

## **Wisconsin Private School Choice Programs and Special Needs Scholarship Program**

Department of Public Instruction Authority

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.<sup>1</sup> Under the Special Needs Scholarship Program ("SNSP"), the state pays scholarships to participating schools on behalf of the parents of students with disabilities who enroll in the program.

WPCP and RPCP are created in Wis. Stat. § 118.60, MPCP in Wis. Stat. § 119.23 and SNSP in Wis. Stat. § 115.7915. The Department of Public Instruction ("DPI") has promulgated rules to administer and enforce MPCP in Chapter 35 of the Wisconsin Administrative Code, WPCP and RPCP in Chapter 48 and SNSP in Chapter 49. DPI has issued a series of policy documents including bulletins, checklists, FAQs, training materials, memos and forms, which summarize, interpret, specify and expand upon PSCP and SNSP statutory and rule requirements and, in some instances, create new ones. DPI also publishes guides for biannual enrollment audits, annual financial audits and other fiscal reports. The result is a complex and often confusing program structure for schools and applicants.

To enroll PSCP or SNSP students, schools must meet initial eligibility requirements such as pre-accreditation or accreditation, adoption of specified policies, submission of budgetary information and the payment of fees and then fulfill ongoing obligations including teacher licensing, hours of instruction, annual financial audits, standardized testing, and record retention. To participate in PSCP, students must meet residency and income requirements. Most RPCP and WPCP students must also meet prior year attendance requirements, unless enrolling in kindergarten or 1st or 9th grade.<sup>2</sup> Specifically:

- MPCP: Reside in the city of Milwaukee and family income not exceeding 300% of the Federal Poverty Level ("FPL") for family size.<sup>3</sup>
- RPCP: Reside in the Racine Unified School District ("RUSD") and family income not exceeding 300% of the FPL for family size.<sup>4</sup>
- WPCP: Reside in Wisconsin and outside of the city of Milwaukee and RUSD, and family income not exceeding 220% of the FPL for family size.<sup>5</sup> Overall participation in WPCP is capped in each school district. The cap is currently 6% of the school district

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

<sup>2</sup> Wis. Stat. §§ 118.60(2)(a), (2)(a)1.a., (2)(a)2., (2)(bm), 119.23(2)(a), (2)(a)1.a.

<sup>3</sup> Wis. Stat. § 119.23(2)(a), (2)(a)1.a.

<sup>4</sup> Wis. Stat. § 118.60(2)(a), (2)(a)1.a.

<sup>5</sup> Wis. Stat. § 118.60(2)(a), (bm).

membership and it increases by 1% through the 2025-26 school year. Beginning with the 2026-27 school year, the cap is lifted.<sup>6</sup> RPCP and WPCP applications must meet one of the prior year enrollment requirements for grades 2 through 8 and 10 through 12:

- Enrolled in a Wisconsin public school in the previous school year;
- Not enrolled in school in the previous school year;
- Attended school in another state in the previous school year;
- Enrolled in PSCP in the previous school year; or,
- On a waiting list for any PSCP school in the previous school year, including the WPCP waiting list resulting from the enrollment cap.<sup>7</sup>

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.<sup>8</sup> There is no income requirement to participate in SNSP and a student remains eligible until he or she graduates from high school or until the end of the school term in which he or she turns 21-years-old. Once enrolled in either program, a student’s residency is confirmed each year, but the income eligibility of PSCP students is not.<sup>9</sup> If family income exceeds the limits in future years, the student may remain in the program.<sup>10</sup> Under DPI rules, PSCP and SNSP students entering 4-year-old kindergarten (“4K”), 5-year-old-kindergarten (“5K”) and first grade must be 4-, 5- and 6-years old, respectively, by September 1.<sup>11</sup> A student may not participate in both SNSP and PSCP.<sup>12</sup>

MPCP and RPCP schools must accept eligible students on a random basis, although statutes allow a preference for certain students and their siblings.<sup>13</sup> Rejected applicants may be placed on a school waiting list for the following year. While the WPCP school district cap is in place, DPI will determine which students to accept on a random basis, subject to preferences allowed by statute.<sup>14</sup> If the district cap has been met, DPI must establish a waiting list in accordance with statutory preferences.<sup>15</sup> If a student is eligible for SNSP but no scholarships are available, he or

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<sup>6</sup> Wis. Stat. §§ 118.60(2)(be), 121.004(5).

<sup>7</sup> Wis. Stat. § 118.60(2)(a)2.

<sup>8</sup> Wis. Stat. § 115.7915(2), (2)(d).

<sup>9</sup> Wis. Stat. §§ 118.60(2)(a)1.a., 1.c., 1.d., (3)(b), (c), 119.23(2)(a)1.a., 1.d., (3)(b).

<sup>10</sup> Wis. Stat. §§ 118.60(2)(a)1., 119.23(2)(a)1.

<sup>11</sup> Wis. Admin. Code §§ 35.05(5), 48.05(5), 49.05(2); *see Application Process, Private School Choice Programs Informational Bulletin 01-01, March 2021, pg. 4.* 4K, 5K and first grade students must submit a completed Annotation of Birth Certificate form and an immunization form, if required by the school.

<sup>12</sup> Wis. Stat. §§ 118.60(4s), 119.23(4s).

<sup>13</sup> Wis. Stat. §§ 118.60(3)(a), 119.23(3)(a).

<sup>14</sup> Wis. Stat. § 118.60(3)(ar)3.

<sup>15</sup> Wis. Stat. § 118.60(3)(ar)3., 4.

she is placed on a waiting list.<sup>16</sup> SNSP and PSCP schools may add seats as allowed by DPI rules and policies.<sup>17</sup>

## **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 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. 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.<sup>18</sup>

Statutes require a school to notify DPI of its intent to participate (“ITP”) in PSCP or SNSP by January 10 each year and indicate the number of PSCP or SNSP students for which the school has space.<sup>19</sup> A new private school<sup>20</sup> must file its ITP by August 1 of the school year prior to its first year of participation and agree to comply with PSCP procedural requirements.<sup>21</sup> DPI requires a PSCP school’s choice administrator or the head of an SNSP school’s governing board to agree to comply with all program requirements. By signing the ITP, he or she acknowledges that compliance with program requirements constitutes a condition of receipt of funds and that failure to comply can result in termination from the program or the withholding of payments.<sup>22</sup> The SNSP intent to participate form specifically states:

I agree, on behalf of the private school, that the private school will comply with all of the requirements of the Special Needs Scholarship Program (“SNSP”) as set forth in Wis. Stat. § 115.7915, Wis. Admin. Code Ch. PI 49 and the department’s **trainings, guidance and bulletins.** (emphasis added) The agreement constitutes a condition of receipt of funds under the SNSP. I further understand and agree that this notice of intent to participate is binding upon the private school, its successors, transferees and assignees for the period during which the private school is a participant in the SNSP. I assure, on behalf of the private school, that

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<sup>16</sup> Wis. Admin. Code § PI 49.05(4)(c)2.

<sup>17</sup> See Wis. Admin. Code § PI 49.04(5); Application Process, Private School Choice Programs Informational Bulletin 01-01, rev. March 2021, pg. 2.

<sup>18</sup> See *Papa v. Wisconsin Department of Health Services*, 2020 WI 66.

<sup>19</sup> Wis. Stat. §§ 115.7915(3), 118.60(2)(a)3.a., 3.b., 119.23(2)(a)3.

<sup>20</sup> A new private school is one that has been in continuous operation in Wisconsin for less than 12 months and that provides education to fewer than 40 pupils divided into two or fewer grades. See Wis. Stat. §§ 118.60(1)(bn), 119.23(1)(ai).

<sup>21</sup> Wis. Stat. §§ 118.60(2)(ag)1.a., 119.23(2)(ag)1.a.

<sup>22</sup> 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.

all contractors, subcontractors, subgrantees and others with whom the private school arrange to provide services or benefits to its pupils, in connect with the SNSP, will not violate the requirements of SNSP.

I have read Wis. Stat. 115.7915 and Wis. Admin. Code ch. PI 49. I understand that Wis. Stat. 115.7915 and Wi. Admin. Code ch. PI 49 are subject to statutory and administration changes. In the event of failure to comply with the SNSP requirements, I understand that the school's participation in the SNSP can be terminated or payments withheld or both. By signing I understand and agree to comply with all of the provisions and requirements set forth in this document.<sup>23</sup>

While language in the PSCP ITP 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."<sup>24</sup> 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.

DPI can bar a school or withhold funds when the school fails to meet requirements that are explicitly permitted or explicitly required by statutes.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.

Statutes allow the superintendent to withhold payments from a school if the school violates Wis. Stat. § 118.60 requirements for WPCP and RPCP, Wis. Stat. § 119.23 requirements for MPCP, Wis. Stat. § 115.7915 requirements for SNSP or Wis. Stat. § 115.383(3)(b), which requires a

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<sup>23</sup> DPI Training: New SNSP Schools Notice of Intent to Participate; <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>.

<sup>24</sup> 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.

<sup>25</sup> Wis. Stat. § 227.10(2m).

<sup>26</sup> See *Clean Wisconsin v. Kinnard Farms*, 2021 WI 71; *Clean Wisconsin, Inc. vs. Wisconsin Department of Natural Resources*, 2021 WI 72.

<sup>27</sup> *Id.*

PSCP school to have a student information system (“SIS”). The superintendent is authorized to bar a school from participating in a PSCP as follows:

**Current School Year.** The superintendent may bar a school that:

- Intentionally or negligently misrepresented any information required under Wis. Stat. §§ 118.60 or 119.23 or any rule promulgated under those sections.
- Failed to provide required information by the due date or within a specified period:
  - Notice of intent to participate and auditor fee;
  - Annual financial audit;
  - Evidence of sound fiscal and internal control practices;
  - Certificate of occupancy; or,
  - Proof that the school’s administrator participated in a fiscal management training program approved by DPI.
- Failed to refund to the state by the date required in rule any overpayment made to the school, including summer school payments.
- Failed to provide mandatory information for applicants and parents:
  - Pupil test scores;
  - Academic standards;
  - School contact person and information;
  - Notice of for-profit or nonprofit status;
  - Appeals process for rejected applicants;
  - Policy and criteria for granting a high school diploma;
  - Nonharassment policy and enforcement;
  - Suspension and expulsion policies and appeal process;
  - Transfer of credit policy;
  - Visitor policy;
  - Names of school shareholders, if any; or,
  - Names of existing and new governing body members.
- Failed to comply with the requirements for:
  - Standardized testing;
  - Teacher aid qualifications;
  - Governing board meetings;
  - Progress records;
  - Diplomas;
  - Academic standards;
  - Visitor policies;
  - Participation in religious activities;
  - Criminal background checks; or,

- Submission of surety bond or anticipated budget by a first time participating school.
- Violated requirements to do the following:
  - Maintain progress records for at least five years;
  - Provide progress records upon request of student or parent/guardian; or,
  - Issue a high school diploma or certificate to each student who satisfactorily completes the course of instruction and any other requirements necessary for high school graduation.
- Retained a disqualified person during the seven years after an order to bar or terminate is issued as an employee, administrator, owner or officer or as a volunteer, director, trustee, person responsible for administrative, financial or student health and safety matters or person designated to assist with the processing of applications. A disqualified person includes an administrator or a controlling owner, trustee, director, person designated to assist with processing application or person whose actions led to the order to bar or terminate.<sup>28</sup>

**Following School Year.** The superintendent may bar a school that:

- Failed to submit proof of accreditation and a notice prepared by the accrediting entity, or to notify DPI that accreditation status has changed;
- Was denied accreditation by the accrediting agency;
- Did not achieve accreditation by December 31 of the third school year following the first school year in which it participated in PSCP; or,
- Intentionally or negligently misrepresented any information required by statute or rule promulgated under statute.<sup>29</sup>

**End of Current School Year.** The superintendent must bar a school that:

- Failed to continuously maintain accreditation;
- Withdrew from the accreditation process; or,
- Had its accreditation revoked, denied or terminated.<sup>30</sup>

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<sup>28</sup> Wis. Stat. §§ 118.60(10)(a), 119.23(10)(a).

<sup>29</sup> Wis. Stat. §§ 118.60(10)(am), 119.23(10)(am).

<sup>30</sup> Wis. Stat. §§ 118.60(10)(ar), 119.23(10)(ar).

**Immediately.** The superintendent may bar a school if he or she determines that the conditions at the school present an imminent threat to the health or safety of the students.<sup>31</sup>

DPI may bar a school from participating in SNSP for any period of time if it determines the school has done any of the following:

- Intentionally or negligently misrepresented any information required under Wis. Stat. § 115.7915 or a rule promulgated under that section.
- Routinely failed to comply with the requirement to submit an annual financial audit or file a surety bond or financial information demonstrating the school has the ability to pay an amount equal to the total amount of scholarships expected to be received by the school during the school year.
- Used a child's scholarship for any purpose other than an educational purpose or rebated, refunded or shared a scholarship with a child or child's parents.
- Failed to refund to the state within 60 days any scholarship overpayments.<sup>32</sup>

At times, 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.<sup>33</sup> For example, statutes require a PSCP school to provide the same hours of instruction as a public school<sup>34</sup> and to adopt criteria for promoting students from grade 4 to grade 5 and from grade 8 to grade 9.<sup>35</sup> They also require both PSCP and SNSP schools to comply with all health and safety laws or codes that apply to public schools.<sup>36</sup> PSCP and SNSP schools must also comply with statutory requirements applicable to all private schools like reporting threats of school violence,<sup>37</sup> filing an annual report, PI-1207, detailing hours of instruction and pupil counts, among other things,<sup>38</sup> and complying with work-based learning program rules.<sup>39</sup> DPI may not apply other public school district governance and finance requirements to PSCP and SNSP schools unless also specifically required by statute.

## **Summary of Issues**

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<sup>31</sup> Wis. Stat. §§ 118.60(10)(b), 119.23(10)(b).

<sup>32</sup> Wis. Stat. § 115.7915(8)(a).

<sup>33</sup> Wis. Stat. § 227.10(2m).

<sup>34</sup> Wis. Stat. §§ 118.60(2)(a)8., 119.23(2)(a)8.

<sup>35</sup> Wis. Stat. § 118.33(6)(c), (cr).

<sup>36</sup> Wis. Stat. §§ 115.7915(6)(a), 118.60(2)(a)5., 119.23(2)(a)5.

<sup>37</sup> Wis. Stat. § 175.32(2)(3).

<sup>38</sup> Wis. Stat. §§ 115.30(2), 118.16(3), 120.18.

<sup>39</sup> Wis. Stat. § 118.56.

In its guidance to new PSCP schools and in the SNSP ITP acknowledgement language, DPI claims that its authority exceeds that in statutes. 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 for intentional and negligent misrepresentations and specific acts or omissions as described above. Regardless of whether statutes are amended, the ITP and any other documents containing similar language should be revised.

## **APPLICANT REQUIREMENTS AND DOCUMENTATION**

DPI has established application processes that are complex and often confusing. 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.

