

Report From Agency

FINAL REPORT
CLEARINGHOUSE RULE 16-004
CHAPTER PI 35
PARENTAL CHOICE PROGRAM FOR STUDENTS RESIDING IN THE CITY OF MILWAUKEE

Analysis by the Department of Public Instruction

Statutory authority: s. 119.23 (11) (a), Stats.

Statute interpreted: s. 119.23, Stats.

The 2013-15 budget, 2013 Wisconsin Act 20, made several modifications to the Milwaukee Parental Choice Program; the program was further modified by the 2015-17 budget, 2015 Wisconsin Act 55. The Milwaukee Parental Choice Program allows eligible private schools to receive state aid payments for eligible students. The rules set forth the MPCP program requirements under s. 119.23, Stats., as modified by 2015 Wisconsin Act 55 and other legislation. The proposed rules and this section of the statutes apply only to private schools that choose to participate in the program. The Department's proposed rule reflects both statutory changes and changes in practice.

The proposed rule refers to ch. PI 48 and ch. PI 49, provisions that are created in separate rule-making orders currently under promulgation. Draft materials of ch. PI 48 may be accessed at:

http://docs.legis.wisconsin.gov/code/chr/all/cr_16_006. Draft materials of ch. PI 49 may be accessed at:

http://docs.legis.wisconsin.gov/code/chr/all/cr_16_005.

The hearing notice was published in the February 1, 2016, edition of the Wisconsin Administrative Register. A public hearing for the rule was held on February 17, 2016, in Milwaukee, WI.

The following persons testified at the February 17, 2016 hearing (some also provided written testimony as well):

| NAME | ORGANIZATION | IN FAVOR OR GENERALLY IN FAVOR | OPPOSED OR GENERALLY OPPOSED | OTHER |
|---------------|---------------------------|--------------------------------------|------------------------------------|-------|
| Steve Schafer | Atonement Lutheran School | X | | |
| Carol Shires | School Choice Wisconsin | X | | |

The following persons submitted written testimony:

| NAME | ORGANIZATION | IN FAVOR OR GENERALLY IN FAVOR | OPPOSED OR GENERALLY OPPOSED | OTHER |
|----------------------------|--|--------------------------------------|------------------------------------|-------|
| Monica Murphy/Karyn Rotker | Disability Rights Wisconsin/American Civil Liberties Union | | | X |
| Kim Wadas | Wisconsin Catholic Conference | X | | |

Summary of public comments relative to the rule and the agency's response to those comments:

