

Wisconsin Department of Transportation

www.dot.state.wi.us

Tommy G. Thompson
Governor

Charles H. Thompson
Secretary

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August 6, 1999

Senator Roger Breske
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Re: Clearinghouse Rule 99-063
Chapter Trans 2, Wisconsin Administrative Code, relating to
elderly and disabled transportation assistance program

Dear Senator Breske:

This is in response to your July 26, 1999 letter, which asks the Department of Transportation to consider modifying portions of this proposed rule. I note that you have not specifically requested that the proposed rule be modified. The topics you have asked DOT to consider are:

1. Whether DOT has any plans to raise the assistance level from 80% to 90%, if section 85.22, Stats., is amended to authorize reimbursement at the higher level.
2. Whether additional criteria should be added to the proposed rule to ensure that requirements for accessibility to persons using wheelchairs are adequately considered when ranking applications for assistance.
3. Whether section 12 of the proposed rule should be amended to clarify the specific types of decisions covered by the informal review process.

Chapter Trans 2 implements a program administered by the Federal Transit Administration (FTA) and the Department of Transportation (DOT). FTA provides federal funds to DOT. DOT uses the federal funds, supplemented with state funds, to purchase vehicles to serve the transportation needs of elderly persons and persons with disabilities when public transportation is unavailable or inadequate.

DOT provides these vehicles to private nonprofit corporations or to local governments in areas where there are no private nonprofit corporations which provide transportation services to elderly persons and persons with disabilities. DOT uses federal and state funds to cover 80% of the cost of purchasing vehicles for elderly and disabled persons. The private nonprofit corporations or local governments applying for assistance pay the remaining 20%.

This assistance program is established in section 85.22, Stats., which requires DOT to:

1. Establish an annual application cycle for the program;
2. Establish criteria for evaluating all applications and for ranking them in statewide priority;
3. Provide financial assistance to applicants based upon the statewide priority ranking and the availability of state and federal funds.

Assistance Level

The Legislature recently amended the statutory rulemaking process by requiring agencies to prepare and publish notice of a statement of the scope of any rule that it plans to promulgate. A statement of scope must contain a description of the objective of the proposed rule, a description of existing policies relevant to the proposed rule, a description of the new policies to be included in the proposed rule, and the statutory authority for the proposed rule. Section 227.135, Stats. DOT prepared and published a detailed statement of scope for this proposed rule. At the time the statement of scope was prepared, the relevant statutory authority, section 85.22(4), Stats., limited federal and state aid for this program to 80% of capital costs. The statement of scope did not include a description of a proposed new policy to raise the assistance level from 80% to 90%. It is DOT's position that it cannot consider raising the assistance level from 80% to 90% in this proposed rule because existing statutory authority limits assistance to 80%, and because the possibility of raising the assistance level above 80% was not included in the statement of scope.

If the Legislature were to amend section 85.22(4), Stats., to authorize assistance at a level higher than 80%, separate rulemaking would have to be initiated, preceded by a new statement of scope which would notify interested parties of the proposed new policy.

DOT is not certain that interested parties would support raising the assistance level to 90%. Although the amount of assistance per vehicle purchased would be increased, there would necessarily be a corresponding reduction in the number of vehicles that could be purchased. Various interested parties have also expressed concerns about the loss of seating capacity and higher operating costs, which would result in fewer people being served.

Wheelchair Accessibility

DOT does not believe it is necessary to amend the proposed rule to include additional criteria addressing wheelchair accessibility because DOT already has a number of ways in which wheelchair accessibility is considered in the application process.

Applications for assistance are evaluated under the criteria established in section Trans 2.06. These criteria have been in effect since the beginning of the program in 1978. The proposed rule amends these criteria, including those addressing wheelchair accessibility requirements. Section 15 of the proposed rule, amending section Trans 2.06(2)(c), requires that DOT consider the percentage of the elderly and disabled population in need of service, and assigns a maximum of 15 points to this factor. Section 16 of the proposed rule, amending section Trans 2.06(2)(c), requires that DOT consider the percentage of the elderly and disabled population which the applicant proposes to serve, and assigns a maximum of 15 points to this factor. Section 17 of the proposed rule, amending section Trans 2.06(2)(c), requires that DOT consider how the applicant's proposed service will meet the needs of the elderly and disabled population, and assigns a maximum of 30 points to this factor. In addition, section Trans 2.06(2)(b), allows DOT to award applicants up to 75 points for demonstrating service to the general elderly and disabled population. These criteria allow DOT to consider the needs of persons using wheelchairs and an applicant's ability to meet that need.