DPI has designated the Online Parent Application ("OAS") as the form on which a student must apply to PSCP.<sup>40</sup> Statutes require a PSCP school to maintain either a paper or an electronic copy of each application and related correspondence.<sup>41</sup> Administrative rules require document retention for five years and specifically list income and residency documentation and notices of acceptance or rejection as required documents.<sup>42</sup>

A student applies to SNSP or requests a transfer on a paper form prepared by DPI and the school enters the application information into Kiteworks, a file sharing platform on which schools can upload information to DPI and download reports.<sup>43</sup> Administrative rules require an SNSP school to retain for five years the copies of all documentation required for the application by rules, documentation received when a student with a disability is reevaluated by the local education agency ("LEA") and quarterly reports made to parents.<sup>44</sup> Application periods for each program are as follows:

- SNSP: Anytime during a school year (July 1 through June 30) for that school year.<sup>45</sup> Administrative rules require an SNSP school to make an eligibility determination within 21 days of receiving the application.<sup>46</sup> The school must then notify the student of

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<sup>40</sup> Wis. Stat. §§ 118.60(3)(a), 119.23(3)(a); Application Process, Private School Choice Programs Informational Bulletin 01-01, rev. March 2021.

<sup>41</sup> Wis. Stat. §§ 118.60(7)(dr), 119.23(7)(dr).

<sup>42</sup> Wis. Admin. Code §§ PI 35.06(4), 48.06(4).

<sup>43</sup> Wis. Stat. § 115.7915(2)(f); Wis. Admin. Code § PI 49.05(5); Student Application and Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02 (ver. 2), rev. June 2020; SNSP Application Submission Print Screens; SNSP Transfer Request Form Submission Print Screens, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/student-applications-processing>.

<sup>44</sup> Wis. Admin. Code § PI 49.06(1).

<sup>45</sup> Wis. Stat. §§ 115.001(2), 115.7915(2)(f); Wis. Admin. Code. § PI 49.02(17).

<sup>46</sup> Wis. Admin. Code § PI 49.05(4).

acceptance or rejection within seven days of confirming that the student's IEP or services plan is in effect.<sup>47</sup>

- WPCP: First weekday in February through the third Thursday in April.<sup>48</sup>
- MPCP and RPCP:
  - First weekday in February through February 20
  - March 1 through March 20
  - April 1 through April 20
  - May 1 through May 20
  - June 1 through June 22
  - July 1 through July 22
  - August 1 through August 20
  - September 1 through September 14
- MPCP (for second semester participation):
  - October 1 through October 20
  - November 1 through November 20
  - December 1 through January 5<sup>49</sup>

A school must notify a PSCP applicant of acceptance or rejection no later than 60 days after the end of the application period.<sup>50</sup> Statues and administrative rules require a WPCP school to make an eligibility determination by the first weekday in May.<sup>51</sup> An RPCP or MPCP school must make an eligibility determination prior to the earliest of the following:

- Random selection;
- The next application period;
- Within 60 days after the school receives the application; or,
- Prior to the next count date.<sup>52</sup>

Administrative rules provide that PSCP applications are ineligible under the following circumstances:

- The application contains contradictory information.<sup>53</sup>

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<sup>47</sup> Wis. Admin. Code § PI 49.05(7r).

<sup>48</sup> Wis. Stat. § 118.60(3)(ar).

<sup>49</sup> Application Process, Private School Choice Program Informational Bulletin 01-01, rev. March. 2021, pg. 2.

<sup>50</sup> Wis. Stat. §§ 128.60(3)(a), 119.23(3)(a).

<sup>51</sup> Wis. Stat. § 118.60(3)(ar)2.; Wis. Admin. Code § PI 48.06(2)(b).

<sup>52</sup> Wis. Admin. Code §§ PI 35.06(2), 48.06(2)(a).

<sup>53</sup> Wis. Admin. Code §§ PI 35.05(7), (8), 48.05(7), (8).

- The application does not comply with pupil application requirements in the rules or those in Wis. Stat. §§ 118.60, 119.23 or 115.7915 and a correction is not allowed by rules. Application requirements in statute relate to form, timing and eligibility as described above.<sup>54</sup> Application requirements in rules include:
  - Proof of residency by the parent;
  - Verification by the school that address is in the school district on the application;
  - Proof of income by the parent; and
  - Income verification.

SNSP administrative rules do not include similar language related to ineligibility.

Some PSCP and SNSP application requirements are unnecessarily complicated by administrative rules. When these requirements are not explicitly required or permitted by statute, they should be repealed. When they are required or permitted but create an unnecessarily complex and confusing process, revisions should be considered.

DPI has also established policies to implement the administrative rule application requirements by establishing exhaustive procedures for submitting and reviewing applications upon which student eligibility is assessed. A 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,
  - To govern the organization or procedure of the agency.<sup>55</sup>

Many of DPI's policies described below are standards or regulations. They are of general application because they describe a class in general terms i.e., PSCP or SNSP schools and applicants, and because new members can be added to the class.<sup>56</sup> They have the effect of law because DPI claims authority to find students ineligible and to withhold payments from schools or bar schools for failure to comply. Finally, they implement, interpret and make specific statutory requirements and also establish agency procedures during enrollment periods and audits.

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<sup>54</sup> Wis. Stat. §§ 115.7915(2)(d), (f), (h), (3)(bm), 118.60(2), (2)(a)2., (2)(bm), (3)(a), (ar), 119.23(2), (2)(a)1.a., (3)(a).

<sup>55</sup> Wis. Stat. § 227.01(13). See also, *Wisconsin Legislature v. Palm*, 2020 WI 42.

<sup>56</sup> *Wisconsin Legislature v. Palm*, ¶21, 22 (citations omitted). It is the persons regulated rather than the type of factual circumstances that determine whether it is of general application.

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, ensures notice and comment before requirements are revised.<sup>57</sup>

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 Court recently reviewed a similar practice of the Wisconsin Department of Health Services (“DHS”) to seek recoupment from health care providers when a post-payment audit found the provider records were not perfect. DHS relied on an agency handbook which stated that “[f]or a covered service to meet program requirements, the services must...meet all program requirements, including but not limited to...documentation requirements” for the authority to enforce this Perfection Policy as it was dubbed by the Court.<sup>58</sup> Since statutes did not explicitly permit or allow DHS to recoup payments to healthcare providers for documentation shortcomings, the Court found the policy unenforceable.<sup>59</sup> Even under the broad definition of explicit established after this case, the Court’s conclusion is sound since the policy was not otherwise linked to verification of covered services, claim appropriateness or claim accuracy – all of which could impact recoupment under the statutes.<sup>60</sup>

Like the DHS Perfection Policy, DPI policies are designed in part to withhold or recoup payments to schools for application shortcomings or for the failure of schools to follow and document procedures not established in statute or rule. These policies fail to differentiate between missing or incomplete documentation that prevents residency and income verification and mere document imperfections. Likewise, they do not differentiate between a school’s failure to confirm eligibility and failure to complete certain procedural steps. In short, statutes do not explicitly require or permit DPI to declare a student ineligible for PSCP or SNSP for document shortcomings when a student is eligible under the statutory criteria.

## **Proof of Residency**

Administrative rules require a PSCP school to verify that a student lives in a school district covered by the program as part of its eligibility determination.<sup>61</sup> An SNSP school must verify that the student address on the application matches the school district on the application.<sup>62</sup> Rules also require a PSPC or SNSP school to obtain “one of the proof of residency documents specified by DPI” that shows the applicant lives at the address on the application at the time of

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<sup>57</sup> See e.g., Wis. Stat. §§ 227.16, 227.135, 227.136, 227.137, 227.19, 227.29.

<sup>58</sup> *Wisconsin Legislature v. Palm*, ¶8.

<sup>59</sup> *Papa v. Wisconsin Department of Health Services*, 2020 WI 66.

<sup>60</sup> *Id.*, ¶41.

<sup>61</sup> Wis. Admin. Code §§ PI 35.05(3), 48.05(3).

<sup>62</sup> Wis. Admin. Code § PI 49.05(4)(a)1.

the application.<sup>63</sup> The only standards and requirements for a residency document that are explicitly required or permitted by the rule are:

- It must be dated no earlier than three months prior to the open application period for PSCP and prior to the date of application for SNSP;
- If a lease is the residency document, the lease term must include the date the application was received;
- The residency document must contain the name of the parent on the application; and,
- The address on the residency document must match the address on the application.

DPI policies establish allowable means of school district verification and allowable proof of residency documentation, which must be confirmed during the enrollment audit.<sup>64</sup> Schools may complete the school district verification using only specified sources or another source permitted by DPI, which are established in a DPI policy.<sup>65</sup>

	<b>Administrative Rule Allowable Sources</b>	<b>DPI Allowable Sources</b>
MPCP	City assessor website Statewide Voter Registration System	Map It Milwaukee Election Commission Property tax bill County Clerk or County Assessor website Statewide parcel map School District online interactive boundary map
RPCP	RUSD transportation information Statewide Voter Registration System	Property tax bill County Clerk or County Assessor website Statewide parcel map School District online interactive boundary map
WPCP	Statewide Voter Registration System	Property tax bill County Clerk or County Assessor website Statewide parcel map School District online interactive boundary map

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<sup>63</sup> Wis. Admin. Code §§ PI 35.05(2), 48.05(2), 49.05(4)(a)2.

<sup>64</sup> 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; Special Needs Scholarship Program Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pgs. 25, 30-31.

<sup>65</sup> Residency Documentation, Private School Choice Programs Informational Bulletin, 04-01, rev. Jan. 2021, pg.3; Residency Documentation, Special Needs Scholarship Programs Informational Bulletin, 01-03, rev. June 2020, pg. 3.

SNSP	Statewide Voter Registration System	Map It – Milwaukee Only Milwaukee election Commission RUSD Transportation Website Property tax bill – January through April apps and transfer request only unless it has a billing date that meets the residency date or the parent can show when the bill was sent MyVote County Clerk or County Assessor website Statewide parcel map School District online interactive boundary map
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Only the following residency documents are permitted.<sup>66</sup>

- Wage statement or W2, but this is not acceptable for an application received after April.
- Water, sewer, gas, electric, cable, satellite or landline phone bill. Schools should use the bill date or the last meter reading date on a utility bill. A letter from one of the above sent to the address on the application (establishing new service or a past due notice). Cellular phone bills and internet-only bills are not acceptable.
- Governmental correspondence, e.g., property tax bill, SSI, W2, TANF, Food Share, USPS or Housing Assistance. Printed documents from Access.gov can be used as residency support if the statement includes a date that shows it meets the date requirement and the parent name.
- Signed and dated lease agreement with a term that includes the date the application was received. Expired leases are not accepted. A month-to-month lease is acceptable only if the start date is between three months before the start of the open application period and the end of the period. Rent receipts are not an allowable residency document.
- Homeless individuals may identify a location of residence if (1) it is an identifiable location that could conceivably serve as temporary residence and (2) he/she provides a letter on from a shelter or public or private organization providing services on the organization's letterhead with the signature of a representative indicating the family lived there during required dates.
- Safe at Home card if the family participates in the Safe at Home program through the Wisconsin Department of Justice. The school must do the following:
  - Verify that the parent/guardian first and last name on the card match the online application.

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<sup>66</sup> 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.

- Determine that the card is not expired. If it is, the family must get a new card or they must update and submit the PSCP application without using the Safe at Home option.
- Verify the address on the card matches the address in the online application.
- Alternative residency verification form. When a parent does not have any of the above referenced documents, but someone else living at the address with the student is able to provide a residency document. The household occupant must provide the proper residency documentation and certify that the student lives with him or her and that the explanation provided of the living situation is correct.<sup>67</sup>

Administrative rules require DPI to establish school district verification methods and allowable residency documents without input from schools and parents. The allowable residency documentation is extremely limited and excludes valid sources that may be accessible to families, including a number those used to establish residency for voting.<sup>68</sup>

### **Proof of Income**

Statutes provide two methods for verifying the income of a PSCP family. The Department of Revenue (“DOR”) will verify income upon receipt of the parents’ social security numbers and marital status, names of all family members residing in the household and the year for which income is being verified.<sup>69</sup> If DOR is not able to verify income, parents must use the DPI alternative income verification method by responding to a series of questions in the online parent application.<sup>70</sup> Administrative rules require a school to obtain “income documentation required by the parent application.”<sup>71</sup> The school must then determine the following:

- That the income documentation matches the information provided on the application;<sup>72</sup> and,
- That the student is income eligible based on the family size and prior year income.<sup>73</sup>

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<sup>67</sup> Private School Choice Programs Alternative Residency Verification, PI-PCP-51, rev. Jan. 2017; Special Needs Scholarship Program Alternative Residency Verification, PI-SNSP-0005, rev. Sept. 2018.

<sup>68</sup> 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 license, 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 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.

<sup>69</sup> Wis. Stat. §§ 118.60(2)(a)1.b., 119.23(2)(a)1.b.

<sup>70</sup> *Id.*

<sup>71</sup> Wis. Admin. Code §§ PI 35.05(4)(b)1., 48.05(4)(b)1.

<sup>72</sup> *Id.*

<sup>73</sup> Wis. Admin. Code §§ PI 35.05(4)(b)2., 48.05(4)(b)2.

If the parent indicates income was received, he or she must enter the adjusted gross income from the 1040 and submit the return, if filed.<sup>74</sup> If one was not filed, the parent must indicate the income received in the previous tax year and submit a W-2 tax form or a final December earnings statement, and any 1099 forms. A person receiving social security benefits receives an SSA-1099 and must include this as income received.<sup>75</sup> No documentation is required for cash income, but the parent must indicate the source of the income.

If a parent did not receive income, the application must contain an explanation of how basic needs are met.<sup>76</sup> Government assistance, with the exception of social security benefits, is not income. If government assistance was received, the parent must provide documentation for each program listed in the online parent application.<sup>77</sup> If a child is in kinship or foster case, the income of the parents is not counted.<sup>78</sup>

### **Documentation Matching Components**

DPI policies interpret the administrative rule requirements that a PSCP or SNSP family's proof of residency document contain "the name of the parent on the application" and "match the address" on the application<sup>79</sup> and that the income documentation for PSPC families "match the information provided on the application."<sup>80</sup> DPI has released dozens of pages of explanations on the required matching components of names and addresses, when corrections are or are not required, when corrections require additional documentation, and the allowable processes for corrections.<sup>81</sup>

The street number, direction, name and suffix, and city and state (but not the unit number or zip code) on the residency documentation must match the information in OAS.<sup>82</sup> If the same documentation is used for income verification, the address must match. If a different income document is used, an address match is not required since the document is from the previous tax year and may be out of date.<sup>83</sup>

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<sup>74</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

<sup>75</sup> *Id.*

<sup>76</sup> Wis. Admin. Code §§ PI 35.05(4)(b)3., 48.05(4)(b)3.

<sup>77</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021, pg. 10.

<sup>78</sup> *Id.* at pg. 11.

<sup>79</sup> Wis. Admin. Code §§ PI 35.05(2), 48.05(2), 49.05(4)(a)2.

<sup>80</sup> Wis. Admin. Code §§ PI 35.05(4)(b)1., 48.05(4)(b)1.

<sup>81</sup> 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 Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

<sup>82</sup> Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021, pg. 6; Residency Documentation, Special Needs Scholarship Program Informational Bulletin 01-03, rev. June 2020, pg. 5.

