

Open Enrollment: What's In the Best Interest of Wisconsin Students, Families, and Public Schools?

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OPEN ENROLLMENT: WHAT’S IN THE BEST INTEREST OF WISCONSIN STUDENTS, FAMILIES, AND PUBLIC SCHOOLS?

In 2011, the Wisconsin legislature greatly expanded Wisconsin’s open enrollment program by lengthening the regular application window and creating a year-round alternative application procedure with a vague and undefined best interest of the pupil standard. This Comment addresses the Wisconsin Open Enrollment Program in the larger context of school choice, its recent amendments, and the resulting obstacles to ensure equal educational opportunities for all Wisconsin students. It suggests that the continued expansion of open enrollment without sufficiently defined standards undermines local control and opts to further a handful of individual students at the expense of the collective statewide population. Further, this Comment advocates for a return to a more limited and defined version of open enrollment and alternatively proposes a balancing test by which to weigh the best interests of each student against the administrative, financial, and equitable implications of open enrollment that impact the effective operation of public schools.

I. INTRODUCTION	814
II. SCHOOL CHOICE: OPEN ENROLLMENT IN CONTEXT.....	817
A. Unraveling School Choice.....	817
B. Arguments For and Against Open Enrollment	820
C. Why Parents Choose	823
D. Federal and State Constitutional Context.....	824
III. THE NEW (BUT NOT IMPROVED) WISCONSIN OPEN ENROLLMENT PROGRAM.....	828
A. Nuts and Bolts: The Wisconsin Open Enrollment Program ..	828
B. The Best Interest Standard.....	831
C. Space Availability Determinations.....	834
D. Financial Implications.....	836
E. The Rise of Virtual Charter Schools in Wisconsin	840
F. Students with Disabilities: The Undue Financial Burden Standard	843
G. Other Equitable Concerns	845

IV. CURTAILING THE EXPANSION OF OPEN ENROLLMENT BEST SERVES ALL WISCONSIN STUDENTS	847
V. CONCLUSION.....	850

I. INTRODUCTION

Private investigators, criminal prosecution, and amnesty programs—once distant topics from public education—are increasingly seen nationwide in school residency disputes. In California, roughly 300 families came forward after a San Francisco school district offered amnesty to families unlawfully enrolled in a high performing district.¹ Additionally, an Ohio mother was convicted of a felony and sentenced to five years in prison after falsifying records and enrolling her kids in a highly-ranked neighboring district.² Similarly, a homeless mother in Connecticut faced charges for first-degree larceny and up to twenty years in prison for stealing roughly \$16,000 in education by registering her son in her babysitter’s school district rather than the mother’s last known residence, a “significantly poorer urban district.”³

An administrator of a high performing district recognized that “[a]t the root of it all [is] people who wanted the best for their children.”⁴ One parent who was prosecuted for enrolling her daughter in a better, neighboring district stated, “[l]ike any parent, I was just looking out for my daughter.”⁵ Another commentator explained that these cases demonstrate “how desperately parents want access to better schools.”⁶

1. Kantele Franko, *Kelley Williams-Bolar Case Highlights Schools’ Efforts to ID Fake Student Addresses*, HUFFINGTON POST (Feb. 25, 2011, 9:53 AM), http://www.huffingtonpost.com/2011/02/25/schools-boost-efforts-to_n_828275.html.

2. The mother was sentenced to five years in prison, is on probation for three years, and must perform eighty hours of community service. Douglas Stanglin, *Ohio Mom Jailed for Falsely Enrolling Kids in Better School*, USA TODAY (Feb. 26, 2011, 2:01 PM), <http://content.usatoday.com/communities/ondeadline/post/2011/01/ohio-mom-jailed-for-enrolling-kids-in-better-school-district/1#.UODavLbR07C>.

3. See Stephanie Reitz, *Tanya McDowell, Conn. Mom, Pleads Not Guilty in School Enrollment Case*, HUFFINGTON POST (Apr. 27, 2011, 2:04 PM), http://www.huffingtonpost.com/2011/04/27/tanya-mcdowell-not-guilty-plea_n_854377.html; see also Peter Applebome, *In a Mother’s Case, Reminders of Educational Inequalities*, N.Y. TIMES, Apr. 28, 2011, at A18.

4. Franko, *supra* note 1.

5. *Id.*

6. Stephanie Reitz, *Kelley Williams-Bolar, Tanya McDowell Cases Raise Fairness Questions*, HUFFINGTON POST (May 10, 2011, 4:08 PM), http://www.huffingtonpost.com/2011/05/10/school-residency-cases_n_860107.html.

Yet, rather than address the inherently inequitable school finance system based largely on property taxes,⁷ the primary response to this disparity has been to provide students with educational options through the expansion of school choice programs.

Wisconsin, in particular, has been at the forefront of the nationwide school choice debate. In 1990, Wisconsin enacted the first government-funded private voucher program in the country, the Milwaukee Parental Choice Program (MPCP), which provides governmental funding directly to families in the form of a voucher that may be used to pay tuition at a participating private school.⁸ Initially limited to 1,000 students from families with income at or below 175% of the federal poverty level,⁹ the MPCP has expanded to families with income at or below 300% of the federal poverty level and over 110 participating private schools with 25,820 students in the 2013–2014 academic year.¹⁰

7. See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1330 (1992) (noting that states largely fund public education through local property taxes, which “results in greater expenditures on education in those areas where property values are highest”); see also *infra* notes 71, 82 (noting that the school finance system based on property taxes in most states has been consistently upheld as constitutional at both the state and federal levels). However, a few state supreme courts have declared that the states’ system of financing public education that relies heavily on local property taxes discriminates against the poor and violates the Equal Protection Clause of the Fourteenth Amendment. See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815–16 (Ariz. 1994); *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (recognizing “that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth”); *Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980).

8. JOHN F. WITTE, *THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA’S FIRST VOUCHER PROGRAM* 3 (2000); SUSAN MITCHELL, *WIS. POLICY RESEARCH INST., HOW SCHOOL CHOICE ALMOST DIED IN WISCONSIN* 4 (Vol. 12, No. 6 1999) (describing the Milwaukee voucher program as a “national laboratory for school choice and its impact on families”); see also Peter M. Kimball, Comment, *Opening the Door to School Choice in Wisconsin: Is Agostini v. Felton the Key?*, 81 MARO. L. REV. 843, 847–48 (1998).

9. Kimball, *supra* note 8, at 848.

10. WIS. DEP’T OF PUB. INSTRUCTION, *MPCP FACTS AND FIGURES FOR 2013–2014* (2013), available at sms.dpi.wi.gov/files/sms/doc/mpcp_14fnf_2013_11.doc; PUB. POLICY FORUM, *SIGNIFICANT GROWTH IN SCHOOL CHOICE: MORE SCHOOLS, MORE STUDENTS, FEWER LIMITS ON INCOME ELIGIBILITY* 1, 3 (Vol. 100, No. 1 2012) [hereinafter *SIGNIFICANT GROWTH IN SCHOOL CHOICE*], available at <http://publicpolicyforum.org/research/significant-growth-school-choice-more-schools-more-students-fewer-limits-income-eligibility>. The MPCP is now in its twenty-third year, yet it has failed to produce expected gains in student academic achievement. See PUB. POLICY FORUM, *CHOICE SCHOOLS HAVE MUCH IN COMMON WITH MPS, INCLUDING STUDENT PERFORMANCE* 1 (Vol. 101 No. 1 2013), available at http://publicpolicyforum.org/sites/default/files/2013VoucherBrief-Clarified_1.pdf

A few years after the creation of the MPCP, Wisconsin launched one of the first statewide inter-district open enrollment programs in 1997 that allow students to attend any public school, regardless of the student's residentially zoned district.¹¹ During the first year of open enrollment in Wisconsin, there were 2,464 student transfers and a total of \$9.6 million in per-pupil funding transferred from one school district to another.¹² Fast-forward fourteen years and the numbers climbed to 41,562 student transitions with a total of \$242.8 million in funds transferred between districts in the 2012–2013 academic year.¹³ Although open enrollment has received less attention than its school choice counterpart—voucher programs¹⁴—the constitutional, financial, and equitable concerns are similarly profound and, perhaps, of greater significance given the statewide scope.¹⁵

This Comment will address recent amendments to Wisconsin's open enrollment statute that greatly expand the scope of the program and carry significant implications for local school districts, and consequently,

(noting that MPCP student proficiency rates on state standardized exams “tend to be slightly below the proficiency rates of students in MPS”); Alan J. Borsuk, *Choice May Not Improve Schools, Study Says: Report on MPS Comes from Longtime Supporter of Plan*, MILWAUKEE J. SENTINEL, Oct. 24, 2007, at 1A. Despite these questionable academic results, “[i]f MPCP were a Wisconsin Public School District, it would be the third largest in the state, behind Milwaukee and Madison districts.” SIGNIFICANT GROWTH IN SCHOOL CHOICE, *supra* at 3. Ironically, the MPCP initially passed constitutional muster on the basis of its limited applicability and experimental nature, although it has since survived multiple state constitutional challenges. *Jackson v. Benson*, 218 Wis. 2d 835, 853–54, 578 N.W.2d 602, 611 (1998) (holding that the MPCP does not violate the Establishment Clause); *Davis v. Grover*, 166 Wis. 2d 501, 530, 480 N.W.2d 460, 474 (1992) (holding that the MPCP does not violate the state Uniformity Clause because participating schools do not constitute “district schools” within the meaning of the state constitution despite public funding).

11. See LEGISLATIVE AUDIT BUREAU, OPEN ENROLLMENT PROGRAM TRANSFER AMOUNT ALTERNATIVES 3 (2011) [hereinafter LEGISLATIVE AUDIT BUREAU ON OPEN ENROLLMENT].

12. WIS. DEP'T OF PUB. INSTRUCTION, PUBLIC SCHOOL OPEN ENROLLMENT BY THE NUMBERS (2013), available at http://sms.dpi.wi.gov/files/sms/pdf/oe_psoe_at_a_glance.pdf.

13. *Id.*

14. See *infra* notes 22, 25 and accompanying text.

15. Deven Carlson et al., *The Determinants of Interdistrict Open Enrollment Flows: Evidence from Two States*, 33 EDUC. EVALUATION & POL'Y ANALYSIS 76, 76 (2011) (“Interdistrict open enrollment is the most widely used form of school choice in the United States.”); Lorna Jimerson, *Interdistrict Open Enrollment: The Benign Choice?*, 76 CLEARING HOUSE 16, 16 (2002) (noting that open enrollment appears to be a “relatively benign policy in the midst of frenzied debate about other choice options” and that it “generates meager debate in the public arena”). See generally *infra* Part III (discussing the constitutional, financial, and equitable implications of inter-district open enrollment in Wisconsin).

Wisconsin families.¹⁶ Part II of this Comment will discuss open enrollment in the larger context of school choice, including arguments for and against, as well as the state and federal constitutional framework. Part III will detail the Wisconsin Open Enrollment Program in the wake of the 2011 legislative amendments, with an emphasis on the new statutory best interest exception that effectively permits year-round open enrollment transfers.¹⁷ The discussion highlights that the recent expansion of open enrollment creates challenges for local school districts to effectively plan space availability, stabilize budgets, and ensure equitable educational services for all students.

Part III then draws attention to a key lobbying force behind the legislative amendments—the for-profit, virtual education industry—and notes how the expansion of open enrollment significantly advanced the rise of virtual education in Wisconsin, an industry that has proven largely ineffective. Finally, Part IV advocates reigning in the continued expansion of open enrollment. This Comment does not suggest eliminating open enrollment in Wisconsin public schools. Rather, it advocates for a return to a more controlled and limited version of the program that existed prior to the 2011 amendments by repealing the best interest exception. In the alternative, Part IV proposes a balancing test by which to weigh the best interests of each student against the administrative, financial, and equitable implications of open enrollment that impact the effective operations of public schools. This Comment suggests that year-round open enrollment without sufficiently defined standards undermines local control and operates against the best interest of *all* children in Wisconsin.

