ Under the rule, DPI may not make a May payment (one of four payments made to schools each year) to a school that ceases instruction prior to the end of its scheduled term without DPI approval.⁶⁸ Payments may be withheld for a violation of statutory requirements and statutes require only that a PSCP school provide a set number of instructional hours each term.⁶⁹ DPI is not authorized to declare a shortened term as a violation *per se* of the hours of instruction requirement or to withhold funds for failing to meet a requirement not explicitly established by statute.

PSCP Independent Financial Audit – Financial Viability

Statutes require PSCP schools to annually submit an independent financial audit prepared in accordance with the American Institute of Certified Public Accountants (“AICPA”) standards.⁷⁰ The auditor must evaluate and conclude whether there is substantial doubt about the entity’s ability to continue as a going concern for a reasonable period of time.⁷¹ DPI may communicate with the auditor as necessary for the purpose of assessing a school’s financial viability.

In addition, administrative rules require the superintendent to make a financial viability determination based on any and all information submitted to DPI under statutes or administrative rules and any additional information DPI requests from a school.⁷² Statutes however appear to limit this comprehensive review to schools participating for the first time since a financial audit has not yet been prepared.⁷³ When an audit has been prepared, arguably DPI is to review the indicators noted by the auditor.

PSCP Independent Financial Audit – DPI Review

A school’s annual independent financial audit is due by October 15.⁷⁴ By April 1, DPI must determine whether the school has provided the information and met the requirements required of

⁶⁶ Wis. Stat. §§ 115.7915(8)(c), 118.60(10)(d), 119.23(10)(d).

⁶⁷ Wis. Admin. Code §§ PI 35.03(7)(b), 48.03(7)(b).

⁶⁸ Wis. Admin. Code §§ PI 35.19(4), 48.19(4).

⁶⁹ Wis. Stat. §§ 115.7915(8)(c), 118.60(10)(d), 119.23(10)(d).

⁷⁰ Wis. Stat. §§ 118.60(7)(am)2m.a, b., 119.23(7)(am)2m.a., b.

⁷¹ Private School Programs On Demand Training 6-11: Financial Viability and Going Concern Determinations, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

⁷² Wis. Admin. Code §§ PI 35.15(2), (6), 48.15(2), (6).

⁷³ Wis. Stat. §§ 118.60(7)(am)3., (7m)(a)2., 119.23(7)(am)3., (7m)(a)2.

⁷⁴ Wis. Stat. §§ 118.60(7)(am)2m., 119.23(7)(am)2m.

an independent financial audit by statute.⁷⁵ Statutes authorize DPI to do the following as part of its review of the financial audit:

- Notify the school whether it requires additional information for this review; and,
- Request additional information from the auditor for purposes of reviewing the audit. This information is limited to missing items or information, or to a matter that may impact the school's financial statement by an amount that is more than 1% of the total amount of payments the school received for the previous school year.⁷⁶

DPI's has interpreted a matter that "may" impact a school's financial statement by more than 1% of total payments to include virtually any matter regardless of its fiscal significance. A

Administrative rules allow DPI to make inquiries, of schools and auditors except as provided in statute, to "ascertain the accuracy and completeness of information contained in audits or reports" required under statutes or administrative rules.⁷⁷ These inquiries should be limited to situations where it is reasonable to believe information is inaccurate or incomplete.

PSCP Lifting of Surety Bond Requirements

Evidence of a school's sound fiscal and internal control practices are required by statute and established in administrative rules.⁷⁸ An independent auditor must complete and submit to DPI by October 15 a Fiscal and Internal Control Practices Report.⁷⁹ The auditor is required by DPI to complete a Financial Viability Risk Assessment ("Risk Assessment") in which he or she determines whether risk indicators identified by DPI exist for the school.⁸⁰ DPI assigns a risk level to each indicator regardless of the individual school's situation.⁸¹ The Risk Assessment is used to determine the sample sizes for agreed upon testing procedures for the Fiscal and Internal Control Practices Report.⁸²

The Risk Assessment assigns at least a medium risk (and requires auditors to consider assigning high risk) to a school that provided a surety bond rather than a budget to meet new school financial requirements if the surety bond has not yet been removed by DPI.⁸³ However, administrative rules make bond removal difficult, placing burdens on these new schools that are

⁷⁵ Wis. Stat. §§ 118.60(7)(am)3.a., 119.23(7)(am)3.a.