Comments on the Rule

- (1) Concerns exist that the May 1st due date for the enrollment audit is too early. Audit firms that do tax work do not have the ability to meet this deadline, making the requirement impractical.
- (2) Concerns exist that 4-year-old kindergarten choice pupils, who are attending full-day kindergarten, are being counted and aided as 0.6 full-time equivalent pupils. The rule should be updated to count those pupils as one full-time equivalent so that choice schools are not losing money to operate a full-day kindergarten.
- (3) Concerns exist that students with disabilities would not be allowed to have the same access in the parental choice program as their non-disabled peers do; however, the following revisions are suggested to ensure that students will be allowed to participate and that the program complies with Title II of the Americans with Disabilities Act (ADA):
 - Data collection and reporting from each participating school, for each school year, that includes: 1) the number of students with disabilities enrolled in each choice school, 2) the number of students with disabilities denied admission in voucher schools disaggregated by grade level and type of disability, 3) the number of students with disabilities who left a voucher school during the school year to return to the public school system, 4) the number of students with disabilities suspended or expelled from a choice school disaggregated by grade level and type of disability.
 - Require staff of schools participating in the parental choice program to attend an ADA training provided by the Department when the school enters the program and on a periodic basis thereafter.
 - Require schools participating in the parental choice program to develop policies and procedures to advise families that students with disabilities are welcome to apply, that students will not be denied enrollment absent a valid ADA defense, that accommodations will be provided, and that students with disabilities will not be expelled or exited from voucher schools unless there are no reasonable modifications to school policies, practices, or procedures that could enhance the school's capacity to serve the students.
- (4) Throughout the rule (for example, in s. PI 35.03(8)(e)), a MPCP school is subject to penalties for failure to adhere to certain restrictions, such as completing the school term once initiated, but the rule does not allow for unique situations when the school may have to close or cease operations temporarily. It would be helpful if the rule recognized an exemption from compliance when such situations arise.
- (5) Even though it is not legally necessary, references to requirements under other subsections of ch. PI 35 are helpful, especially for private school leaders and administrators who may not have significant experience with state administrative code compliance. Please consider adding references for clarity where it may prove helpful. For example, in s. PI 35.03(2) (which is at s. PI 35.02 (3) in the final rule), consider referencing after "The Choice Administrator..." the phrase "as defined in PI 35.02(2)."
- (6) In a similar fashion, greater distinction could be made between s. PI 35.03(3) and (4) by beginning s. PI 35.03(3) with the phrase "Except as provided under sub (4)."
- (7) Also within s. PI 35.03(3), it seems sub (a)3 should be renumbered sub (b) and subsequent subs renumbered accordingly.
- (7) To provide greater clarity as to what correspondence is to be maintained by a school under s. PI 35.06(4)(c), consider limiting the requirement to correspondence related to a pupil's application and acceptance or non-acceptance.
- (8) As with s. PI 35.14(3)(d), s. PI 35.13(3) should afford schools the opportunity to note when an expense or vendor payment is in dispute and therefore has not or will not be paid within the requisite timeline.
- (9) Under s. PI 35.15(2), "A school shall submit to the department any information the department requires to determine the ability of the school to continue financially, including an audit of the financial statements of the school's legal operating organization." For a larger operating organization, this would give the Department access to financial documents (potentially subject to open records laws) documenting the finances of operations or programming wholly unconnected to the operations of a school. This provision's language should be limited to Department requests for documentation that are necessary to verify the fiscal viability of the school. The phrase "including an audit of the financial statements of the school's legal operating organization" is technically unnecessary as a school that fails to provide documentation to the Department that is sufficient to demonstrate its fiscal viability would simply lose access to the program.

- (10) Finally, s. PI 35.16(1)(d) defines a teacher aide as “any individual serving in the classroom who is not a teacher.” However, schools have individuals, such as parents, who are “serving in the classroom” as indoor recess monitors or class lunch monitors, etc., and not teacher aides. Instead, the definition should be tied to the provision or facilitation of instruction, which would thereby encompass individuals who may aid students out of the classroom as well, such as on field trips or when visiting other schools.

Agency Response

- (2) The Department did not implement this recommendation since the 4-year-old kindergarten payment made is consistent with the payment method for the public school districts.
- (3) While the Department is committed to ensuring its administration of the Choice program does not discriminate against children with disabilities, the Department lacks the statutory authority under ss. 119.23 and 227.10, Stats., to implement the requested changes related to the ADA and children with disabilities.
- (5) The Department did not implement this recommendation since “choice administrator” is a defined term. Therefore, including a reference to the definition in s. PI 35.03 (2) is unnecessary.
- (7) The requirements for what must be retained for a student are established in s. 119.23 (7) (dr), Stats. The requirements in the rule are consistent with the statute.
- (8) If the auditor identifies any past due amounts as part of the fiscal and internal control practices report under s. PI 35.13 (14), the school is required to submit a letter indicating how it has resolved the issue. The school can include an explanation and additional information regarding the situation in this letter and it is considered by the Department in its review of the financial situation of the school.

