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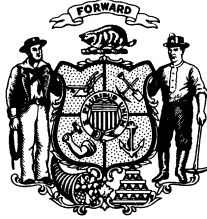

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CLEARINGHOUSE RULE 96–140

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 1994.]

1. Statutory Authority

a. In the definition of "parent" in s. DWD 56.02 (18), treatment foster parents should also be included according to s. 49.132 (1) (c), Stats. [which was renumbered from s. 46.98 (1) (c), Stats., by 1995 Wisconsin Act 404].

b. Under s. 49.132 (4) (d), Stats., the Department of Workforce Development (DWD) must approve a county's rate for licensed day care if it finds the rate is set at a reasonable and customary level which does not preclude an eligible parent from having a reasonable selection of child care providers.

However, s. DWD 56.03 (5) (c) provides that "[t]he department may set maximum rates for multicounty or multitribe areas based on surveys or another methodology instead of setting rates based on each county's or tribe's survey." In light of s. 49.132 (4) (d), Stats., it does not appear that DWD has the authority to do so. (Section 49.155 (6), Stats., allows DWD to set child care rates in a county or multicounty area for the Wisconsin Works (W-2) child care subsidy. However, the W-2 child care subsidy has not yet gone into effect and is not the subject of ch. DWD 56 at this time.)

Moreover, even if there were statutory authority for s. DWD 56.03 (5) (c), the rule does not make clear its relationship to s. DWD 56.03 (5) (a). For example, is s. DWD 56.03 (5) (c) intended to be limited to situations in which DWD disapproves the rates of all of the counties in a multicounty area or all of the tribes in a multitribal area under s. DWD 56.03 (5) (a), or is s. DWD 56.03 (5) (c) intended to override s. DWD 56.03 (5) (a)? If s. DWD 56.03 (5) (c) is retained, its relationship to s. DWD 56.03 (5) (a) should be clarified.

Also, s. DWD 56.06 (1) (a) 1. refers to DWD's setting "rates for a multicounty area which includes the particular county or tribal area." This provision should be deleted if DWD does not have authority to set multicounty rates. If it is retained, the hyphenation or nonhyphenation of multi-county/multicounty should be made consistent. Also, if s. DWD 56.06 (1) (a) 1. is retained, it appears that it should also refer to a multitribe (or multitribal) area.

c. Section DWD 56.04 (3) (a) 1. to 3. lists three categories of child care providers for which a child care administrative agency may pay for child care services. Section DWD 56.04 (3) (a) 3. refers to "[p]rograms established and provided by a school board under s. 120.13 (14), Stats." It appears that under s. 49.132 (1) (am), Stats., programs "contracted for" under s. 120.13 (14), Stats., should also be included.

Also, in s. DWD 56.06 (2) (e), it appears that the reference to a "day care program established and provided by a school board" should be changed to a "day care program established or contracted for by a school board."

d. Section DWD 56.04 (3) (e) indicates that an in-home care arrangement may be authorized for reimbursement under certain circumstances. Included are circumstances under which "licensed or certified care" is not available during the times needed or within a reasonable geographic distance. This implies that an in-home care provider need not be certified.

This is contrary to s. 48.651, Stats., and proposed s. DWD 55.03 (2) (a) (in Clearinghouse Rule 96-141) which provides reimbursement only for in-home providers who are certified.

If the intention is to authorize reimbursement when care is not available in a licensed day care center, a school-age day care program or a certified child care provider's home, this should be explicitly stated.

e. Section DWD 56.07 (2) (a) provides that a parent is eligible for low-income child care funds if the parent has need for child care services for a child who is under 13 years of age and meets the criteria under ***either*** s. DWD 56.07 (2) (b) ***or*** (c).