⁷⁶ Wis. Stat. §§ 118.60(7)(am)3.b., 119.23(7)(am)3.b.

⁷⁷ Wis. Admin. Code §§ PI 35.20(1), 48.20(1).

⁷⁸ Wis. Stat. §§ 118.60(7)(am)2m.b., 119.23(7)(am)2m.b.; Wis. Admin. Code §§ PI 35.13, 48.13.

⁷⁹ Wis. Stat. §§ 118.60(7)(am)2m.b., 119.23(7)(am)2m.b.

⁸⁰ Financial Viability Risk Assessment For the Year Ended June 30, 2021, <https://dpi.wi.gov/parental-education-options/choice-programs/financial-reports/fiscal-practices>.

⁸¹ *Id.*

⁸² Private School Choice Programs Audit Guide, Fiscal and Internal Control Practices Report to the Wisconsin Department of Public Instruction, Dec. 15, 2020.

⁸³ *Id.*

not placed on existing schools. When a first time participant files a surety bond, it must do so annually until an independent financial audit “does not contain any indicators that private school is not financially viable” and two consecutive sound fiscal and internal control practices reports do not indicate that the school “is not financially viable.”⁸⁴ Administrative rules additionally require the financial audit be prepared at the consolidated level⁸⁵ and include two-year comparative financial statements.⁸⁶ Yet, statutes give school the option of filing a consolidated audit, but do not require it.⁸⁷ Further, DPI allows all other newly participating schools completing the initial audit to include only the current school year in the statement of activities and statement of cash flows.⁸⁸

SNSP Independent Financial Audit

Statutes require SNSP schools to annually submit an independent financial audit prepared in accordance with AICPA standards.⁸⁹ Statutes do not require DPI to review the auditor’s findings and assess financial viability or for schools to also submit evidence of sound fiscal and internal control practices. But administrative rules allow DPI to make inquiries to ascertain the accuracy and completeness of information contained in audits and any other reports required by statutes or rules.⁹⁰ There is likely a benefit to clarifying DPI’s role once the audit is completed as well as to its authority regarding other required reports.

Reserve Balance and Cash and Investment Balance

Statutes require the PSCP and SNSP financial audit to include a calculation of the school’s fund for future eligible education expenses i.e., its reserve balance.⁹¹ Statutes require a PSCP school to maintain a cash and investment balance at least equal to its reserve balance, but do not require the same of an SNSP school.⁹² Administrative rules do require an SNSP school to maintain a cash and investment balance.⁹³

SNSP Financial Information in Lieu of Surety Bond

Statutes require that if an SNSP school’s initial expected payment is at least \$50,000 in scholarships during a school year, it must either file a surety bond or file with DPI financial

⁸⁴ Wis. Stat. §§ 118.60(7m)(a)3., 119.23(7m)(a)3.

⁸⁵ Wis. Admin. Code §§ 35.14(7)(a), 48.14(7)(a).

⁸⁶ *Id.*

⁸⁷ Wis. Stat. §§ 118.60(7)(am)2m.a., 119.23(7)(am)2m.a.

⁸⁸ Financial Audit and PSCP/SNSP Reserve Balance, Private School Choice Programs and Special Needs Scholarship Program Informational Bulletin 08-01, rev. July 2019.

⁸⁹ Wis. Stat. § 115.7915(6)(e).

⁹⁰ Wis. Admin. Code § PI 49.14(1).

⁹¹ Wis. Stat. §§ 115.7915(6)(e), 118.60(7)(am)2m.a., (an)1., 2, 119.23(7)(am)2m.a., (7)(an)1., 2.

⁹² Wis. Stat. §§ 118.60(7)(an)1., 119.23(7)(an)1.

⁹³ Wis. Admin. Code § PI 49.09(3)(e), (4).

information demonstrating the school's ability to pay an amount equal to the total amount of expected scholarships that year.⁹⁴ Administrative rules establish the required financial information and allow DPI to request any other information to determine the financial position of the school.⁹⁵ This open ended requirement makes it difficult for schools to predict compliance requirements that change from year-to-year or school-to-school. In addition, rules allow DPI to review "any other information available to the department," suggesting that it may look to outside sources,⁹⁶ while statutes require this determination to be made based on the information filed.⁹⁷ There is likely a benefit to clarifying the scope of DPI's review.

