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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 03-006

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 2002.]**

#### 1. Statutory Authority

a. The Department of Public Instruction (DPI) must determine the amount of compensation if there is disagreement about the amount of compensation regarding a proposed parental contract that falls under s. 121.55 (1) (b), Stats. However, if s. 121.55 (3), Stats., applies, a statutory formula determines the amount of compensation to a parent.

The statutes do not appear to specify a role for DPI if there is a disagreement about the calculations in the s. 121.55 (3) formula. While the State Superintendent must examine and determine all appeals which “by law” are made to the State Superintendent [s. 115.28 (5), Stats.], there does not appear to be a law providing for such an appeal to the State Superintendent in the case of a dispute about the calculations in the s. 121.55 (3) formula.

However, s. PI 7.06 (3) provides for an appeal to DPI by either party in a case involving s. 121.55 (3). Under what statutory authority is s. PI 7.06 (3) promulgated?

If DPI asserts that there is statutory authority to promulgate s. PI 7.06 (3), the rule should be modified to reflect that payment may not exceed actual cost, as specified in s. 121.55 (3), Stats. Also, how will DPI ascertain “actual cost” under that statute?

b. Section PI 7.04 (3) indicates that if a parent or guardian rejects a contract under s. PI 7.04 (that is, under s. 121.55 (1) (b), Stats.), the school board is still obligated to provide transportation for the pupil using one of the options under s. 121.55 (1) (a) or (c) to (e), Stats. Further, s. PI 7.06 (2) (intro.) provides that DPI will determine the amount of compensation for a

contract under s. PI 7.04 upon a request of “both parties.” Therefore, under the proposed rule, a parent who does not agree with the proposed contract amount under s. 121.55 (1) (b) could insist on transportation being provided under s. 121.55 (1) (a) or (c) to (e), Stats., by the simple expedient of refusing to agree to jointly request that DPI determine the compensation amount under s. PI 7.06 (2) (intro.).

This puts all of the bargaining chips on the side of the parent in a dispute under s. 121.55 (1) (b), Stats. This result seems contrary to the statutes. The statutes provide that if the school board and the parent or guardian cannot agree on the amount of compensation, DPI determines the amount of compensation in the contract. Thus, it appears that s. PI 7.04 (3) should be changed to read: “If the school board and the parent or guardian cannot agree on the amount of compensation, the department shall determine the amount of compensation under s. PI 7.06 (2).” Until that determination is made, the school board shall provide transportation for the pupil using one of the options under s. 121.55 (1) (a) or (c) to (e), Stats.

Moreover, it is not clear that there is statutory authority to require that “both” parties request a determination as provided in s. PI 7.06 (2) (intro.). The statutes provide that if the parties cannot agree, DPI makes the determination. Why is it not sufficient to have one of the parties (rather than both of the parties) make the request to DPI?

c. Section PI 7.05 (3) requires that a worksheet and estimate be maintained for three years following the school year in which the contract would apply. Section 19.21 (6), Stats., generally requires that a school board’s records be retained for at least seven years, unless the Public Records Board has established a shorter time period. Section 19.21 (6), Stats., provides that this retention requirement does not apply to “pupil records” under s. 118.125, Stats. Section 118.125 (3), Stats., generally provides that pupil records are maintained for the period specified by school board written rule.

It appears that the worksheet referred to in s. PI 7.05 (3), Stats., is not specific to a pupil and should be maintained for the period specified in s. 19.21 (6), Stats., unless the Public Records Board has established a shorter time. As it does not appear that the board has done so, it appears that there is no statutory authority for s. PI 7.05 (3) to specify a three-year retention period for this document.

The written record of the estimated cost to transport a specific pupil arguably is a pupil record, which would mean that the statutes provide that the school board is to establish the retention period pursuant to s. 118.125 (3), Stats. Therefore, it appears that there is no statutory authority for s. PI 7.05 (3) to specify a three-year retention period for this document.

## **2. Form, Style and Placement in Administrative Code**

a. In s. PI 7.02 (1), “ss.” should be changed to “s.” because only one section is referred to.

b. In s. PI 7.06 (1), “ss.” should be changed to “s.” and “subs.” should be changed to “sub.” because the conjunction in both cases is “or.”

c. In the next-to-last paragraph of the appendix, “he/she” should be changed to “the pupil.” [See s. 1.01 (3), Manual.]

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

a. The second paragraph of the analysis indicates that, with respect to s. 121.55 (1) (b), Stats., the “*rules* and present practice require . . . .” (Emphasis added.) It is not clear what existing rules are being referred to.

b. In s. PI 7.04 (3), reference is made to using one of the methods described under s. 121.55 (1) (a) or (c) to (e), Stats. If this provision is retained, should a reference to s. 121.555, Stats., be included?

c. The last sentence of s. PI 7.06 (3) refers to a nonexistent “s. 7.05 (3) (a).” First, “PI” should be inserted. Second, it appears that the reference should be to s. PI 7.05 (4) (a), rather than s. PI 7.05 (3) (a).

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. It appears that two of the major goals of the proposed rule should be to: (1) explain the relationship of s. 121.55 (1) (b), Stats., and s. 121.55 (3), Stats.; and (b) clarify when each applies. However, the rule does neither. Rather, it simply provides that under s. 121.55 (1) (b), Stats., certain things occur, and under s. 121.55 (3), Stats., other things occur.