II. SCHOOL CHOICE: OPEN ENROLLMENT IN CONTEXT

A. Unraveling School Choice

School choice has become a “cornerstone of federal educational policy,” yet many do not understand the basic framework, much less its

16. See generally Memorandum from Anne Sappenfield, Senior Staff Attorney, Wis. Legislative Council (Feb. 17, 2012).

17. The best interest exception permits year-round open enrollment when it is in the best interest of the child. See *infra* Part II.A–B.

nuances and implications.¹⁸ The word “choice” is a political goldmine as it appeals to a fundamental democratic value—the right to choose—while being apolitical on its face.¹⁹ Even though the inherent ambiguity may be useful politically, it has caused much confusion.²⁰ Nonetheless, the various educational arrangements under the umbrella of school choice can be boiled down to two primary categories: choices within the public school system and choices between public and private schools.²¹ Private school choice programs, such as vouchers and tuition tax credits, have raised significant constitutional concerns under the Establishment Clause of the First Amendment because they permit students to attend private—and often religious—schools with public resources.²² Additionally, voucher programs are largely confined to urban cities with a high concentration of poverty and are limited to low-income families.²³

On the other hand, public school choice options such as magnet schools, charter schools, post-secondary enrollment, and open

18. Chia-Lin Hsieh & Jianping Shen, *Is School Choice a Mechanism for Sustaining Change? Implications from a National Survey*, 75 CLEARING HOUSE 88, 88 (2001).

19. Angela Slate Rawls, Comment, *Eliminating Options Through Choice: Another Look at Private School Vouchers*, 50 EMORY L.J. 363, 363 (2001); Kimball, *supra* note 8, at 843 (quoting Tommy Thompson, Governor of Wis., State of the State Address, Address Before the Joint Convention (Jan. 29, 1997), in SENATE J., 1997–1998 SESSION, at 54, 57).

20. See generally Kim K. Metcalf & Polly A. Tait, *Free Market Policies and Public Education: What Is the Cost of Choice?*, 81 PHI DELTA KAPPAN 65, 67 (1999) (noting the “tremendous confusion that exists over the effects” of school choice); Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255, 275 (1995) (“[T]he vagueness of the concept of choice enhances its political appeal because the term can be construed to mean various things.”).

21. Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?*, 43 DEPAUL L. REV. 1, 10–24 (1993) (providing an overview of public and private school choice); Hsieh & Shen, *supra* note 18, at 88.

22. WIS. LEGISLATIVE REFERENCE BUREAU, SCHOOL CHOICE IN WISCONSIN 1, 10 (1995); see also R. KENNETH GODWIN & FRANK R. KEMERER, SCHOOL CHOICE TRADEOFFS: LIBERTY, EQUITY, AND DIVERSITY 7 (2002).

23. ROSLYN ARLIN MICKELSON ET AL., SCHOOL CHOICE AND SEGREGATION BY RACE, CLASS, AND ACHIEVEMENT 9 (2008), available at <http://nepc.colorado.edu/files/CHOICE-08-Mickelson-FINAL-EG043008.pdf> (noting that voucher programs to date have been targeted at “low-income students in urban schools”). However, voucher programs are beginning to expand. SIGNIFICANT GROWTH IN SCHOOL CHOICE, *supra* note 10, at 1. In 2011, amendments to the MPCP contained a provision that expanded school choice programs in cities outside of Milwaukee, which led to the creation of the Parental Private School Choice Program in Racine and a small statewide version in various cities. *Id.* The program in Racine allows 250 students to attend; within the first year, eight schools enrolled 228 students. *Id.* at 11.

enrollment allow parents to shop among various public school options.²⁴ In contrast to voucher programs that have been steeped in controversy for decades,²⁵ open enrollment programs have not been as extensively examined and have received significantly less attention nationwide.²⁶ However, as of 2013, forty-six states had enacted some form of an open enrollment policy,²⁷ most of which are statewide and mandatory, as opposed to the more limited and largely regional private school choice voucher programs.²⁸ Because open enrollment impacts a substantially larger segment of the populace than voucher programs, its implications in the school choice debate should not be overlooked.

Although the structure of open enrollment programs vary from state to state,²⁹ there are two primary forms implemented across the country: intra-district and inter-district, which may be voluntary or mandatory programs.³⁰ Intra-district open enrollment programs permit students to attend any school within their resident school district, space permitting.³¹ On the other hand, inter-district programs permit students to cross school district lines and attend any public school, even if it is outside of the district the student is residentially zoned to attend, so long as the

24. KIM SHEANE & LOUANN BIERLEIN, *OPEN ENROLLMENT/EDUCATIONAL CHOICE: A NATIONAL REVIEW* 8–10 (1991) (describing characteristics of charter schools, magnet schools, and post-secondary enrollment programs); *see also* DAVID DODENHOFF, WIS. POLICY RESEARCH INST., *THE LIMITS OF PARENT-DRIVEN REFORM* 5–6 (Vol. 20, No. 8 2007), available at <http://www.wispolitics.com/1006/Vol20no8.pdf>; Kimball, *supra* note 8, at 843. *See generally* WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 22.

25. GODWIN & KEMERER, *supra* note 22, at 57 (explaining that the “most heated debates over choice” center around voucher programs and describing in particular the controversy surrounding the Milwaukee Public School Voucher Program); David M. Welsch et al., *An Examination of Inter-District Public School Transfers in Wisconsin*, 29 *ECON. EDUC. REV.* 126, 127–28 (2010). *See generally* Greg Todd, Comment, “Fully Participating” Voucher Programs and the Wisconsin Template: A Brick or a Breach in the Wall of Church-State Separation?, 2 *U. PA. J. CONST. L.* 710 (2000) (analyzing the constitutionality of Milwaukee voucher program).

26. *See* Carlson et al., *supra* note 15, at 76 (“[I]nterdistrict open enrollment [has] largely flown below the radar screen of scholars and policy analysts.”); Welsch et al., *supra* note 25.

27. Alabama, the District of Columbia, Maryland, North Carolina, and Virginia have not enacted an open enrollment policy. *See* EDUC. COMM’N. OF THE STATES, *OPEN ENROLLMENT: 50-STATE REPORT* (2013), available at <http://mb2.ecs.org/reports/report.aspx?id=268>.

28. Alan Wolfe, *The Irony of School Choice: Liberals, Conservatives, and the New Politics of Race*, in *SCHOOL CHOICE: THE MORAL DEBATE* 31, 34 (Alan Wolfe ed., 2003).

29. Jimerson, *supra* note 15, at 16.

30. EDUC. COMM’N. OF THE STATES, *supra* note 27. Some states have adopted a mixture of both inter- and intra-district enrollment. *See* Smith, *supra* note 20, at 266–68.

31. Smith, *supra* note 20, at 266.

nonresident school has space available and the parents comply with the requisite procedures.³²

For example, the Wisconsin Open Enrollment Program, further detailed in Part III, operates statewide and requires a parent to submit an application to the school district the student wishes to attend during a specified time frame,³³ unless the student satisfies one of seven exceptions.³⁴ The participating nonresident school district must then accept potential students on a random basis using certain acceptance criteria, although preference may be given to students and siblings of students who are already attending the nonresident district.³⁵ The Wisconsin Department of Public Instruction (DPI) then transfers a specified amount of student aid to the nonresident, receiving school district.³⁶ Intra-district programs are significantly less problematic as compared to inter-district programs because the district revenue stays put and other issues of equity are of lesser concern.³⁷ As a result, this Comment focuses on the implications of the inter-district open enrollment program in Wisconsin.

B. Arguments For and Against Open Enrollment

Because of the ambiguity surrounding school choice, it is often appealing to both political parties, although for different reasons.³⁸ While some conservatives consider the free market the “silver bullet” to improve schools, some liberals view school choice as a vehicle for social equality.³⁹ In general, advocates of open enrollment favor the injection

32. Hsieh & Shen, *supra* note 18, at 88; *see also* WIS. ADMIN. CODE PI § 36.03 (Sept. 2012); Elaine M. McGillivray, Comment, *The New Minnesota Miracle?: A Critique of Open Enrollment in Minnesota's Public Schools*, 11 HAMLINE J. PUB. L. & POL'Y 105, 107 (1990).

33. WIS. STAT. § 118.51(3)(a)(1) (2011–2012).

34. *Id.* § 118.51(3m)(a); *see also infra* notes 99–102 and accompanying text.

35. *Id.* § 118.51(3)(a)(2); *see also infra* note 111 (noting that students may begin attending a nonresident school district before the open enrollment application has been approved or denied).

36. *See infra* note 158 and accompanying text (noting that the costs associated with each student transfer for the 2011–2012 academic year was \$6,867 per student).

37. *See infra* Part III.G (discussing equitable concerns of inter-district open enrollment).

38. JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 21 (1994) (“[G]iven the combination of potent appeal and fundamental ambiguity, it is not surprising that choice is a label simultaneously pursued by the political right and left alike.”).

39. MICKELSON ET AL., *supra* note 23, at 3–4; *see also* McGillivray, *supra* note 32, at 114 (“[Liberals support choice also]. Many are calling choice ‘empowering,’ a way within the public school system to extend to all the freedom wealthy families have always had: choosing

of the free market into public education to increase competition and, ultimately, improve the quality of educational services.⁴⁰ Under this market theory approach that makes room for consumer choices, the overall education system is enhanced because schools are forced to either improve or shut down,⁴¹ as opposed to the public school system that provides “no incentive to improve.”⁴² Instead, choice schools must “work to keep their customers,”⁴³ unlike the traditional, monopolistic public schools that are “complacent, lethargic, inefficient, and unresponsive to the needs of most students.”⁴⁴ In addition to injecting the competitive spirit of the free market, open enrollment empowers parents to take a more active role in their child’s education,⁴⁵ which proponents argue ultimately improves student performance.⁴⁶ Not only does the program induce systemic change, but it can also “rescue children from bad schools” by providing access to high performing schools that would otherwise be inaccessible.⁴⁷

In contrast, opponents often adhere to the equity theory, which criticizes the commoditization of public education and argues that a market-based approach wrongfully transforms public education into a

where and how their children will be educated.” (alteration in original) (quoting Kathleen Sylvester, *Schools of Choice: A Path to Educational Quality or ‘Tiers of Inequity’?*, GOVERNING, July 1989, at 50–51)).

40. GODWIN & KEMERER, *supra* note 22, at 19–23 (explaining the arguments in favor of school choice); *see also* Smith, *supra* note 20, at 277.

41. Smith, *supra* note 20, at 277–84 (discussing the market theory versus the equity theory). Research conducted in Wisconsin indicates that districts that lose students experience slightly higher test scores in the following academic year. David M. Welsch & David M. Zimmer, *Do Student Migrations Affect School Performance? Evidence from Wisconsin’s Inter-District Public School Program*, 31 ECON. EDUC. REV. 195, 206 (2012). Although the evidence may suggest the competitive effect of open enrollment works, Welsch and Zimmer note that the result may stem from the departure of low-performing students. *Id.* at 205.

42. EMILY VAN DUNK & ANNELIESE M. DICKMAN, *SCHOOL CHOICE AND THE QUESTION OF ACCOUNTABILITY: THE MILWAUKEE EXPERIENCE 1* (2003).

43. *See id.* at 1–2; Dodenhoff, *supra* note 24, at 4; Daniel, *supra* note 21, at 9–24 (providing an overview of public and private school choice); *see also* Hsieh & Shen, *supra* note 18, at 88.

44. Daniel, *supra* note 21, at 25.

45. *See* McGillivray, *supra* note 32, at 109–10.