Further, DOT requires applicants requesting vehicles that are not wheelchair accessible to explain and justify the request. DOT's application scoring team specifically reviews wheelchair accessibility within an applicant's entire fleet of vehicles to determine whether a wheelchair accessible vehicle is necessary to meet the needs of elderly and disabled persons in the applicant's service area. Approximately 80% of the vehicles purchased under this program are accessible to persons using wheelchairs, which demonstrates that DOT already devotes adequate consideration to ensuring that vehicles purchased under this program are wheelchair accessible.

Contested Case/Informal Review

Some private transportation businesses routinely object to applications for assistance submitted by private nonprofit corporations. This is because the private transportation businesses want to provide transportation services for the applicant in lieu of the applicant seeking DOT assistance in purchasing vehicles for elderly and disabled persons.

Section 12 of the proposed rule creates section Trans 2.055, which describes the procedure used by DOT when reviewing an objection to an application for DOT assistance in purchasing vehicles for elderly and disabled persons.

The Department's review is limited to considering whether a private transportation company or other party has been adversely affected by a private nonprofit corporation's or local government's failure to satisfy DOT's procedural requirements for applying for assistance to obtain vehicles for elderly and disabled persons.

The proposed revision establishes a fast, informal review procedure rather than the cumbersome, expensive, time consuming contested case and judicial review process established in Chapter 227, Stats. The Department has chosen a fast informal review process to ensure that it can continue to provide assistance to private nonprofit corporations and local governments providing transportation services to elderly and disabled persons without unnecessary delay. It is noteworthy that no one objected to this informal review procedure at the public hearings or in written comments submitted to the Department after the hearings.

Chapter 227, Stats., does not require that formal contested case procedures be used in all circumstances. J.F. Ahern Co. v. Wisconsin State Building Commission, 114 Wis. 2d 69, 92-95 (Ct. App. 1983), review denied 114 Wis. 2d 601; Gleason v. Department of Transportation, 61 Wis. 2d 562 (1973). A person is entitled to a formal contested case hearing only if a "substantial interest" is injured by agency action or inaction. Milwaukee Metropolitan Sewerage District v. Department of Natural Resources, 126 Wis. 2d 63, 74 (1985); section 227.42, Stats; Kathleen S. Donius, Milwaukee Metropolitan Sewerage District v. DNR: Expanding the Scope of State Agency Actions Covered by Contested Case Hearings, 1986 Wis. L. Rev. 963.

Chapter 227, Stats., does not require that all agency actions be subject to judicial review. A person is entitled to judicial review only if a "substantial interest" is injured by agency action or inaction. Department of Revenue v. Hogan, 198 Wis. 2d 792, 803 (Ct. App. 1995); Madison Landfills, Inc. v. Department of Natural Resources, 180 Wis. 2d 129 (Ct. App. 1993); section 227.52, Stats.

Section 12 of the proposed rule (section Trans 2.055) addresses objections made by a private transportation company or other party to a private nonprofit corporation's or local government's application for assistance. It does not address objections or appeals made by an unsuccessful applicant for assistance. DOT wishes to make clear that private nonprofit corporations and local governments who unsuccessfully apply for assistance under this program are not entitled to a contested case hearing or judicial review concerning the denial or ranking of an application. This has been DOT's practice since at least 1982.

The section 227.42, Stats., right to hearing does not apply when there is evidence of legislative intent that a particular interest is not protected. DOT believes that section 85.22, Stats., provides clear evidence of legislative intent that there is no right to a contested case hearing, either for an unsuccessful applicant for assistance, or for a private transportation company or other party challenging an applicant's compliance with DOT's procedural requirements for applying for assistance.

As noted above, section 85.22, Stats., requires DOT to:

1. Establish an annual application cycle for the program;
2. Establish criteria for evaluating all applications and for ranking them in statewide priority;
3. Provide financial assistance to applicants based upon the statewide priority ranking and the availability of state and federal funds.

Further, state and federal funds are made available to DOT on a fiscal year basis. Federal funds, which comprise about 60% of the available funds for this program, must be obligated within the federal fiscal year in which they have been made available, or they are lost.

By establishing statutory requirements that DOT must implement an annual application cycle, that uniform criteria for evaluating applications must be developed, that all applications must be ranked in statewide priority, and that applications must be approved on the basis of the statewide priority ranking, the legislature has expressed an intent that contested case hearings are not required. Formal contested case hearings typically take more than a year to complete, especially if judicial review is mandated. Also, the appeal process would remain open-ended because subsequent appeals could follow upon initial appeals as the statewide priority ranking of applications is revised after the conclusion of contested case hearings and judicial review.