Changes made as a result of oral or written testimony:

- (1) The Department modified the date by which the January enrollment audit is due in s. PI 35.07 (1). If the school is not participating in a program under s. 118.60, Stats., the January enrollment audit is due by June 30 rather than by May 1. The structure of s. PI 35.07 (1) was modified to clearly state the required due dates for the enrollment audits.
- (4) The Department added language to ss. PI 35.19 (4) and PI 35.03 (7), which allows a school to cease instruction prior to the end of its scheduled school term if it obtained prior written approval from the Department.
- (6) The recommendations were accepted by the Department.
- (9) Section PI 35.15 (2) allows for the Department to request information that is needed to determine the financial ability of a school to continue. This information is only requested when there are indicators that the school may not have the financial ability to continue. This provision is included for situations where a school is part of a legal entity since the financial situation of the school is based on the situation of the legal entity as a whole, not only the school activity and balances. The Department modified the language to clarify that the Department may request an audit of the school’s legal operating organization prepared in accordance with generally accepted accounting principles.
- (10) Modified the definition of teacher aide in s. PI 35.16 (1) (d) to include any individual assisting with educational programming who is not a teacher or volunteer. The Department also removed “volunteers” from s. PI 35.16 (3).

Changes to the analysis or the fiscal estimate:

None.

Responses to Clearinghouse Report:

1. Statutory Authority:

- a. The recommendation was accepted by the Department.
- b. The Department did not accept this recommendation. In order to effectuate the purpose of the statute, the rule requires a school to identify in advance which standard under s. 119.23 (7) (a), Stats., the school will use. A school is required to meet one of the standards under s. 119.23 (7) (a), Stats., during the school year. If the school does not identify which standard it will meet and how it will meet it, the school may not have the data to determine if it has met the standard at the end of the school year. This has been the Department's longstanding interpretation of s. 119.23 (7) (a), Stats.
The Department's interpretation is also consistent with legislative intent. The classification of a "new private school" was added in 2013 Wisconsin Act 237, which was enacted April 8, 2014. This act also added the requirement to specify which continuing eligibility standard the new private school will meet. Therefore, the requirement for the new private school to identify which continuing eligibility standard it will meet in advance of the school year is supporting the fact that identification of the standard in advance is needed.
- c. The provisions specified in s. PI 35.05 (4) were primarily related to the Department of Public Instruction income determination method. The Department modified s. PI 35.05 (4) to clarify which requirements apply to the Department of Revenue income determination method and which requirements apply to the Department of Public Instruction income determination method.
- d. Reviewed the calculation of the full-time equivalent in s. PI 35.06 (6) (b) 2. for accuracy and modified the content to be consistent with the public school method.

2. Form, Style and Placement in Administrative Code:

All of the recommendations under this section were accepted, with the exception of comment h, which identified that a change should be made to s. PI 35.05 (1) (e). This change was not made because the definition in this paragraph was not used, so par. (e) was removed.

3. Conflict With or Duplication of Existing Rules:

The Department removed the terms "private school choice programs" and "Milwaukee parental choice program." The Milwaukee parental choice program references were replaced with "choice program." The private school choice programs references were replaced with a reference to the programs under ss. 118.60 and 119.23, Stats.

4. Adequacy of References to Related Statutes, Rules and Forms:

The recommendations in paragraphs a and d-h were accepted by the Department.

- b. Throughout the rule, the Department includes the requirements that the school must meet in order to become and remain eligible for the programs under s. 119.23, Stats. Therefore, the Department did not believe a cross reference to one of those requirements was needed in s. PI 35.03.
- c. Modified the cross reference in s. PI 35.03 (4) (c) to include all of the continuing eligibility standards since several of standards may include the use of an academic achievement test.
- i. The Department does not believe a cross reference to s. 119.23 (10), Stats., in s. PI 35.20 (3) is appropriate. Section PI 35.20 (3) explains what individuals may be disqualified. By contrast, s. 119.23 (10), Stats., explains what may happen to a school that retains someone who is disqualified.