46. GODWIN & KEMERER, *supra* note 22, at 20 (noting that choice encourages parents to become “consumers of education rather than targets of social policy” and that research indicates greater involvement of parents increases student academic success).

47. SHEANE & BIERLEIN, *supra* note 24, at 1, 8–10.

product, where some students benefit and other students do not.⁴⁸ Under this approach, school choice improperly leads to a form of social Darwinism that treats public schools like supermarkets, where parents and students are now customers that dictate the success and failure of public schools.⁴⁹ Except the system compromises the quality of education received by those students in the losing school districts, rather than some inadequate commodity on the shelves of the local grocery store.⁵⁰ Opponents of school choice further argue that business cannot serve as a model for public schools because the nature of public schools “stress[es] collective goods and collective values,” unlike the nature of the free market, which furthers the individual at the expense of the collective.⁵¹ Further, there appears to be a lack of evidence that students who attend choice public schools experience enhanced academic achievement.⁵² Other criticisms of open enrollment include the loss of local control,⁵³ increased social and racial segregation,⁵⁴ and equitable

48. Smith, *supra* note 20, at 279; *see also infra* notes 168–70 and accompanying text (explaining situations where open enrollment creates “more losers than winners” throughout Wisconsin).

49. GODWIN & KEMERER, *supra* note 22, at 38 (explaining that parents who did not participate in school choice programs “did not see education as a ‘commodity’ over which they could exercise power as consumers”); Patrick E. Mascia, Comment, *Open Enrollment: Social Darwinism at Work*, 23 CREIGHTON L. REV. 441, 443 (1990).

50. As the California Supreme Court noted, “[u]nequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.” *Serrano v. Priest*, 487 P.2d 1241, 1257 (Cal. 1971) (quoting *San Francisco Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 676 (Cal. 1971)).

51. GODWIN & KEMERER, *supra* note 22, at 25; *see also* Daniel, *supra* note 21, at 26.

52. Jimerson, *supra* note 15, at 19 (“[N]o evidence conclusively proves that the act of choosing improves students’ academic achievement.”).

53. McGillivray, *supra* note 32, at 123–27.

54. Although desegregation reached a peak at the end of the 1980s, the last two decades—since the implementation and widespread adoption of school choice—have seen increased re-segregation by race and socioeconomic status. MICKELSON ET AL., *supra* note 23, at 6–7. “In fact, open enrollment plans allow more advantaged students to transfer to relatively whiter, more affluent school systems, thereby exacerbating race and [socioeconomic status] inequality between districts.” *Id.* at 12; *see also* Jimerson, *supra* note 15, at 17 (“Most studies . . . indicate that choice causes increased stratification along ethnic and socioeconomic lines.” (citing BRIAN P. GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 181 (2001))); Cynthia Boyd, *Minnesota’s New ‘White Flight’: School Open-Enrollment Program*, MINNPOST (Jan. 11, 2013), <http://www.minnpost.com/community-sketchbook/2013/01/minnesota-s-new-white-flight-school-open-enrollment-program> (noting that the state open enrollment program has resulted in increased racial segregation and the districts gaining students from open enrollment are “predominantly white districts becoming whiter”).

concerns that address whether it is fundamentally the nature of public education to pit school districts against one another, thereby creating “winning” and “losing” school districts.⁵⁵

The two opposing theoretical approaches to open enrollment implicate a fundamental clash between the purposes of public education.⁵⁶ Under the market theory, the purpose of education is to benefit the individual,⁵⁷ whereas the equity theory seeks to benefit society at large.⁵⁸ One commentator noted that “[w]hen it comes to education policy, Americans want it all,” but when faced with the trade-off between freedom of choice and equality of opportunity “Americans will nearly always choose freedom.”⁵⁹ Accordingly, the expansion of school choice continues to be an attractive alternative for parents who are disillusioned with their children’s current public school placements.

C. Why Parents Choose

A comprehensive review of open enrollment requires an inquiry into the basic question of what motivates parent decisions to transfer students from one public school district to another. Not surprisingly, students transfer to districts that have higher test scores,⁶⁰ have higher median income,⁶¹ have higher academic standards,⁶² and are generally in safer neighborhoods.⁶³ A recent in-depth study in Wisconsin concluded that parents are attracted to districts that have high achievement, high

55. McGillivray, *supra* note 32, at 126.

56. GODWIN & KEMERER, *supra* note 22, at 13–14 (“Publicly funded education creates an inherent tension between the right of parents to transmit their culture to their children and the right of society to use the educational system to produce the values that society believes are critical to its continuance.”).

57. Smith, *supra* note 20, at 279–80.

58. *Id.*

59. GODWIN & KEMERER, *supra* note 22, at 1 (“We demand better test score results for all students, greater equality of opportunity, respect for diversity, preparation for good citizenship, efficiency, regulatory accountability, the development of autonomy in students, and preparation for jobs in a postindustrial society. But it is impossible to maximize educational performance in all these areas at the same time.”); Wolfe, *supra* note 28, at 42–43 (explaining that overall, Americans value freedom more than equality).

60. Randall Reback, *Demand (and Supply) in an Inter-District Public School Choice Program*, 27 ECON. EDUC. REV. 402, 403 (2008).

61. See Richard Fossey, *Open Enrollment in Massachusetts: Why Families Choose*, 16 EDUC. EVALUATION & POL’Y ANALYSIS 320, 324 (1994).

62. DAVID J. ARMOR & BRETT M. PEISER, *COMPETITION IN EDUCATION: A CASE STUDY OF INTERDISTRICT CHOICE* 122–23 (1997).

63. See GODWIN & KEMERER, *supra* note 22, at 9.

spending, more extracurricular activities, and a low percentage of minorities.⁶⁴ The study also concluded that students are transferring from districts that have high property values, but low tax rates, “suggest[ing] that families may avoid paying higher taxes while at the same time benefitting from the higher spending on education.”⁶⁵ Anecdotal evidence also suggests that convenience, parent perception of the school, and parent dissatisfaction heavily contribute to open enrollment choices.⁶⁶ Other reasons include ease of transportation, proximity to a parent’s workplace, and program shopping.⁶⁷ The underlying motivations for district transfers provide a useful vantage point from which to analyze the recent amendments to the Wisconsin Open Enrollment Program, as will be discussed in Part III.

D. Federal and State Constitutional Context

While open enrollment has received less attention than voucher programs, the constitutional implications are similarly profound. At both the federal and state levels, there seems to be a disconnect between the supportive rhetoric and the practical realities within education law, which significantly impacts the practical implementation of open enrollment. Despite the famous language from *Brown v. Board of Education* that “education is perhaps the most important function of state and local governments,”⁶⁸ the United States Supreme Court held that education is not a federal fundamental right explicitly or implicitly guaranteed by the Federal Constitution in *San Antonio Independent*

64. Welsch et al., *supra* note 25, at 132–36; *see also* GODWIN & KEMERER, *supra* note 22, at 8 (“Research on magnet schools and open enrollment programs shows that unless a choice policy includes provisions that prevent it, white parents will choose schools that enroll a lower percentage of minority students than the school their children left.”).

65. Welsch et al., *supra* note 25, at 132.

66. Amy Hetzner, *Higher Spending, Test Scores Attract More Students*, MILWAUKEE J. SENTINEL, Sept. 29, 2009, at B1 (citing Stockbridge School District Superintendent Dave Moscinski, who noted that “perception plays a key role in school district choices, whether that is based on actual performance or not” and parent Stacy Juhl, who utilizes open enrollment based on convenience); *see also* Sara Kuhl, *Open Enrollment Makes Schools More Competitive, Study Says*, U. OF WISCONSIN-WHITEWATER (Feb. 21, 2012), <http://www.uww.edu/news/archive/2012-02-open-enrollment> (noting that parent dissatisfaction is likely a key reason for student transfers).

67. Kuhl, *supra* note 66 (“If a student is very interested in robotics, but your district doesn’t have a robotics program, it makes sense to change districts.” (quoting David Welsch, Assistant Professor of Economics at the University of Wisconsin-Whitewater) (internal quotation marks omitted)).

68. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

School District v. Rodriguez.⁶⁹ In addition, although the Supreme Court recognizes public schools as a matter of “supreme importance” and the “most vital civic institution for the preservation of a democratic system of government,”⁷⁰ *Rodriguez* held that the Texas school finance system based on property taxes, which resulted in wealth inequality between districts, did not violate the Equal Protection Clause of the Fourteenth Amendment.⁷¹ Thus, state action as it relates to the financing of public education must merely be rationally related to legitimate state purposes,⁷² whereas a complete deprivation of education is subjected to strict scrutiny and more likely to be deemed unconstitutional.⁷³

Although there is no federal fundamental right to education, state constitutions have taken different approaches on the issue.⁷⁴ For example, Wisconsin has defined education as a fundamental right subject to strict scrutiny⁷⁵ pursuant to Article X, Section 3 of the state’s constitution, which states:

The legislature shall provide by law for the establishment of district schools, which shall be as *nearly uniform as practicable*; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein.⁷⁶

Even though education is a fundamental right, Wisconsin case law has broadly interpreted the requirement that district schools be as

69. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“Public education is not a ‘right’ granted to individuals by the Constitution.”).

70. *Plyler*, 457 U.S. at 221 (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan J., concurring) (internal quotation marks omitted) (citing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923))).

71. *Rodriguez*, 411 U.S. at 28 (noting that the school finance system did not operate to the disadvantage of a suspect class).

72. *Id.* at 40.

73. *Plyler*, 457 U.S. at 221 (“We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”). *Plyler* involved the deprivation of public school funding for undocumented children. *Id.* at 205, 221.

74. *See, e.g., Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (en banc) (interpreting ARIZ. CONST. art. XI, §§ 1, 6); *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977) (interpreting CONN. CONST. art. VIII, § 1). *But see, e.g., Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982) (interpreting COLO. CONST. art. IX, § 2 and holding that education is not a fundamental right).

75. *Busé v. Smith*, 74 Wis. 2d 550, 567, 579–80, 247 N.W.2d 141, 149, 155 (1976).

76. WIS. CONST. art. X, § 3 (emphasis added).

nearly uniform as practicable—known as the Uniformity Clause—to provide “not a ceiling but a floor” of “certain minimal educational opportunities.”⁷⁷ The Uniformity Clause has been interpreted to refer to the “character of instruction” provided in Wisconsin public schools rather than the “method of forming school districts.”⁷⁸ However, the Uniformity Clause does require “[a]n equal opportunity for a sound basic education . . . that will equip students for their roles as citizens and enable them to succeed economically and personally.”⁷⁹ While open enrollment implicitly assumes public schools are not uniform,⁸⁰ the Wisconsin Supreme Court has held that “absolute uniformity” is not required.⁸¹ As a result, any disparity resulting from the school finance system based largely on property taxes was held not to violate the Wisconsin Constitution, so long as each school district is adequately or minimally funded.⁸²

Similar to the rationale in *Rodriguez*,⁸³ a rational basis standard of review is applied to school finance mechanisms in Wisconsin because the rights implicated “are premised upon spending disparities and not upon a complete denial of educational opportunity.”⁸⁴ In *Vincent v.*

77. *Vincent v. Voight*, 2000 WI 93, ¶ 61, 236 Wis. 2d 588, 614 N.W.2d 388 (quoting *Davis v. Grover*, 166 Wis. 2d 501, 639, 480 N.W.2d 460, 474 (1992); *Jackson v. Benson*, 218 Wis. 2d 835, 894–95, 578 N.W.2d 602, 628 (1998)).

78. *Id.* ¶ 31 (quoting *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 290, 221 N.W. 860, 862 (1928)); *Kukor v. Grover*, 148 Wis. 2d 469, 520, 436 N.W.2d 568, 589 (1989) (Bablitch, J. dissenting) (“Character of instruction has been more recently expressed as ‘services, procedures, opportunities or rules’ provided in district schools.” (quoting *Zweifel v. Joint Dist. No. 1, Belleville*, 76 Wis. 2d 648, 653, 251 N.W.2d 822, 824 (1977))).