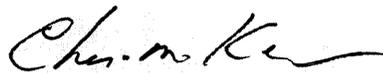
DOT cannot effectively administer this program on an annual application cycle and provide financial assistance to applicants based on statewide priority ranking within the federal and state fiscal years, if DOT is required to provide formal contested case hearings followed by judicial review to unsuccessful applicants. Federal funds could not be obligated within the federal fiscal year and would lapse. It is impractical for DOT to conduct a series of individual formal contested case hearings for unsuccessful applicants to determine whether the decision to allocate funds to various applicants or programs was correct.

The Department's informal review is appropriate because a private transportation company has no "substantial interest" in a private nonprofit corporation's or local government's compliance with DOT's procedural requirements for applying for assistance to obtain vehicles for elderly and disabled persons.

Unsuccessful applicants for assistance are not entitled to a contested case hearing under section 227.42, Stats., because section 85.22, Stats., provides evidence of legislative intent that this interest is not to be protected through the mechanism of appeal through formal contested case hearings.

The Department must ensure that federal and state funds available under the elderly and disabled transportation assistance program are obligated in accordance with statutory requirements. DOT must also ensure that these funds are obligated within the federal fiscal year, before they are lost. The Department is satisfied that an informal review process is more appropriate than the formal contested case and judicial review in chapter 227, Stats.

Respectfully,



Charles M. Kernats
Assistant General Counsel

cc: Representative Brandemuehl
Secretary Charles Thompson
Joe Maassen, Deputy General Counsel
Robert Cook, Executive Assistant
Ron Morse, DTIM Bureau of Transit and Local Roads

ROGER BRESKE

STATE SENATOR

12th District

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Eland, WI 54427
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RECEIVED

JUL 28 1999

OFFICE OF THE SECRETARY
WISCONSIN DOT

July 26, 1999

Mr. Charles H. Thompson, Secretary
Wisconsin Department of Transportation
4802 Sheboygan Avenue
P.O. Box 7910
VIA INTER-DEPARTMENTAL MAIL

RE: Clearinghouse Rule 99-063
Chapter Trans 2, Wisconsin Administrative Code, Relating to Elderly and Disabled
Transpiration Assistance Program

Dear Secretary Thompson:

Following a public hearing on July 21, 1999 on the above-captioned rule, the Senate Committee on Insurance, Tourism, Transportation and Corrections recommended that the Committee request that the Department of Transportation consider modifications to the rule under s. 227.19 (4) (b) 2., Stats.

Specifically, the Committee requests that the department consider modifications and clarifications in the following areas:

1. The intended actions by the department with regard to the rule if the current Biennial Budget is approved with the increased reimbursement for accessible vehicles included. Specifically, the Committee would like clarification of the department's plans relating to allowing reimbursement of accessibility features on vehicles at a 90% level rather than the current 80% level.

2. An indication of how client needs are taken into account with regard to accessibility requirements and the department's conclusion as to whether an amendment to the rule is necessary to ensure that such determinations are taken into account in the application process.

3. With regard to the contested case issue, a clarification as to the specific decisions that are covered by the provision and which decisions are not covered by the provision. Also, a more complete explanation is requested of the department with regard to the statutory authority

Secretary Charles Thompson
July 26, 1999
Page 2

The committee is not requesting that the department modify the rule with regard to any of these provisions, but rather that the department consider modification and clarification of these provisions. Agreement by the department will permit some additional time for review of these important provisions by both the department and the committee.

In order to assure continuing jurisdiction of the Senate Committee, please provide your response to this request by August 6, 1999. Under the statutes, if the department agrees to consider these modifications the review period for both the Senate and Assembly is extended to either the 10th day following the receipt of the committee's modified proposed rules or the expiration of the statutory review period, whichever is later.

I appreciate the willingness of the department to work with the Committee to work on these important issues. If you have any questions regarding these matters, please feel free to contact me or my staff directly at my legislative office.

Sincerely,



Senator Roger Breske
Chair, Senate Committee on Insurance,
Tourism, Transportation & Corrections

RB:vlv

cc: Representative David Brandemuehl
Ron Morse, Department of Transportation

ROGER BRESKE

STATE SENATOR

12th District

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July 26, 1999

Mr. Charles H. Thompson, Secretary
Wisconsin Department of Transportation
4802 Sheboygan Avenue
P.O. Box 7910
VIA INTER-DEPARTMENTAL MAIL

JUL 28 1999

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Lack*

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Secretary Charles Thompson
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I appreciate the willingness of the department to work with the Committee to work on these important issues. If you have any questions regarding these matters, please feel free to contact me or my staff directly at my legislative office.