SNSP Order to Bar

Statutes allow DPI to bar an SNSP school for any period of time if it determines that, among other things, the school did either of the following:

- Intentionally or negligently misrepresented any information required under statutes or rules,⁹⁸ or,
- Routinely failed to comply with the requirement to submit an annual financial audit or to file a surety bond or alternative financial information.⁹⁹

Administrative rules allow DPI to bar a school for errors related to background checks with no requirement that the school act negligently or intentionally.¹⁰⁰ They also interpret "routinely failed to comply" in a manner that is likely intended to incorporate audit-related bulletins, training materials and guides.¹⁰¹ Any basis for barring in the administrative rules should be reviewed to ensure compliance with statutes and to eliminate any improper expansion of DPI authority.

SNSP Spaces Available

Statutes require a school to notify DPI of its intent to participate in SNSP and to include the number of spaces it has available for students receiving a scholarship.¹⁰² Administrative rules require a school to file an ITP form annually by the first weekday in March.¹⁰³ The notice is required to include both the number of scholarships available for new or transferring students

⁹⁴ Wis. Stat. § 115.7915(6)(f).

⁹⁵ Wis. Admin. Code § PI 49.04(1m)(b)1.-4.

⁹⁶ Wis. Admin. Code § PI 49.04(2).

⁹⁷ Wis. Stat. § 115.7915(6)(f).

⁹⁸ Wis. Stat. § 115.7915(8).

⁹⁹ Wis. Stat. § 115.7915(6)(e), (f), (8)(a)2.

¹⁰⁰ Wis. Admin. Code § PI 49.14(4)(f), (g).

¹⁰¹ Wis. Admin. Code § PI 49.14(4).

¹⁰² Wis. Stat. § 115.7915(3)(a).

¹⁰³ Wis. Admin. Code § PI 49.03(3).

and the number of scholarship students that “will continue to participate” in SNSP.¹⁰⁴ DPI’s application of the rule requires a K-8 school to continue offering a scholarship once an eighth grade SNSP student graduates. The rule should be clarified to prevent DPI from mandating the number of scholarships a school must provide.

SNSP Accreditation Requirement

Statutes require that an SNSP school either be approved as a private school by the superintendent or be accredited by an organization named in statute.¹⁰⁵ Administrative rules however require all SNSP schools to be accredited.¹⁰⁶ DPI training materials do correctly state the statutory requirement, but the rule should be corrected.¹⁰⁷

POLICIES THAT SHOULD BE PROMULGATED AS RULES

DPI has issued at least 25 bulletins, hundreds of pages of training materials and several audit guides which summarize statutory and rule requirements and provide guidance as to procedures. However, some also contain new regulations, standards, and statements of policy and others contain requirements that implement, interpret or make specific statutes. Both should be promulgated as rules.¹⁰⁸ Some of these that relate to the application process are noted above. Additional DPI policies impact student eligibility, school compliance and payments to schools and may be written with no input from stakeholders or legislators, and revised at any time without notice or comment. In contrast, administrative rules must be promulgated publicly with a number of opportunities for stakeholder input and legislative review.¹⁰⁹ Furthermore, the legislature may prevent final promulgation of a proposed rule and may repeal an existing one,¹¹⁰ but lacks authority to overturn agency policies.¹¹¹

Student Eligibility Requirements

- **Open Application Periods:** The open application periods for RPCP and MPCP are established in a DPI bulletin.¹¹² DPI undoubtedly has authority to establish those periods, but since they drive deadlines impacting a school’s obligations and a student’s

¹⁰⁴ Wis. Admin. Code § PI 49.03(3)(a), (b).

¹⁰⁵ Wis. Stat. § 115.7915(2)(c).

¹⁰⁶ Wis. Admin Code § PI 49.03(6).

¹⁰⁷ Special Needs Scholarship Program Training: Private School SNSP Registration Requirements, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>.

¹⁰⁸ Wis. Stat. § 227.01(13). *See also, Wisconsin Legislature v. Palm.*

¹⁰⁹ *See e.g.,* Wis. Stat. §§ 227.16, 227.135, 227.136, 227.137, 227.19, 227.29.

¹¹⁰ Wis. Stat. §§ 227.19(5), 227.26.