5. Clarity, Grammar, Punctuation and Plainness:

The recommendations in paragraphs b-f, l-o, q, r, t, w-y, bb, dd, hh, kk, ll, mn, oo-rr, uu -zz, and ccc were accepted by the Department.

a. See Section 3 above for a description of how the Department addressed this comment.

g. The Department requires that the choice administrator provide documentation that he or she has the required credentials with the intent to participate in s. PI 35.03 and the new private school information in s. PI 35.04 since a choice administrator with the required credentials is necessary for participation in the program. The determination if the other individuals at the school have the required credentials is completed as part of the fiscal and internal control practices report required under s. PI 35.13 (14).

h. Added a date to s. PI 35.03 (3) (a) by which the school must provide the random selection plan if it is written by the school and the date by which the state superintendent must approve the plan.

i. Removed s. PI 35.03 (4) (c) to eliminate the redundancy between s. PI 35.03 (4) (a) and (c). In order to address other comments, the Department moved s. PI 35.03 (4) (a) to s. PI 35.04 (1) (a) 1.

j and tt-Created a new section for new private school requirements (s. PI 35.04) and moved all new private school requirements to this section to clarify the requirements for new private schools compared to other schools. As part of this change, the Department removed some components of the financial review from s. PI 35.04 because they are not required for new private schools. The Department also added s. PI 35.04 (3) to identify the method that new private schools must use to repay any differences in the auditor fee. The sections that were moved are:

- o Section PI 35.03 (4) was moved to s. PI 35.04 (1) (a).
- o Section PI 35.03 (6) (a) was moved to s. PI 35.04 (1) (b) and (c).
- o Section PI 35.03 (5) (a) was moved to s. PI 35.04 (1) (d).
- o Section PI 35.17 (3) was moved to s. PI 35.04 (1) (e).
- o Section PI 35.14 (1) was moved to s. PI 35.04 (1) (f).
- o The new school intent to participate in s. PI 35.03 (3) was moved to s. PI 35.04 (2).
- o Section PI 35.14 (4) was moved to s. PI 35.04 (4).
- o Section PI 35.03 (5) was moved to s. PI 35.03 (4).
- o Section PI 35.03 (6) was moved to s. PI 35.03 (5).
- o Section PI 35.03 (7) was moved to s. PI 35.03 (6).
- o Section PI 35.04 previously included student fees. This section was moved to s. PI 35.03 (8).

k. Clarified the timeframe covered in s. PI 35.03 (4) (a) 1. b. by modifying the language to “annual or semi-annual.”

p. The Department did not change the citation in s. PI 35.03 (5) (a) 1. or (5) (b) 1. from s. 119.23 (6m) (b) 4., Stats., to s. 119.23 (6m) (b), Stats., because the other provisions included in s. 119.23 (6m) (b), Stats., are submitted through a different report.

s. Removed the definition for designee included in s. PI 35.05 (1) (e) because the term was not used in the rule.

u. Modified the reference to s. 118.14, Stats, by changing it to s. 118.14 (1), Stats., at PI 35.05 (5), PI 35.06 (8) (a) 1., and PI 35.07 (3) (o). However, the Department did not add that the student must attain the required age by September 1 of the year the student seeks to attend school since this is already specified in s. 118.14 (1), Stats.

v. Removed the reference to the alternative residency form.

z. Removed s. PI 35.06 (7) (c), where the term “pupil count report” was used and modified s. PI 35.06 (7) (b) to include that the list of choice pupils must be by grade level. The comments indicate that the Department should clarify whether a form will be provided for submission. Section PI 35.06 (7) and (8) indicate that the report shall be submitted using the online application system. This is the online reporting application that the schools use to submit the reports.

aa. Clarified that the Department requires an enrollment audit twice a year in s. PI 35.07 (1). The Department did not include additional information regarding the use of different auditors for the audits and agreed upon procedure reports required during the year. There is no specific requirement that the same auditor be used for all reports. However, the Department generally encourages schools to use the same auditor. Since there is no requirement that the auditor be the same, the additional information was not deemed necessary.

cc. The Department separated the procedures in s. PI 35.07 (3) (e) and (f) to clarify the requirements. The Department also modified s. PI 35.07 (3) (h) to clarify the requirements. Although these procedures are similar, the rule defines

what each report is and comparing the pupil information between each report is a necessary to ensure that they match and that the pupil counts are correct.