79. *Vincent*, 2000 WI 93, ¶ 51.

80. *McGillivray*, *supra* note 32, at 127 (“Open enrollment can be construed as an admission that schools are not uniform.”).

81. *Vincent*, 2000 WI 93, ¶ 68.

82. *Id.* (“[A] school finance system that uniformly funds school districts to provide a basic level of education is constitutional.”).

83. *Compare San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (“[N]o charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”), *with Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (finding a fundamental right to education and holding that the school financing system based on property taxes was in violation of the Equal Protection Clause of the Fourteenth Amendment).

84. *Vincent*, 2000 WI 93, ¶ 83 (quoting *Kukor v. Grover*, 148 Wis. 2d 469, 498, 436 N.W.2d 568, 580 (1989)) (“We carefully distinguish between the fundamental right to an equal opportunity for a sound basic education under art. X, § 3 and the wealth-based arguments the Petitioners make. In other words, the fundamental right to an equal opportunity for a sound basic education does not rest on any classification based on

Voight, the Wisconsin Supreme Court held that there was insufficient evidence to demonstrate that the basic education afforded to students in property-poor school districts was inferior to the education received by students in property-rich districts.⁸⁵ Ultimately, the court noted that there was no proof of “poor standardized test scores, college entrance rates, or the like.”⁸⁶ In the end, “[m]erely showing disparity of the financial resources among school districts is not enough in this state to prove a lack of equal opportunity for a sound basic education Wisconsin requires districts to fulfill a constitutional minimum educational offering, not a maximum.”⁸⁷ In light of the constitutional minimum guarantee, local districts are able to raise and expend funds above and beyond the threshold required by the state.⁸⁸ Thus, significant wealth disparity between school districts has been given the rubber stamp of approval by the federal government and many state governments, such as Wisconsin, by merely affording rational review, rather than strict scrutiny.

If *Rodriguez* or *Vincent* were revisited today, it is possible, and likely, that the outcomes would be different.⁸⁹ One commentator noted that the *Rodriguez* decision “is more like a fragile scale that is quite capable of being tipped”⁹⁰ due to strong dissenting opinions that

wealth. . . . Since the Petitioners’ argument rests on wealth-based classifications and not classifications based on art. X, § 3, we apply the rational basis test.”); *see also Rodriguez*, 411 U.S. at 23–24.

85. *Vincent*, 2000 WI 93, ¶ 72.

86. *Id.*

87. *Id.* ¶ 71. *Compare id.* (noting that financial disparity is not sufficient to violate the Wisconsin guarantee of a free public education), *with Robinson v. Cahill*, 303 A.2d 273, 297–98 (N.J. 1973) (holding a public school financing system based largely on property taxes unconstitutional because it failed to satisfy state constitutional guarantee of a “thorough and efficient” free public education).

88. *Vincent*, 2000 WI 93, ¶ 59 (“[T]he constitution does not require districts to have uniform revenue-raising capacity.”); *see also Busé v. Smith*, 74 Wis. 2d 550, 572, 247 N.W.2d 141, 151 (1976).

89. *See* Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 HOFSTRA L. REV. 953, 994 (1998) (“Although the degree of unequal educational opportunities may have been remarkably different in 1973 when *Rodriguez* was decided, today it is clear that many of this nation’s poorest children are learning in inadequate educational systems that have failed to teach them the most basic subjects.”); Erik LeRoy, Comment, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation*, *Buse v. Smith Criticized*, 1981 WIS. L. REV. 1325, 1332–33 (1981) (“*Rodriguez* is a widely criticized decision.”).

90. Lynch, *supra* note 89, at 992.

“sharply undercut the [majority opinion’s] strength.”⁹¹ Moreover, recent research on open enrollment in Wisconsin outlined in Part III.C suggests that parents have their children transfer schools precisely because of “poor standardized test scores, college entrance rates, or the like.”⁹² As the United States Supreme Court recognized, “[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life” and take an “inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual.”⁹³ Until existing case law is revisited, the legislature is best suited to address the disparities by crafting legislation that adequately protects the Wisconsin state guarantee of a uniform and free public education.⁹⁴ Unfortunately, the expansion of Wisconsin’s inter-district open enrollment program fails to provide the necessary protections.

III. THE NEW (BUT NOT IMPROVED) WISCONSIN OPEN ENROLLMENT PROGRAM

A. Nuts and Bolts: The Wisconsin Open Enrollment Program

In 2011, the Wisconsin legislature greatly expanded the scope of open enrollment by lengthening the regular application window and by creating an alternative application procedure that may be used at any time during the year.⁹⁵ Under the prior law, there was a three-week timeframe to apply for open enrollment, starting the first Monday in February and ending the third Friday following the first Monday in February.⁹⁶ However, the application window was expanded to three months under 2011 Wisconsin Act 114, and parents are now eligible to apply from the first Monday in February until the last weekday in April.⁹⁷ Additionally, applications may be submitted to a maximum of

91. *Id.*

92. See *Vincent*, 2000 WI 93, ¶ 72; see also *supra* notes 60–63 and accompanying text.

93. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

94. *Kukor v. Grover*, 148 Wis. 2d 469, 510, 436 N.W.2d 568, 585 (1989) (“Such demands cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community.”).

95. See 2011 Wis. Act 114.

96. Memorandum from Mary Jo Cleaver, Open Enrollment Consultant, to District Administrators and Open Enrollment Coordinators (Feb. 2, 2012), available at sms.dpi.wi.gov/files/sms/doc/oe_mmo_extended_ap_2012_02_02.doc.

97. TONY EVERS, INITIAL PROCEDURES FOR IMPLEMENTING 2011 WISCONSIN ACT 114* EXCEPTIONS TO THE PUBLIC SCHOOL OPEN ENROLLMENT APPLICATION PERIOD 8

three nonresident school districts during an academic year.⁹⁸ The challenges for school administrators created by this expanded application window are detailed below throughout Part III.

The 2011 amendments also created seven exceptions to the regular application period that permit parents to apply for open enrollment at any time during the year, if the student falls into one of the enumerated categories.⁹⁹ A parent is now eligible to apply to no more than three nonresident schools for open enrollment outside of the application window if¹⁰⁰:

1. The resident school board determines that the pupil has been the victim of a violent criminal offense, as defined by the department by rule.¹⁰¹
2. The pupil is or has been a homeless pupil in the current or immediately preceding school year. . . .
3. The pupil has been the victim of repeated bullying or harassment
4. The place of residence of the pupil's parent or guardian and of the pupil has changed as a result of military orders. . . .
5. The pupil moved into this state. . . .
6. The place of residence of the pupil has changed as a result of a court order or custody agreement or because the pupil was placed in a foster home or with a person other than the pupil's parent, or removed from a foster home or from the home of a person other than the pupil's parent. . . .
7. The parent of the pupil, the resident school board, and the nonresident school board agree that attending school in the nonresident school district is *in the best interests of the pupil*.¹⁰²

(2012) [hereinafter DPI INITIAL PROCEDURES], available at <http://www.k12.com/sites/default/files/pdf/school-docs/OE-FAQ-Act-114.pdf>.

98. WIS. STAT. § 118.51(3)(a)(1) (2011–2012).

99. DPI INITIAL PROCEDURES, *supra* note 97, at 1–2.

100. WIS. STAT. § 118.51(3m)(a).

101. If the student has been a victim of a violent crime, the resident district may not deny an application due to undue financial burden. WIS. DEP'T OF PUB. INSTRUCTION, FULL-TIME INTER-DISTRICT PUBLIC SCHOOL OPEN ENROLLMENT IN WISCONSIN 76 (2012) [hereinafter DPI OPEN ENROLLMENT OVERVIEW 2012–2013], available at sms.dpi.wi.gov/files/sms/ppt/oe_overview_2013-14.ppt.

102. WIS. STAT. § 118.51(3m)(b)(1)–(7) (emphasis added).

In evaluating open enrollment applications under the regular and alternative application period, a nonresident school district may consider space availability,¹⁰³ whether the student has been expelled from any school in the past two years, whether the student is habitually truant, and whether a student's necessary special education services are available.¹⁰⁴ The 2011 amendment also requires a district to make a space availability determination eight months prior to the start of the academic year, at the January school board meeting.¹⁰⁵ Districts are no longer able to consider racial balance as a factor in rejecting or approving an application to transfer in or out of a school district following a 2007 Attorney General Opinion that Wisconsin Statute Section 118.51(7) is unconstitutional.¹⁰⁶ Subsequent to the 2007 Attorney General Opinion, a class action lawsuit—filed by Madison students whose applications were denied because departure from the school would have increased racial imbalance—led all Wisconsin schools to remove race as a factor in the open enrollment application process.¹⁰⁷

Moreover, if the resident school district denies transfer, the parent is entitled to appeal the decision to the DPI.¹⁰⁸ The resident school district must then respond to the DPI and defend the decision to deny the student's transfer.¹⁰⁹ If the DPI determines the transfer is in the student's best interest, the decision will be overturned.¹¹⁰ However, students may begin attending the nonresident school district before the open enrollment application has been approved or denied due to the timing of the application and appeals process, which takes an

103. See *infra* Part III.C for a detailed discussion on space availability determinations.

104. WIS. STAT. § 118.51(5)(a); see also *infra* Part III.F for more discussion on special education students.

105. WIS. STAT. § 118.51(5)(a)(1); WIS. DEP'T OF PUB. INSTRUCTION, QUESTIONS AND ANSWERS ABOUT FULL-TIME INTER-DISTRICT PUBLIC SCHOOL OPEN ENROLLMENT 12 (2012) [hereinafter DPI QUESTIONS AND ANSWERS], available at <http://dpi.wi.gov/sms/psctoc.html> at 12.

106. Letter from J.B. Van Hollen, Wis. Att'y Gen., to Anthony Evers, Deputy State Superintendent, at 1 (Dec. 20, 2007); *N.N. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927, 931 (W.D. Wis. 2009).

107. Tony Galli, *Madison School District Settles Open Enrollment Lawsuit*, WKOW.COM (June 1, 2011, 6:48 PM), <http://www.wkow.com/story/14823272/madison-school-district-settles-open-enrollment-lawsuit> (noting that the Madison school district ultimately settled the case for \$90,000); see also *N.N.*, 670 F. Supp. 2d at 931.

108. WIS. STAT. § 118.51(9); WIS. ADMIN. CODE PI § 36.10(2)(a) (Sept. 2012).

109. See DPI QUESTIONS AND ANSWERS, *supra* note 105, at 12.

110. *Id.* at 23–24.

undetermined amount of time depending on the situation.¹¹¹ If the denial is ultimately upheld by the DPI, the district superintendent must then force the student to return to the resident district mid-year.¹¹² Further, the DPI's decision may be appealed to the circuit court within thirty days of the decision, prolonging the student's undetermined status, and, potentially, attendance at a nonresident district.¹¹³

Other amendments to the Wisconsin Open Enrollment Program were made in 2011, such as the ability for a school board to create waiting lists as well as minor school aid adjustments.¹¹⁴ However, this Comment is limited to those provisions with significant implications for Wisconsin families as well as those amendments that pose barriers to the effective operations of local school districts, such as the new best interest of the pupil standard.

B. The Best Interest Standard

The Wisconsin Supreme Court noted that “[t]he history of education since the Industrial Revolution shows a continual struggle between two forces; the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children.”¹¹⁵ The clash of these two forces is aptly demonstrated by the new “best interest” exception to Wisconsin’s application period for inter-district open enrollment. The

111. *Id.* at 23 (“The length of time it takes to decide an appeal depends on when the appeal was received, how long it takes to compile the record of the decision, whether the parties file briefs and responses, how many appeals the department receives, and how complicated the issues are in the appeal. Most decisions are made and orders mailed during the month of August.”); *see also* DPI INITIAL PROCEDURES, *supra* note 97, at 8. The memo noted that:

Given the timing of the application procedures, it is very possible that students may begin attending the nonresident school district before the resident school district has acted on the application.