Sincerely,



Senator Roger Breske
Chair, Senate Committee on Insurance,
Tourism, Transportation & Corrections

RB:vlv

cc: Representative David Brandemuehl
Ron Morse, Department of Transportation

Shower reimbursement
for left-equipped vehicles
to 2016 (now, everything
at 80%).

CR-99-023

Ron Morse, ETD Transit Program

Rule re: vehicle accessibility

dealing w/ private, non-profit org.

MT Public Transit

DOT's proposal to exclude their
demonstrations from the statutory
hearing & judicial review
requirements - only applies
to grant applications, not
complaints of service.

ROGER BRESKE

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July 13, 1999

Secretary Charles Thompson
Department of Transportation
4802 Sheboygan Avenue
VIA INTER-DEPARTMENTAL MAIL

RE: Clearinghouse Rule 99-063
Relating to: elderly and disabled transportation program

Dear Secretary Thompson:

Enclosed, please find a hearing notice for the Senate Committee on Insurance, Tourism, Transportation and Corrections related to the rule listed above. Pursuant to § 227.19(4)(a) and (b) Wis. Stats., the Committee is extending its review of this proposed rule and requests that you make the appropriate agency personnel available for this hearing.

The Committee's concerns are twofold. First, we will review the substantive policy proposed by the Department to utilize vehicles which are not handicapped accessible for use in this program. Second, the Committee will examine the Department's legal authority to exclude their determinations from the hearing and judicial review requirements of § 227 Wis. Stats. As the hearing notice indicates, I have scheduled the Committee's oversight hearing for **July 21st at 10:30AM in Room 201SE of the State Capitol.**

Thank you for your assistance with this matter. As always, please feel free to give me a call should you have any questions or concerns regarding this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Roger Breske".

ROGER BRESKE, CHAIR
Senate Committee on Insurance, Tourism,
Transportation & Corrections

RB/vlv

cc: Joe Maasen, Department of Transportation
Ron Morris, Department of Transportation
Donald J. Schneider, Senate Chief Clerk
Representative Brandemuehl, Assembly Transportation Committee



DAVID BRANDEMUEHL

State Representative
49th Assembly District

TO: Members, Assembly Transportation Committee

FROM: Rep. David Brandemuehl, Chair *Dab*

DATE: July 8, 1999

RE: Clearinghouse Rule

The following clearinghouse rule has been referred to the Assembly Transportation Committee:

Clearinghouse Rule 99-063: relating to elderly and disabled transportation capital assistance program.

Please contact my office if you would like a copy of this rule. Any questions may be directed to Bill Ford, Legislative Council Attorney for the committee at 266-0680. The deadline for committee action on this rule is **August 6, 1999**.

CR 99-063

The Wisconsin Department of Transportation proposes an order to repeal TRANS 2.015(1m) and (4), 2.045(2) to (6), 2.05(1)(e) to (i), 2.06(2)(c)2. and 2.08; renumber TRANS 2.10(1)(a)3. to 6.; renumber and amend TRANS 2.06(2)(c)3 and (d); amend TRANS 2.01, 2.015(3), 2.02(1) and (2), 2.04(3), 2.045, 2.05(1)(a) to (d) and (3), 2.06(2)(c)1. to 4., 2.09 and 2.10(1)(a), (b)6., (2)(a)(intro.) and (b)(intro.); repeal and recreate TRANS 2.07; and create TRANS 2.055, 2.06(2)(c)3. and (d)2., 2.10(1)(a)3. and 2.11, relating to elderly and disabled transportation capital assistance program.

REPORT OF THE DEPARTMENT OF TRANSPORTATION
ON THE FINAL RULE DRAFT

This report is submitted to the presiding officers of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

Submitted by:



CHARLES M. KERNATS
Assistant General Counsel
Office of General Counsel
Department of Transportation
Room 115-B, Hill Farms State
Transportation Building
P. O. Box 7910
Madison, WI 53707-7910
(608) 267-7940

PART 1

Analysis Prepared by the Wisconsin Department of Transportation

STATUTORY AUTHORITY: ss. 85.16(1), 85.22(3)(h) and 227.11(2), Stats.

STATUTES INTERPRETED: s. 85.22, Stats.