ee. The financial audit includes the auditor's statement that the audit is free of material misstatements (known as an auditor opinion). Therefore, the Department specified that the audit opinion is part of the financial audit in the definition in s. PI 35.02 (10). The requirement that the management letter prepared by the auditor be provided with the financial audit is not included in rule because the requirement is in statute and additional guidance regarding the management letter is not required.

ff. The Department did not add any additional clarification regarding what is meant by the statement of activities because s. PI 35.09 (1) (a) identifies the statement of activities as a statement required by generally accepted accounting standards. Section PI 35.09 (1) (b) is an exception to s. PI 35.09 (1) (a).

gg. Modified the wording in s. PI 35.11 (3) for clarity

ii. The department did not modify s. PI 35.11 (7) as recommended because the subsection was revised and the reference that required correcting was removed.

jj. Changed "or" to "and" in s. PI 35.12 (3). Reviewed the appropriateness of maintaining the working papers for five years from the due date of the financial audit as required in s. PI 35.12 (3). This is appropriate because the financial audit relies on information from the enrollment audits for completion of the report. Additionally, the procedures in the fiscal and internal control practices report are also related to the financial audit.

mm. Modified s. PI 35.12 (6) for clarity.

ss. The review of the management letter is completed as part of the fiscal and internal control practices. As such, it is most appropriately included in s. PI 35.13 (13).

aaa. The language in s. PI 35.16 (3) was modified so the change was no longer required.

bbb. Modified s. PI 35.16 (5) for clarity.

Changes deemed necessary by the Department to improve implementation of the rule:

- Added references to chs. PI 48 and 49 and ss. 115.7915 and 118.60, Stats., to the related statutes or rules in the analysis.
- Moved the definition for "4-year-old kindergarten outreach activities" to s. PI 35.02 (1).
- Removed "legal guardians" from the list of who 4-year-old kindergarten outreach activities may be provided to in s. PI 35.02 (1) since it is included in the definition of parent.
- Modified s. PI 35.02 (3) for clarity.
- Modified s. PI 35.02 (5) for clarity.
- Modified who may establish the normal class period or equivalent to only include the governing body in the definition of "credit" in s. PI 35.02 (7).
- Modified the definition of parent in s. PI 35.02 (17) to include an individual who has the legal authority to make educational decisions for the pupil in cases where a pupil's biological parent, legal guardian, parent by adoption, or step-parent does not reside in the same household as the pupil applicant.
- Added s. PI 35.02 (18) (c) to clarify that professional standards include the standards issued by the American Institute of Certified Public Accountants.
- Added a definition for working papers to s. PI 35.02 (25) and used the term in the rule.
- Modified s. PI 35.03 (4) (b) and (c) for clarity.
- Modified s. PI 35.03 (5) for clarity.
- Modified s. PI 35.03 (7) (e) to only reference pars. (a) and (b) because they are the only reports that would need to resubmitted if the school shortens its school term.
- Referenced the specific amounts in s. PI 35.10 (3) that must be included in the budget in ss. PI 35.04 (1) (f) 4., PI 35.13 (2) (a) 4., and PI 35.14 (1) (a) 4.
- Changed ss. PI 35.04 (1) (f) 5., PI 35.13 (2) (a) 5., and PI 35.14 (1) (a) 5. to "net assets" instead of "net program assets."
- Clarified that application documentation may be obtained outside the open application period in s. PI 35.05 (6) by including an exception under s. PI 35.05 (8).