... If the resident school district denied the application because it does not believe the transfer is in the best interests of the student, the student may continue to attend the nonresident school district pending the outcome of the appeal.

Id.

112. DPI INITIAL PROCEDURES, *supra* note 97, at 8.

113. WIS. ADMIN. CODE PI § 36.10(4)(b); WIS. STAT. § 227.53.

114. WIS. STAT. § 118.51(5)(d)(1); Memorandum from Anne Sappenfield, *supra* note 16.

115. *Busé v. Smith*, 74 Wis. 2d 550, 571, 247 N.W.2d 141, 151 (1976) (quoting James S. Coleman, *Forward* to JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION, at vii (1970)) (internal quotation marks omitted).

first six exceptions to the open enrollment application period provide specific circumstances that are not likely to be the cause of substantial controversy.¹¹⁶ In fact, some of the exceptions are quite practical (i.e., for students who move into the state¹¹⁷) and other exceptions may be useful to give students a fresh start at a new school system, particularly in the case of students that are bullied or harassed.¹¹⁸ However, the seventh exception provides a vague and undefined option for district transfer when the parent(s), the resident district superintendent, and the nonresident district superintendent agree that the transfer is in the “best interests of the pupil.”¹¹⁹

The legislature failed to define standards by which the “best interests of the pupil” is to be measured and, consequently, the exception effectively permits year-round open enrollment at the discretion of individual families, assuming the parent complies with the application procedures and there is space available.¹²⁰ Initially, the DPI provided a cyclical and unhelpful definition, noting that, “[a] transfer is in the best interests of the student if the parent and nonresident school district agree and the resident school district does not disagree that the transfer is in the student’s best interest.”¹²¹ A more recent publication from the DPI notes that when reviewing the best interest exception, the initial assumption is that the “[p]arent is [the] best judge of the pupil’s interests.”¹²² Additionally, “[a] nonresident or resident school district may only deny if the district has sufficient reason to overcome the parent’s judgment” that the transfer is not in the student’s best interest.¹²³ However, most superintendents expected to make a best interest determination have never even met the student, much less are able to adequately address the considerations necessary to deem a certain placement in the best interest of a student.¹²⁴

116. See WIS. STAT. § 118.51(3m).

117. *Id.* § 118.51(3m)(b)(5).

118. *Id.* § 118.51(3m)(b)(3).

119. *Id.* § 118.51(3m)(b)(7).

120. See DPI OPEN ENROLLMENT OVERVIEW 2012–2013, *supra* note 101, at 75.

121. DPI INITIAL PROCEDURES, *supra* note 97, at 11.

122. DPI OPEN ENROLLMENT OVERVIEW 2012–2013, *supra* note 101, at 75.

123. *Id.*

124. Even in a small town, such as Plymouth, Wisconsin, with a total population of roughly 8,000, Superintendent Clark Reinke indicated that he and his colleagues are not sure how to make best interest determinations when they have never personally met the students. Telephone interview with Dr. Clark Reinke, Former Superintendent, Plymouth School District (Oct. 22, 2012).

As a result, if a child does not meet the first six exceptions, there is no guidance on what may be factored into the best interest consideration. Perhaps standards will be developed through a case-by-case analysis during the appeal process, or administrative rules will be promulgated.¹²⁵ However, the DPI is currently left with few options but to defer to the parent's judgment, which may not always be forthcoming. For example, the Nebraska legislature recently removed a requirement for parents to include in the application the reason for the student's desire to transfer to another district after "the realization that parents are not always truthful about" the reasons for district transfer.¹²⁶ Without sufficiently defined standards, it is likely that extracurricular activities, parent dissatisfaction, and general convenience will continue to play a significant role in parents' determinations of the best interests of their children.¹²⁷

For now, the vague and undefined best interest standard within the context of public education appears ripe for litigation.¹²⁸ Similar to the lawsuit filed by disgruntled students denied transfer based on a statutory provision regarding racial balance, it is only a matter of time before students denied transfer under the best interest exception also appeal the decision to the courts.¹²⁹ Yet the exception establishes a seemingly impossible standard for the district to rebut, despite financial and

125. See DPI INITIAL PROCEDURES, *supra* note 97, at 12. In the initial memo relating to the 2011 amendments, the DPI noted:

DPI will review the facts and arguments submitted by the parents and the resident school district and make a decision about whether the transfer is in the best interests of the student.

The DPI will not consider any factors that are not related to the best interests of the student. That is, DPI will not consider the financial effect on the resident school district or any other factors, except as they relate to the best interests of the student.

The DPI's decision is final.

Id.

126. Smith, *supra* note 20, at 278 (noting reasons that parents do not disclose motivations behind relocation, such as racial motivations).

127. See *supra* Part II.C (discussing reasons why parents choose particular school districts, including higher test scores and extracurricular activities).

128. The author is unaware of any filed or pending lawsuits to date. See *infra* note 232 and accompanying text.

129. See *supra* note 107 and accompanying text (discussing the 2007 class action lawsuit based on the denial of open enrollment transfer applications).

logistical impediments to local control.¹³⁰ Moreover, the “amorphous” nature of the best interest standard places a judge in the difficult situation to provide substance to the fluid, “inherently arbitrary,” and indeterminate standard when decisions are inevitably appealed to the circuit courts.¹³¹ Until greater clarity is provided, the decision appears to rest largely in the hands of dissatisfied parents.¹³²

C. Space Availability Determinations

Another challenge enhanced by the 2011 amendments relates to the school district’s requirement to make a space availability determination. Under Wisconsin law, school boards are only required to accept nonresident students if there is space available, in addition to a few other considerations.¹³³ However, in light of the dramatic expansion of the Wisconsin’s Open Enrollment Program, a space availability determination is now required in January of each year, a full eight months prior to the start of the following academic year.¹³⁴ Concerns and questions among school districts are widespread. How can a district effectively plan eight months in advance when students can leave at any time throughout the year?¹³⁵ Also, what happens if the January projections are wrong?¹³⁶ The DPI indicates that if a nonresident school district accepts a student and later discovers a lack of space availability, the district cannot rescind the offer.¹³⁷ Thus, the DPI gives significant consideration to the newly required January projections.¹³⁸ The DPI grants a narrow exception to districts for students with an individualized

130. See *infra* Part III.C–D.

131. See Lynn M. Akre, Comment, *Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the “Best Interest of the Child” Standard*, 75 MARQ. L. REV. 628, 670–71 (1992) (“It is the judges who are the most deeply enmeshed in the problem who carry the heaviest responsibility on their shoulders and are forced to continually struggle to find meaning in the amorphous ‘best interest of the child’ standard.”).

132. See *supra* note 122 and accompanying text; see also *infra* Part IV (providing recommendations to repeal the best interest exception, or, alternatively, to provide standards by which to evaluate a best interest determination).

133. WIS. STAT. § 118.51(5)(a)(1) (2011–2012); see also *supra* note 103 and accompanying text.

134. See *supra* note 105 and accompanying text.

135. See *infra* notes 165–67 and accompanying text.

136. See *infra* notes 165–67 and accompanying text.

137. DPI QUESTIONS AND ANSWERS, *supra* note 105, at 13 (“Once a student is approved for open enrollment, that student must be permitted to open enroll.”).

138. See *id.* at 12.

education program (IEP)¹³⁹ that is created or altered after the student enrolls in the nonresident district.¹⁴⁰

The school district is permitted to take into consideration several factors in determining space availability, including class size limits, student-teacher ratios, and enrollment projections.¹⁴¹ However, the space determination cannot be arbitrary or unreasonable and the district must be able to provide a reasonable justification for an applicant's denial based on space availability.¹⁴² In *McMorrow v. Benson*, the Whitefish Bay School District denied the plaintiff's application for open enrollment for lack of space availability but accepted the applications of three continuing students that were already enrolled in the school.¹⁴³ The circuit court held that the decision to accept continuing students despite an expressed concern for space availability was arbitrary.¹⁴⁴ The court of appeals affirmed the circuit court and found that the continuing student provision that permits nonresident districts to guarantee approval to currently attending students "applies only when there are spaces available in the first place."¹⁴⁵ However, "when there are more applicants than spaces available, the pupils accepted shall be determined on a random basis" even if certain students are currently attending the district.¹⁴⁶

In light of the 2011 amendments to open enrollment, it is possible that the circuit court decision would come out differently because the decision operated against the best interest of the continuing students, who were required to transfer districts in the middle of the academic year. Thus, school districts must now re-evaluate the little Wisconsin case law that provides substantive guidance on space availability determinations, while making difficult projections in the midst of year-round open enrollment transfers.

139. An Individualized Education Program (IEP) is a written statement for each child with a disability that includes a statement of the child's present level of academic achievement, measurable annual goals, a description of the child's progress toward meeting the goals, as well as other federal requirements. 34 C.F.R. § 300.320 (2012).

140. WIS. STAT. § 118.51(12)(a) (2011–2012).

141. *McMorrow v. Benson*, 2000 WI App 173, ¶ 13, 238 Wis. 2d 329, 617 N.W.2d 247 (citing WIS. STAT. § 118.51(5)(a)).

142. *Id.* ¶ 10.

143. *Id.* ¶ 11.

144. *Id.* ¶ 6.

145. *Id.* ¶ 16 (emphasis omitted).

146. *Id.* (emphasis omitted).

D. Financial Implications

In addition to logistical considerations such as the space availability determination, the expansion of open enrollment impacts local district finances. Although public school financing is not explicitly addressed by the open enrollment amendments, the loss of students significantly impacts a school district's budget through the loss of per-pupil funding.¹⁴⁷ The districts that lose a substantial number of students through open enrollment transfers "have fewer dollars to spend on the students remaining, and the operation of those districts will become less uniform, thorough, and efficient."¹⁴⁸ Districts suffering from the sustained loss of financial resources are then forced to eliminate many attractive aspects of a well-rounded public school, such as physical education, art, music, journalism, advanced placement courses, and field trips.¹⁴⁹ Thus, the financial implications of the recent amendments impact all families with students in the public school system, especially those that remain in the "losing" districts that enter into a "downward and accelerating 'spiral of decline.'"¹⁵⁰

Under the Wisconsin's Open Enrollment Program, families do not pay for the cost of attending a nonresident district.¹⁵¹ Rather, the DPI transfers aid from the resident to the nonresident school on a prorated basis,¹⁵² although an exception exists for special education students.¹⁵³ The amount transferred per student is "equal to the statewide average per pupil school district cost for regular instruction, co-curricular activities, instructional support services and pupil support services in the

147. School districts derive most of their revenue through state aid—which is based on the districts per pupil value of taxable property—and local property taxes. RUSS KAVA & LAYLA MERRIFIELD, WIS. LEGISLATIVE FISCAL BUREAU, STATE AID TO SCHOOL DISTRICTS 1, 3 (2013), available at http://legis.wisconsin.gov/lfb/publications/Informational-Papers/Documents/2013/24_State%20Aid%20to%20School%20Districts.pdf (noting that in 2010–2011 over 87% of district revenue came from state aid and property taxes); see also WIS. STAT. § 118.51(16) (2011–2012).

148. McGillivray, *supra* note 32, at 129.

149. Jimerson, *supra* note 15, at 18.

150. *Id.* (quoting Kenneth Howe et al., *School Choice Crucible: A Case Study of Boulder Valley*, 83 PHI DELTA KAPPAN 137, 144 (2001)).