General Summary of Proposed Rule. Chapter Trans 2 establishes the Department's administrative interpretation of s. 85.22, Stats., including the administration of assistance under the federal sec. 5310 program (formerly sec. 16), and prescribes administrative policies and procedures for implementing the elderly and disabled transportation capital assistance program authorized under s. 85.22, Stats. The purpose of this rule making is to clarify existing provisions of the rule as well as incorporate changes to reflect current program policy and conditions and improve program administrative procedures.

This proposed rule:

Simplifies the requirements an applicant must satisfy to qualify for elderly and disabled transportation capital assistance. The proposed rule eliminates an applicant's requirement to give private transportation providers the opportunity to submit proposals to provide service. The proposed rule merely requires applicants to give private transportation providers the opportunity to comment on the applicant's decision to seek capital assistance from the Department.

Establishes a simplified process for the Department to review challenges to an application for elderly and disabled capital assistance.

Revises and clarifies criteria, relative weights, and minimum point totals for evaluating applications for elderly and disabled transportation capital assistance.

Provides the Department with greater discretion to determine the types of vehicles that may be provided under the elderly and disabled capital assistance program.

Eliminates the option of allowing applicants awarded capital assistance to purchase vehicles. The proposed rule will continue to authorize the Department to procure vehicles on behalf of applicants awarded capital assistance, but will eliminate the option of allowing applicants to purchase vehicles on their own.

Establishes record and reporting requirements.

Allows for greater flexibility in membership requirements of transportation coordinating committees.

Fiscal Effect. No fiscal impact is anticipated from the promulgation of this proposed rule.

Copies of Proposed Rule. Copies of the proposed rule may be obtained upon request, without cost, by writing to Ron Morse, or by calling (608) 266-1650. Hearing-impaired individuals may contact the Department using TDD (608) 266-3351. Alternate formats of the proposed rule will be provided to individuals at their request.

PART 2
TEXT OF PROPOSED RULE

Under the authority vested in the state of Wisconsin, department of transportation, by ss. 85.16(1), 85.22(3)(h) and 227.11(2), Stats., the department of transportation hereby proposes to amend a rule interpreting s. 85.22, Stats., relating to elderly and disabled transportation capital assistance program.

SECTION 1. Trans 2.01 is amended to read:

TRANS 2.01 Purpose and scope. The purposes of this chapter are to establish the department's administrative interpretation of s. 85.22, Stats., including the administration of assistance under the federal sec. ~~46~~ 5310 program, and to prescribe administrative policies and procedures for implementing the elderly and disabled transportation capital assistance program authorized under s. 85.22, Stats.

SECTION 2. Trans 2.015(1m) is repealed.

SECTION 3. Trans 2.015(3) is amended to read:

Trans 2.015(3) "Federal sec. ~~46~~ 5310 program" means the federal assistance program under 49 USC ~~1612(b)(2)~~ 5310.

SECTION 4. Trans 2.015(4) is repealed.

SECTION 5. Trans 2.02(1) and (2) are amended to read:

Trans 2.02(1) An eligible applicant may apply for capital assistance under s. 85.22, Stats. All applicants shall comply with federal regulations governing the federal sec. ~~46~~ 5310 program. ~~In addition to being eligible for assistance under the federal sec.~~

~~16 program, an applicant shall, at the time it applies for capital assistance, have legal authority to contract or subcontract with any other transportation provider in its proposed service area, unless it is prohibited from subcontracting by its contracts with agencies of county government. An applicant which is prohibited in this way from subcontracting shall be eligible to apply for capital assistance only if the contracts which prohibit it from subcontracting were publicly bid and open to all transportation providers.~~

(2) State aids administered under this chapter are available only for projects for which applicants received notice of eligibility under 49 USC ~~1612(b)(2)~~ 5310 after July 1, 1977. Projects that are eligible for such assistance but do not receive federal moneys due to insufficient federal funds are eligible for state aids under s. Trans 2.03.

SECTION 6. Trans 2.04(3) is amended to read:

Trans 2.04(3) Demonstrate how the proposed project will be integrated with specialized transportation services provided by public transit systems and previous federal sec. ~~46~~ 5310 program grantees located within the applicant's service area; and

SECTION 7. Trans 2.045 is amended to read:

Trans 2.045 (title) ~~Opportunity for competition~~ **Private provider participation.**

~~(4)~~ Every application shall include evidence that all other transportation providers in the applicant's service area have been afforded ~~a competitive~~ an opportunity to ~~furnish comment on the service which an applicant proposes to furnish with the vehicles to be purchased with aid assistance~~ comment on the service which an applicant proposes to furnish with the vehicles to be purchased with aid assistance under this chapter. In each case where an applicant provides this opportunity to other transportation providers, the evidence shall include copies of all correspondence between the applicant and other transportation providers, except that the evidence shall include one copy of the notice required under s. Trans

2.05(1)(d) and a certified list of all other transportation providers to which the notice was mailed rather than copies of all the notices actually mailed. ~~The evidence shall also include copies of all proposals received by the applicant from other transportation providers. All notifications and correspondence from an applicant to other transportation providers shall be conducted by certified return receipt mail.~~ The department may reject an application for failure to comply with this requirement.