<sup>83</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

The first and last name of the parent in OAS must match the first and last name on the residency and income documentation, but a middle name, middle initial or suffix need not match.<sup>84</sup> If the documentation contains a misspelling or a nickname or drops part of a hyphenated name, corrections can be made without obtaining new documentation.<sup>85</sup>

## **Application Corrections**

An SNSP application is considered received when the application and residency documentation are submitted to the school.<sup>86</sup> For an SNSP transfer request, the school must also receive the IEP or services plan.<sup>87</sup> Under administrative rules, if an SNSP application or transfer request is missing residency documentation, the school may correct it if the student was not counted on a previous count date and the applicant provides the missing documentation by the due date of the enrollment audit.<sup>88</sup>

A PSCP school must receive residency and income documentation during the open application in which the application is received.<sup>89</sup> According to DPI policies, a PSCP application is complete when a school receives the online parent application, proof of income eligibility, if required, proof of residency and a completed Annotation of Birth Certificate Form for 4K, 5K or first grade students.<sup>90</sup> Corrections to the PSCP online application may be made through December 15 for those received prior to the third Friday in September and by the first weekday in May for those received after third Friday in September or by the last weekday in June for an MPCP-only school (i.e., the due dates of the enrollment audits).<sup>91</sup> A PSCP school may correct residency documentation through these dates as long as the documentation originally submitted contains an address and the parent's name, even if it is misspelled, abbreviated or a nickname.<sup>92</sup> A school may likewise correct income documentation if the documentation originally submitted was not the allowable type or was not for the correct year.<sup>93</sup> DPI policies however differentiate between types of corrections and establish three different deadlines for when they may be made: the end of the open application period, the date of the school's eligibility determination and the due dates of the enrollment audits.

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<sup>84</sup> Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021, pg. 6; Residency Documentation, Special Needs Scholarship Program Informational Bulletin 01-03, rev. June 2020, pg. 6.

<sup>85</sup> *Id.*

<sup>86</sup> Wis. Admin. Code § PI 49.05(3).

<sup>87</sup> Wis. Admin. Code § PI 49.05(5)(b).

<sup>88</sup> Wis. Admin. Code § PI 49.07(3)(m), (t).

<sup>89</sup> Wis. Admin. Code §§ PI 35.05(6), 48.05(6).

<sup>90</sup> Application Process, Private School Choice Program Informational Bulletin 01-01, rev. March 2021. If a school requires immunization records, those must also be submitted.

<sup>91</sup> Wis. Admin. Code §§ PI 35.05(8)(a), 48.05(8)(a),

<sup>92</sup> Wis. Admin. Code §§ PI 35.05(8)(b), 48.05(8)(b).

<sup>93</sup> Wis. Admin. Code §§ PI 35.05(8)(c), (d), 48.05(8)(c), (d).

## PSCP Residency

### *Allowable Corrections through the Enrollment Audit*

DPI policies allow the following corrections through the due date of the enrollment audits regardless of when they are discovered:<sup>94</sup>

- Correct the student name, date of birth, gender or grade level on the parent application or in OAS.
- Correct the parent name on the parent application or in OAS. The middle initial or name and suffix need not match.
- Correct the address on the parent application or in OAS. Street number, direction, name, and suffix and the city and state must match the residency document. The unit number and zip code need not match.
- Correct the address if the street name, street suffix or city is misspelled on the residency documentation with a parent letter or email stating the correct address (which must match the school district verification document and OAS) and that the street name, street suffix and or city is misspelled on the documentation. If a street direction or suffix is abbreviated on one document and spelled out on another, corrections are not necessary.
- Correct a parent name that is misspelled, abbreviated or shortened on the residency document with a parent letter or email to the school stating “my correct legal name is [the name in OAS]. The name on my residency documentation is [incorrect name on documentation]. My name is incorrectly spelled on the documentation and correct on the Online Parent Application.”<sup>95</sup> Such a correction is not required for spacing, apostrophe, hyphen or capitalization differences. Examples requiring corrections include: Jenifer vs. Jennifer, Dan vs. Daniel, Gonzalez-Dominquez vs. Gonzalez.
- Correct a parent name on the residency document when the parent’s legal name has changed.<sup>96</sup> Under its policies, DPI will accept a marriage certificate, divorce decree, or certificate of citizenship as evidence of a name change. But since schools are not permitted to copy several of these documents, they must do the following:

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<sup>94</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021; 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; Processing and Verifying Applications, Private School Choice Programs, Application Verification and Corrections FAQ – 2021-22 School Year.

<sup>95</sup> Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2020, pg. 6; Residency Documentation, Special Needs Scholarship Program Informational Bulletin 01-03, rev. June 2020, pg. 6.

<sup>96</sup> Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2020, Appendix C; Residency Documentation, Special Needs Scholarship Program Informational Bulletin 01-03, rev. June 2020, Appendix C.

- Birth certificate: Complete a copy of the Annotation of Birth Record/Facts Form.
- Marriage certificate: Draft a letter that includes (1) the first and last name of both parents, (2) the date of the marriage, (3) the government entity that issued the license and (4) the signature of the school employee drafting the letter and the date.
- Certificate of naturalization or certificate of citizenship: Draft a letter that includes (1) the individual's legal name, (2) the date the document was issued, (3) the government entity that issued the document and (4) the signature of the school employee drafting the letter and the date.<sup>97</sup>

When an auditor discovers that a parent submitted a document not allowed by DPI rules or policies, a document without the required date or a document with a name or address lacking required matching components, it must be corrected by obtaining new documentation.

According to the DPI enrollment audit guides, as long as the original documentation contained a parent name and address, the school can obtain new residency documentation by the due date of the enrollment audit.<sup>98</sup> The new document must be in the parent's name, contain the parent's correct address and be one of the residency documents specified by DPI as described above.<sup>99</sup> If the document does not meet all of these requirements, the application is ineligible.<sup>100</sup>

#### *Allowable Corrections through Eligibility Determination*

When a school discovers that a parent submitted a document not allowed by DPI policies, a document without the required date or a document with a name or address lacking required matching components, it must be corrected by obtaining new documentation.<sup>101</sup> According to DPI policies, as long as the original documentation contained a parent name and address, the school can obtain new residency documentation by the date of the eligibility determination.<sup>102</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> See DPI Auditor In Depth Training: Choice Applications, Aug. 2020. The training provides that if a school identifies a documentation error, it may not find the application eligible until new documentation is received. If the school did not identify the error, but the auditor does, the school may obtain new documentation by December 15 or the due date of the January enrollment audit.

<sup>99</sup> Wis. Admin. Code §§ PI 35.05(8)(b), 48.05(8)(b), 49.07(3)(m), (t).

<sup>100</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pgs. 27-28.

<sup>101</sup> Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021, pg. 7.

<sup>102</sup> See DPI Auditor In Depth Training: Choice Applications, Aug. 2020. The training provides that if a school identifies a documentation error, it may not find the application eligible until new documentation is received. If the school did not identify the error, but the audit does, the school may obtain new documentation by December 15 or the due date of the January enrollment audit.

This policy's impact on schools and applicants is significant since schools have a small window to make an eligibility determination. Administrative rules set determination deadlines that generally occur much sooner than notifications of acceptance or rejection made no later than 60 days after the end of the application period.<sup>103</sup> DPI establishes multiple application periods for PSCP and MPCP<sup>104</sup> and administrative rules require the eligibility determination to be made prior random selection, the next application, within 60 days after the school receives the application or prior to the next count date, whichever occurs first.<sup>105</sup> The WPCP application period ends on the third Thursday in April<sup>106</sup> and schools must make eligibility determinations by the first weekday in May,<sup>107</sup> the same day statutes require schools to provide DPI the number of students who applied and the names of applicants whose sibling have also applied.<sup>108</sup> With that information, DPI must determine whether the number of applicants in any school district exceeds the enrollment cap triggering the need for random selection.<sup>109</sup>

The only correction deadlines set by administrative rules are the due dates of the enrollment audits and the audit guides make no reference this earlier deadline set by DPI policies.<sup>110</sup> The auditor is required only to ensure that all documentation was received during the open application period in which the application was received unless corrections are allowed.<sup>111</sup> Accordingly, documentation that supports the address and income information provided by the parent but contains minor errors that do not prevent an eligibility determination are correctable through the date established in administrative rules.

### PSCP Income

#### *Allowable Corrections through the Enrollment Audit*

According to DPI policies, only the following corrections may be made through the due dates of the enrollment audits.

- Correct a parent name that is misspelled, abbreviated or shortened with a parent letter or email to the school stating “my correct legal name is [the name in OAS]. The name on my residency documentation in [incorrect name on documentation]. My name is incorrectly spelled on the documentation and correct on the Online Parent Application.” Such a correction is not required for spacing, apostrophe, hyphen or capitalization

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<sup>103</sup> Wis. Stat. §§ 118.60(3)(a); 119.23(3)(a); Wis. Admin. Code §§ PI 35.06(2), 48.06(2)(a), (b).

<sup>104</sup> Application Process, Private School Choice Program Informational Bulletin 01-01, rev. March 2021, pg. 2.

<sup>105</sup> Wis. Admin. Code §§ 35.06(2), 48.06(2)(a).

<sup>106</sup> Wis. Stat. § 118.60(3)(ar)1.

<sup>107</sup> Wis. Admin. Code § PI 48.06(2)(b).

<sup>108</sup> Wis. Stat. § 118.60(3)(ar)2.

<sup>109</sup> Wis. Stat. § 118.60(3)(ar)3.

<sup>110</sup> Private School Choice Programs Audit Guide Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 22.

<sup>111</sup> *Id.*

differences. Examples include: Jenifer vs. Jennifer, Dan vs. Daniel, Gonzalez-Dominquez vs. Gonzalez.<sup>112</sup>

- Correct a parent name on the income documentation when the parent's legal name has changed by submitting a marriage certificate, divorce decree, or certificate of citizenship as evidence of a name change. But since schools are not permitted to copy several of these documents, they must do the following:
  - Birth certificate: Complete a copy of the Annotation of Birth Record/Facts Form.
  - Marriage certificate: Draft a letter that includes (1) the first and last name of both spouses, (2) the date of the marriage, (3) the government entity that issued the license and (4) the signature of the school employee drafting the letter and the date.
  - Certificate of naturalization or certificate of citizenship: Draft a letter that includes (1) the individual's legal name, (2) the date the document was issued, (3) the government entity that issued the document and (4) the signature of the school employee drafting the letter and the date.<sup>113</sup>
- Correct any error or documentation deficiency noted by an auditor. Administrative rules allow a PSCP school to obtain additional documentation when the original documentation was not for the correct year or was not the required document type.<sup>114</sup> When there is no income, the auditor must either obtain a tax transcript verification of nonfiling for all parents on the application and the required documentation showing government assistance received, or obtain a tax transcript showing all parents on the application did not have any adjusted gross income.<sup>115</sup> When income is indicated, the auditor must obtain a tax transcript for all parents on the application and verify that it shows the family to be income eligible.<sup>116</sup> However, this correction method is unworkable in two instances. First, if the IRS does not provide the tax transcript in a timely manner. Second, if a parent is recently divorced, separated or widowed. DPI advises that if the 1040 indicates ineligibility with the spouse's income included, the

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<sup>112</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021; Processing and Verifying Applications, Private School Choice Programs, Application Verification and Corrections FAQ – 2021-22 School Year, pg. 16.

<sup>113</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021; Processing and Verifying Applications, Private School Choice Programs, Application Verification and Corrections FAQ – 2021-22 School Year, pg. 17.

<sup>114</sup> Wis. Admin. Code §§ PI 35.05(8)(c)-(e), 48.05(8)(c)-(e).

<sup>115</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 23.

<sup>116</sup> Wis. Admin. Code §§ PI 35.05(8)(c), 48.05(8)(c); Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021; Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 23.

parent should use the DPI determination method.<sup>117</sup> In that case, the parent indicates that he or she did not file a 1040 (since it would not accurately represent his or her income) and then provides information about only his or her income and government assistance received.<sup>118</sup> Since a tax transcript is required to correct any documentation errors by a parent in this situation, it appears the application will be found ineligible.

#### *Allowable Corrections through Eligibility Determination*

When a school discovers that income documentation was not the required document type or was for the wrong year, corrections are made in the same manner as when discovered by an auditor. If income was indicated, the school must obtain a tax transcript for all parents on the application that shows the family is income eligible. Again, this method of correction appears unworkable if the IRS does not provide the tax transcript or if a parent is recently divorced, widowed or separated. When there is no income, the school must obtain a tax transcript showing all parents on the application did not have any adjusted gross income.<sup>119</sup> The only correction deadlines set by administrative rules are the due dates of the enrollment audits. The auditor must ensure that all documentation was received during the open application period in which the application was received unless corrections are allowed, but the audit guide does not reference corrections that must be made by the eligibility determination.<sup>120</sup> Documentation that supports the address and income information provided by the parent but contains minor errors that do not prevent an eligibility determination are correctable through the date established in rules.

#### *Allowable Corrections through End of Open Application Period*

Social Security Benefits vs. SSI: If a parent mistakenly classifies social security benefits as government assistance or SSI as income, he or she must correct the online parent application before the end of the application period. If not, the application must be determined ineligible.<sup>121</sup> It is not clear why the correction must be made by this date. If the total amount of income or assistance received is indicated on the online parent application, but entered in the wrong section, no information is missing.

Basic Needs Explanation: Administrative rules require a parent to provide a “sufficient explanation” of how basic needs were met when stating that no income was received.<sup>122</sup> Some acceptable explanations may include obtaining support from family or friends or identifying government assistance received, which must also be identified in the government assistance section of the parent application.<sup>123</sup> If the explanation is not sufficient, the school must find the

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<sup>117</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021, pg. 15.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 22.

<sup>121</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

<sup>122</sup> Wis. Admin Code §§ PI 35.05(4)(b)3., 48.05(4)(b)3.

<sup>123</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

application ineligible.<sup>124</sup> The auditor is to ensure that the explanation is sufficient.<sup>125</sup> In addition, if the explanation states that income was received, but the application does not, the application is ineligible.<sup>126</sup>

- If the explanation identifies government assistance, the school must obtain a statement from the assistance provider indicating the assistance received in the prior year.<sup>127</sup> If however the explanation of basic needs states that government assistance was received, but the application does not, the application is ineligible.<sup>128</sup>
- The explanation may not indicate the receipt of cash income. If it does, the parent must amend the application to include this as income.<sup>129</sup> According to the IRS, cash income is income received from an employer or self-employed activity, but this is not explicitly stated in DPI policies.<sup>130</sup> If cash gifts are to be included in this category, DPI must clarify the requirements. If there is cash income, DPI policies do not require the parent to provide documentation but does require the submission of information as to its source.<sup>131</sup>

**Other Income:** The DPI audit guides reference “other income” that is neither cash income nor income reported on a 1040, W2 Wage and Tax Statement, final December earnings statement, or 1099.<sup>132</sup> Supporting documentation is required when a parent reports other income. This is not referenced in DPI policies and it is unclear what it encompasses.

An application should not be found ineligible because a parent misclassified income when DPI policies are vague and not found in statute or administrative rule. Furthermore, neither an auditor nor DPI should have authority to second guess a school’s assessment of the basic needs explanation when no standard exists.

### SNSP Residency

Administrative rules allow an SNSP school to correct an application or transfer request that is missing residency documentation by the due date of the enrollment audit when an auditor identifies the missing information and the application was not counted on a previous count

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<sup>124</sup> Wis. Admin. Code §§ PI 35.05(4)(b)3., 48.05(4)(b)3.

<sup>125</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 23

<sup>126</sup> Wis. Admin. Code §§ PI 35.05(4)(b)4., 48.05(4)(b)4.

<sup>127</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021, pgs. 9-10.

<sup>128</sup> Wis. Admin. Code §§ PI 35.05(4)(b)4., 48.05(4)(b)4.

<sup>129</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

<sup>130</sup> *Id.* at 8, 10.