While s. DWD 56.07 (2) (b) refers to the parent's being income-eligible or on Aid to Families with Dependent Children (AFDC), s. DWD 56.07 (2) (c) provides that a parent is eligible if less than 20 years of age and in certain educational programs. The combination of s. 56.07 (2) (a) and (c) does not require that a parent be income-eligible. However, s. 49.132 (4) (am), Stats., requires that such a parent who applies for aid on or after May 10, 1996 must also have a family income which is equal to or less than 165% of the federal poverty line. This should also be included as a requirement--perhaps by requiring in par. (c) as well as par. (b) that the parent is income-eligible.

2. Form, Style and Placement in Administrative Code

a. Section DWD 56.02 (intro.) indicates that "[t]he definitions in subch. VI [sic; see item 4. c.] apply to this subchapter [sic; see item 4. b., below], except the definition of 'parent' under s. DWD 55.02 (13)." It then specifies additional definitions for ch. DWD 56. As discussed in item 4. c., it appears that the intention is to indicate that the definitions in ch. DWD 55 apply. If that is the intention, the following comments apply:

(1) "Department" is defined in s. DWD 55.02 (5) and has a different meaning than the definition of "department" in s. DWD 56.02 (7). Therefore, the definition of "department" in s. DWD 55.02 (5) should also be indicated as an exception.

(2) "Provider" is defined in s. DWD 55.02 (15) and has a different meaning than the definition of "provider" in s. DWD 56.02 (6). Therefore, the definition of "provider" in s. DWD 55.02 (15) should also be indicated as an exception.

(3) "Tribe" is defined in s. DWD 55.02 (21) and has the same meaning as the definition of "tribe" in s. DWD 56.02 (22). Therefore, the definition of "tribe" in s. DWD 56.02 (22) could be deleted.

(4) It is unclear why an exception was made for the definition of "parent" as the list of persons appears to be the same in s. DWD 55.02 (13) and s. DWD 56.02 (18) [although s. DWD 56.02 (18) includes a statutory reference that is not in s. DWD 55.02 (13)]. In what way are these definitions meant to differ?

b. The definition of "AFDC" in s. DWD 56.02 (1) should include the U.S. Code cite.

c. It is preferable that all subunits of a rule, except introductory material, should end with a period rather than a semicolon, "or" or "and." [See s. 1.03 (intro.), Manual.] For example, in s. DWD 56.03 (4), par. (a) should end with a period as should all of the subdivisions in par. (b).

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

a. In the rule report and analysis, and throughout ch. DWD 56, reference is made to s. 46.98, Stats., and various subdivisions of that section. However, 1995 Wisconsin Act 289 renumbered s. 46.98, Stats., to s. 49.132, Stats., effective July 1, 1996. Therefore, all of the references in the proposed order to s. 46.98, Stats., should be changed to s. 49.132, Stats.

It would be useful in the first paragraph of the analysis to explain that s. 46.98, Stats., had been affected by 1995 Wisconsin Acts 27 and 289 and then renumbered to s. 49.132, Stats., by 1995 Wisconsin Act 404, effective July 1, 1996. The first sentence of the proposed order should also be amended to explain this.

b. Sections DWD 56.01 and 56.02 (intro.) refer to "this subchapter." As there is no subchapter, these references should be changed to "this chapter."

c. Section DWD 56.02 (intro.) indicates that "the definitions in subch. VI apply . . . ." However, there is no subch. VI in ch. DWD 56. It appears that this reference should be changed to ch. DWD 55.

d. Section DWD 56.04 (1) (f) refers to "s. 49.50 (6g), Stats." This reference should be changed to "s. 49.191 (2), Stats." inasmuch as this provision was renumbered by Act 27 effective July 1, 1996.

e. Section DWD 56.04 (1) (g) refers to "s. 49.50 (7), Stats." This reference should be changed to "s. 49.26, Stats.," inasmuch as this provision was also renumbered by Act 27 effective July 1, 1996.

f. Section DWD 56.04 (4) (b) 1. b. refers to "stipulated child care services from a provider under sub. (2)." Section DWD 56.04 (2) appears to be an incorrect cross-reference. Is "sub. (3)" the correct cross-reference?