SECTION 8. Trans 2.045(2) to (6) are repealed.

SECTION 9. Trans 2.05(1)(a) to (d) are amended to read:

Trans 2.05(1)(a) On or before the first Monday in February, the applicant shall submit its completed application to the ~~department's appropriate district office;~~ department.

(b) Not less than 70 days before the application deadline, the applicant shall cause to be published a "Notice to Transportation Providers" in newspapers likely to give notice in the planned service area of the applicant. The notice shall include the applicant's name; the address and phone number of a contact person; a short description of the equipment for which the applicant is applying for a capital grant; and the applicant's proposed service area; ~~and the date by which another transportation provider must request additional information under par. (e);~~

(c) Not less than 70 days before the application deadline, the applicant shall submit its completed proposed transportation schedule and budget and shall submit a list of all other transportation providers operating within the applicant's service area to the appropriate department district office;

(d) Not less than 60 days before the application deadline, the applicant shall mail a notice of its intention to request capital assistance under this chapter to all other transportation providers operating within applicant's proposed service area and to the chairperson of the county board for any county in which the applicant proposes to operate.

SECTION 10. Trans 2.05(1)(e) to (i) are repealed.

SECTION 11. Trans 2.05(3) is amended to read:

Trans 2.05(3) At the same time that an applicant submits the original manuscript of its application to the ~~department's appropriate district office~~ department, it shall also submit copies for review and comment to the department's appropriate district office and to the appropriate intergovernmental review agency in accordance with Presidential Executive Order E. O. 12372. It shall also send a letter offering to submit copies for review and comment to the appropriate area agency on aging, and to the appropriate department of health and ~~social~~ family services' division of community services' regional strategic finance's area office. In order to be considered by the department, comments from these agencies must be submitted to the department's appropriate district office within ~~45~~ 30 days following submission of the application to the department. The department shall give appropriate consideration to the review comments.

SECTION 12. Trans 2.055 is created to read:

TRANS 2.055 Request for department review. (1) A person adversely affected by a violation of s. Trans 2.045, 2.05 or 2.10 may request the department to review an application for capital assistance under this chapter.

NOTE: Specific allegations shall be sent to Director, Bureau of Transit & Local Roads, P. O. Box 7913, Madison, WI 53707-7913, with a copy sent to the affected applicant.

(2) A request for department review under sub. (1) shall be made in writing and shall be filed with the department within 10 days of the application filing deadline in s. Trans 2.05(1)(a).

(3) If the department receives a request for review of an application for capital assistance under this chapter, the chief of the specialized transit section shall conduct the department review.

(4) In conducting its review, the department may consider only an applicant's compliance with applicable state and federal procedural requirements.

(5) All interested parties shall be given the opportunity to submit written or documentary evidence and written arguments to the department. Interested parties shall provide a copy of any written evidence, arguments, or correspondence submitted to the department to all other parties involved in the department review.

(6) The department shall limit its review to consideration of written or documentary evidence and written arguments. The formal contested case requirements in ch. 227, Stats., are not applicable to this review.

NOTE: A request for Department review under this section is not a contested case as defined in s. 227.01(3), Stats., and not subject to the contested case hearing requirement in s. 227.42, Stats.

(7) In conducting its review, the department may request interested parties to provide additional written information. The failure of any interested party to provide information requested by the department, or to cooperate with the department in its review, may result in dismissal of a request for review or denial of an application for capital assistance.

(8) The chief of the specialized transit section shall submit a written recommendation to the director of the bureau of transit and local roads, who shall issue a written decision. A copy of the director's decision shall be provided to the applicant and to the person requesting the department review.

(9) The decision of the director of the bureau of transit and local roads shall be the final decision of the department and may not be subject to further appeals or judicial review.

NOTE: The Department's decision under this section does not affect a person's substantial interests and is not subject to judicial review under s. 227.52, Stats.

SECTION 13. Trans 2.06(2)(c)1. is amended to read:

Trans 2.06(2)(c)1. Estimate of elderly and disabled population and sources or methodology used to derive the figure (0-15 points);.