<sup>131</sup> *Id.*; Training 8-3: Income Requirements, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

<sup>132</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction.

date.<sup>133</sup> According to DPI policies, when an SNSP school identifies documentation errors during the 21 days prior to its eligibility determination, it may obtain correct documentation. If it does not do so within this time period, the application is ineligible.<sup>134</sup>

According to DPI policies, if the school determines that the school name or resident school district was incorrectly entered in the application or transfer request, the SNSP administrator must email DPI with the student name, date of birth, and identification of the information that needs to be corrected. If the school determines that any other information submitted to the department was incorrect, the school must notify the school's auditor of the required change.<sup>135</sup>

### SNSP Form of Corrections

According to DPI policies, an SNSP school must maintain a paper application or transfer request, with the “For School Use Only” section completed, to which all changes are made. Any corrections must be made with a strike through line and initialed by the SNSP administrator or designee. The school must have written documentation to support the change. An auditor must review corrections and if any were made with whiteout, the application or transfer request is ineligible for payment.<sup>136</sup> Since neither statutes nor administrative rules require DPI to find a student ineligible based on the form of corrections to an application, this policy is invalid.

### PSCP Form of Correction

When residency or income documentation is corrected with a new document, DPI policies require the school to retain the original, write “original” on it and write “correct” with the date received on the new document.<sup>137</sup> A school must be able to demonstrate documentation was originally received during the open application period as required by rules. But since administrative rules do not mandate how this must be done, failing to comply with the DPI policy does not make an application ineligible.

## **Application Verification**

### IEP or Services Plan Verification:

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<sup>133</sup> Wis. Admin Code § PI 49.07(3)(m), (t).

<sup>134</sup> Student Application and Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02, rev. June 2020 (ver. 2), pg 4.

<sup>135</sup> Student Application and Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02, rev. June 2020 (ver. 2).

<sup>136</sup> *Id.*; Special Needs Scholarship Program Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 21; Special Needs Scholarship Program Audit Guide, Enrollment Audit for February and May 2020 Payment Eligibility for January 10, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 20.

<sup>137</sup> Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021; Processing and Verifying Applications, Private School Choice Programs, Application Verification and Corrections FAQ – 2021-22 School Year; Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021.

To attend an SNSP school, a student with a disability must reside in Wisconsin and have an IEP or services plan in effect<sup>138</sup> and the school must request verification from the LEA that developed IEP or services plan.<sup>139</sup> According to DPI policies, if the LEA determines the student does not have an IEP or services plan that meets SNSP requirements but the parent has documentation indicating otherwise, the parent must contact the LEA directly regarding the discrepancy.<sup>140</sup> If the LEA determines that the parent is correct, the LEA should send the school a revised verification email with the corrected information. If the LEA does not do so before the deadline for accepting or rejecting students, the SNSP school must send the student a letter of denial. Since this deadline is established by administrative rule and not statute,<sup>141</sup> the rule could be amended to include an extension for the application or to place specific requirements on the LEA so that an LEA's mistake does not force a child to reapply.

#### Rerunning DOR Income Determination

DPI sets policies and procedures for, and limits on, rerunning income determinations due to a new tax information, DOR error or parent error.

#### *Incorrect DOR Determination*

Under DPI policies, a parent who believes the DOR ineligibility determination is incorrect must submit the ineligible application in the online parent application before the end of the open application period. The school must then rerun the DOR income eligibility determination to determine whether DOR has new records indicating the family meets the income eligibility requirements e.g., an amended return. Prior to June 2020, DOR and DPI took the position that income determinations could not be rerun. That month, the two agencies entered into a Memorandum of Understanding ("MOU") memorializing the process for rerunning the determination.<sup>142</sup> The MOU can be terminated by DOR and DPI at any time and no third party can rely on it for any purpose. For these reasons, school authority to rerun a determination and the process for doing so should be promulgated in a rule.

If a school reruns an income determination and DOR still indicates the family is ineligible, the school must request copies of the first two pages of the parents' 1040s from two years prior and one year prior, if they have been filed. If the school determines the application appears to be eligible after its review, it must send an email to DPI with the following:

- Application number;

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<sup>138</sup> Wis. Stat. § 115.7915(2), (2)(d).

<sup>139</sup> Wis. Stat. § 115.7915(3)(bm).

<sup>140</sup> Student Application & Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 02-01, rev. June 2020 (v2).

<sup>141</sup> Wis. Admin. Code § PI 49.05(7r).

<sup>142</sup> Memorandum of Understanding Between Wisconsin Department of Revenue And Wisconsin Department of Public Instruction, June 22, 2020.

- Email address used for the application;
- The Adjusted Gross Income on Line 11 of the prior year for all parents on the application or an indication that it has not been filed;
- The Adjusted Gross Income on Line 8B of the tax form from two years prior for all parents on the application or an indication that it has not been filed;
- An indication of whether either tax form was amended; and,
- The family size the school used for the income determination.<sup>143</sup>

There is no further indication of next steps or DPI's duties once it receives the information. Since this impacts an eligibility determination, the authority of schools and duty of DPI should be promulgated in a rule.

#### *Correction to Family Size*

When using the DOR income verification method, a PSCP applicant must provide family size since it is required to determine whether the family meets the FLP requirements for eligibility.<sup>144</sup> Under DPI policies, if a parent did not enter all family members on the application, the school must determine if the family would be income eligible when the family members are added.”<sup>145</sup> If the school determines that the application is income eligible, it must instruct the parent to submit the ineligible application and email the school the parent names and address, the student name, the name, address and relation to the student of the additional family member and whether the additional family member is in foster or kinship care.<sup>146</sup> According to DPI policies, it will review the email and determine whether the verification should be rerun. If rerun, it must be completed before the eligibility determination is made by the school.<sup>147</sup> The authority for and purpose of the DPI review of the additional family members is unclear. Since there is no limitation on how many times the DOR verification can be run, this is an unnecessary step in the process.

#### Kinship and Foster Care Verification

According to DPI, sufficient documentation confirming a kinship or foster care placement includes a verification letter, a check or check stub for foster or kinship care, court documents showing placement for foster care students, or a reassessment letter for payment under the kinship care program. The verification and reassessment letter must come from one of the contracted agents for

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<sup>143</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021, pg. 13-14.

<sup>144</sup> Wis. Admin. Code §§ PI 35.02(17), 48.02(17). Statutes refer to the FPL as determined by the federal Office of Management and Budget (“OMB”) but it appears that the United States Department of Health and Human Services is the agency that issues the FPL guidelines. See Federal Register, Vol. 85, No. 12, Friday, January 17, 2020. “Due to confusing legislative language dating back to 1972, the poverty guidelines sometimes have been mistakenly referred to as the “OMB” (Office of Management and Budget) poverty guidelines or poverty line. In fact, OMB has never issued the guidelines; the guidelines are issued each year by the Department of Health and Human Services.”

<sup>145</sup> Income Verification, Private School Choice Programs Informational Bulletin 04-02, rev. Jan. 2021, pg. 13-19.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

the kinship care agency. According to DPI, the documentation must be provided before the eligibility determination must be made for the application.<sup>148</sup>

### Transferring Applications of Movers

Statutes allow DPI to transfer the application of a WPCP student who moves after the end of the open application period and before the third Friday in August when the school has verified the student's eligibility and the student continues to reside in a district that is not RUSD or the city of Milwaukee.<sup>149</sup> The school to which the student wishes to transfer must have space available and the school district where it is located must be under the enrollment cap. DPI policies require the school to complete the school district verification, obtain residency documentation and email DPI by the third Friday in August the student name, the date of the residence change, the new address and school district, a statement that the school has space available for the student and that it has obtained the residency documentation and a parent email or signed letter showing the transfer request that includes the student name.<sup>150</sup> DPI will review the request and notify the school whether or not the application may be transferred shortly after the third Friday in August. If the transfer request is approved for a new student that used the DPI income determination method, the school that the student transferred to must obtain the income documentation from the school where the student had an accepted application.<sup>151</sup>

DPI policies also set the required procedures for transferring a WPCP application when a student wishes to stay at the same school.<sup>152</sup> If the student moves within the same school district, DPI need not be notified. If the student moves to a different school district outside of the city of Milwaukee or RUSD, the school must email DPI "as soon as possible" with the student name, new address and school district of the new address. DPI will "review the information and inform the school of next steps."<sup>153</sup>

If the student moves to the city of Milwaukee or RUSD, the student should apply to MPCP or RPCP at the school if it also participates in these programs. If the school does not have additional open application periods or seats available, DPI may transfer the accepted application to the school. The school must complete the school district verification, obtain new residency documentation and email DPI the student name, new address and new school district by the third Friday in August. DPI will review the request and notify the school whether or not the application may be transferred. After the third Friday in August, the school must complete the school district verification and obtain a residency document dated between the third Friday in August and the due date of the September count report for the auditor's review during the September enrollment audit.<sup>154</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> Wis. Stat. § 118.60(3)(ar)6.

<sup>150</sup> Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021, pg. 8.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 9.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 10.

Presumably, DPI will deny a transfer request only if the school district verification was incorrect or the district cap has been met, but this is not explicitly stated and should be clarified in rule. In addition, the statement that DPI will review a request to stay at the same school and inform the school of next steps is vague. Whatever these steps are, they should be established in a rule. Finally, it should be clarified in rule that if a school submits an incomplete request, it may supplement it.

## **Eligibility Determination**

**SNSP Application and Transfer Request Form:** Statutes require a student or parent to submit an application on a form prepared by DPI as described above. 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 that is acknowledged by the applicant.<sup>155</sup> Yet DPI policies require an applicant to complete a paper application or transfer request and sign it by hand in ink.<sup>156</sup> It can then be scanned and submitted to the school electronically.<sup>157</sup> The school enters the information from eligible applications for which the school has available seats into Kiteworks.<sup>158</sup> Under DPI policies, applications and transfer requests are ineligible if they are not signed, signed by hand or signed by a specific date.<sup>159</sup> These requirements do not exist in statute and are not a condition of eligibility.

## **Summary of Issues**

- Allowable school district verification methods are those established in administrative rule and any others allowed by DPI, which have been identified in department policies. It is unclear why all were not identified when the rule was promulgated. There may be a benefit to updating the rules or mirroring school district verification by public schools.
- Allowable proof of residency documentation is established in DPI policies. The allowable documents are extremely limited and only a fraction of those allowed for establishing residency for voting purposes. There are undoubtedly additional residency

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<sup>155</sup> Wis. Stat. § 119.7915(2)(f).

<sup>156</sup> Student Application Checklist 2020-21 School Year, Special Needs Scholarship Program, rev. June 2021; Transfer Request Checklist 2021-22 School Year, Special Needs Scholarship Program, rev. June 2021.

<sup>157</sup> Student Application and Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02, rev. June 2020 (v2).

<sup>158</sup> Application Submission Print Screens: Special Needs Scholarship Program 2020-21 Student Application, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/student-applications-processing>.

<sup>159</sup> Student Application and Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02, rev. June 2020 (v2); Student Application Checklist 2020-21 School Year, Special Needs Scholarship Program, rev. June 2021; Transfer Request Checklist 2020-21 School Year, Special Needs Scholarship Program, rev. June 2021; Special Needs Scholarship Program Audit Guide, Enrollment Audit for February and May 2020 Payment Eligibility for January 10, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 27.

documents that are accessible to families and there is likely a benefit to establishing them in administrative rules.

- While administrative rules set deadlines of December 15 and the due date of the January enrollment audit as the deadline for corrections to PSCP applications and documentation, DPI policies differentiate between types of corrections and establish three different deadlines for when they may be made: the end of the open application period, the date of the school's eligibility determination and the due dates of the enrollment audits. These differing deadlines are problematic since the schools have a small window in which to obtain corrected documentation and make an eligibility determination. The administrative rules should be followed and clarified as necessary.
- DPI policies interpret the administrative rule requirements that a PSCP or SNSP family's proof of residency document contain "the name of the parent on the application" and "match the address" on the application<sup>160</sup> and that the income documentation for PSCP families "match the information provided on the application." DPI policies establish required matching components of names and addresses, when corrections are or are not required, when corrections require additional documentation, and the allowable procedures for correcting errors in the parent's name and updating a parent's legal name. Since these policies establish requirements and procedures for determining eligibility, there is likely be a benefit to establishing them in administrative rules.
- DPI policies establish SNSP application form errors that render a student ineligible as well as the acceptable form corrections to PSCP residency and income documentation and SNSP application and transfer requests. However, statutes do not authorize DPI to deny eligibility due to the form rather than the substance of an application.
- Administrative rules put an SNSP applicant at a disadvantage when an LEA mistakenly notifies the school that an IEP or services plan is not in effect. Administrative rules could be revised to prevent a student having to reapply when the LEA does not correct the mistake in a timely manner.
- DPI policies require department approval before a school can rerun a DOR income determination after a parent adds family members to an application. There is no limit on how many times the determination may be rerun and there appears to be no basis for DPI approval. There is likely a benefit to clarifying these points in administrative rules.
- DPI policies do allow a school to rerun a DOR income determination when the parent believes the determination was incorrect. This is based on an MOU executed by DPI and DOR in 2020. Since either agency can terminate the MOU at any time and no third party may rely on it, its requirements should be promulgated as a rule.
- Parents are required to obtain a tax transcript from the IRS when making corrections to income documentation, but rules and policies do not address a situation where the IRS

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<sup>160</sup> Wis. Admin. Code §§ PI 35.05(2), 48.05(2), 49.05(4)(a)2.

does not provide it in a timely manner. Nor do they address a situation where the transcript will not accurately represent the income of a widowed, divorced or separated parent. These issues should be addressed in the administrative rules.

- DPI policies establish requirements for transferring the applications of WPCP students who move after the end of the application period and before the third Friday in August. Because the policies lack clarity about the reasons for which DPI may deny a request and the procedures DPI will follow in some instances, there is likely a benefit to establishing them in a rule.

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.<sup>161</sup> An agency may not enforce a rule while it is suspended and JCRAR may suspend a rule an unlimited number of times.<sup>162</sup> To make the suspension permanent, a new law must be enacted.<sup>163</sup> 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.<sup>164</sup> An emergency rule is in effect for 150 days and may be extended for a total of 120 days.<sup>165</sup> 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.<sup>166</sup>

## **DPI RULES LACKING STATUTORY AUTHORITY**

DPI has authority to promulgate administrative rules interpreting the provisions of a statute it enforces or administers, if it considers it necessary to effectuate the purpose of the statute.<sup>167</sup> Statutes do not need to direct DPI to write each specific rule, but any requirement, standard or threshold in a rule must be explicitly required or permitted by the statute. Prior to 2011, courts had determined that an agency's regulatory powers, including rulemaking authority, could be implied.<sup>168</sup> With 2011 Wisconsin Act 21 ("Act 21") however, the legislature significantly altered administrative powers by imposing this explicit authority requirement and rejecting implied powers.<sup>169</sup> As the Court noted last year in *Wisconsin Legislature v. Palm* (the lawsuit

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<sup>161</sup> Wis. Stat. § 227.26(2)(d).

<sup>162</sup> Wis. Stat. § 227.26(2)(im).

<sup>163</sup> Wis. Stat. § 227.26(2)(f), (i).

<sup>164</sup> Wis. Stat. § 227.26(2)(b).

<sup>165</sup> Wis. Stat. § 227.24(1)(c), (2)(a).

<sup>166</sup> Wis. Stat. § 227.19(5)(d), (dm).

<sup>167</sup> Wis. Stat. § 227.11(2)(a).

<sup>168</sup> *Wisconsin Legislature v. Palm* 2020 WI 42, ¶51.

<sup>169</sup> *Id.*

challenging the DHS Secretary-Designee's Safer at Home Order), Act 21 requires imprecise delegations of power to administrative agencies to be narrowly construed.<sup>170</sup>

Each requirement or standard promulgated in a rule must be explicitly authorized or explicitly permitted by statute.<sup>171</sup> 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.<sup>172</sup> 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. But as noted above, the PSCP and SNSP statutes are narrowly drafted without broad directives or grants of authority to DPI. Student eligibility and school qualifications for participation are precise and statutes do not direct DPI to establish others. DPI is granted authority to implement certain requirements but not expand them.