¹¹¹ *See* Wis. Stat. § 227.26(2)(b). The legislature’s Joint Committee for Review of Administrative Rules can direct an agency to promulgate a statement of policy or interpretation of statute as an emergency rule.

¹¹² Application Process, Wisconsin Private School Choice Programs Informational Bulletin 01-01 rev. March. 2021, pg. 2.

eligibility,¹¹³ there is likely a benefit to establishing them in statute or rule. For example, 15 to 20 days is a short turnaround time for submitting and completing applications and collecting required documentation. There may be a benefit to reducing and lengthening the application periods.

School Compliance Requirements

- **EIN Verification Letter:** According to recent DPI training materials for new PSCP schools, a school must provide DPI an Employer Identification Number (“EIN”) verification letter from the IRS so that DPI can verify a school’s legal name when it files a surety bond and can set up ACH payment transfers to the school for the four annual payments.¹¹⁴ This documentation is not required by statutes or administrative rules. A school currently enters its legal name on documents filed with DPI and submits its EIN for the purpose of receiving payments.
- **Adding Seats:** Administrative rules require SNSP schools to indicate on the ITP the number of scholarships available for new students and the number of continuing scholarship students.¹¹⁵ The rule allows a school to add scholarships during the school year by notifying DPI and paying a bond.¹¹⁶ Administrative rules require a PSCP school to indicate on the ITP the number of spaces it has available for choice students in all programs.¹¹⁷ DPI policies establish when a PSCP school may revise the number of seats available or add a grade, and whether and how it must report changes to DPI.¹¹⁸ There is likely a benefit to establishing these reporting requirements in rule as was done for SNSP schools.
- **Hours of Instruction:** Statutes require a PSCP school to provide 1,050 hours of direct instruction for grades 1 through 6 and 1,137 hours of direct instruction for grades 7 through 12.¹¹⁹

Virtual Instruction. A 2020 court decision allows a PSCP school to meet the statutory hours of instruction requirement with virtual instruction.¹²⁰ DPI has issued several documents with information about what constitutes virtual instruction, how to count

¹¹³ Wis. Stat. §§ 118.60(3)(a), 119.23(3)(a). For MPCP, prior to 2017 Wisconsin Act 36, the statutory language was “within 60 days after receiving the application, the private school shall notify each applicant, in writing, whether his or her application has been accepted.”

¹¹⁴ Email from Chanell Crawford, DPI Director, Parental Education Options, Feb. 23, 2021.

¹¹⁵ Wis. Admin. Code § PI 49.03(3)(a), (b).

¹¹⁶ Wis. Admin. Code § PI 49.04(5).

¹¹⁷ Wis. Admin. Code §§ PI 35.03(3)(b), 48.03(3)(a)2.

¹¹⁸ Application Process, Wisconsin Private School Choice Programs Informational Bulletin 01-01 rev. March. 2021, pg. 3.

¹¹⁹ Wis. Stat. §§ 118.60(2)(a)8., 119.23(2)(a)8.

¹²⁰ *School Choice Wisconsin Action v. DPI*, Case No. 19 CV 574, Waukesha County, Jan. 2020.

instructional hours, and how to take attendance.¹²¹ The PSCP and SNSP statutes should be amended to codify this court decision and revise any existing requirements that conflict with virtual instruction. Furthermore, administrative rules should be amended to recognize virtual instruction and incorporate some of DPI's policies regarding taking attendance and counting hours of instruction.

Full Day Kindergarten. Under administrative rules, a student in 5K is counted as a 0.5 FTE, except that a student enrolled in a full-day program three, four or five days per week is counted as a 0.6, 0.8 or 1 FTE respectively.¹²² Full day means that the length of a 5K day must be the same as the length of a first grade day.¹²³ According to DPI, full day 5K may not begin instruction prior to the day first graders are also in school.¹²⁴ If 5K students attend school before such time in order to acclimate to a school environment, those days will not count toward hours of instruction.¹²⁵ The administrative rule should be clarified to allow schools to count all hours of instruction.

Summer School Title I. To be eligible for a summer school payment, a PSCP or SNSP school must provide no less than 19 days of instruction and each day must be comprised of at least 270 minutes of instruction.¹²⁶ According to the DPI enrollment audit guide and training materials, because Title I classes are not eligible for payment through PSCP, those instructional hours do not count toward the number required for a summer school program.¹²⁷ However, PSCP payments are not made for classes but for students and DPI already has policies in place to prevent duplicate government payments for the same student. Accordingly, when calculating a school's hours of instruction, Title I classes should be included.