SECTION 14. Trans 2.06(2)(c)2. is repealed.

SECTION 15. Trans 2.06(2)(c)3. is renumbered Trans 2.06(2)(c)2. and amended to read:

Trans 2.06(2)(c)2. Percentage of the elderly and disabled population in need of service and the ~~proportion which the applicant proposes to serve~~ methodology used to arrive at the percentage (0-30 0-15 points); and.

SECTION 16. Trans 2.06(2)(c)3. is created to read:

Trans 2.06(2)(c)3. The percentage of the elderly and disabled population which the applicant proposes to serve and how that percentage was derived (0-15).

SECTION 17. Trans 2.06(2)(c)4. is amended to read:

Trans 2.06(2)(c)4. ~~Evidence that existing~~ How applicant's proposed service is not adequate to will meet the identified needs of the elderly and disabled population (0-45 0-30 points).

SECTION 18. Trans 2.06(2)(d) is renumbered Trans 2.06(2)(d)1. and amended to read:

Trans 2.06(2)(d)1. Evidence of financial ~~and managerial~~ capabilities of the applicant in assuring that adequate operating funds ~~and practices~~ will be available to support the proposed project objectives. ~~Applicant experience with previous federal sec. 16 program capital assistance grants may be considered (0-45 0-15 points).~~

SECTION 19. Trans 2.06(2)(d)2. is created to read:

Trans 2.06(2)(d)2. Evidence of managerial capabilities of the applicant in assuring that adequate personnel, experience, training, safety and other practices will be available to support the project objectives. Applicant experience with previous capital assistance under this chapter may be considered (0-30 points).

SECTION 20. Trans 2.07 is repealed and recreated to read:

TRANS 2.07 Vehicles offered. Types of vehicles offered under this chapter, equipped as human service vehicles or standard yellow school buses, shall be determined by the department for each grant cycle. Factors including, but not limited to, funding levels, volume of requests, vehicle availability and technological innovations shall be used in the department's determination. No communications equipment shall be offered under this chapter.

SECTION 21. Trans 2.08 is repealed.

SECTION 22. Trans 2.09 is amended to read:

Trans 2.09 Vehicle registration. A ~~grantee under the federal sec. 16~~ program recipient shall at all times maintain human service vehicle ~~or~~, school bus, or municipal registration, as appropriate, on every vehicle purchased in part with ~~aids~~ assistance under ~~s. 85.22, Stats., and~~ this chapter whether the vehicles are operated by the ~~grantee~~ recipient or by other transportation providers. If a ~~grantee~~ recipient fails to comply with this registration requirement, the department may reassign the vehicles not properly registered ~~by the grantee~~ to other eligible applicants specified in s. Trans 2.02(1) and may reject pending or future applications of the ~~grantee~~ recipient for ~~aids~~ assistance under ~~s. 85.22, Stats~~ this chapter.

SECTION 23. Trans 2.10(1)(a) is amended to read:

Trans 2.10(1)(a) ~~Has 10 or more~~ Includes members representing at least the following:

SECTION 24. Trans 2.10(1)(a)3. is renumbered Trans 2.10(1)(a)4.

SECTION 25. Trans 2.10(1)(a)3. is created to read:

Trans 2.10(1)(a)3. County department of social services or county department of human services;

SECTION 26. Trans 2.10(1)(a)4. to 6. are renumbered Trans 2.10(1)(a)5. to 7.

SECTION 27. Trans 2.10(1)(b)6., (2)(a)(intro.) and (b)(intro.) are amended to read:

Trans 2.10(1)(b)6. Act on requests by local public bodies to be designated as coordinators of transportation services for elderly and disabled persons for the purpose of becoming eligible for assistance under the federal sec. ~~16~~ 5310 program.

(2)(a)(intro.) Is determined by the department to be eligible for assistance under the federal sec. ~~46~~ 5310 program after first certifying to the department that no private, nonprofit organizations as specified in s. Trans 2.015(2m) are readily available to provide transportation services to elderly and disabled persons in a proposed service area and providing all of the following or similar documentation supporting such certification:

(b)(intro.) Is approved by the department to be the coordinator of transportation services to the elderly and disabled persons in the proposed service area. A local public body shall be ~~after first being so~~ approved by the county board and a transportation coordinating committee and the county board and providing which satisfies the membership requirements in sub. (1)(a). The department may waive the membership requirements in sub. (1)(a) if the county board provides satisfactory evidence that the county board made a reasonable attempt to include members of all groups identified in sub. (1)(a). The applicant shall provide all of the following or similar documentation to the department verifying such approval:

SECTION 28. Trans 2.11 is created to read:

Trans 2.11 Reporting requirements. All recipients shall maintain records in the manner required by the department for all vehicles purchased with program funds and shall make semi-annual reports on each vehicle as well as special reports as required by the department. If required semi-annual reports are not current at the time of the application filing deadline, the department may deny that recipient's application.

