

Report From Agency
FINAL REPORT
CLEARINGHOUSE RULE 16-005
CHAPTER PI 49
SPECIAL NEEDS SCHOLARSHIP PROGRAM

Analysis by the Department of Public Instruction

Statutory authority: s. 115.7915 (10), Stats.

Statute interpreted: s. 115.7915, Stats.

The basis and purpose of the proposed rule, including how the proposed rule advances relevant statutory goals or purpose:

2015 Wisconsin Act 55 created the Special Needs Scholarship Program. The effective date of the program is the 2016-17 school year. Section 115.7915 (10), Stats., requires the department to promulgate administrative rules related to pupil and school application processes. Additional changes to s. 115.7915, Stats., were made by 2015 Wisconsin Act 289 and 2015 Wisconsin Act 297, including requiring schools accept applications in the order they are received, allowing an applicant to apply for the program at any time, and expanding the list of private school accreditation entities. This proposed rule creates procedures for administering the special needs scholarship program, including procedures related to the eligibility and participation of schools, the calculation and distribution of state aid paid for special needs scholarships, and the application procedures for pupils and private schools.

The proposed rule refers to s. PI 35.06 (6) and ch. PI 48, provisions that are created in separate rule-making orders currently under promulgation. Draft materials of s. PI 35.06 (6) may be accessed at:

http://docs.legis.wisconsin.gov/code/chr/all/cr_16_004. Draft materials of ch. PI 48 may be accessed at:

http://docs.legis.wisconsin.gov/code/chr/all/cr_16_006.

Note: The scope statement for this rule, SS 081-15, was approved by State Superintendent Tony Evers on September 15, 2015, and it allows the Department to promulgate an emergency rule for the purpose of implementing the Special Needs Scholarship Program. The information contained in this report relates to the promulgation of the permanent rule only.

A list of the persons who appeared or registered for or against the proposed rule at a public hearing:

The hearing notice was published in the February 1, 2016 edition of the Wisconsin Administrative Register. A public hearing for the proposed permanent rule was held on February 18, 2016.

The following persons testified at the February 18, 2016 hearing (some also provided written testimony as well):

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Sally Flaschberger	Disability Rights Wisconsin	X		
Kim Wadas	Wisconsin Catholic Conference			X

The following persons submitted written testimony:

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
John Jagler	Wisconsin State Legislature	X		
Beth Sweeden	Wisconsin Board for People with Developmental Disabilities			X

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

Comments on the Rule

- (1) PI 49.05 concerning application requirements. The portion of the rule does not appear to include verification of the open enrollment denial but the required application requires the parent to complete the open enrollment denial section and provide a copy of their open enrollment denial letter. The application requirement should include language about the open enrollment denial but there may be some difficulty in parents producing letters of denial.
- (2) PI 49.12 concerning education services reporting. It is understood that reporting to the school board detailing the implementation and progress for each student participating in the special needs scholarship program is no longer part of the law; therefore, the rule and form should be shifted to the parent reporting requirement and include language stating: *Regularly report to the parent of a child attending the private school and receiving a scholarship under this section a record of the implementation of the child's individualized education program or services plan under subd. 1., including an evaluation of the child's progress, in the form and manner prescribed by the department.* The Department has already developed a “Record of Implementation form” which was originally intended to be used by school boards. It is recommended that the Department repurpose the existing form and use it to provide progress reports to parents.
- (3) The possibility exists that s. PI 49.03 (3) (e), which provides that a school that intends to participate in the program must agree to use the plan established by Department for ensuring random selection of pupils, may create confusion for schools when s. 115.7915 (3) (b), Stats., provides that a participating school shall select pupils on a random basis. It appears that the statutes conflict with the rule; therefore, clarification around this provision is requested.
- (4) The language of s. PI 49.03 (6) (b) indicates that the accreditation letter shall be dated no earlier than the beginning of the school year, but because the letter does not need to be supplied to the Department until August 1, which is close to the beginning of the school year, it might offer more clarity to simply state that the letter must be dated within the prior 12 months.
- (5) While the rule is very similar to the proposed ch. PI 48 rule implementing the parental choice program, concerns exist that the required procedures for the enrollment audit, which include verification of a 4-year old-kindergarten program and completion of a fraud risk assessment under s. PI 49.07 (3) (b) and (c), may not exist in the underlying statute the same way that they do for ch. PI 48 and may be difficult for a school participating in the special needs program to complete.
- (6) Under s. PI 49.04 (2) (g) schools should be afforded 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.
- (7) Throughout the rule (for example, in s PI 49.13 (5)), a school participating in the program 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.
- (8) Even though it is not legally necessary, references to requirements under other subsections of ch. PI 49 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 49.03 (2), consider referencing after “The [Special Needs Scholarship Program] Administrator...” the phrase “as defined in s. PI 49.02 (17).”