g. Section DWD 56.06 (3) (a) provides that a rate higher than the maximum allowed under "this section" may be set for a child with a special need. Was the reference intended to be to "subs. (1) and (2)"?

h. Section DWD 56.06 (3) (b) refers to standards under "s. HSS 55.90." However, no such section exists. The cross-reference should be corrected.

i. Section DWD 56.06 (3) (b) provides that higher rates may be paid for higher quality care "up to maximums determined by the department." It would be helpful to cross-reference provisions which specify how the department is to establish such maximums.

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

a. Section 4, item 3 of the additional material provided to the Clearinghouse indicates that one of the key changes in the proposed order is that a local agency is permitted to determine that a parent is no longer eligible for child care funds if the parent fails to make required copayments. However, such a provision is not included in the proposed order. The additional material should be amended to delete reference to this.

b. In the first sentence of the proposed order preceding the analysis, the reference to "HSS 55.70 to s. 55.77" should be changed to "ss. HSS 55.70 to 55.77."

c. Item 5 in the analysis indicates that reimbursement may be on the basis of authorized units of service "or for days of attendance." However, the rule does not refer to "days of attendance." The analysis should be amended to delete reference to this.

d. In s. DWD 56.02 (4), "ss." should be changed to "s." since the conjunction is "or."

e. Section DWD 56.02 (5) defines "child care price." However, that term does not appear to be used in ch. DWD 56. If it is not, the definition of the term should be deleted. Also, what is the meaning of "set day care price" in s. DWD 56.06 (2) (a) 2.? Is it different than "child care price"?

f. The definition of "income" in s. DWD 56.02 (13) refers, in pertinent part, to "net income from nonfarm self-employment, net income from farm self-employment . . . ." Inasmuch as there is no distinction between farm and nonfarm income for purposes of ch. DWD 56, could this part of the definition simply refer to "net income from self-employment . . ."?

g. Section DWD 56.02 (14) provides that "'[i]ncome-eligible' means family income as established in s. 46.98 (4) (a) and (am), Stats." The defined term appears to be an adjective, but

the definition is a noun. It appears that the definition should be modified to something similar to the following: "'Income-eligible' means eligible to receive aid based on the amount of family income as established in s. 49.132 (4) (a) and (am), Stats."

Moreover, it appears that this definition is unnecessary since s. DWD 56.07 (2) (e) provides that "[a] parent is income-eligible if standard family income is at or below levels set in s. 46.98 (4) (a) and (am), Stats." (Alternatively, the provision in s. DWD 56.07 (2) (e) could be eliminated.) If s. DWD 56.07 (2) (e) is retained, the reference to "standard family income" should be changed to "family income" inasmuch as that is the term used in s. 49.132 (4) (a) and (am), Stats. Moreover, without further explanation, it is unclear what "standard family income" means as opposed to "family income."

h. Section DWD 56.02 (18) provides that a "parent" includes a "person acting in the place of a parent." It then indicates that this phrase "means a person to whom the child is related in one of the ways listed in s. HSS 201.17 (1)." Section HSS 201.17 (1) lists certain relatives of a child but does not require that the child be under the relative's care. The latter provision is included in s. HSS 201.17 (2).

It appears that it would be more appropriate to indicate that a "'person acting in the place of a parent' means a person to whom the child is related in one of the ways listed in s. HSS 201.17 (1) and who has the child under his or her care as provided in s. HSS 201.17 (2)."