- **WPCP Waiting List & Student Withdrawals:** Statutes require DPI to establish a WPCP waiting list in accordance with statutory preferences.¹²⁸ DPI policies establish requirements for notifying DPI of WPCP student withdrawals in order to fill seats from the waiting list and for when schools receive payments after their withdrawal.¹²⁹ There is

¹²¹ Choice/SNSP Pupil Count Information, Memo to Choice Schools from the Department of Public Instruction, Aug. 13, 2020; Choice/SNSP 2020-21 Attendance, Hours of Instruction, and Drills Information, Memo to Choice Schools from the Department of Public Instruction, Aug. 28, 2020, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>; see <https://dpi.wi.gov/cal>.

¹²² Wis. Admin Code §§ PI 35.06(6)(b)1., 2., 2m., 48.06(6)(b)1., 2., 2m., 49.06(3)(b)1., 2., 2m.

¹²³ Wis. Admin Code §§ PI 35.06(6)(b)4., 48.06(6)(b)4., 49.06(3)(b)4.; Private School Choice Programs On Demand Training 9-3, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

¹²⁴ Email from Chanell Crawford, DPI Director, Parental Education Options, Dec. 16, 2020.

¹²⁵ *Id.*

¹²⁶ Wis. Stat. §§ 115.7915(4p)(b), 118.60(4m), 119.23(4m).

¹²⁷ 2020-21 September Enrollment Audit Guide, pg. 29-30; Choice Training: Summer School Count Report, <https://dpi.wi.gov/parental-education-options/choice-programs/bulletins>.

¹²⁸ Wis. Stat. § 118.60(3)(ar)3.-4., (3)(c).

¹²⁹ Application Process, Private School Choice Programs Informational Bulletin 01-01, rev. March 2021, pg. 10.

likely a benefit to establishing in rule when schools receive payments for a withdrawn student.

- **Background Checks:** Statutes require a school to conduct criminal background investigations of its employees and exclude them from employment under certain circumstances.¹³⁰ Administrative rules interpret statutory terms and identify acceptable background check methods.¹³¹ DPI policies establish additional requirements for PSCP and SNSP employee background checks, including additional interpretations and procedures that auditors are required to review and apply.¹³² They are complex and should be clarified in the administrative rules.
- **Anticipated Budget and Cash Flow Reports:** Statutes require a new PSCP school to submit a complete anticipated budget for the first fiscal period of participation in the program.¹³³ Statutes and rules establish the report's contents.¹³⁴ DPI requires a school to include minimum amounts for certain expenses and, if it does not, DPI will add them prior to determining whether "the school meets choice requirements."¹³⁵ DPI also requires the submission of documents not listed in administrative rules.¹³⁶

Payment Eligibility Requirements

- **4K Outreach:** Statutes provide that a pupil enrolled in a 4K program that provides 437 hours of instruction is counted as 0.6 FTE if the program annually provides at least 87.5 additional hours of outreach activities.¹³⁷ Administrative rules define 4K outreach activities as direct services provided to the 4K parents that have an educational component. The activities must be documented in teacher logs and reviewed in the annual financial audit.¹³⁸ DPI policies interpret "outreach" and "educational component," and establish rules for counting hours.¹³⁹ An independent audit is required to apply these policies when reviewing a school's eligible education expenses. There is likely a benefit to clarifying the administrative rule.

¹³⁰ Wis. Stat. §§ 115.7915(6)(d), 118.60(7)(h), 119.23(7)(h).

¹³¹ Wis. Admin. Code §§ PI 35.13(10m), 48.13(10m), 49.03(4); *see also* Wis. Stat. § 108.02(12).

¹³² Criminal Background Checks, Private School Choice Programs and Special Needs Scholarship Program Informational Bulletin 02-03, rev. July 2020, pg. 3.

¹³³ Wis. Stat. §§ 118.60(2)(ag)1.b, 119.23(2)(ag)1.b.

¹³⁴ *Id.*; Wis. Admin. Code §§ PI 35.04(1)(f), 48.04(1)(f).

¹³⁵ Budget Report and Anticipated Cash Flows Instructions, <https://dpi.wi.gov/parental-education-options/choice-programs/school-reports>.