151. WIS. STAT. § 118.51(16); see also LEGISLATIVE AUDIT BUREAU ON OPEN ENROLLMENT, *supra* note 11, at 4.

152. WIS. STAT. § 118.51(16)(c); see also LEGISLATIVE AUDIT BUREAU ON OPEN ENROLLMENT, *supra* note 11, at 7.

153. The resident school district pays the nonresident district directly for a special education student. See WIS. STAT. § 118.51(17); *Doe v. Wis. Dep't of Pub. Instruction*, No. 03-CV-892, slip op. at 2 (E.D. Wis. Dec. 2004).

previous school year.”¹⁵⁴ By looking to aggregate state data, proponents of open enrollment minimize the financial impacts.¹⁵⁵ At the statewide level, only 4.4% of the student population in Wisconsin participated in open enrollment in the 2011–2012 academic year.¹⁵⁶ However, a microlevel analysis at the district level indicates that over 50% of Wisconsin school districts suffered a net loss of students, which includes a loss in state aid.¹⁵⁷ For the 2011–2012 academic year, the total amount transferred per student using open enrollment was \$6,867,¹⁵⁸ and out of 424 districts, 224 had a net loss of students and 199 had a net gain in the 2010–2011 academic year.¹⁵⁹

A 2011 legislative audit report on open enrollment indicates that those districts with a net gain of students had higher property taxes than those districts with a net loss.¹⁶⁰ As a result, the transfer of students through open enrollment disproportionately impacts districts with lower property taxes by taking roughly \$7,000 for each student out of the district without regard to certain fixed costs.¹⁶¹ Although a percentage cap on transfers out of a resident school district was initially authorized, the law no longer permits a denial of an open enrollment application under the percentage cap or based on an undue financial burden, as it did prior to and during the 2005–2006 academic year.¹⁶² Therefore, a resident district cannot deny a student the opportunity to transfer to a nonresident district solely because of the financial burden imposed by the aggregate loss of students to neighboring districts.¹⁶³ Moreover,

154. DPI QUESTIONS AND ANSWERS, *supra* note 105, at 30; *see also* WIS. STAT. § 118.51(16)(a).

155. Jimerson, *supra* note 15, at 18.

156. RUSS KAVA, WIS. LEGISLATIVE FISCAL BUREAU, OPEN ENROLLMENT PROGRAM: INFORMATIONAL PAPER 27, at 10 (2013), *available at* http://legis.wisconsin.gov/lfb/publications/Informational-Papers/Documents/2013/27_Open%20Enrollment%20Program.pdf.

157. *Id.* at app. 15–24; LEGISLATIVE AUDIT BUREAU ON OPEN ENROLLMENT, *supra* note 11, at 4.

158. WIS. DEP’T OF PUB. INSTRUCTION, OPEN ENROLLMENT AT A GLANCE: STATEWIDE DATA (2012), *available at* http://sms.dpi.wi.gov/files/sms/pdf/oe_psoc_at_a_glance.pdf; *see also* WIS. STAT. § 118.51(16)(a).

159. LEGISLATIVE AUDIT BUREAU ON OPEN ENROLLMENT, *supra* note 11, at 7.

160. *Id.* The receiving districts tend to be smaller, have higher direct educational costs per student, and receive less equalization aid. *Id.*

161. *Id.* at 6–7.

162. *Sch. Dist. of Stockbridge v. Evers*, 2010 WI App 144, ¶ 1, 330 Wis. 2d 80, 792 N.W.2d 615 (interpreting WIS. STAT. § 118.51(6) (2007–08)).

163. *See id.*

districts are not permitted to increase property taxes to offset any loss of state aid resulting from open enrollment transfers and are without recourse to compensate for the lost funding.¹⁶⁴

In fact, the extended application period has created “a budgeting nightmare for districts working on financial forecasts” for the upcoming year.¹⁶⁵ During the same period where students apply for open enrollment transfers, school districts are required to make space availability determinations, set budgets, estimate enrollment, and anticipate staff needs for the following school year.¹⁶⁶ In Racine, district leaders attempted to plan for the 2011–2012 school year with an anticipated \$4.35 million revenue loss resulting from open enrollment.¹⁶⁷ Similarly, open enrollment created “more losers than winners” in Kenosha County where only five of the twelve public school districts gained more students than it lost in the 2010–2012 school years.¹⁶⁸ School administrator David Milz noted that for the Salem school system, open enrollment “represent[s] a huge financial loss of nearly \$1 million from [the] budget, money that cannot be recovered.”¹⁶⁹ For the

164. LEGISLATIVE AUDIT BUREAU ON OPEN ENROLLMENT, *supra* note 11, at 5.

165. Dorothy Jasperson-Robson, *Open Enrollment Extension Presents Budgeting Delays for School Districts*, WESTBY TIMES (Feb. 15, 2012, 1:00 PM), http://lacrossetribune.com/westbytimes/news/local/open-enrollment-extension-presents-budgeting-delays-for-school-districts/article_b6692c12-57f3-11e1-aac0-0019bb2963f4.html; Morgan Smith, *Weighing Options for Expanding School Choice*, N.Y. TIMES, Dec. 14, 2012, at A27A.

166. Jasperson-Robson, *supra* note 165. The Westby Times reported:

Charles Norton, the Westby Area School District Administrator, said each year as school districts prepare the budget for the upcoming school year, the first and most challenging decision made is to forecast the number of students enrolled by building/grade and the overall district, and those numbers are used to estimate the potential level of state aid, as well as class sizes and the number of staff required to fill their educational needs.

“Without this key piece of the puzzle, the process simply cannot begin in earnest. Pushing the open enrollment deadline back to April 30 will certainly have an impact on our ability to forecast final student counts thereby making it even more difficult to finalize a budget and the related staff counts required to meet student need,” Norton said.

Id.

167. Melinda Tichelaar, *Racine Unified School District Budget Impacted by Declining Enrollment*, CALEDONIA PATCH (Aug. 15, 2011, 3:00 PM), <http://caledonia.patch.com/articles/racine-unified-school-district-budget-impacted-by-declining-enrollment>.

168. Jill Tatge-Rozell, *County Schools Raked by Open Enrollment: Only Five of 12 Local Districts Gaining Students; Millions in Aid Changing Hands*, KENOSHA NEWS (Feb. 7, 2011, 1:16 AM) (on file with author).

169. *Id.*

districts that receive more students than they lose, the open enrollment program is considered a means to combat budget shortfalls, but in the end it serves to only intensify the already stark wealth disparity between school districts.¹⁷⁰

The financial implications of open enrollment are not unique to Wisconsin. In fact, Ohio,¹⁷¹ Minnesota,¹⁷² and Texas¹⁷³ also report that open enrollment poses significant constraints to district funding.¹⁷⁴ In Ohio, the financial implications are even greater when a district opts not to participate in open enrollment because even though a district can choose to not accept incoming transfer students, it cannot refuse to permit resident students to transfer out.¹⁷⁵ Although a full discussion of school finance litigation is beyond the scope of this Comment, public school finances impact all students and families, particularly those in the 50% of districts with dwindling state funding each year.¹⁷⁶ The fiscal uncertainty experienced by these districts is only compounded by the year-round statutory exceptions to the open enrollment application period, which also provides a new pool of potential students to funnel toward virtual charter schools.

170. In Wauwatosa, the district intended to “patch an anticipated \$1.6 million budget shortfall” by admitting an additional 270 open enrollment students in the 2009–2010 academic year. *See More Open Enrollment Students Could Solve District’s Budget Gap*, WAUWATOSA NOW (May 28, 2009), <http://www.wauwatosanow.com/news/46360947.html>.

171. Richard Jones, *Open Enrollment Hurts Some Schools in Funding*, OXFORD PRESS (Oxford, Ohio) (Jan. 6, 2012, 10:35 PM), <http://www.oxfordpress.com/news/news/local/open-enrollment-hurts-some-schools-in-funding/nNYd6/> (noting that although some schools recoup a significant portion of lost funds through incoming student transfers, others fall far short; for example, the Middletown school system lost more than \$1.8 million in funding but only gained a little over \$323,000 through new students enrolled in the district); *see also Open Enrollment Helps, Hurts School Districts*, STAR BEACON (Ashtabula, Ohio) (Oct. 21, 2011), <http://starbeacon.com/local/x553406727/Open-enrollment-helps-hurts-school-districts> (noting that the open enrollment program “play[s] havoc with the per-pupil funding that follows each child”).

172. Mascia, *supra* note 49, at 462–63 & n.241 (citing Interview with Willard K. Baker, Executive Director, Minnesota School Board, in Connie Leslie et al., *Giving Parents a Choice*, NEWSWEEK, Sept. 19, 1988, at 78).

173. Morgan Smith, *Some Texas Districts Pursuing School Choice Locally*, TEXAS TRIBUNE (Dec. 14, 2012), <http://www.texastribune.org/2012/12/14/some-texas-districts-pursuing-school-choice-locall/> (quoting Michael Zolkosi, Ysleta Independent School District Superintendent, who noted that open enrollment “hurts districts in the planning for facilities, salaries for teachers, [and] building locations for students” (internal quotation marks omitted)).

174. Mascia, *supra* note 49, at 463–64.

175. *See Open Enrollment Helps, Hurts School Districts*, *supra* note 171.

176. *See* LEGISLATIVE AUDIT BUREAU ON OPEN ENROLLMENT, *supra* note 11, at 7.

E. The Rise of Virtual Charter Schools in Wisconsin

Another factor accelerating the loss of financial support from public schools in Wisconsin is the rise of the for-profit virtual education industry, which was a key lobbying force behind the 2011 amendments and has since significantly benefitted.¹⁷⁷ Virtual charter schools are publicly funded schools that operate independently of many state regulations applied to traditional public schools yet are eligible for the same state aid per pupil.¹⁷⁸ Students attend school from home and communicate with teachers virtually, largely through online forums.¹⁷⁹ While the tremendous increase in students opting out of their resident district seems to support the argument to do away with the residential-based education model, the Supreme Court upheld the legitimacy of state residency requirements in *Martinez v. Bynum*.¹⁸⁰ Nonetheless, residency requirements are increasingly challenged as antiquated and irrelevant in the twenty-first century due to increased global mobility and the proliferation of virtual charter schools.¹⁸¹ Although the residential-based public education system is alive and well today, the expansion of the open enrollment program as well as the removal of a virtual school enrollment cap has paved the way for the continued expansion of virtual schools.¹⁸²

Interestingly, the virtual education industry in Wisconsin was one of the primary lobbyists behind the 2011 legislative expansion of open

177. Eric Oliver, *Half of Virtual Charter Schools Judged in New Report Cards Miss Mark*, MILWAUKEE J. SENTINEL, Oct. 28, 2013, at 9A.

178. PAUL STUIBER ET AL., WIS. LEGISLATIVE AUDIT BUREAU, AN EVALUATION: VIRTUAL CHARTER SCHOOLS 3–4 (2010), available at <http://legis.wisconsin.gov/lab/reports/10-3full.pdf>; Oliver, *supra* note 177 (“Like other charter schools, virtual charter schools are eligible for \$7,775 annually in state aid per pupil.”).

179. STUIBER ET AL., *supra* note 178, at 19–20.

180. *Martinez v. Bynum*, 461 U.S. 321, 326–27 (1983). Bona fide residency requirements—as opposed to durational residency requirements that condition a benefit on a minimum period of residence within a particular jurisdiction—are generally upheld as they further a substantial state interest in assuring that services provided for its residents are enjoyed by its residents. *Id.* at 325.

181. See Sarah L. Browning, *Will Residency Be Relevant to Public Education in the Twenty-First Century?*, 8 PIERCE L. REV. 297, 338–44 (2010).