i. Section DWD 56.02 (20) defines "rate" as the maximum a county or tribal agency will pay for child care. However, rather than use this defined term consistently, various terms are used. For example, s. DWD 56.03 (2) refers to "reasonable and customary child care rates"; s. DWD 56.03 (5) (a) 2. refers to "maximum allowable rate"; s. DWD 56.04 (4) (d) 2. and 3. refer to "reimbursement rate"; s. DWD 56.05 (3) refers to "reasonable and customary rates and the maximum rate"; s. DWD 56.06 (1) (a) 1. refers to "reasonable and customary maximum child care rates"; s. DWD 56.06 (1) (a) 1. and (c) (intro.), (2) and (3) (b) refer to "maximum rates"; s. DWD 56.06 (4) refers to "maximum reimbursement rates"; and s. DWD 56.07 (2) (b) 1. refers to the "county maximum child care rate." In order to avoid ambiguity, the defined term should be used consistently. (Because "maximum rate" is used so often, it may be preferable to select this as the defined term, especially since that is the term used in the statutes.) [See, e.g., s. 49.132 (4) (d), Stats.]

Moreover, in order to be consistent with the provision in s. 49.132 (4) (d), Stats., which requires that the maximum rate be set at a reasonable and customary ***level***, it would be preferable to: (1) change the phrase "reasonable and customary child care rates" in s. DWD 56.03 (2) to "rates"; (2) change the phrase "reasonable and customary rates" in s. DWD 56.05 (3) to "reasonable and customary levels"; and (3) eliminate the phrase "reasonable and customary" in s. DWD 56.06 (1) (a) 1.

j. In s. DWD 56.03 (4) (b) (intro.), the phrase "allocation formula" should be changed to "formula" inasmuch as s. DWD 56.02 (11) defines "formula" and provides that it is a method for determining funding allocations.

k. Section DWD 56.03 (4) (b) 2. refers to considering the number of parents who have "children of child care age." This term is undefined. If it is intended to refer to children under

13 years of age [see s. DWD 56.07 (2) (a) regarding eligibility], this should be explicitly stated. If it has a different meaning, this should be explicitly stated.

l. Section DWD 56.03 (4) (b) 4. refers to "[e]ach county's expenditure history." If this is intended to refer to expenditure history with respect to child care, this should be explicitly stated. If it is intended to refer to some other expenditure, this should be explicitly stated.

m. In s. DWD 56.03 (5) (a), the comma following "tribe" should be deleted.

n. The word "Whether" should be inserted at the beginning of both s. DWD 56.03 (5) (a) 1. and 2.

o. In s. DWD 56.03 (5) (a) 2, the phrase "rate permits" should be changed to "rates permit" since more than one rate is established.

p. Section DWD 56.04 (2) provides that "[r]equirements for tribes using family services program funds shall be set in the terms of the contract." The rule does not make clear what contract is referred to. If, for example, it refers to a contract between a tribe and DWD regarding family services program funds, this could be stated. If it refers to a contract under some provision in the statutes or Administrative Code, a cross-reference would be helpful.

q. Section DWD 56.04 (3) (b) (intro.) provides that "[a] child care administrative agency may purchase services from a child care provider other than a child care provider under par. (a) only when one of the following conditions is met:". The following comments apply:

(1) Under the definition of "child care provider" in s. DWD 56.02 (6), the only "child care provider" who is a "child care provider other than a child care provider in par. (a)" appears to be a program contracted for by a school board. As noted in item 1. c., it appears that this omission should be corrected.

If it is corrected, it is unclear that there are any persons who meet the definition of "child care provider" but who are not listed in s. DWD 56.04 (3) (a). If there are such persons, the rule would be clearer if they were specifically listed in s. DWD 56.04 (3) (b). However, if there are such persons, it is unclear why they should have been excluded from eligibility for payment under s. DWD 56.04 (3) (a).

If the intention is to provide that the persons from whom services may be purchased under s. DWD 56.04 (3) (b) are persons who are not "child care providers" as defined in s. DWD 56.02 (6), what statutes provide authority for such a provision?

(2) The phrase "only when one of the following conditions is met" should be changed to "only if at least one of the following conditions is met."