¹³⁶ *Id.*

¹³⁷ Wis. Stat. §§ 121.004(7), 121.02(1)(f).

¹³⁸ Wis. Admin. Code §§ PI 35.07(3)(b), 48.07(3)(b).

¹³⁹ 4K Parental Outreach Activities, Private School Choice Programs and Special Needs Scholarship Program Informational Bulletin 02-01, rev. Oct. 2016.

- **Primarily SNSP Education Expenses:** Statutes require an SNSP school's annual financial audit to be accompanied by the auditor's statement that the report fairly represents the school's eligible education expenses.¹⁴⁰ DPI policies differentiate between general eligible education expenses, statement of actual cost eligible education expenses and primarily SNSP eligible education expenses.¹⁴¹ Primarily SNSP eligible education expenses are not identified by statute or rule. DPI policies establish and define this category of expenses and describe how they are allocated.¹⁴² These requirements should be added to the existing rule to create certainty schools and also be extended to the PSCP school.

CONCLUSION

- DPI views the PSCP and SNSP program requirements with which schools and families must comply to encompass more than statutes and properly promulgated rules. According to DPI, it has authority to bar schools and withhold payments for noncompliance with guidance, training materials and bulletins. If DPI cannot identify explicit authority for these requirements, DPI must not enforce them. Documents making this assertion or requiring schools to acknowledge it should also be amended. In addition, there is likely a benefit to amending DPI's statutory authority to withhold payments from schools so that it more closely mirrors its authority to bar schools.
- DPI has established application processes for PSCP and SNSP in guidance, training materials and bulletins that are complex and often confusing. Some DPI administrative rules unnecessarily complicate statutory requirements and should be revised. A number of policies and procedures fit the statutory definition of a rule and should be promulgated as one. Doing so provides for stakeholder input and legislative review, and it allows for notice and comment prior to any DPI revisions. Other policies and procedures should be eliminated entirely because they declare certain application and document deficiencies as fatal even when they do not prevent an accurate eligibility determination.
- DPI administrative rules include a number of requirements that are not explicitly authorized by statute. Rule amendments are likely necessary in a number of instances. In others, statutory amendments may be necessary to clarify DPI authority.
- DPI has issued a large body of guidance found in bulletins, training materials, FAQs, forms and audit guides. In addition to policies related to the application process and student eligibility, they establish policies that impact school compliance and payments to schools. Auditors are directed to review and rely on bulletins in many instances and DPI presents bulletin requirements as enforceable program requirements in trainings. Some of these policies may be unproblematic for schools and families. But there is likely a

¹⁴⁰ Wis. Stat. § 115.7915(6)(e).

¹⁴¹ Eligible Education Expenses, Special Needs Scholarship Program Informational Bulletin 8-02, rev. July 2019.

¹⁴² *Id.*

benefit to establishing some as rules since it provides the opportunity for input and for notice before requirements change.

While DPI's authority may always be clarified by amending statutes, the legislature's Joint Committee for Review of Administrative Rules ("JCRAR") also serves as a check on agency regulations and policies. JCRAR may vote to suspend a rule or a portion of a rule for specific reasons including absence of statutory authority, conflict with state law, failure to comply with legislative intent or arbitrariness and capriciousness or imposition of undue hardship.¹⁴³ An agency may not enforce a rule while it is suspended and JCRAR may suspend a rule an unlimited number of times.¹⁴⁴ To make the suspension permanent, a new law must be enacted.¹⁴⁵ JCRAR may also direct an agency to promulgate an emergency rule when it determines that a statement of policy or interpretation of statute meets the definition of a rule.¹⁴⁶ An emergency rule is in effect for 150 days and may be extended for a total of 120 days.¹⁴⁷ Once it expires, the agency may not enforce the policy in question unless it promulgates a permanent rule. JCRAR is authorized to block the promulgation of permanent rules when they exceed the agency's explicit authority.¹⁴⁸

¹⁴³ Wis. Stat. § 227.26(2)(d).

¹⁴⁴ Wis. Stat. § 227.26(2)(im).

¹⁴⁵ Wis. Stat. § 227.26(2)(f), (i).

¹⁴⁶ Wis. Stat. § 227.26(2)(b).

¹⁴⁷ Wis. Stat. § 227.24(1)(c), (2)(a).

¹⁴⁸ Wis. Stat. § 227.19(5)(d), (dm).