- As it relates to PSCP applicant income eligibility, schools or parents must submit specific information to DPI. DPI in turn provides that information to DOR so that it may verify income eligibility. When DOR is not able to verify income or eligibility, DPI is required to utilize an alternative process to determine eligibility on the basis of family income.<sup>173</sup> The alternative process is established by DPI, but it must still assess income eligibility as defined by statute.
- As it relates to PSCP school participation, statutes explicitly establish requirements, documentation and timelines. DPI has authority to set the auditor fee (to fund DPI auditors) and to create forms on which school must submit required information, but it may not mandate additional information for establish other requirements.<sup>174</sup>

It is worth noting however is that the Attorney General recently opined that a statute granting general rulemaking authority does confer explicit authority.<sup>175</sup> 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. These 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.<sup>176</sup>

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<sup>170</sup> *Palm*, ¶52.

<sup>171</sup> 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.

<sup>172</sup> *Palm*, ¶ 52 (citations omitted). See also Wis. Stat. § 227.11(2)(a)1., 2.

<sup>173</sup> Wis. Stat. §§ 118.60(2)(a)1.b., 119.23(2)(a)1.b.

<sup>174</sup> Wis. Stat. §§ 118.60(2)(a)3., (2)(ag)1., 119.23(2)(a)3., (2)(ag)1.

<sup>175</sup> AOG-04-20

<sup>176</sup> Wis. Stat. §§ 115.7915(10), 118.60(11)(a), 119.23(11)(a).

## **Count Reports & Enrollment Audits**

Under statutes, schools receive payments on behalf of parents of students enrolled in PSCP or SNSP in September, November, February and May.<sup>177</sup> Administrative rules require DPI to set the September payment based on preliminary enrollment reports submitted to DPI by the last weekday in August, and the remaining payments based on pupil count reports submitted in September and January.<sup>178</sup> DPI adjusts those payments based on enrollment audit findings.<sup>179</sup>

A PSCP school's preliminary enrollment report includes all accepted applications and a list of all PSCP students by grade level, excluding any students who have withdrawn.<sup>180</sup> The count report indicates the total of all students in school on the count date or a date before or after as allowed by rules, the grade of each student participating in PSCP and whether each was in school on the count date, and the number of students on a PSCP waiting list.<sup>181</sup> A WPCP school must verify the address of each incoming student on the third Friday in September count report and determine the resident school district for any incoming student who moved.<sup>182</sup>

An SNSP school's preliminary enrollment report includes enrolled SNSP students by grade level and indicates whether any student has been determined to no longer have a disability or no longer be eligible for a scholarship.<sup>183</sup> The count report indicates the total of all student in school on the count date or before or after as allowed by rules, the grade of each student participating and whether each was in school on the count date, and whether SNSP students receive a full or partial scholarship.<sup>184</sup> For each SNSP new or transfer student on the third Friday in September count report who was accepted in the previous school year, the school must obtain residency documentation to confirm the student's address and, if the student has moved, determine the student's resident school district.<sup>185</sup>

The count dates are the third Friday in September and the second Friday in January, although the rules reference an exception that applies only to public school districts.<sup>186</sup> The exception allows the count date to occur on the third weekday that follows the next school day on which school is in session when the designated count date is a regularly scheduled holiday or a day school is not in session "for a reason approved by the school board."<sup>187</sup> This is because state statutes require

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<sup>177</sup> Wis. Stat. §§ 115.7915(4m)(b), 118.60(4)(c), 119.23(4)(c).

<sup>178</sup> Wis. Admin. Code §§ PI 35.02(6), 35.06(8), (9), 48.02(6), 48.06(8), (9), 49.02(4), 49.06(5), (6).

<sup>179</sup> Wis. Admin. Code §§ PI 35.07(7), 35.19(1)-(4), 48.07(7), 48.19(1)-(4), 49.07(4)(a), 49.13(1)-(3).

<sup>180</sup> Wis. Admin. Code. §§ PI 35.06(7), 48.06(7).

<sup>181</sup> Wis. Admin. Code §§ PI 35.06(8), (9), 48.06(8), (9).

<sup>182</sup> Wis. Admin. Code § PI 48.06(8)(b).

<sup>183</sup> Wis. Admin. Code § PI 49.06(4).

<sup>184</sup> Wis. Admin. Code § 49.06(5), (6). *See* Wis. Stat. § 115.7519(4m)(e)2., a student who is no longer eligible for SNSP may continue to receive a partial scholarship equal to a choice payment.

<sup>185</sup> Wis. Admin. Code § PI 49.06(5)(c).

<sup>186</sup> Wis. Admin. Code §§ PI 35.02(6), 35.06(8), (9), 48.02(6), 48.06(8), (9), 49.02(4), 49.06(5), (6).

<sup>187</sup> Wis. Admin. Code §§ PI 35.02(6), 48.02(6), 49.02(4); Wis. Stat. § 121.05(3m).

only public school districts to submit count reports (called membership reports in statute) and enrollment audits to DPI and they require DPI to calculate state aid payments based on this information.<sup>188</sup> But neither those statutes nor Wis. Stat. §§ 115.7915, 118.60 or 119.23 extend the count report and audit requirements to PSCP or SNSP. Membership reports for public school districts generally report the average number of enrolled students on the third Friday of September and the second Friday of January of the previous school year and the full time equivalent summer school enrollment in the summer prior to the counted year. Membership is one piece of data used to calculate equalization aid for the next school year.<sup>189</sup> The funding mechanism for WPCP and SNSP is not the same. These schools are paid a set voucher or scholarship for each student enrolled in the program and payment is made for the current year of enrollment.

Statutes require DPI to pay PSCP and SNSP schools on behalf of the student's parent or guardian<sup>190</sup> PSCP statutes specifically require that this be done "upon receipt from a pupil's parent or guardian of proof of the pupil's enrollment in the private school during the school term."<sup>191</sup> Curiously, administrative rules, DPI policies and audit guides do not reference the proof of enrollment requirement for PSCP students.<sup>192</sup> While SNSP statutes do not include proof of enrollment language, the SNSP enrollment audit guides indicate that signed and dated applications and transfer requests are the proof of enrollment required for an SNSP payment.<sup>193</sup>

The PSCP preliminary enrollment report is generated by OAS and the SNSP report is generated by Kiteworks.<sup>194</sup> The school is required to review each student and confirm that the student has an eligible application and is enrolled, and that his or her parent has indicated the student will attend.<sup>195</sup> In the case of WPCP, DPI has additional real time information since it requires

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<sup>188</sup> Wis. Stat. §§ 115.28(18), 120.24(1), 121.004(5), 121.07.

<sup>189</sup> State Aid to School Districts, Informational Paper, Legislative Fiscal Bureau, 2021, pg. 8.

<sup>190</sup> Wis. Stat. §§ 118.60(4)(bg)3.-5., 119.23(4)(bg)3.-5., Wis. Stat. § 115.7915(4m)(a).

<sup>191</sup> Wis. Stat. §§ 118.60(4)(bg)3.-5., 119.23(4)(bg)3.-5. See also Wis. Stat. § 118.60(3)(d), WPCP and RPCP parents must, by the third Friday in September, notify DPI (on a DPI form) that their child is currently participating in the program

<sup>192</sup> Prior to 2016, Wis. Admin. Code Chapter 35 required an MPCP school administrator to ensure that "applications submitted for the pupils included in the membership report are complete and accurate as proof of enrollment qualifying for a state aid payment." See Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2015 Payment Eligibility, September 18, 2015 Count Date, pg. 2.

<sup>193</sup> Enrollment Audit Guide, Enrollment Audit for September and November 2020 Eligibility for September 18, 2020 Count Date, Issued by the Department of Public Instruction, pg. 36; Enrollment Audit Guide, Enrollment Audit for February and May 2020 Eligibility for January 10, 2020 Count Date, Issued by DPI pg. 27. See also Wis. Admin. Code § PI 49.06(3m), SNSP schools submit all accepted application and transfer requests to DPI four times each year: the second Friday in August, the last weekday in August, the third Friday in September and the second Friday in January.

<sup>194</sup> Kiteworks Instructions, Special Needs Scholarship Program, rev. Aug. 2020. <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-reports>.

<sup>195</sup> Training 9-2: Preliminary Enrollment Report, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

schools to provide immediate notice when a student withdraws.<sup>196</sup> Furthermore, each student is assigned a unique student identifier that would prevent a student from being enrolled at more than one school.

Administrative rules require PSCP and SNSP schools to engage an auditor to compile an enrollment audit for each count report. The audit for the September count report is due on December 15 for all schools and the audit for the January count report is due by the first weekday in May, except that it is due on the last weekday in June for a school participating only in MPCP.<sup>197</sup> The auditor must use agreed upon procedures to identify ineligible students for whom the school received payments, students with incorrect data in DPI's database and additional eligible students qualifying for payment.<sup>198</sup> Auditors must, among other things, determine the school's process for preparing attendance reports and accepting and reviewing applications. The auditor must also:

- Verify that the total number of students on official attendance records and count reports match;
- Verify that SNSP or PSCP students on official attendance records and count reports match;
- Verify that SNSP and PSCP students were in attendance on the count date or alternative date, as allowed;
- Reconcile with the official attendance records, the number of students the school reported to DPI on PI-1207 (on or before October 15) each year, which includes information about enrollment, grade and instructional offerings, hours of instruction, religious affiliation, and special needs, gifted and other programming;
- Verify that the RPCP and MPCP waiting list students on the count report match those on the school waiting list; and,
- Verify that applications for enrolled and waiting list students complied with all application requirements. If a student moved, verify that the residency documentation meets requirements.<sup>199</sup>

It is unclear how this complex process, in which school must engage twice each school year, implements the statutory requirement to pay a school on behalf a student's parents "upon receipt from the pupil's parent or guardian of proof of the pupil's enrollment" as described above. If count reports and enrollment audits are to continue, they should be established in statute with specific requirements and limitations. For example:

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<sup>196</sup> Wis. Stat. § 118.60(3)(ar)(5); Application Process, Private School Choice Programs Information Bulletin 01-01, rev. March 2021, pg. 10; Residency Documentation, Private School Choice Programs Informational Bulletin 04-01, rev. Jan. 2021.

<sup>197</sup> Wis. Admin. Code §§ PI 35.07(1)(a), (b), 48.07(1)(a), (b), 49.07(1)(a), (b).

<sup>198</sup> *Id.*

<sup>199</sup> Wis. Admin. Code §§ PI 35.07, 48.07, 49.07.

- **Revised Frequency:** While PSCP and SNSP schools must submit two enrollment audits each school term, only 25% of public school districts do so each year.<sup>200</sup> In addition, each PSCP or SNSP enrollment and financial audit must include a fraud risk assessment.<sup>201</sup> Administrative rules require an auditor to conduct the assessment with each of the two enrollment audits.<sup>202</sup> They also require an auditor to comply with AICPA standards when conducting the annual financial audit and DPI notes that these standards include identifying and assessing the risks of fraud.<sup>203</sup> Although the two risk assessments differ, 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 not be as significant.
- **Count Reports vs. Attendance Records:** Administrative rules require a school to provide to the auditor preliminary enrollment reports, count reports, official attendance records, original classroom records and the annual private school report (PI-1207) to verify enrollment and determine payment amounts.<sup>204</sup> Auditors must compare official attendance records with count reports and determine that the students on the count reports were in attendance on the count date. They also require auditors to reconcile the attendance records with the number of students reported to DPI on Form PI-1207. Finally, auditors must select a sample of at least 60 non-PSCP or non-SNSP students from original classroom records (teacher-originated test scores, report cards, progress reports and attendance records) and verify that they were included in the attendance records. Since DPI essentially relies on real-time information to calculate SNSP and PSCP payments, duplicative records and reports should be addressed.
- **Audit Limits:** An audit must be conducted using agreed upon procedures and auditors must perform auditing procedures established in rules and as agreed to by the auditor and DPI.<sup>205</sup> Each audit guide “contains procedures identified as ‘Agreed-Upon Procedures’

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<sup>200</sup> Wis. Admin. Code §§ PI 35.07(1)(a), (b), 48.07(1)(a), (b), 49.07(1)(a), (b); Wis. Stat. § 115.28(18).

<sup>201</sup> 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..

<sup>202</sup> Wis. Admin. Code §§ PI 35.07(3)(c), 48.07(3)(c), 49.07(3)(c).

<sup>203</sup> Wis. Admin. Code §§ PI 35.12(1), 48.12(1), 49.10(1); Private School Choice Programs & Special Needs Scholarship Program, Fraud Risk Guide for the Year Ending June 30, 2021.

<sup>204</sup> 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).

<sup>205</sup> Wis. Admin. Code §§ PI 35.07(1), (3)(q), 48.07(1), (3)(q), 49.07(1), (3)(q).

that constitute the procedures agreed upon by the auditor and DPI”<sup>206</sup> and an auditor must submit an Independent Accountant’s Report on Applying Agreed-Upon Procedures.<sup>207</sup> In addition to testing, the procedures include directives for the auditor to familiarize himself or herself with school processes. For example, an auditor must “obtain an understanding of the process used to prepare attendance records, accept and review applications, and other considerations” and “obtain an understanding of the process used by the school to record summer school attendance.”<sup>208</sup> DPI has treated this procedure as requiring control testing, but administrative rules require only that the auditor determine the school’s process for preparing attendance records and accepting and reviewing applications.<sup>209</sup> Any testing required by administrative rules is explicitly stated, such as testing of the SIS.<sup>210</sup> Since neither statutes nor administrative rules establish any requirements related to attendance taking, the purpose of such testing is unclear. Clarification that the agreed upon procedures may not establish auditing requirements not required by statute or professional standards is needed.

- **DPI Audit Review:** DPI must review the enrollment audits and certify an amount due from or to a school.<sup>211</sup> DPI indicates that once it has “reviewed and made any necessary changes to the enrollment audit, certification letters are mailed.”<sup>212</sup> Upon submitting the audit, the auditor notes the number of corrections made by the school that did not require corrections to DPI records. The school’s choice administrator can indicate that he or she does not agree with all of the required corrections and submit a letter to DPI. 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,<sup>213</sup> 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.

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<sup>206</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 2; Private School Choice Programs Audit Guide, Enrollment Audit for February and May 2020 Payment Eligibility for January 10, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 2.

<sup>207</sup> 2020-21 September Enrollment Agreed Upon Procedures Report, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>.

<sup>208</sup> *Id.*

<sup>209</sup> Wis. Admin. Code §§ PI 35.07(3)(a), 48.07(3)(a).

<sup>210</sup> Wis. Admin. Code §§ PI 35.07(3)(d), 48.07(3)(d).

<sup>211</sup> Wis. Admin. Code §§ PI 35.07(4)(a), 48.07(4)(a), 49.07(4)(a).

<sup>212</sup> 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>.

<sup>213</sup> Wis. Admin. Code §§ PI 35.20(1), 48.20(1).