Consideration could be given to making the following changes:

- 1) In s. PI 7.04 (2), specify that “Except as provided in s. PI 7.05, the amount of compensation provided in the contract shall be . . . .”
- 2) In s. PI 7.05 (1), specify that “If s. 121.55 (3), Stats., applies, a school board may fulfill its obligation . . . .” Section PI 7.05 could then be restructured to explicitly state at the beginning when s. 121.55 (3), Stats., applies and how the calculations are made. For example, the material in s. PI 7.05 (3) could be revised and inserted prior to the material in s. PI 7.05 (2), which simply explains the contract amount. The suggested revisions to current s. PI 7.05 (3) involve: (a) changing the introduction in the first sentence to state: “Prior to offering a contract under this section, the school board shall estimate . . . .”; and (b) changing the second sentence to state: “If the estimated cost of transporting the private school pupil is more than 1.5 times the school district’s average cost per pupil for bus transportation in the previous year, exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities, the school board may offer a contract under this section.”

b. It appears that the defined term “number of pupils transported” in s. PI 7.03 (2) is not used in the rule, other than in the appendix. A term should not be defined unless it is used.

Moreover, the asterisked definition of the term in the appendix is inconsistent with the definition in s. PI 7.03 (2). The definition in s. PI 7.03 (2) indicates that the number excludes “pupils with disabilities who received special transportation and kindergarten pupils transported only during the noon hour.” In contrast, the definition in the appendix does not exclude pupils with disabilities or kindergarten pupils transported only during the noon hour. Moreover, the definition in s. PI 7.03 (2) refers to pupils transported for the purpose of attending curricular programs or activities. In contrast, the definition in the appendix refers to pupils transported for the purpose of attending school during regular school hours. These inconsistencies lead to ambiguity.

c. The rule uses the term “school bus” and the term “bus.” (See, for example, ss. PI 7.03 (2) and 7.05.) It is unclear if the terms are intended to be synonymous. “School bus” is a defined term in s. 340.01 (56), Stats., but not all “buses” are school buses. The rule should be clarified.

Also, it may be useful to include a clear statement as to whether costs for transportation in vehicles described in s. 121.555, Stats., are to be included in the calculations of average cost and in the calculations of number of pupils transported.

d. The title to s. PI 7.04 refers in part to “contracts for transportation,” and the title to s. PI 7.05 refers in part to “contracts for the transportation.” Consideration could be given to making them parallel by adding “the” to s. PI 7.04 (title) or deleting “the” from s. PI 7.05 (title).

e. In some provisions, the rule refers to costs or the number of pupils transported in a “year.” (See, for example, ss. PI 7.05 (2) and (3) and 7.06 (3) and the first paragraph of the appendix.) In other provisions, the proposed rule refers to costs or the number of pupils transported in a “school year.” (See, for example, ss. PI 7.03 (2) and 7.05 (4) (a) and (b) and the last paragraph of the appendix.)

The two terms have different meanings. “School year” is defined in s. 115.001 (13), Stats., as beginning July 1 and ending June 30. In the general definitions section of the statutes, “year” is defined in s. 990.01 (49), Stats., as a calendar year. However, s. 990.01 (intro.), Stats., indicates that a word is to have the meaning specified in s. 990.01, Stats., unless the construction would produce a result inconsistent with the manifest intent of the Legislature. While s. 121.55 (3), Stats., refers to cost per pupil in the previous “year,” it is arguable that the intent was to refer to a school year, and it has apparently been interpreted consistently as referring to a school year. If so, ambiguity in the rule would be lessened by consistently referring to “school year,” rather than “year.”

f. The rule is very confusing with respect to how pupils with disabilities are dealt with in calculating the average cost per pupil for bus transportation in the previous school year in the formula under s. 121.55 (3), Stats. Section 121.55 (3), Stats., twice refers to the “school district’s average cost per pupil for bus transportation in the previous year, exclusive of transportation for kindergarten pupils during the noon hour and for pupils with disabilities.” The confusion in the rule arises from the following inconsistencies:

- 1) The definition of “number of pupils transported” in s. PI 7.03 (2) indicates that the number excludes pupils with disabilities “who received special transportation.”
- 2) Section PI 7.05 (2) and (3) and the first paragraph of the appendix refer simply to excluding “pupils with disabilities,” apparently regardless of whether they receive special transportation.
- 3) The definition of “number of pupils transported” in the last paragraph of the appendix makes no mention of “pupils with disabilities,” much less pupils with disabilities who received special transportation.
- 4) The formula in the appendix makes no provision for subtracting out the expense of transporting pupils with disabilities, even though it provides for subtracting out the expense of transporting kindergarten pupils at the noon hour.

These inconsistencies should be eliminated.

g. In the notice provided under s. PI 7.05 (4), has consideration been given to including notice about the school board not being obligated to provide transportation if a properly offered contract is rejected?

h. Section PI 7.06 (1) indicates that if DPI is asked to determine the amount of compensation, the parties must accept DPI’s determination. However, the next sentence indicates that DPI’s final decision must specify any rights to a judicial review. If there are rights to a judicial review, the need for the sentence indicating that the parties must accept DPI’s determination seems superfluous and creates confusion.

i. Section PI 7.06 indicates that if the school board and parent or guardian cannot agree on the amount of compensation, DPI determines the amount. This clearly applies for s. PI 7.04 disagreements. Has any consideration been given to specifying in the administrative code how the request to DPI for a determination is made, for example, by providing a form in an appendix or by, at a minimum, indicating in a note with which division or section in DPI the request is to be filed.

j. In s. PI 7.06 (2) (a), “as determined by the parent or guardian” should be set off by commas.

k. It would be useful if the worksheet in the appendix had a place to indicate the school year for which the calculations are being made (for example, 2002-03.)

l. In the next-to-last paragraph of the appendix, reference is made to multiplying \$5 times the distance between the pupil’s home and the private school the pupil attends. If this is \$5 per mile, as indicated in s. PI 7.05 (2), reference to “miles” should be added in the appendix. Also, is this interpreted as miles along the usually traveled route or actual miles?