



PUBLIC SCHOOL OPEN ENROLLMENT INFORMATIONAL BULLETIN

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Special Education Space Determinations and Reasons for Denial for Open Enrollment

This bulletin covers information specific to special education space determinations for open enrollment purposes and specifically covers school board policies, criteria used to determine special education space, the actual designation of available spaces, reasons for denial, and why the criteria selected must be used consistently.

For more general information related to special education and open enrollment, please see [Bulletin-16-05-Special-Ed-and-OE.pdf](#).

Statutory Reference

Wis. Stat. § 118.51(5)(a)1. provides that a nonresident school board shall determine the number of regular education and special education spaces available within the school district in the January meeting of the school board.

Wis. Stat. § 118.51(5)(a)4. provides that a nonresident school board may consider whether the special education or related services described in the child's individualized education program under Wis. Stat. § 115.787(2) are available in the nonresident school district or whether there is space available to provide the special education or related services identified in the child's individualized education program, including any class size limits, pupil-teacher ratios or enrollment projections established by the nonresident school board.

Wis. Admin. Code § PI 36.06(5)(a) provides that at the January board meeting, the nonresident school board shall designate the number of regular education spaces, by grade, and the number of special education spaces, by program or services, in the district using the criteria specified in its policy under Wis. Admin. Code § PI 36.04(2).

School Board Policies

If the nonresident school board wishes to consider whether it has available space in the special education or related services required in the Individualized Education Program (IEP) of pupils seeking to open enroll into the district, the board must specify this in its open enrollment policy as well as the criteria it will consider when making its determinations. The policy may not specify that it cannot provide services to pupils with a specific disability. The policy can only consider the availability of space in special education and/or related services.

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Criteria for Determining Available Space in Special Education or Related Services

The school board must have criteria for determining whether it has space in any special education or related service. Specific criteria must be applied consistently to ensure decisions about special education space are not arbitrary or unreasonable. Criteria may include:

- Class size limits or pupil-teacher ratios
- Staffing capacity limit, including:
 - The amount of services pupils may need (e.g., minutes/hours, days per week)
 - Class/group size based on intensity of pupil needs (e.g., 1:1, small group, crisis intervention)
 - The type of staff to address various disability-related needs (e.g., special education teacher, pupil services staff, related services, paraprofessional, etc.)
- Projected pupil enrollment and changes to services in pupils' IEPs
- Other considerations concerning availability of space in the special education or related services

Neither state nor federal special education law contain requirements for minimum or maximum space/staffing capacity to provide special education and/or related services. Local school districts are responsible for determining policies and criteria related to space/staff capacity to provide special education services.

The school board's criteria may not include:

- Limits that are based on pupil eligibility category labels (e.g., SLD, Autism, ID)
- Limits that are based on IDEA environment codes (e.g. amount of time in general education classroom, IDEA Env. Code B)
- Limitations related to transportation

Designation of Space

School boards are required to designate the number of regular education and special education spaces available for the next school year. The number of regular education spaces is designated by grade. The number of special education spaces is designated by available special education and related services. Space determinations must only be made and approved by the school board at its January board meeting.

If the board does not intend to deny applicants due to space, it may make that determination and document it in its January board meeting minutes.

Reasons for Denial for Open Enrollment Applicants with IEPs

Both state and federal laws prohibit discrimination against a pupil based on the pupil's physical, mental, emotional, or learning disability. The board also may not deny open enrollment based on the pupil's eligibility for or need of a reasonable accommodation in a Section 504 plan. An application may only be denied if there is no space in the special education or related services required in the pupil's IEP or if the special education or related services are not available in the nonresident district.

The nonresident school board may not deny a pupil's open enrollment because the pupil has a specific disability. The board must examine the pupil's IEP to determine whether it has space in the specific special education or related services required by the pupil's IEP. The board may not make any assumptions about the special education or related services the pupil needs based on the identified disability. The board must review each applicant's IEP and individually consider whether space is available in the specific special education and related services required by the pupil's IEP.

Even if the district's special education and related services are at capacity, the school board may not deny a pupil's open enrollment without a specific review of the pupil's IEP. The board must provide the special education and related services required in the pupil's IEP in its entirety. If the board cannot do so, it may deny the application.

In addition, the school board cannot deny an application on the basis that transportation is required in the pupil's IEP. Wis. Stat. § 118.51(14)(a)2. states that if a pupil with a disability has transportation required in their IEP, the nonresident district must provide such transportation.

Under Wis. Stat. § 118.51(5)(a)6, a nonresident school board may, but is not required to, deny an application for a child that has been referred for an initial special education evaluation that has not been completed. If the nonresident school board approves the open enrollment application, the nonresident district should complete the evaluation, and if the pupil is found eligible, develop an initial IEP and determine if it has available the special education and related services to provide a placement. If the nonresident district does not have available the special education and related services, it may terminate the open enrollment. The resident district would then be responsible for adopting or revising the IEP and offering a placement to implement the IEP.

If a pupil has been found sometime in the past to have a disability, but does not have a current IEP, the nonresident school board's decision must be based on the availability of special education and related services required by the most recent IEP. If the IEP cannot be obtained for the pupil, the nonresident school board must review the most recent evaluation for the pupil and, based upon that review, develop an IEP and determine whether it has available the special education and related services to provide a placement. If neither an IEP nor an evaluation is available, the pupil should be considered a nondisabled pupil and the pupil's application must be considered using the criteria for nondisabled pupils.

If a pupil has an IEP developed or revised after attending the nonresident school district, the nonresident district may consider whether it has available the special education and related services required by the pupil's revised IEP. If it does, the nonresident district must implement the pupil's IEP as written. If it does not, the nonresident district may, but is not required to, notify the parent and resident district that the open enrollment will be terminated and the pupil must return to the resident district.

Pupils who were evaluated and found eligible for special education but whose parents either did not provide consent for initial special education placement, or revoked consent for continuing special education placement, are NOT considered pupils with disabilities for the purpose of open enrollment. Under these circumstances, pupils' open enrollment applications must be considered using the space criteria for nondisabled pupils.

Criteria Must Be Followed Consistently

It is important for a school board to make sure that its criteria is included in its open enrollment policy and to ensure that the criteria is followed exactly and consistently. On appeal, the Department is required to affirm a school board's decision unless the Department finds that the decision was arbitrary or unreasonable. This means that the Department will most likely uphold a decision if both of the following are true:

- The school board's policy and criteria are in compliance with state law and are neither arbitrary nor unreasonable.
- The school board properly and consistently applied its policy and criteria, and followed state law and its policies in determining which applications will be approved and denied.

Some examples of actions that have been found to be arbitrary or unreasonable include:

- The school board did not follow the open enrollment law.
- The school board did not have the required policy upon which the decision was made.
- The school board used criteria that were arbitrary or unreasonable.

- The school board did not follow its policy, was inconsistent in following its policy, or made arbitrary or unreasonable exceptions to its policy.
- The school board did not establish the number of special education spaces available in the district. Instead, the board limited the number of pupils it would accept based on the pupils' identified disability.