- **Audit Guide Limits:** Administrative rules require auditors to complete all of the procedures specified in the DPI audit guide, including those listed in rules.<sup>214</sup> But the guide is not subject to any type of oversight. DPI makes revisions each year which may include new procedures, reviews and tests or directives to assess compliance based on new or revised DPI policies. Auditors must complete DPI trainings and review the policies on completing and accepting applications and the student application checklists and indicate to DPI that this was completed.<sup>215</sup> Auditors must apply those policies when testing school compliance and applicant eligibility. DPI audit guides should provide guidance about completing requirements and procedures established in statute, rule or professional standards referenced in rule but it should not require auditors to apply substantive DPI policies that should be promulgated as rules. DPI enforcement decisions should not be based on new auditing procedures or on policy documents.
- **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.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> 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 schools may admit students at an earlier age may not be a pressing one, it illustrates the need to clarify that public school district statutes do not apply to PSCP and SNSP schools unless explicitly stated. DPI currently applies these statutes erratically to achieve specific policy goals.
- **Penalties:** DPI may determine that all PSCP or SNSP pupils are ineligible for voucher payments or scholarships if a school fails to submit an enrollment audit.<sup>219</sup> Payments may be withheld for a violation of statutory requirements and there is currently no

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<sup>214</sup> Wis. Admin. Code §§ PI 35.07(3), PI 48.07(3), 49.07(3).

<sup>215</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Department of Public Instruction, pg. 7; Private School Choice Programs Audit Guide, Enrollment Audit for February and May 2020 Payment Eligibility for January 10, 2020 Count Date, Issued by the Department of Public Instruction, pg. 6.; Special Needs Scholarship Program Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 6; Special Needs Scholarship Program Audit Guide, Enrollment Audit for February and May 2020 Payment Eligibility for January 10, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pg. 6.

<sup>216</sup> Wis. Admin. Code §§ PI 35.05(5), 48.05(5), 49.05(2).

<sup>217</sup> Wis. Stat. §§ 118.14(1), 120.12(25).

<sup>218</sup> Early Admission for Kindergarten and First Grade, Informational Bulletin; *see also* Wis. Stat. §§ 118.14(1), 120.12(25).

<sup>219</sup> Wis. Admin. Code §§ PI 35.07(4), PI 48.07(4), PI 49.07(4).

requirement to complete an enrollment audit.<sup>220</sup> If enrollment audits are established in statute, DPI's authority to bar schools or withhold payments for errors or omissions should also be addressed.

## **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.<sup>221</sup> Under administrative rules, new schools must report to DPI the hours of instruction for the upcoming school year by the first weekday in May.<sup>222</sup> Continuing schools must report to DPI on September 30 for the current school term:

- The school's start and end date;
- The dates of the two governing body meetings required by statutes; and,
- The hours of instruction.<sup>223</sup>

A school must provide documentation to DPI showing how it is meeting the hours of instruction requirement, upon DPI's request.<sup>224</sup> This is done via the Form PI-1207, which includes enrollment numbers and other instruction-related information.

Under the rules, DPI may not make a May payment to a school that ceases instruction prior to the end of its scheduled school term without DPI's written approval.<sup>225</sup> According to DPI, any other revisions to the schedule need not be reported.<sup>226</sup> When a school submits the hours of instruction report, the administrator certifies that the school is aware that payments may be withheld if the school year ends earlier than scheduled.<sup>227</sup> But again, 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.<sup>228</sup> 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 seek a DPI approval not required by statute.

## **PSCP Independent Financial Audit – Financial Viability**

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<sup>220</sup> Wis. Stat. §§ 115.7915(8)(c), 118.60(10)(d), 119.23(10)(d).

<sup>221</sup> Wis. Stat. §§ 118.60(2)(a)8., 119.23(2)(a)8.

<sup>222</sup> Wis. Admin. Code §§ PI 35.03(7)(a), 48.03(7)(a).

<sup>223</sup> Wis. Admin. Code §§ PI 35.03(7)(b), 48.03(7)(b).

<sup>224</sup> Wis. Admin. Code §§ PI 35.03(7)(f), 48.03(7)(f).

<sup>225</sup> Wis. Admin. Code §§ PI 35.19(4), 48.03(4).

<sup>226</sup> On Demand Training 3-1, Reporting Hours of Instruction, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

<sup>227</sup> *Id.*

<sup>228</sup> Wis. Stat. §§ 115.7915(8)(c), 118.60(10)(d), 119.23(10)(d).

Statutes require a PSCP school to annually submit an independent financial audit prepared in accordance with AICPA standards.<sup>229</sup> The auditor must, among other things, evaluate the school's financial viability in accordance with these standards. DPI may not require the auditor to comply with standards that exceed those of AICPA.<sup>230</sup> Standards require evaluating and concluding whether there is substantial doubt about the entity's ability to continue as a going concern for a reasonable period of time.<sup>231</sup> If there is substantial doubt, the auditor will indicate so with a paragraph in the audit opinion.<sup>232</sup> DPI may communicate with an auditor as necessary for the purpose of assessing a school's financial viability.<sup>233</sup>

Administrative rules establish a definition of financial viability as the ability of a school to pay for goods and services, make debt service payments, and pay other obligations as they become due.<sup>234</sup> DPI directs the auditor to examine the following factors and assign the level of risk that is required or should be considered.

- A summary review of the financial position of the school as of the last financial audit including the net asset position, cash balance, availability of funding, and other key financial indicators;
- A review of the prior year's Fiscal & Internal Control Practices Report and any areas of non-compliance;
- Any information provided by DPI about past dues with vendors, employees, or other financial related concerns;
- Any information that comes to the auditor's attention regarding past dues with government agencies, vendors, or employees;
- The expected budget and projected cash flow for the school year; and,
- Any other information that may impact the ability of the school to pay for goods and services, make debt service payments, and pay other obligations as they become due.<sup>235</sup>

According to DPI, an audit opinion indicating there is doubt about a school's ability to continue as a continuing concern is only one indicator to consider when determining a school's financial

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<sup>229</sup> Wis. Stat. §§ 118.60(7)(am)2m.a, b., 119.23(7)(am)2m.a., b.

<sup>230</sup> Wis. Stat. §§ 118.60(7)(am)2m.a., 119.23(7)(am)2m.a.

<sup>231</sup> On Demand Training 6-11, Financial Viability and Going Concern Determinations, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

<sup>232</sup> *Id.*

<sup>233</sup> Wis. Stat. §§ 118.60(7)(am)2m.a., 119.23(7)(am)2m.a.

<sup>234</sup> Wis. Admin. Code §§ PI 35.02(11), PI 48.02(11).

<sup>235</sup> Financial Viability Risk Assessment for the Year Ended June 30, 2021, <https://dpi.wi.gov/parental-education-options/choice-programs/financial-reports/fiscal-practices>.

viability.<sup>236</sup> The superintendent will also consider other indicators established in the rules such as a negative net current obligation, or a net loss.<sup>237</sup>

However, DPI is required by statute to write a rule establishing evidence of financial viability only for schools that are first-time participants in PSCP.<sup>238</sup> A new school may either file a surety bond or submit a complete anticipated budget.<sup>239</sup> A school that submits an anticipated budget must also submit “evidence of financial viability, as prescribed by the department by rule.” Since a first time participant will not submit a financial audit until after its first year of participation, statutes recognize that DPI requires other information to assess financial viability at the outset. When the first time participant ultimately submits its independent financial audit and evidence of sound fiscal and internal control practices, neither of those may contain indicators that the school is not financially viable.<sup>240</sup>

### **PSPC Fiscal & Internal Control Practices Report – Fiscal Viability Risk Assessment**

Evidence of a school’s sound fiscal and internal control practices are required by statute and established in administrative rules.<sup>241</sup> 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.<sup>242</sup> DPI assigns a risk level to each indicator regardless of the individual school’s situation.<sup>243</sup> For example, high risk is assigned if DPI has receive call from school employees indicating they were not paid on time or vendors and landlords indicate they did not receive timely payments, with no consideration of the facts of the situation. The Risk Assessment is used to determine the sample sizes for agreed upon testing procedures for the Fiscal and Internal Control Practices Report.<sup>244</sup>

DPI requires that medium risk is assigned to, and that high risk should be considered for, 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.<sup>245</sup> When a first time participant files a surety bond, it must do so annually until an independent financial audit “does

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<sup>236</sup> *Id.*

<sup>237</sup> On Demand Training 6-11, Financial Viability and Going Concern Determinations, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

<sup>238</sup> Wis. Stat. §§ 118.60(7m)(a)2., 119.23(7m)(a)2.

<sup>239</sup> *Id.*

<sup>240</sup> Wis. Stat. §§ 118.60(7m)(b)1., 119.23(7m)(b)1.

<sup>241</sup> Wis. Stat. §§ 118.60(7)(am)2m.b., 119.23(7)(am)2m.b.; Wis. Admin. Code §§ PI 35.13, 48.13. An independent auditor must complete and submit to DPI by October 15 a Fiscal and Internal Control Practices Report.

<sup>242</sup> Financial Viability Risk Assessment For the year ended June 30, 2021, <https://dpi.wi.gov/parental-education-options/choice-programs/financial-reports/fiscal-practices>.

<sup>243</sup> *Id.*

<sup>244</sup> Private School Choice Programs Audit Guide, Fiscal and Internal Control Practices Report to the Wisconsin Department of Public Instruction, December 15, 2020.

<sup>245</sup> *Id.*

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.”<sup>246</sup> Administrative rules add requirements for bond removal not found in statute. First, the financial audit must be prepared at the consolidated level.<sup>247</sup> A parish school, for example, that does not wish to file a consolidated audit would have to continue filing a surety bond for the duration of its participation in PSCP. Statutes give schools the option of filing a consolidated audit, but do not require it.<sup>248</sup> Second, the audit must include financial statements that are two-year comparative financial statements.<sup>249</sup> This is a departure from the treatment of other first time participating schools. According to DPI policies, the first year that a school completes a financial audit, it may include the current school year in the statement of activities and statement of cash flows. Once the school completes an audit, the next audit must include two year comparative audited financial statements.<sup>250</sup>

### **PSCP Independent Financial Audit – DPI Review**

The annual independent financial audit is due by October 15.<sup>251</sup> By April 1, DPI must determine whether the school has provided the information and met the requirements required of an independent financial audit by statute.<sup>252</sup> 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.<sup>253</sup>

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. According to DPI, any matter has the potential to have this impact. To prevent DPI from expanding its own authority beyond the legislature’s intent, the existing statutory language could be modified.

Since audit requirements may not exceed AICPA standards, any missing items or information sought by DPI is limited to that required by statutes or AIPCA. But administrative rules allow

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<sup>246</sup> Wis. Stat. §§ 118.60(7m)(b)1., 119.23(7m)(b)1.

<sup>247</sup> Wis. Admin. Code §§ 35.14(7)(a), 48.14(7)(a).

<sup>248</sup> Wis. Stat. §§ 118.60(7)(am)2m.a., 119.23(7)(am)2m.a.

<sup>249</sup> *Id.*

<sup>250</sup> Financial Audit and PSCP/SNSP Reserve Balance, Private School Choice Programs and Special Needs Scholarship Program Informational Bulletin 08-01, rev. July 2019.

<sup>251</sup> Wis. Stat. §§ 118.60(7)(am)2m., 119.23(7)(am)2m.

<sup>252</sup> Wis. Stat. §§ 118.60(7)(am)3.a., 119.23(7)(am)3.a.

<sup>253</sup> Wis. Stat. §§ 118.60(7)(am)3.b., 119.23(7)(am)3.b.

DPI to make inquiries to “ascertain the accuracy and completeness of information contained in audits or reports” required under statutes or administrative rules.<sup>254</sup> These inquiries should be limited to situations where there is a reason to believe information is inaccurate or incomplete.

### **SNSP Independent Financial Audit**

Statutes require an SNSP school to annually submit a financial audit prepared by an independent auditor in accordance with standards established by AICPA.<sup>255</sup> The auditor must among other things, evaluate the school’s financial viability in accordance with those standards. DPI may not require the auditor to comply with standards that exceed those of AICPA.<sup>256</sup> 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.<sup>257</sup> This is broad and undefined authority and there is 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 a PSCP or SNSP financial audit to include a calculation of the school’s fund for future eligible education expenses i.e., reserve balance.<sup>258</sup> Administrative rules establish requirements for calculating the required reserve balance.<sup>259</sup> 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.<sup>260</sup> Administrative rules do require an SNSP school to maintain a cash and investment balance and establish requirements for calculating the necessary amount.<sup>261</sup> It is unclear why statutes do not require a cash and investment balance but presumably an SNSP school would maintain one for practical purposes.

### **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 information demonstrating the school’s ability to pay an amount equal to the total amount of expected scholarships for that school year.<sup>262</sup> Administrative rules establish the required financial information including a budget and cash flow report, statement of whether the school

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<sup>254</sup> Wis. Admin. Code §§ PI 35.20(1), 48.20(1).

<sup>255</sup> Wis. Stat. § 115.7915(6)(e).

<sup>256</sup> *Id.*

<sup>257</sup> Wis. Admin. Code § PI 49.14(1).

<sup>258</sup> Wis. Stat. §§ 115.7915(6)(e), 118.60(7)(am)2m.a., (7)(an)1., 2, 119.23(7)(am)2m.a., (7)(an)1., 2.

<sup>259</sup> Wis. Admin. Code §§ PI 35.02(20), 35.10(3)(c), (d), (4), (5)(b), (6), 48.02(20), 48.10(3)(c), (d), (4), (5)(b), (6), 49.09(3)(d), (4).

<sup>260</sup> Wis. Stat. §§ 118.60(7)(an)1., 119.23(7)(an)1.

<sup>261</sup> Wis. Admin. Code § PI 49.09(3)(e), (4).

<sup>262</sup> Wis. Stat. § 115.7915(6)(f).

has any past due amounts, interest or penalties due to government agencies, the most recent balance sheet and income statement, and bank statements for all accounts on the balance sheet.<sup>263</sup> Rules also require a school to file any other information required by DPI to determine the financial position of the school and allow DPI to review “any other information available to the department” to determine if the school demonstrates the ability to pay as required.<sup>264</sup> But statutes require this determination to be made based only the information filed and not on outside sources.<sup>265</sup> There is likely a benefit to clarifying the scope of DPI’s review.

### **SNSP Order to Bar**

As described above, 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 rule;<sup>266</sup> or,
- Routinely failed to comply with the requirement to comply with the standards for the annual financial audit or for a surety bond or alternative financial information.<sup>267</sup>

Administrative rules allow DPI to bar a school for errors related to background checks with no requirement that the school act negligently or intentionally.<sup>268</sup> Similarly, they allow barring for an audit compliance failure that is neither routine nor negligent or intentional.<sup>269</sup> The rules appear to interpret “routinely failed to comply” in a manner that is likely intended to incorporate the audit procedures established in policies, training materials and audit guides.<sup>270</sup> 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.<sup>271</sup> Administrative rules require a school to file an ITP form annually by the first weekday in March.<sup>272</sup> The notice must include both the number of scholarships available for new or transferring students and the

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<sup>263</sup> Wis. Admin. Code § PI 49.04(1m)(b)1.-4.

<sup>264</sup> Wis. Admin. Code § PI 49.04(1m)(b)5., (2).

<sup>265</sup> Wis. Stat. § 115.7915(6)(f).

<sup>266</sup> Wis. Stat. § 115.7915(8).

<sup>267</sup> Wis. Stat. § 115.7915(6)(e), (f), (8)(a)2.

<sup>268</sup> Wis. Admin. Code § PI 49.14(4)(f), (g).

<sup>269</sup> Wis. Admin. Code § PI 49.14(4)(c), (d).

<sup>270</sup> *Id.*

<sup>271</sup> Wis. Stat. § 115.7915(3)(a).