182. See Eric Litke, *Virtual School Enrollment Jumps 38 Percent*, SHEBOYGAN PRESS (Oct. 21, 2012), <http://www.sheboyganpress.com/apps/pbcs.dll/article?AID=/201210191636/SH019802/310190372>; see also Erin Richards & Jennifer Zahn, *Many Districts Losing Students: But Some Online Charter Schools Report Hefty Gains*, MILWAUKEE J. SENTINEL, October 15, 2012, at 1A.

enrollment in Wisconsin.¹⁸³ According to the Wisconsin Government Accountability Board, virtual education organizations—including K12 Inc., Insight Schools, and the Wisconsin Coalition of Virtual School Families—spent a significant amount of time and resources advocating on behalf of the open enrollment amendments.¹⁸⁴ During the Senate Committee on Education hearings on Senate Bill 2, the Wisconsin Coalition for Virtual School Families gave the only public testimony in support of the proposed legislation, aside from the DPI and the Wisconsin Association of School Boards.¹⁸⁵ Significantly, K12 Inc., which is headquartered in Virginia but operates in Wisconsin and nationwide, spent nearly \$26.5 million on advertising in 2010 yet only one third of its students achieved Adequate Yearly Progress, a threshold measurement defined by the No Child Left Behind Act to assess students' progress on standardized tests.¹⁸⁶

Wisconsin State Superintendent, Tony Evers, and the former chair of the Senate Committee on Education and Corrections, John Lehman, have both expressed distaste with this consequence of the expansion of open enrollment.¹⁸⁷ Superintendent Evers recently commented that, “[o]ne of the concerns I do have is that the virtual school law is relatively permissive, and we have some schools popping up around the state that frankly look more like resource centers for home school kids than they do schools.”¹⁸⁸ Further, Senator John Lehman noted discomfort with the state assuming financial responsibility for home school families using virtual education programs.¹⁸⁹ The DPI has little

183. See *Eye on Lobbying: Senate Bill 2*, GOV'T ACCOUNTABILITY BOARD, <https://lobbying.wi.gov/What/BillInformation/2011REG/Information/7918> (last visited Dec. 28, 2013); see also Memorandum from Rose Fernandez, Wisconsin Coalition of Virtual School Families, to Assembly Republicans (Apr. 29, 2011), available at <http://www.wivirtualschoolfamilies.org/alerts/memo-on-sb2/>.

184. See *Eye on Lobbying: Senate Bill 2*, *supra* note 183.

185. *Senate Committee on Education Public Hearing*, WISCONSINEYE at 16:40–38:35 (Jan. 13, 2011), <http://www.wiseye.org/Programming/VideoArchive/EventDetail.aspx?evhdid=3582>. Representatives from the Wisconsin Coalition of Virtual School Families testified that the proposed expansion of open enrollment was necessary, but not sufficient, and that the bill is only the beginning of an effort to erode the traditional, residentially based public school system. *Id.*

186. Stephanie Saul, *Profits and Questions at Online Charter Schools*, N.Y. TIMES, Dec. 13, 2011, at A1; No Child Left Behind Act, Pub. L. No. 107-110, § 1111(b)(2), 115 Stat. 1445–46 (2001) (codified at 20 U.S.C. § 6311 (2012)).

187. Litke, *supra* note 182.

188. *Id.*

189. *Id.*

oversight over virtual schools, online students are exempt from daily attendance laws, and the DPI does not track daily attendance or have an alternative system in place to ensure regular attendance.¹⁹⁰

Although the DPI recently announced plans for an in-depth study of virtual schools during the 2012–2013 school year,¹⁹¹ no study was planned until a media investigation revealed “significant achievement gaps between students” attending virtual charter schools and those attending traditional public schools.¹⁹² The investigation reported that students in virtual schools “struggle to finish high school in four years, repeat grades five times as frequently and last year trailed their counterparts in every subject but reading on the annual Wisconsin Student Assessment System test.”¹⁹³ As one Wisconsin superintendent argued in a brief to the DPI supporting the denial of a student’s transfer request, “[w]ith 39 years of experience as a professional educator, a doctorate degree in education, [and] 13 years as Superintendent of the Plymouth School District . . . I cannot in good conscience agree that enrollment in a virtual school is in the best educational interests of this student.”¹⁹⁴ The most recent report card issued by the DPI found that half of the virtual schools assessed did not meet state performance expectations.¹⁹⁵

Not only have the schools failed to perform academically, but the rise of virtual education has also negatively impacted public school finances. A 2010 legislative audit recognized that school districts suffer a financial loss when students not previously enrolled in the district attend virtual schools through open enrollment because few schools lose enough students to reduce fixed costs.¹⁹⁶ Although the drafting record for 2011 Wisconsin Act 114 indicated no projected change in the state budget, an impact in the local budget was predicted if students who are currently home schooled chose to attend a nonresident school district by

190. Eric Litke, *DPI Planning “In-Depth” Study of Virtual Schools*, SHEBOYGAN PRESS (Oct. 18, 2012), <http://www.sheboyganpress.com/apps/pbcs.dll/article?AID=/201210181312/SHE019802/310180373> [hereinafter *DPI Planning “In-Depth” Study of Virtual Schools*]; see also STUIBER ET AL., *supra* note 178, at 19–21.

191. *DPI Planning “In-Depth” Study of Virtual Schools*, *supra* note 190. Recommendations for this study were made by the state’s nonpartisan Legislative Audit Bureau in a report issued in February 2010. See STUIBER ET AL., *supra* note 178, at 7.

192. *DPI Planning “In-Depth” Study of Virtual Schools*, *supra* note 190.

193. *Id.*

194. See Letter from Clark Reinke, Superintendent, to Jennifer Danfield, Open Enrollment Consultant (Sept. 6, 2012) (on file with author).

195. Oliver, *supra* note 177.

196. *Id.*

using open enrollment.¹⁹⁷ In a very short time, that prediction has come true. Home-school students are now enrolling in virtual schools, at the taxpayer's expense, when they never attended the public school and the district did not initially receive funding for the student.¹⁹⁸

One school administrator at a virtual school in Merrill, Wisconsin noted that about 80% of the school's 460 students are former home-school students who were never enrolled in the public school system.¹⁹⁹ These school districts not only lose expected funding from their projected budget when existing students leave, but they also have to account for unexpected funds when a previously home-schooled student now wants to attend a virtual school.²⁰⁰ In an effort to mitigate this challenge, administrative regulations require an applicant to register in the resident district prior to beginning open enrollment.²⁰¹ However, increasing use of the best interest standard ensures that students will be transferring throughout the year, leaving district budgets in constant fluctuation.²⁰² Assuming financial responsibility for Wisconsin students to attend these "relatively permissive . . . resource centers" that have failed to meet minimum performance expectations does not appear to serve the best interest of Wisconsin students and families.²⁰³

F. Students with Disabilities: The Undue Financial Burden Standard

While open enrollment is increasingly accessible to the majority of the population, students with disabilities face additional hurdles and are

197. See DONALD SMITH, WIS. DEP'T OF ADMIN., FISCAL ESTIMATE-2011 SESSION 2 (2011), available at http://docs.legis.wisconsin.gov/2011/related/fe/sb2/sb2_DPI.pdf.

198. Litke, *supra* note 182. The same is true with recent expansion of the private school choice program in Racine and various other cities in Wisconsin. Erin Richards & Patrick Simonaitis, *Most Students Applying for State Voucher Program Attend Private Schools*, MILWAUKEE J. SENTINEL (Aug. 15, 2013), <http://www.jsonline.com/news/education/most-students-applying-for-state-voucher-program-attend-private-schools-b9976473z1-219789131.html>. In fact, 67% of students who participated in the new and limited Wisconsin state voucher program "were already attending a private school last year without the help of taxpayer dollars." *Id.*

199. Litke, *supra* note 182.

200. In addition, public schools are unable to compete with the marketing funds available to the for-profit virtual school programs. *Id.*

201. See WIS. ADMIN. CODE § PI 36.03(1)(f), (3)(d) (Sept. 2012).

202. See *supra* notes 165–70 and accompanying text (discussing the financial and budgeting "nightmare" caused by the open enrollment amendments).

203. See *supra* note 188 and accompanying text.

more likely to be denied participation than non-disabled students.²⁰⁴ During the 2012–2013 academic year, special education student applications were denied roughly 42% of the time, as opposed to a 32% denial rate for general education students.²⁰⁵

Open enrollment costs for students with disabilities are paid by the resident school district directly to the nonresident district, unlike students without disabilities where the DPI transfers funds directly.²⁰⁶ The nonresident school district bills the standard transfer amount for regular education students plus any “actual, additional, special education costs” incurred in educating the student.²⁰⁷ Because nonresident school districts do not shoulder the cost of educating transfer students with disabilities, the nonresident school district can only deny enrollment for lack of space availability or if the services required by the IEP are not available.²⁰⁸ The nonresident school district is not permitted to deny a student with an IEP based on financial considerations.²⁰⁹ However, resident school districts are permitted to deny an open enrollment request for a student with an IEP if the cost of the special education imposes an “undue financial burden,” which takes into consideration the school district’s total economic circumstances.²¹⁰

204. See WIS. DEP’T OF INSTRUCTION, OPEN ENROLLMENT APPROVALS AND DENIALS: SPECIAL EDUCATION AND NOT SPECIAL EDUCATION (2012), available at <http://oe.dpi.wi.gov/files/oe/pdf/multi-yr-sped-participation-data.pdf>; Emily Kram, *Disabilities Create Hurdles to Open Enrollment*, SUPERIOR TELEGRAM (Sept. 4, 2013), <http://www.superiortelegram.com/content/disabilities-create-hurdles-open-enrollment>.

205. WIS. DEP’T OF INSTRUCTION, *supra* note 204.

206. See *Doe v. Wis. Dep’t. of Pub. Instruction*, No. 03-CV-892, slip op. at 2 (E.D. Wis. Dec. 2004).

207. *Id.* “Actual, additional special education costs” are those costs actually incurred by the school district that are specific to the student and would not be incurred if the student were not attending the nonresident school district. *Id.*

208. WIS. STAT. §§ 118.13(1), 118.51(5)(a)(4) (2011–2012).

209. WIS. STAT. § 118.51(12)(a)–(b), (17); see also *Doe*, No. 03-CV-892, slip op. at 2 (holding unconstitutional a prior version of the open enrollment statute that permitted open enrollment tuition for disabled students to exceed tuition for non-disabled students).

210. WIS. STAT. § 118.51(12)(b)(1); *Sch. Dist. of Stockbridge v. Evers*, 2010 WI App 144, ¶ 11, 330 Wis. 2d 80, 792 N.W.2d 615 (holding that a resident school district is permitted to deny a transfer application to a nonresident school district based on the costs to implement a student’s IEP). An “undue financial burden” is determined “in light of the resident school district’s total economic circumstances, including its revenue limit . . . , its ability to pay tuition costs for the pupil, and the per pupil special education or related services costs for children with disabilities continuing to be served by the resident school district.” WIS. STAT. § 118.51(12)(b)(1).

The DPI recently shed some light on the “undue financial burden” standard by overturning the Rice Lake School Board’s denial of an open enrollment transfer for a disabled student in 2010.²¹¹ Since 2009, the Rice Lake School District had reduced its operating budget by over \$680,000 due to declining enrollment largely attributed to open enrollment.²¹² In order to accommodate the transfer request for a student with exceptional needs, the resident district (Rice Lake) was required to fund a duplicate program already running with a cost of roughly \$80,000 for occupational and physical therapy costs as well as special education and related services.²¹³ Even though the resident district already had a program to serve the student’s needs, the DPI held that “the statute does not permit a district to deny because the tuition cost is a financial burden; the financial burden must be ‘undue.’”²¹⁴

Despite this recent decision, the contours of what constitutes an undue financial burden remain relatively unclear.²¹⁵ Nonetheless, disabled students may be denied transfer to a nonresident school district based on an undue financial burden while their non-disabled counterparts may not.²¹⁶ Although such regulation is likely due to competing public policy concerns, the end result leaves school districts in a fiscal nightmare while depriving disabled students of equal access to participate in open enrollment.