- Clarified that applications may be corrected as described in s. PI 35.05 (8) but if the correction is made it must comply with the requirements in s. PI 35.05 (8).
- Clarified that the information that must be obtained to correct an application as described in s. PI 35.05 (8) (c) and (d) is the information for the prior year.
- Added a reference to the nonrefundable auditor fee paid by the new private schools to s. PI 35.06 (1) (c).
- Modified the reference in s. PI 35.06 (4) (a) to include all of s. PI 35.05 since the required residency and income documentation may be included in a different subsection than s. PI 35.05 (2) or (4).
- Modified s. PI 35.06 (5) for clarity and to state that a school may not receive a payment for a student under s. 119.23, Stats, and receive a payment for the same student under s. 115.7915 or 118.60, Stats.
- Section PI 35.07 (1) references the required “agreed upon procedures.” Added that the auditor must complete the report using professional standards, which is where the requirements for an agreed upon procedure report are explained.
- Modified s. PI 35.07 (3) (b) for clarity.
- Added a reference to the summer school report to s. PI 35.07 (3) (p) for clarity.
- Modified s. PI 35.07 (4) by indicating that if the school fails to provide the required enrollment audit, the students may be determined ineligible. Previously, s. PI 35.07 (4) indicated that the students shall be determined ineligible.
- Modified the structure of s. PI 35.07 (4) for clarity.
- Modified s. PI 35.08 (1) to reference the school term rather than the school year.
- Added that summer school classes could also be directed by a teacher to s. PI 35.08 (3) (b) 6.
- Clarified in s. PI 35.10 (1) (b) that land is included as an eligible education expense using an allocation method, if applicable.
- Added s. PI 35.10 (1) (d) to clarify that eligible education expenses that partially relate to educational programming and partially relate to other activities are included using an allocation method. Section PI 35.13 (5) (h) already required that the school determine what allocation methods will be used and the auditor review under s. PI 35.10 (2) already included a review to ensure the identified allocation methods were used.
- Clarified that expenses for students attending the private school who are enrolled in a public school district are not an eligible education expense in s. PI 35.10 (1) (e) 5.
- Clarified that the government assistance that is included in offsetting revenue under s. PI 35.10 (3) (a) 2. is the government assistance that is received for eligible education expenses.
- Added s. PI 35.10 (3) (a) 3., which identifies that fundraising revenue is offsetting, up to the amount of non-administrative fundraising expenses.
- Added s. PI 35.10 (3) (a) 4., which identifies that insurance proceeds received for eligible education expenses are offsetting.
- Renumbered s. PI 35.10 (3) (c) and (d) because the rule skipped (c).
- Clarified in s. PI 35.10 (4) that the cash and investment balance that must be maintained for schools participating in a program under ss. 115.7915 and 119.23, Stats., is the sum of the required reserves less the sum of any remaining depreciation on fixed assets used by the school and any land purchases that have not yet been included as an eligible cost.
- Modified the auditor bar language in s. PI 35.12 (7) to indicate that an auditor may be barred if they fail to meet the requirements and that an auditor who is barred shall not complete accounting, auditing, or other auditing requirements for any school participating in a program under ss. 115.7915, 118.60 or 119.23, Stats. Also modified s. PI 35.11 (7) to indicate that an auditor who is barred under ss. PI 35.12 (7), PI 48.12 (7), or PI 49.11 (7) shall not complete accounting, auditing, or other reporting requirements for any school participating in s. 119.23, Stats.
- Modified s. PI 35.13 (2) (b) for clarity.
- Clarified that employees must be paid as required by the compensation agreement and the dates for payment in s. PI 35.13 (4).

- Modified the policy under s. PI 35.13 (5) (h) to specify that it must include how government assistance revenues will be allocated, if applicable.
- Modified s. PI 35.13 (9) for clarity.
- Modified the structure of s. PI 35.14 (1) for clarity.
- Clarified that the financial statements provided under s. PI 35.15 (6) (d) 7. must show that the legal entity of the school meets the requirements in s. PI 35.15 (6) (d) 1. to 3.
- Modified the structure of s. PI 35.15 (6) (d) 7. for clarity.
- Included the required documentation if a teacher or administrator meets the credential requirement through a department license in s. PI 35.16 (5).
- Removed teacher aide from s. PI 35.16 (5).
- Added that the foreign evaluation in s. PI 35.16 (5) (b) can show that a teacher or administrator meets the credential requirement if the degree is the equivalent of higher than a bachelor's degree.
- Clarified that no aid may be paid to a school that does not meet the requirements of ch. PI 35 or s. 119.23, Stats.
- As permitted by s. 227.44 (8), Stats., added s. PI 35.21 (4) to allow individuals to obtain a transcript of a contested case hearing.