<sup>272</sup> Wis. Admin. Code § PI 49.03(3).

number of scholarship students that “will continue to participate” in SNSP.<sup>273</sup> When identifying continuing students, the school must include those on the second Friday in January count report and those accepted after that count report, unless they have withdrawn.<sup>274</sup> DPI’s application of the rule requires a K-8 school to continue offering a scholarship once an eighth grade SNSP student graduates. This is unworkable under DPI policies which prohibit a school from reducing the number of scholarships once it has received applications for all of them.<sup>275</sup> A school’s potential inability to reduce the scholarship number later has financial implications since a school may be forced to file a new bond.<sup>276</sup> 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 under Wis. Stat. § 118.165 by the superintendent<sup>277</sup> or be accredited by an organization named in statutes as of August 1 preceding the school term for which a scholarship is awarded.<sup>278</sup> Administrative rules however require all SNSP schools to be accredited.<sup>279</sup> Although DPI training materials correctly state the requirement as either accreditation or submission of a private school requirements form, the administrative rule should be corrected to comply with statutes.<sup>280</sup>

## **Summary of Issues**

- If count reports and enrollment audits are to continue, they should be established in statute with revisions and limitations related to frequency, required records, audit scope, scope of DPI review, and penalties for failure to comply. If any count or audit requirements currently applicable to public schools district will apply to PSCP and SNSP schools, this should be explicitly stated with appropriate limitations.
- Administrative rules allowing DPI to withhold payments from a school that shortens a school term without DPI approval should be repealed.

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<sup>273</sup> Wis. Admin. Code § PI 49.03(3)(a), (b).

<sup>274</sup> Wis. Admin. Code § PI 49.03(3)(b)1., 2.

<sup>275</sup> Student Application and Transfer Request Information, Special Needs Scholarship Program Informational Bulletin 01-02, rev. June 2020 (v2), pg. 9.

<sup>276</sup> *Id.*; Wis. Admin. Code § PI 49.04(1m), (5).

<sup>277</sup> A private school must be privately controlled, provide at least 875 hours of instruction each school year, and provide a sequentially progressive curriculum of fundamental instruction in reading, language arts, mathematics, social studies, science and health. The program cannot be operated or instituted for the purpose of avoiding or circumventing the compulsory school attendance requirement and the pupils must return annually to the homes of their parents or guardians for not less than 2 months of summer vacation.

<sup>278</sup> Wis. Stat. § 115.7915(2)(c).

<sup>279</sup> Wis. Admin. Code § PI 49.03(6).

<sup>280</sup> 2020-21 Training: Private School SNSP Registration Requirements, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>.

- Statutes and administrative rules providing for DPI review of annual financial audits require clarifications to prevent DPI from engaging in an exhaustive review of an audit when no issues were raised by the auditor.
- The breadth of the statutory provisions requiring an auditor to evaluate whether there is a substantial doubt about a school's ability to continue as a going concern and allowing DPI to communicate with the auditor as necessary to assess the school's financial viability may require clarification. Administrative rules require the superintendent to make a financial viability determination separate from the audit, but it is not known if this is required by AIPCA standard or typical in this situation.
- SNSP statutory audit requirements are not as robust as those for PSCP, but administrative rules allow DPI to make inquiries to ascertain the accuracy and completeness of information contained in the audits and other reports required by statutes or rules. 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.
- Administrative rules require an SNSP school to maintain a cash and investment balance equal to its reserve balance, but statutes do not. There may be a benefit to establishing it in statute.
- When an SNSP school files financial information demonstrating its ability to pay an amount equal to the total amount of expected scholarships for that school year, DPI may, under administrative rules, require the school to provide additional information and may review any other information available to the department. Since these requirements exceed those in statutes, the administrative rules should be narrowed.
- Administrative rules that establish acts or omission that may lead to an SNSP school being barred from the program appear to exceed its statutory authority. Any basis for barring established in rule should not expand DPI's authority.
- DPI interprets administrative rules to require an SNSP school to continue offering a scholarship to new applicants when an eighth grade scholarship student graduates. Since statutes do not allow DPI to mandate the number of scholarships provided, the rule should be clarified.
- Administrative rules require all SNSP schools to be accredited but statutes do not. The rule should be revised to accurately represent the statutory requirement.

As noted above, while the full legislature must approve statutory changes, JCRAR has authority 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.<sup>281</sup> An agency may not enforce a rule while it is

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<sup>281</sup> Wis. Stat. § 227.26(2)(d).

suspended and JCRAR may suspend a rule an unlimited number of times.<sup>282</sup> To make the suspension permanent, a new law must be enacted.<sup>283</sup>

## **POLICIES THAT SHOULD BE PROMULGATED AS RULES**

DPI has issued at least 25 bulletins, hundreds of pages of training materials and several audit guides and reports which summarize statutory and rule requirements and provide guidance as to agency procedures. However, some also contain regulations, standards and statements of policy while others contain requirements that implement, interpret or make specific statutes. Both should be promulgated as a rule.<sup>284</sup> 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 may be 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.<sup>285</sup> Furthermore, the legislature may prevent final promulgation of a proposed rule and may repeal an existing one,<sup>286</sup> but it lacks authority to overturn agency policies.<sup>287</sup>

A DPI policy may explain how it will implement statutory and rule requirements, including any existing operating procedures of the agency. It may also provide guidance or advice with respect to how an agency is likely to apply a statute or rule to a class of persons.<sup>288</sup> But these DPI policies may include only those requirements and standards explicitly stated in statutes and properly promulgated administrative rules. If DPI issues a policy to interpret or make specific a statute or to govern DPI procedures, it must be promulgated in a rule, as permitted by statute.

### **Student Eligibility Requirements**

#### Open Application Periods

Enrollment periods for RPCP and MPCP are established in a DPI bulletin.<sup>289</sup> The application period for WPCP is established in statute.<sup>290</sup> But the only statutory reference to the RPCP and MPCP application periods is that a school must notify a student of application acceptance or rejection no later than 60 days after the end “of the application period in which an application is

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<sup>282</sup> Wis. Stat. § 227.26(2)(im).

<sup>283</sup> Wis. Stat. § 227.26(2)(f), (i).

<sup>284</sup> Wis. Stat. § 227.01(13). See also, *Wisconsin Legislature v. Palm*.

<sup>285</sup> See e.g., Wis. Stat. §§ 227.16, 227.135, 227.136, 227.137, 227.19, 227.29.

<sup>286</sup> Wis. Stat. §§ 227.19(5), 227.26.

<sup>287</sup> 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. See Wis. Stat. § 227.26(2)(b).

<sup>288</sup> Wis. Stat. § 227.01(3m).

<sup>289</sup> Application Process, Private Schools Choice Programs Informational Bulletin 01-01, rev. March 2021, pg. 2.

<sup>290</sup> Wis. Stat. § 118.60(3)(ar).

received.”<sup>291</sup> DPI undoubtedly has authority to establish those periods, but since they drive deadlines impacting a school’s obligations and a student’s eligibility, there may be a benefit to establishing them in statute or rule. For example, 15 to 20 days is a short turnaround time for submitting completed applications, collecting required documentation and making any necessary corrections. 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.<sup>292</sup> This requirement is not in statutes or administrative rules and DPI has not previously required the verification letter. A school currently enters its legal name on documents filed with DPI and submits its EIN for the purpose of receiving payments.

### Adding Seats

SNSP administrative rules establish procedures for adding scholarships during a school year, but PSCP statutes and rules do not.<sup>293</sup> Administrative rules require a PSCP to indicate the number of seats available on the ITP, which is due by January 10.<sup>294</sup> According to DPI policies, MPCP and RPCP schools may increase or decrease the number of seats available prior to an open application period and may increase the number of seats available after the end of all open application periods for the school year.<sup>295</sup> The meaning of these two statements taken together is unclear. A school may change the total number of seats when revising the number of seats by grade, but may not take a seat away from a student who already accepted one. A school is not required to notify DPI when it revises the number of seats. However, if a school adds or eliminates grades offered, it must submit a School Information Update form to DPI.<sup>296</sup>

A WPCP school may increase the number of seats in any grade by the first weekday in May when it enters the Final WPCP Seats Report in OAS.<sup>297</sup> If the school reduces the number of seats and the number is insufficient to accommodate all returning students, some will be placed

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<sup>291</sup> 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.”

<sup>292</sup> DPI Training: Schools New to the Private School Choice Program in the 2021-22 School Year; Email from Chanell Crawford, DPI Director, Parental Education Options, Feb. 23, 2021.

<sup>293</sup> Wis. Admin. Code § PI 49.04(5).

<sup>294</sup> Wis. Admin. Code §§ PI 35.03(3)(b), 48.03(3)(a)2.

<sup>295</sup> Application Process, Private School Choice Programs Informational Bulletin 01-01, rev. March 2021, pg. 3.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

on the WPCP waiting list. A WPCP school cannot add grades on or after the start of the WPCP open application period i.e., the first weekday in February.<sup>298</sup>

Since these policies establish requirements and limitations not found in statutes or administrative rules, there is likely a benefit to adding them to existing rules.

#### WPCP Student Withdrawals

Statutes require DPI to establish a WPCP waiting list in accordance with statutory preferences.<sup>299</sup> A school must notify DPI when a student withdraws from the school or ceases participation in WPCP so that it can fill seats from the waiting list.<sup>300</sup> The school must email DPI the student name and either a form signed by the parent showing the student has withdrawn or will not be attending the school or a letter or email from a parent on the application sent to the school which includes the parent, student and school names.<sup>301</sup> A letter must be signed by the parent and email must be from the parent and include the email heading information (To, From, Date and Subject lines). DPI indicates that it will fill seats up to the second Friday in January and that schools are not required to notify the department of withdrawals after that date. DPI policies provide that schools will receive payments as follows:

- Student counted on the preliminary enrollment report but not the September count report: The amount of the September payment for the student will be deducted from the November payment.
- Student counted on the September count report who withdraws after that date: The school will receive a November payment for the student.
- Student counted on the January count report who withdraws after the second Friday in January: The school will receive a February and May payment.

Since these policies impact payments to schools established by statute, there is likely a benefit to promulgating them in a rule.

#### 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 7-12.<sup>302</sup> A school must provide documentation to DPI showing how it is meeting the hours of instruction requirement, upon DPI's request.<sup>303</sup>

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<sup>298</sup> *Id.*

<sup>299</sup> Wis. Stat. § 118.60(3)(ar)3.-4., (3)(c).

<sup>300</sup> Wis. Stat. § 118.60(3)(ar)5.

<sup>301</sup> Application Process, Private School Choice Program Informational Bulletin 01-01, rev. March 2021, pg. 10.

<sup>302</sup> Wis. Stat. §§ 118.60(2)(a)8., 119.23(2)(a)8.

<sup>303</sup> Wis. Admin. Code §§ PI 35.03(7)(f), 48.03(7)(f).

*Virtual Instruction Attendance:*

Under a 2020 court decision, a PSCP school may meet hours of instruction requirements with virtual instruction.<sup>304</sup> According to DPI, virtual hours of instruction should be based on the time teachers are available to students and the school's estimate of the amount of time needed to accomplish daily learning objectives.<sup>305</sup> A school must define its attendance policy for instructional settings, determine methods for documenting attendance and record attendance for virtual instruction daily.<sup>306</sup> Instruction must include more than dropping off homework and the teacher must be working with the child on the materials.<sup>307</sup> Attendance may be reported in half or full-day increments, depending upon the school's policy. This policy may differ by grade level or range. DPI recommends that schools enter attendance daily while providing corrections as appropriate on a weekly basis.<sup>308</sup>

During the enrollment audit, the auditor must obtain the school's virtual attendance policy and an explanation of the process the school used to determine whether a student should be recorded as in attendance. The auditor is to refer to DPI attendance taking policies in a virtual environment as well as a communication about summer school.<sup>309</sup> Furthermore, DPI directs auditors to consider the risk associated with taking attendance in a virtual environment during the fraud risk assessment and provides sample questions for the choice administrator, office staff, accountants, teachers, information technology personnel about documenting virtual attendance.<sup>310</sup> Updates to statutes and administrative rules are required to address a PSCP school's authority to provide virtual instruction and ensure that the requirements for counting hours are uniform and transparent.

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<sup>304</sup> *School Choice Wisconsin Action v. DPI*, Case No. 19 CV 574, Waukesha County, Jan. 2020.

<sup>305</sup> Choice/SNSP 2020-21 – Attendance, Hours of Instruction and Drills Information, Department of Public Instruction Memorandum to DPI Private School Choice, Aug. 28, 2020, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>; Private School Choice Programs & Special Needs Scholarship Program for Summer 2020, DPI Informational Document, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>; SNSP June 2020 Training SNSP Payment Process, Financial & Enrollment Audits Training, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>; On Demand Training 9-3 3rd Friday in September & 2nd Friday in January Count Reports, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

<sup>306</sup> Choice/SNSP 2020-21 Attendance, Hours of Instruction and Drill Information, Department of Public Instruction Memorandum to DPI Private School Choice, Aug. 28, 2020, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>. Learning management system records, evidence of daily work, submission or completion of assignment, module or exam, system log-in, weekly progress reports, attendance taken in synchronous events, contact or activity logs, pacing charts that track a student's progress, weekly check-ins.

<sup>307</sup> SNSP June 2020 Training SNSP Payment Process, Financial & Enrollment Audits Training, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>.

<sup>308</sup> *Id.*

<sup>309</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 count Date, Issues by the Wisconsin Department of Public Instruction, pg. 7

<sup>310</sup> *Id.* at pg. 4; Private School Choice Programs & Special Needs Scholarship Program Fraud Risk Assessment Guide for the Year Ending June 30, 2021.

### *Full Day Kindergarten*

Under administrative rules, a student in 5K is counted as a 0.5 FTE, except that a student enrolled in a program that requires full-day attendance 3, 4 or 5 days per week is counted as a 0.6, 0.8 or 1 FTE respectively.<sup>311</sup> A full day of kindergarten instruction must be the same length as a full day of first grade instruction.<sup>312</sup> The 5K program must require full day attendance for an entire school term, except that kindergarteners may have the same days off as other grades.<sup>313</sup> According to DPI, if 5K students attend school prior to the official start date for first graders in order to acclimate to a school environment, those days will not count toward hours of instruction.<sup>314</sup> DPI's interpretation appears to be that hours of instruction are counted for the school term and since full day attendance is required for the entire school term, the half days cannot be counted. Arguably however, the requirement for full day attendance for the entire school term does not prohibit additional half days but does prohibit the 5K program from beginning instruction on a day after the rest of the students began. This issue should be clarified so that schools can count all instructional days.

### *Summer School Virtual Instruction Hours*

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.<sup>315</sup> For virtual instruction, schools are directed to develop a schedule that specifies the actual or estimated number of minutes required for each activity that makes up the class. Activities may be real-time, asynchronous, or a combination of the two.<sup>316</sup> Asynchronous activities are those in which a student is working independently under their teacher's direction using an online program, learning management system or printed materials.<sup>317</sup> The DPI audit guide refers auditors to these policies when assessing whether a summer school program is in compliance with administrative rules. It also directs schools to create a policy determining how it will determine if a pupil is in attendance for the day.<sup>318</sup> Since school payments are conditioned on compliance with these policies for counting hours of instruction, statutes and rules should be updated to recognize summer school virtual instruction.

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<sup>311</sup> 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.

<sup>312</sup> Wis. Admin. Code §§ PI 35.06(6)(b)4., 48.06(6)(b)4, 49.06(3)(b)4.; On Demand Training 9-3, 3rd Friday in September & 2nd Friday in January Count Reports, <https://dpi.wi.gov/parental-education-options/choice-programs/on-demand-training>.