(3) Section DWD 56.04 (3) (b) 1. to 4. lists four circumstances under which a child care administrative agency may purchase services from a child care

> provider other than a child care provider listed in s. DWD 56.04 (3) (a). Proposed s. DWD 55.03 (2) (in Clearinghouse Rule 96-141) lists three circumstances under which child care does not have to be provided by a "regulated provider" in order for reimbursement to be made. Two of the circumstances are identical to those in s. DWD 56.04 (3). Is there a reason s. DWD 55.03 (3) (a) is worded differently than s. DWD 56.04 (3) (b) 3. and 4.?

r. In s. DWD 56.04 (3) (b) 2., the phrase "regulated child care provider" is confusing. Considering the definition of "child care provider" in s. DWD 56.02 (6), this would appear to apply to persons who are licensed or certified but not to providers in a program established or contracted for by a school board. Is this the intention? In any case, in order to avoid ambiguity, the term "regulated" should be defined if it is used.

s. Section DWD 56.04 (3) (b) 3. and 4. both indicate that the "care is for a[n] . . . enrollee to attend . . . ." However, the care is for the enrollee's child. It would be preferable to substitute another phrase for the phrase "is for," for example, by providing that the "care permits a[n] . . . enrollee to attend . . ." or by providing that the "care is necessary in order for a[n] . . . enrollee to attend . . . ."

t. Section DWD 56.04 (3) (c) provides that a child care administrative agency may not purchase services or issue vouchers for child care services provided by a person legally responsible for a child. Section DWD 56.04 (3) (d) provides the same with respect to child care services provided by a person residing in the child's household. Neither section prohibits authorizing reimbursement or paying parents for services provided by such persons. If the intention is to exclude such reimbursement or payment, this should be specified.

u. In s. DWD 56.04 (3) (e) (intro.), it is unclear who may authorize an in-home care arrangement. This should be specified.

v. Section DWD 56.04 (4) (a) provides that a child care administrative agency must provide child care services directly, provide services by contracting with child care providers, provide vouchers to parents for purchasing services or, under certain circumstances, reimburse or make payments to parents. However, s. DWD 56.07 (1) (a) permits only two of these options with respect to low-income child care funds, namely, vouchers and purchase-of-service contracts. Is s. DWD 56.07 (1) (a) correct? If so, it appears that a clause should be added to s. DWD 56.04 (4) (a) limiting its applicability.

w. In s. DWD 56.04 (4) (b) 1. b., the phrase "stipulated child care services" is unclear. In what document are the services "stipulated"?

Also, s. DWD 56.04 (4) (d) 1. refers to "authorized units of service," and s. DWD 56.04 (4) (d) 2. refers to "approved units." Is there a difference between stipulated services, approved units and authorized units? If not, one term should be selected and used consistently.

x. Section DWD 56.04 (4) (d) 1. provides that for licensed group and family day care centers, a child care administrative agency must make payments based on authorized units of service. However, s. DWD 56.04 (4) (d) 3. provides that for licensed group and family day care

centers, a child care administrative agency may make payments based on units of service used under certain circumstances.

If s. DWD 56.04 (4) (d) 3. is intended to be an exception to s. DWD 56.04 (4) (d) 1., then s. DWD 56.04 (4) (d) 1. should make this clear. In that case, s. DWD 56.04 (4) (d) 1. could begin with a phrase such as "Except as provided in subd. 3.,".

Also, the intent of s. DWD 56.04 (4) (d) 3. would be clearer if the phrase "when the schedule of child care is expected to vary widely" were moved and inserted immediately before the phrase "the agency."

y. In s. DWD 56.04 (4) (d) 1., it is unclear on what basis a determination is made that "excessive absence" has occurred.

z. For certified providers, s. DWD 56.04 (4) (d) 2. indicates that a child care administrative agency must "reimburse" for units of service used by each "with the reimbursement rate increased by 10 percent to account for absent days." Is this intended to be reimbursement, or is it intended to be payment to the certified provider? It appears that it should be changed to the latter.