G. Other Equitable Concerns

In addition to the disparate treatment for disabled students and financial disparities between school districts, open enrollment raises other equitable concerns that primarily face low-income families and students. Traditionally, equitable arguments center on the barriers for low-income families that do not have the ability to transport their

211. *School Disputes Student Transfer*, CHRONOTYPE (Rice Lake, WI) (Sept. 9, 2010), <http://www.ricelakeonline.com/main.asp?SectionID=25&subsectionID=84&articleID=20365>.

212. *Id.*

213. *Id.*

214. *Id.* (quoting the DPI decision regarding the Rice Lake transfer denial).

215. In addition, the financial burden on the resident school district is compounded by the responsibility to provide transportation for students with IEPs that require transportation. *See* WIS. STAT. § 118.51(14)(a)(2). In contrast, parents are responsible for transportation to the nonresident school for non-disabled students. *See id.* § 118.51(14)(a)(1).

216. *See id.* § 118.51(12)(b)(1).

children to a neighboring district or cannot afford transportation costs.²¹⁷ However, Wisconsin has attempted to mitigate this disparity by providing transportation assistance for low-income parents who are eligible for free or reduced meals under federal guidelines.²¹⁸

Instead, the equitable implications that stem from the recent amendments to the open enrollment program relate to a lack of information or misinformation. Low-income and less educated families tend to have less access to information relating to the quality of school systems.²¹⁹ For example, the 2014–2015 DPI Open Enrollment Brochure states that “[t]he application period closes at 4:00 p.m. on April 30, 2014. *Late applications will not be accepted for any reason.*”²²⁰ One Wisconsin news article reported that the application deadlines from February through April are “firm” and that “early and late applications are not accepted.”²²¹ For a parent who is not “in the know,” the emphasized language that “[l]ate applications will not be accepted for any reason” seems pretty clear. Unless the parent has sufficient information relating to the alternative application period, the quoted language above would likely be the last stop for many Wisconsin parents.

Additionally, studies of the open enrollment programs in Akron, Omaha, and Des Moines indicated a “glaring underutilization” by nonwhite students and “a disproportionate number of white students transferring out of the urban district[s].”²²² An Iowa Board of Education report concluded that nonwhite students did not have sufficient information about the open enrollment program but would participate if such information was provided.²²³ In addition, studies indicate that

217. See McGillivray, *supra* note 32, at 120 (“Transportation issues have led to law suits in other states where low income students have been denied the right to attend a school of choice because they lacked affordable transportation. When adequate transportation is not provided, open enrollment merely becomes another program which disadvantaged pupils may not use.”).

218. WIS. STAT. § 118.51(14)(b).

219. Smith, *supra* note 20, at 279 (quoting Richard W. Campbell & Lawrence R. Hepburn, *Educational Choice: Is It Really a “Panacea” for What Ails American Schools?*, 2 KAN. J.L. & PUB. POL’Y 61, 70 (1992)); see also VAN DUNK & DICKMAN, *supra* note 42, at 97 (noting that shopping for schools is not an easy task).

220. WIS. DEP’T OF PUB. INSTRUCTION, FULL-TIME INTER-DISTRICT OPEN ENROLLMENT IN WISCONSIN PUBLIC SCHOOLS, available at <http://sms.dpi.wi.gov/files/sms/pdf/OE%20brochure%202014-15.pdf>.

221. Jaspersen-Robson, *supra* note 165.

222. Constance Hawke, *The “Choice” For Urban School Districts: Open Enrollment or Desegregation?*, 115 ED. LAW REP. 609, 620 (1997).

223. *Id.* at 619–20.

“minority parents and parents of lower socioeconomic status have fewer interactions with individuals who have knowledge about schools” and as a result have less information by which to make a decision.²²⁴ Thus, appropriate implementation of an open enrollment program requires greater efforts to provide sufficient information to parents and students of disadvantaged backgrounds in order to level the playing field.²²⁵

IV. CURTAILING THE EXPANSION OF OPEN ENROLLMENT BEST SERVES *ALL* WISCONSIN STUDENTS

Although this Comment does not advocate the elimination of open enrollment entirely, it suggests that the recent and continued expansion of the program undermines the effectiveness of over half of the state public school districts that suffer from the infusion of the free market into Wisconsin public education.²²⁶ Unless the expansion of open enrollment is reined in with sufficient parameters, it will continue to grow and further compromise the education of those students who remain in the losing districts.²²⁷ Instead, a return to the limited, three-week application period allows districts sufficient time to plan while providing parents with an opportunity to participate in the open enrollment program, as has been the case since its inception in 1998. Additionally, the legislature should closely evaluate how the expanded open enrollment application period facilitates the rise of virtual education and implement strict regulations to ensure performance expectations are satisfied by virtual schools. The significant achievement gaps between virtual schools and traditional public schools as well as the overall lack of regulation indicates that the proliferating

224. VAN DUNK & DICKMAN, *supra* note 42, at 97–98 (citing MARK SCHNEIDER ET AL., CHOOSING SCHOOLS: CONSUMER CHOICE AND THE QUALITY OF AMERICAN SCHOOLS 149 (2000); Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, in WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 95, 110 (Bruce Fuller et al. eds., 1996)).

225. Hawke, *supra* note 222, at 620 (noting “school districts implementing open enrollment should consider making dissemination of information about open enrollment options to parents and students a top priority, with the hopes of generating as much interest as possible in both the white and nonwhite sector”).

226. See *supra* notes 157–59 and accompanying text (noting that 50% of Wisconsin public school districts lost students and financial support in the 2010–2011 academic year as a result of open enrollment).

227. See *supra* note 185 (highlighting that proponents of the 2011 legislative amendments consider the expansion as “only the beginning”).

virtual education industry is not currently in the best interest of Wisconsin students and families.²²⁸

Moreover, the Wisconsin legislature should repeal the statutory best interest exception to the open enrollment application period in light of the limited benefit and the significant impediment to local control it provides. Similar to the best interest of the child standard that has long been applied in the context of family law,²²⁹ the recent inclusion of the best interest of the pupil standard introduces ambiguity and uncertainty into the realm of public education.²³⁰ Historically, the best interest standard has received significant criticism with many arguing that “it is too indeterminate to be helpful in legal decisions.”²³¹ Also, the best interest standard is sure to increase litigation surrounding open enrollment transfers, just as it has done in family law disputes.²³² Instead, if one of the first six categories that permit an exception to the application period do not apply, it is reasonable to require the student to wait until the application period opens for the subsequent year, particularly in light of the administrative, financial, and logistical concerns that directly impact the overall efficiency of the public school system.²³³ These six exceptions provide greater certainty for all parties and relatively objective standards to guide student transfer decisions with minor conflict.²³⁴

228. See *supra* notes 193–94 and accompanying text.

229. Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 43 (2006) (“The ‘best interests of the child’ standard expresses the state’s *parens patriae* role and has been widely adopted by state legislatures to guide judges making custodial and other decisions related to children.”).

230. In contrast, proponents of the best interest standard in other fields of the law see the standard as providing flexibility and adaptability. Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute’s “Approximation Rule,”* 41 *U. BALT. L. REV.* 83, 98 (2011).

231. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 *U. CHI. L. REV.* 1, 4 (1987); Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 *HARV. EDUC. REV.* 599, 599 (1973); Rachel M. Colancecco, Note, *A Flexible Solution to a Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 *DREXEL L. REV.* 573, 604 (2009) (“[T]he best interests of the child standard has generated a substantial amount of criticism.”).

232. Warshak, *supra* note 230, at 86 (citing Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 *MD. L. REV.* 497, 508 (1988)); see also *supra* notes 128–32 and accompanying text.

233. See *supra* notes 165–70 and accompanying text (discussing the financial and budgeting “nightmare” caused by the open enrollment amendments).

234. See *supra* notes 100–02 and accompanying text (listing the statutory exceptions to the regular open enrollment period).

In the alternative, a balancing test should be employed by which school districts, the DPI, and Wisconsin courts might weigh the best interest of each student against the administrative, financial, and equitable implications that impact the effective operations of public schools. In education law, the Supreme Court has developed balancing tests in several contexts to weigh the interests of the state in providing an efficient public service against the interest of the individual.²³⁵ However, there must be sufficiently defined parameters. Even where the best interest standard has been applied in other areas of the law, courts are guided by factors enumerated in statutes or developed through case law.²³⁶ For example, child custody and physical placement determinations in Wisconsin are guided by sixteen codified factors.²³⁷ Similarly, guidelines for evaluating an application under the best interest exception should be developed.

First, the primary motivation for the student's requested district transfer should be considered. Factors to consider include, but are not limited to, whether there is an imminent need for a change in educational placement, whether the student's physical or mental well-being is compromised, whether the district transfer is primarily for non-academic purposes (including parent or guardian convenience or extracurricular activities), whether requiring the student to wait until the subsequent academic year would significantly impact the ability of the student to receive a quality education, and the opinion of educational professionals that have personal knowledge of the student. Of course, the risk posed by retaining the best interest approach is that parents will not be forthright about the true reasons for transfer, which is likely to be less than altruistic.²³⁸

Second, the primary motivation for district transfer must outweigh the administrative, financial, and equitable implications for school districts outlined in this Comment. A consideration of the impact on

235. *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968) (applying a balancing test in the context of free speech that weighs the right of the individual against the government's interest in operating an efficient and effective government service); *see also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (applying a balancing test in the context of Fourth Amendment student drug testing).

236. Warshak, *supra* note 230, at 99; Akre, *supra* note 131, at 638 (noting that “most state statutes delineate certain factors to be considered in determining the best interest of the child”).

237. WIS. STAT. § 767.41(5) (2011–2012).

238. *See supra* note 126 and accompanying text.

public school districts provides a more holistic determination, taking into account the best interest of *all* Wisconsin children rather than just one student. As one commentator argued in opposition to the best interest standard, “by promoting the interest of [a] child in a particular case, one may work against the interests of children in general.”²³⁹ Rather than focus on the individual at the expense of the collective, public schools should consider the cumulative impact of student transfers and the “broader educative effects of the law.”²⁴⁰ An approach that balances the interest of the individual student against the interest of the state is necessary to satisfy the Wisconsin state constitutional guarantee of a uniform public education for all students.

V. CONCLUSION

Expansion of the Wisconsin Open Enrollment Program obstructs local control over educational resources and as the United States Supreme Court stated in *Martinez*, “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools.”²⁴¹ Although student transfers based on preferred extracurricular activities or parental convenience might be in the best interest of one particular child, this Comment urges policymakers to look at the bigger picture and consider the best interest of all children as well as the fundamental purpose of Wisconsin public education.

At the end of the day, a system that pits one public school against another, thereby creating winning and losing school districts, inequitably impacts Wisconsin students and families. Further, the expansion of open enrollment serves to facilitate the largely unregulated and ineffective virtual education industry. Any attempt to rationalize the less than optimal education received by students left behind in the losing districts fails to take into consideration the fundamental state constitutional guarantee of “[a]n *equal* opportunity for a sound basic education.”²⁴² In the end, the best interests of *all* Wisconsin students are served by returning to the more limited and controlled inter-district

239. Elster, *supra* note 231, at 21. Elster argues that “in addition to the interest of the particular child in any given decision, one must take account of the interests . . . of children in general.” *Id.* at 32.

240. *Id.* at 32.

241. *Martinez v. Bynum*, 461 U.S. 321, 329 (1983) (quoting *Milliken v. Bradley*, 418 U.S. 717, 741 (1974)) (internal quotation marks omitted).

242. *Vincent v. Voight*, 2000 WI 93, ¶ 51, 236 Wis. 2d 588, 614 N.W.2d 388 (emphasis added).

open enrollment program that existed prior to the 2011 legislative amendments.

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