<sup>313</sup> Wis. Admin. Code §§ PI 35.06(6)(b), 48.06(6)(b), 49.06(3)(b).

<sup>314</sup> December 16, 2020 email from Chanell Crawford, DPI Director, Parental Education Options.

<sup>315</sup> Wis. Stat. §§ 115.7915(4p)(b), 118.60(4m), 119.23(4m).

<sup>316</sup> Private School Choice Programs & Special Needs Scholarship Program for Summer 2020, DPI Informational Document, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>.

<sup>317</sup> *Id.*

<sup>318</sup> Private School Choice Programs & Special Needs Scholarship Program for Summer 2020, DPI Informational Document, <https://dpi.wi.gov/parental-education-options/choice-programs/september-enrollment-audit>; SNSP June 2020 Training SNSP Payment Process, Financial & Enrollment Audits Training, <https://dpi.wi.gov/parental-education-options/special-needs-scholarship/school-training>.

### *Summer School Title I*

According to the DPI enrollment audit guide and training materials, no courses funded by Title I may be included in the 19 days or 270 hours required to qualify for summer school payments.<sup>319</sup> This requirement is not in administrative rules or DPI policies.<sup>320</sup> According to DPI training materials, no Title I courses may be included on the Summer School Course List because they are not “eligible for payment through the Private School Choice Summer School Program.”<sup>321</sup> However, PSCP and SNSP payments are not made for classes but for students and DPI already has policies in place to prevent duplicate government payments. Under statutes, the amount of the summer school payment is adjusted downward by DPI for a student who attends less than 15 days of summer instruction<sup>322</sup> and DPI does not allow a school to count a day on which the student only attended Title I classes.<sup>323</sup> Since payments are already reduced when students are attending only Title I classes on a given day, all hours of instruction should be counted to determine if a school provides the required 270 minutes of daily instruction necessary to qualify as a summer school program.

### Background Checks

Statutes require a school to conduct criminal background investigations of its employees and exclude them from employment if they fall into either of the following categories:

- They are not permitted to hold a teaching license as a result of an offense; or,
- They might reasonably be believed to pose a threat to the safety of others.<sup>324</sup> Administrative rules provide that an individual who might reasonably be believed to pose a threat to the safety of others includes individuals who have engaged in immoral conduct. As defined by statute, immoral conduct includes:
  - Behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare, or education of any pupil;
  - The intentional use of an educational agency’s equipment to download, view, solicit, seek, display, or distribute pornographic material; or

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<sup>319</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Department of Public Instruction; *See also* Summer School, Private School Choice Programs Information Bulletin 03-01, Aug. 2020.

<sup>320</sup> *See* Summer School, Private School Choice Programs Information Bulletin 03-01, Aug. 2020.

<sup>321</sup> DPI Training: Summer School Count Report Instructions, <https://dpi.wi.gov/parental-education-options/choice-programs/bulletins>.

<sup>322</sup> Wis. Stat. §§ 115.7915(4p)(a)2., 3., 118.60(4m)(a)2., 3., 119.23(4m)2., 3.

<sup>323</sup> Choice Training: Summer School Count Report, <https://dpi.wi.gov/parental-education-options/choice-programs/bulletins>.

<sup>324</sup> Wis. Stat. §§ 115.7915(6)(d), 118.60(7)(h), 119.23(7)(h).

- Assisting a school employee, contractor, or agent to obtain a new job in a school or with an LEA, if the individual knows or has a reasonable suspicion to believe that the school employee, contractor, or agent committed a sex offense and the victim was a minor or a pupil.

Administrative rules provide that a school can satisfy the background check requirements by either obtaining a copy of the individual's DPI license or conducting a criminal background check.<sup>325</sup> As it relates the latter, DPI policies place the following requirements for schools:

- A school's background check process must be "sufficient to determine that the requirements are met."<sup>326</sup> A school may, but is not required to, use a background check information source listed on the DPI website for the criminal background check.<sup>327</sup>
- A school must establish a policy or other written document indicating what they consider to be immoral conduct which will be used to determine whether conduct identified in the background check falls into this category and disqualifies them from employment.<sup>328</sup> Since immoral conduct may not be illegal, schools may use the DPI Conduct and Competency Form as a resource. The form requires license applicants to answer questions about any past immoral conduct.<sup>329</sup>
- If the background check reveals "potential areas of concern," as it relates to immoral conduct, the school should review the relevant information to determine whether the behavior prohibits the employee from being employed at the school.
- If a school must conduct background checks for workers from an outside vendor and the vendor already conducts background checks that meet the program requirements, the school may use these.

The SNSP audit guides and the PSCP Fiscal and Internal Control Practices Report include several pages of instructions for testing a school's background check process and directs auditors to DPI policies and trainings for applicable requirements.<sup>330</sup> Since DPI may withhold payments or bar schools for failure to comply with the statutory background check requirement, any

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<sup>325</sup> *Id.*

<sup>326</sup> Criminal Background Checks, Private School Choice Programs and Special Needs Scholarship Program Informational Bulletin and FAQ 02-03, rev. July 2018, pg. 9.

<sup>327</sup> *Id.* at pg. 6.

<sup>328</sup> *Id.* at pg. 5.

<sup>329</sup> *Id.* at pg. 6

<sup>330</sup> Special Needs Scholarship Program Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 Count Date, Issued by the Wisconsin Department of Public Instruction, pgs. 10-12; Private School Choice Programs Audit Guide, Fiscal and Internal Control Practices Report to the Wisconsin Department of Public Instruction December 15, 2020, Issue by the Wisconsin Department of Public Instruction, pgs. 37-42.

policies on which auditors will rely to determine compliance should be clarified and promulgated in an administrative rule.

### Anticipated Budget and Cash Flow Reports

Statutes require a new PSCP school to file a surety bond or submit a complete anticipated budget for the first fiscal period of participation in the program.<sup>331</sup> It must show:

- That the school will have a positive cash flow in each month of the fiscal period and no operating deficit;
- Anticipated enrollments of both all students and PSCP students;
- Estimated revenues and costs;
- Schedule of anticipated beginning and ending net program assets.
- Schedule of monthly cash flow requirements; and,
- Contingent funding sources in the event actual enrollments are less than expected.<sup>332</sup>

Administrative rules require schools to also show:

- Estimated amounts of net eligible education expenses;
- Anticipated beginning and ending reserve balance;
- Evidence of availability of other funding sources; and,
- A statement of whether the school has any past due accounts, interest or penalties due with IRS, DOR or DWD.<sup>333</sup>

DPI policies set minimum amounts schools must include for the following expenses:

- Utilities;
- Administrative supplies;
- Classroom supplies;
- Insurance;
- Independent auditing services; and,
- SIS.

If a school does not includes these amounts, DPI will add them prior to determining whether “the school meets the Choice requirements”<sup>334</sup> Schools must also submit to DPI:

- Current balance sheet;
- Current year-to-date income statement;

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<sup>331</sup> Wis. Stat. §§ 118.60(2)(ag)1.b, 119.23(2)(ag)1.b.

<sup>332</sup> *Id.*

<sup>333</sup> Wis. Admin. Code §§ PI 35.04(1)(f), 48.04(1)(f).

<sup>334</sup> Budget Report and Anticipated Cash Flow for Year Ending June 30, 2021, Instructions for Completion, PI-PCP-14, <https://dpi.wi.gov/parental-education-options/choice-programs/school-reports>.

- All cash and investment account bank statements dated no earlier than two months before the due date of the budget;
- June 30 balance sheet unless the school is a current participant; and,
- Income statement for previous year.

All of the additional requirements in administrative rules, DPI policies and report instructions may typically be included in anticipated budgets. If they are not, it should be determined which requirements are unnecessary or unduly burdensome so that they may removed.

## **Payment Eligibility Requirements**

### **4K Outreach**

Statutes provide that a pupil enrolled in a public school district 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.<sup>335</sup> Administrative rules define PSCP and SNSP 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.<sup>336</sup> DPI policies interpret “outreach,” and “educational component,” and establish requirements for counting hours.<sup>337</sup>

- Parent outreach is associated with activities that assist the parents and have an educational component. Parental involvement is not the same and is focused on involving parents and families as full partners in the education of their children and those activities may not be counted as outreach. Every outreach activity must be available to all 4K parents i.e., they may not be student or grade specific. Parents must keep logs for specific at-home activities.
- Educational component is not defined, but a number of examples are provided. In general, the educational component requires providing information or resources to parents that assists them in supporting their child’s education both inside and outside of school, but this is not explicitly stated in the administrative rules.
- Hours may be counted only for those activities beyond those that would occur as part of the school’s overall parent involvement effort. At home activities must be counted as directed by the DPI policies.

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<sup>335</sup> Wis. Stat. §§ 121.004(7), 121.02(1)(f).

<sup>336</sup> Wis. Admin. Code §§ PI 35.07(3)(b), 48.07(3)(b)

<sup>337</sup> K4 Parental Outreach Activities, Private School Choice Programs and Special Needs Scholarship Program Informational Bulletin 02-01, rev. Oct. 2016.

According to DPI audit guides, the auditor must review the school's outreach activities to ensure "they are all acceptable activities."<sup>338</sup> Since DPI conditions payments on compliance with the policies, their requirements should be clarified and promulgated as a rule.

**Primarily SNSP Eligible 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.<sup>339</sup> DPI policies differentiate between general eligible education expenses, statement of actual cost eligible education expenses and primarily SNSP eligible education expenses.<sup>340</sup>

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.<sup>341</sup> According to DPI, they are those expenses that are at least 50% related to SNSP students and that, although primarily for SNSP students, others are also benefitting. The allocation when calculating these expenses must be specific and not general. DPI policies also direct how these expenses are treated in the calculation of net eligible education expenses and how they can be allocated.<sup>342</sup> Adding these policies to the existing rule would create clarity and certainty for schools. For consistency in funding, an identical rule for PSCP should be considered.

**Summary of Issues**

- DPI policies establish MPCP and RPCP open application periods, which are brief. Since they impact a school's obligations and a student's eligibility, there may be a benefit to establishing them in rule and reducing or lengthening them.
- DPI policies require new schools to submit an EIN verification letter to DPI by February 15. There is no requirement in statutes or administrative rules to do so and although DPI has long required EIN numbers in order to make payments to schools, the additional documentation requirement was only recently established.
- DPI policies establish policies and procedures when a PSCP school adds seats for additional students. Since these policies establish requirements and limitations not found in statutes or administrative rules, there is likely a benefit to adding them to existing rules.
- DPI policies establish methods for counting hours of virtual instruction and taking attendance in a virtual environment, for both the school term and summer school. Since

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<sup>338</sup> Private School Choice Programs Audit Guide, Enrollment Audit for September and November 2020 Payment Eligibility for September 18, 2020 count Date, Issued by the Department of Public Instruction, pg. 9.

<sup>339</sup> Wis. Stat. § 115.7915(6)(c).

<sup>340</sup> Eligible Education Expenses, Special Needs Scholarship Program Informational Bulletin 8-02, rev. July 2019.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

PSCP and SNSP schools' ability to offer virtual instruction is the result of a lawsuit against DPI, it should be codified in statutes and administrative rules should be updated to reflect this instructional method.

- DPI policies exclude half-day 5K instructional hours when they occur on a day before first graders begin instruction. There is likely a benefit to clarifying administrative rules so that schools may count all instructional hours.
- DPI policies exclude Title I classes from the total instructional hours required to qualify for summer school payments. While a school should not receive a payment for a student who attends only Title I classes on any given day, a school should be permitted to count all instructional hours for purposes of qualifying as a summer school program.
- Administrative rules and DPI policies establish a complex background check process that requires familiarity with Wisconsin labor law and other statutes. Since auditors test a school's background check policies based on these requirements and they expand the statutory basis for withholding payments or barring schools, these policies should be clarified and promulgated in a rule.
- Administrative rules and DPI policies and report instructions establish a number of requirements for anticipated budget and cash flow reports that are not found in statute. If these requirements are not typically included in anticipated budgets, there may be a benefit to simplifying the process.
- DPI policies establish what qualifies as 4K outreach and how those activities should be counted. Since auditors rely on these policies to determine how students should be included in a count report, the requirements should be promulgated as an administrative rule.
- DPI policies establish primarily SNSP eligible education expenses as a category of SNSP eligible education expenses and direct how these expenses are treated in the calculation of eligible educational expenses and how they can be allocated. Since other categories are established by administrative rules, this should be as well. Similar provisions should also be considered for PSCP.

In addition to suspending rules for reasons specified in statute, JCRAR may 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.<sup>343</sup> An emergency rule is in effect for 150 days and may be extended for a total of 120 days.<sup>344</sup> 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.<sup>345</sup>

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<sup>343</sup> Wis. Stat. § 227.26(2)(b).

<sup>344</sup> Wis. Stat. § 227.24(1)(c), (2)(a).

<sup>345</sup> Wis. Stat. § 227.19(5)(d), (dm).

## **CONCLUSION**

When the Wisconsin Legislature enacted Act 21 a decade ago it fundamentally altered the rulemaking process and limited delegation of legislative power to administrative agencies. Prior to Act 21, an agency's rulemaking authority could be "fairly implied" by statute.<sup>346</sup> Implied authority allowed an agency to establish regulatory standards that did not contradict those in statute as long as the agency had jurisdiction over the subject matter of the rule.<sup>347</sup> Act 21 invoked constitutional separation of powers principals by reaffirming that agencies possess only that authority granted by the legislature. Specifically, requirements, standards and thresholds implemented or enforced by an agency must be explicitly permitted or required by statutes.<sup>348</sup> Last year, the Court acknowledged the legislature's rejection of implied agency powers and explained that the explicit authority requirement means imprecise delegations of power to administrative agencies must be narrowly construed.<sup>349</sup>

More recently, the Court defined the term explicit in a manner that arguably recognizes some implied agency powers. According to the Court, explicit authority can be found in a broad grant of authority because explicit does not mean specific.<sup>350</sup> The Court acknowledged that it must strictly construe an agency's authorizing statute as granting no implicit authority. This does not mean however that Act 21 strips an agency of the legislatively granted explicit authority it already has or limits the breadth of that authority. According to the Court, Act 21 requires only that a statute's text clearly express that an agency can undertake certain actions. While this new interpretation of explicit impacts any analysis of DPI authority, it should be noted that statutes grant the superintendent broad authority over public schools, but limited and precise authority over private schools, including those in PSCP and SNSP. Accordingly, DPI continues to exceed its regulatory authority by enforcing requirements and standards not required or permitted by statutes and failing to promulgate rules when required to do so by statutes.

- 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. This view is not supported by statute or caselaw. Any DPI documents making this assertion or requiring schools to acknowledge it should be revised. 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

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<sup>346</sup> See *Watkins v. Labor and Industry Review Commission*, 345 N.W.2d 482 (Wis. 1984).

<sup>347</sup> See *Oneida County v. Converse*, 508 N.W.2d 416 (Wis. 1993).

<sup>348</sup> Wis. Stat. § 227.10(2m).

<sup>349</sup> *Wisconsin Legislature v. Palm*, 220 WI 42, ¶ 52.

<sup>350</sup> *Clean Wisconsin v. Kinnard Farms*, 2021 WI 71; *Clean Wisconsin, Inc. vs. Wisconsin Department of Natural Resources*, 2021 WI 72.

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 are likely necessary to clarify or limit 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 the policies may be appropriate under GAAP or generally accepted auditing standards. The contents of others may not negatively impact schools or families. But schools and families may benefit from establishing some of them as rules since it provides the opportunity for input and notice before requirements change.