Also, it appears that the rate is automatically increased by 10% regardless of how many absences occurred. Is that the intention, or is the intention to pay for actual absences up to 10% of the authorized units of service per month? This should be clarified. This comment also applies to s. DWD 56.04 (4) (d) 3. with respect to an increase of 10% for licensed group and family day care centers.

aa. Section DWD 56.05 (5) (a) specifies which items must be included on the waiting list for child care funds. It does not require that the list include the number of children and the ages of the children with respect to a particular parent. However, s. DWD 56.05 (5) (d) indicates that the county must submit information on request to DWD about the number and ages of the children on the waiting list. Thus, these items should also be included in s. DWD 56.05 (5) (a).

ab. In s. DWD 56.06 (1) (b), "tribal agency under par. (a) 2." should be changed to "tribal agency acting under par. (a) 2." Also, the phrase "centers in the county" should be changed to "centers in the county or tribal area."

ac. Section DWD 56.06 (1) (d) 3. and 4. respectively refer to Level I and Level II certified family day care providers. Section DWD 56.06 (1) (d) 5. refers to in-home providers. As it appears that in-home providers also have to be certified (see item 1. d.), it appears that s. 56.06 (1) (d) 3. and 4. should refer to certified family day care providers that do not provide in-home care.

ad. In order to be consistent, the references in s. DWD 56.06 (2) (b) to "family day care center (or centers)" should be changed to "licensed family day care center (or centers)."

ae. Section DWD 56.06 (2) (e) indicates that for a school board day care program or a certified school-age day care program, the rates must be established "in accordance with par. (a) or (b)." How is a determination made as to whether the rates in par. (a) or those in par. (b) apply?

af. In s. DWD 56.07 (1) (a), are “day care services” the same as “child care services”? If so, in order to be consistent with the remainder of the rule, the term “child care services” should be used. If not, the difference between the terms should be explained.

ag. In s. DWD 56.07 (3) (a), the phrase “because of false information or serious violation of program requirements provided to county agencies concerning income or eligibility” should be changed to “because of false information provided to county agencies concerning income or eligibility or serious violation of program requirements.”

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

Section DWD 56.02 (14) defines “income-eligible” as family income as established in s. 46.98 (4) (a) and (am), Stats. (As noted above, these provisions have been renumbered to s. 49.132 (4) (a) and (am), Stats.) Section 49.132 (4) (a), Stats., applies to persons who applied for aid prior to May 10, 1996 and, in pertinent part, provides for eligibility if family income is equal to or less than 75% of the state median income. Section 49.132 (4) (am), Stats., applies to persons who apply for aid on or after May 10, 1996 and, in pertinent part, provides for eligibility if family income is equal to or less than 165% of the federal poverty line.

Federal provisions which remain in effect until October 1, 1996 provide (at least with respect to programs for which federal IV-A funding is provided) that, in pertinent part, an “eligible child” is an individual whose family income does not exceed 75% of the state median income for a family of the same size. [42 USC 9858n (5) and 45 CFR 98.20 (a) (2).]

According to page VIII-28 of the Wisconsin Works Waiver Application submitted by the Department of Health and Social Services to the U.S. Department of Health and Human Services, a waiver was requested to implement the 165% of the federal poverty line eligibility provision. It may be possible that someone applying for aid on or after May 10, 1996 would have an income which did not qualify under the 165% test but would qualify under the 75% test, for example, a person on AFDC who is switched to transitional child care benefits after getting a job paying more than 165% of the federal poverty line but less than 75% of the state median income. Did Wisconsin receive the requested waiver to implement s. 49.132 (4) (am)?

Also, effective October 1, 1996, P.L. 104-188 merges various child care programs into the child care and development block grant and changes the definition of “eligible child” in 42 USC 9858n (5), in pertinent part, to an individual whose family income does not exceed 85% of the state median income for a family of the same size. Will a waiver be needed from that provision after October 1, 1996 to continue implementing the 165% eligibility provision?