- (9) Student privacy is an issue of utmost importance, especially with special needs pupils who must share a wealth of personal health information with school personnel. We urge that s. PI 49.12 be implemented in such a manner that any identifying student information be removed from reports provided to the school board of the resident school district.

Agency Response

- (1) Section 49.05 was changed due to 2015 Wisconsin Act 289. The revised language includes a general reference to obtaining evidence that the parent complies with the requirements in s. 115.7915 (2) (a), Stats., as required by the parent application.
- (3) 2015 Wisconsin Act 289 removed open application periods and random selection and, as a result, this change is no longer applicable.
- (4) Wis. 115.7915 (2) (c), Stats., requires a school to be accredited as of the August 1 preceding the school term. The Department does not believe a change to s. PI 49.03 (6) should be made because the existing language better ensures the school is accredited as of August 1.
- (5) The verification that a 4-year old kindergarten program includes outreach and completion of the fraud risk assessment under s. PI 49.07 (3) are completed by the auditor, they are not completed by the school. The Department will provide auditors with an audit guide that explains the required procedures. As a result, the Department does not believe that the requested changes are necessary.
- (8) The Department did not implement this recommendation since “special needs scholarship program administrator” is a defined term. Therefore, including a reference to the definition in s. PI 49.03 (17) is unnecessary.
- (9) The requirement to report to the resident school district in s. PI 49.12 was removed due to changes made as a result of 2015 Wisconsin Act 289. Reporting to a resident school district is now required under s. 115.7915 (6) (h) 2., Stats.

Changes made as a result of oral or written testimony:

- (2) The Department modified s. PI 49.12 (1) to specify that a school’s required reporting to a parent of a pupil’s progress shall describe the implementation of the child’s individualized education program or services plan, as modified by agreement between the school and the child’s parent, and the pupil’s academic progress. The rule also specifies that a school shall use a form provided by the Department.
- (6) The Department modified s. PI 49.04 (3) (b) to indicate that if a school is having a dispute with a vendor regarding the amount the school owes to a vendor, the dispute will not be considered an indicator that the school would not be able to repay the Department if certain criteria are met.
- (7) The Department added language to s. PI 49.13 (5) that allows a school to cease instruction prior to the end of its scheduled school term if it obtained prior written approval from the Department.

Changes to the analysis or the fiscal estimate:

- None.

Responses to Clearinghouse Report:

1. Statutory Authority:

The recommendation was accepted by the Department.

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

The recommendations in paragraphs b-d were accepted by the Department.

a. The report indicates the Department should consider if all of the language regarding the certificate of occupancy requirements is necessary because it repeats statute. The Department believes that the certificate of occupancy provisions are clearer if the rule specifies the types of documents that may be provided to meet the requirements, rather than requiring that the reader refer to the statutory requirements. Therefore, the Department did not change the language in s. PI 49.03 (5).

e. The Department did not add a reference to s. 118.125, Stats., because the statutory language at s. 118.125 (2), Stats., only pertains to records maintained by public school districts.

5. Clarity, Grammar, Punctuation and Plainness:

The recommendations in paragraphs a-b, e, g-i, and k-l were accepted by the Department.

c and d. The Department did not make the changes suggested to ss. PI 49.05 (3) or PI 49.05 (7) (a) and (b) because the language that was referenced was removed.

f. The Department did not change the language in s. PI 49.07 (1). An auditor is required to submit an enrollment audit that determines if the enrollment information that is reported under s. PI 49.07 (4) (b) is correct. Changing the term to “report” changes the meaning of the term from auditing the enrollment information to auditing the report.

j. The Department did not make the changes recommended to ss. PI 49.10 (3) and 49.11 (3) because the Department believes the original language is clearer.

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

- Added references to chs. PI 35 and 48 and ss. 118.60 and 119.23, Stats., to the related statutes or rules in the analysis.
- Added 2015 Wisconsin Act 289 and 2015 Wisconsin Act 297 to the plain language analysis.
- Added the definition for “4-year-old kindergarten outreach activities” to s. PI 49.02 (1).
- 2015 Wisconsin Act 289 added that a child with a disability who has reached the age of 18 and has not been adjudicated incompetent may apply for the program. Added a definition of applicant that includes a parent and a child with a disability who has reached the age of 18 and has not been adjudicated incompetent.
- Modified s. PI 49.02 (3) for clarity.
- The Department specified that the audit opinion is part of the financial audit in the definition in s. PI 49.02 (7).
- Added s. PI 49.02 (13) (c) to clarify that professional standards include the standards issued by the American Institute of Certified Public Accountants.
- Referenced the intent to participate form in the definition of the special needs scholarship administrator in s. PI 49.02 (18).
- Modified s. PI 49.03 (3) (d) to indicate that the notice of intent to participate must be completed by the head of the governing board.
- Changed the date the certificate of occupancies are due for the year ending June 30, 2017, from May 1 to August 1 in s. PI 49.03 (5) (d).
- Specified that a criminal background check under s. PI 49.03 (4) must be completed once every five years.
- Changed the date a surety bond is due for the year ending June 30, 2017, from June 1 to August 1 in s. PI 49.04 (5).
- 2015 Wisconsin Act 289 removed open application periods and allowed for applicants to apply for the special needs scholarship program at any time. As a result, the Department made the following changes:

- Modified the requirement in s. PI 49.03 (3) (b) to include pupils who applied to a school after the 2nd Friday in January.
- Removed s. PI 49.03 (3) (e).
- Modified the application requirements section, s. PI 49.05, to clarify the application process.
- Removed s. PI 49.06 (1) regarding the application eligibility determination. This provision is now included in s. PI 49.05.
- Added language to s. PI 49.07 (3) (n) to clarify how application corrections required as a result of an auditor's review must be made. Also modified which applications must be tested by an auditor to include any applications that were not counted on a previous count date since applications received after the 2nd Friday in January will not be subject to auditor review until the following school year.
- Referenced the specific amounts in s. PI 49.09 (3) that must be included in the budget in s. PI 49.04 (1) (b) 1. d.
- Added language to s. PI 49.05 describing how an applicant may transfer an application between schools participating in the special needs scholarship program.
- Added s. PI 49.05 (8) to specify when a pupil may no longer receive a scholarship under s. 115.7915, Stats.
- Modified s. PI 49.06 (1) for clarity.
- Modified s. PI 49.06 (2) to state that a school may not receive a payment for a pupil under s. 115.7915, Stats., and receive a payment for the same pupil under s. 118.60 or 119.23, Stats.
- Modified s. PI 49.06 (4) (b) and (c) for clarity.
- Included the residency documentation and verification information in s. PI 49.06 (5) (c) rather than doing a cross reference to s. PI 49.05.
- Section PI 49.07 (1) references the required "agreed upon procedures." Added that an auditor must complete the report using professional standards, which is where the requirements for an agreed upon procedure report are explained.
- Modified the structure of s. PI 49.07 (1) for clarity.
- Separated s. PI 49.07 (m) into s. PI 49.07 (m) and (n) for clarity.
- Modified the structure of s. PI 49.07 (3) (b), (d), (h), and (p) for clarity.
- Added that the amount to be paid to a school is based on a full time equivalent and that pupils must meet statutory age eligibility requirements. The full time equivalent requirements were added to ss. PI 49.06 (3), PI 49.09 (3) (c), and PI 49.13. The age requirements were added to ss. PI 49.05 (2), PI 49.06 (5) (b), and PI 49.07 (3) (o).
- Clarified in s. PI 49.09 (1) (b) that land is included as an eligible education expense using an allocation method, if applicable.
- Added s. PI 49.09 (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.
- Clarified that expenses for pupils attending the private school who are enrolled in a public school district are not an eligible education expense in s. PI 49.09 (1) (e) 4. Also made the reference in s. PI 49.07 (3) (j) 2. to pupils enrolled a public school district rather than pupils enrolled in a contract or partnership school of a public school district.
- Modified s. PI 49.09 (3) (a) to include a calculation of net eligible education expenses exclusively for special needs scholarship program pupils and changed the related language in s. PI 49.09 (3).
- Clarified that the government assistance that is included in offsetting revenue under s. PI 49.09 (3) (b) 2. is the government assistance that is received for eligible education expenses.
- Added s. PI 49.09 (3) (b) 3., which identifies that fundraising revenue is offsetting, up to the amount of non-administrative fundraising expenses.
- Added s. PI 49.09 (3) (b) 4., which identifies that insurance proceeds received for eligible education expenses are offsetting.
- Clarified in s. PI 49.09 (4) that the cash and investment balance that must be maintained for schools participating in a program under s. 115.7915, Stats., and s. 118.60 or 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 s. PI 49.10 (3), (4), and (5) for clarity.
- Modified the auditor bar language in s. PI 49.11 (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 reporting requirements for any school participating in a program under s. 115.7915, 118.60 or 119.23, Stats. Also modified s. PI 49.10 (7) to indicate that an auditor who is barred under s. 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. 118.60, Stats.
- Modified s. PI 49.11 (1) and (6) for clarity.
- Removed s. PI 49.12 (1) because 2015 Wisconsin Act 289 removed the requirement that private schools annually report special needs scholarship program pupils' progress to public school districts.
- Clarified the titles in ss. PI 49.04 (1) and PI 49.13 (5).
- Modified s. PI 49.13 (intro.) for clarity.
- Corrected the reference in s. PI 49.14 (4) (c) and (d) from s. PI 49.04 (2) to s. PI 49.04 (1) (b).
- Modified s. PI 49.14 (4) (g) for clarity.
- As permitted by s. 227.44 (8), Stats., added s. PI 49.15 (4) to allow individuals to obtain a transcript of a contested case hearing.