NOTE: The report required by the Department is DOT Form Wisconsin Department of Transportation 1610, Vehicle Operation Semi-Annual Report, and can be obtained from the Bureau of Transit and Local Roads, P. O. Box 7913, Madison, WI 53707-7913.

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2), Stats.

Signed at Madison, Wisconsin, this 18 day of June, 1999.

A handwritten signature in cursive script that reads "Charles H. Thompson". The signature is written in black ink and is positioned above a horizontal line.

CHARLES H. THOMPSON

Secretary

Wisconsin Department of Transportation

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PART 3

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 99-063

AN ORDER to repeal Trans 2.015 (1m) and (4), 2.045 (2) to (6), 2.05 (1) (e) to (i), 2.06 (2) (c) 2. and 2.08; to renumber Trans 2.10 (1) (a) 3. to 6.; to renumber and amend Trans 2.06 (2) (c) 3. and (d); to amend Trans 2.01, 2.015 (3), 2.02 (1) and (2), 2.04 (3), 2.045, 2.05 (1) (a) to (d) and (3), 2.06 (2) (c) 1. to 4., 2.09 and 2.10 (1) (a) and (b) 6. and (2) (a) (intro.) and (b) (intro.); to repeal and recreate Trans 2.07; and to create Trans 2.055, 2.06 (2) (c) 3. and (d) 2., 2.10 (1) (a) 3. and 2.11, relating to elderly and disabled transportation capital assistance program.

Submitted by **DEPARTMENT OF TRANSPORTATION**

03-29-99 RECEIVED BY LEGISLATIVE COUNCIL.
04-23-99 REPORT SENT TO AGENCY.

RS:DLS:jal;rv

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CLEARINGHOUSE RULE 99-063

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 September 1998.]

1. Statutory Authority

a. Section Trans 2.055 (6) provides in part that the formal contested case requirements in ch. 227, Stats., are not applicable to the review of an application for capital assistance. If, without this provision, a review would be subject to contested case requirements, the department should cite its statutory authority for this provision. However, if this is merely a statement that these proceedings do not meet the definition of a contested case, this information should be contained in a note to the rule.

b. Section Trans 2.055 (9) provides that the final decision of the department is not subject to judicial review. The department should cite its authority for this exemption to ch. 227, Stats.

c. Section Trans 2.09 provides that a recipient of assistance must maintain human service vehicle or school bus registration, except that a local public body owner or operator may maintain municipal registration in certain circumstances. If human service vehicle or school bus registration is a general requirement, what authority exists for the department to exempt a local public body owner or operator from maintaining that registration?

2. Form, Style and Placement in Administrative Code

a. In SECTION 8, the word "is" should be replaced by the word "are."

- b. In s. Trans 2.06 (2) (c) 4., the word "shall" should be replaced by the word "will."

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

- a. In s. Trans 2.055 (2) and (9), the commas should be deleted.
- b. In s. Trans 2.10 (1) (a) 3., the comma should be deleted.
- c. Section Trans 2.11 provides that assistance recipients must maintain records in the manner required by the department and prepare special reports as required by the department or by governing federal regulations. Can cross-references be provided to these requirements? If not, how will recipients discern the requirements and why are the requirements not placed in the Wisconsin Administrative Code?

PART 4
CR 99-063

ANALYSIS OF FINAL DRAFT OF TRANS 2

(a) **Need for Amended Rule.** Chapter Trans 2 establishes the Department's administrative interpretation of s. 85.22, Stats., including the administration of assistance under the federal sec. 5310 program (formerly sec. 16), and prescribes administrative policies and procedures for implementing the elderly and disabled transportation capital assistance program authorized under s. 85.22, Stats. The purpose of this rule making is to clarify existing provisions of the rule as well as incorporate changes to reflect current program policy and conditions and improve program administrative procedures.

This proposed rule:

Simplifies the requirements an applicant must satisfy to qualify for elderly and disabled transportation capital assistance. The proposed rule eliminates an applicant's requirement to give private transportation providers the opportunity to submit proposals to provide service. The proposed rule merely requires applicants to give private transportation providers the opportunity to comment on the applicant's decision to seek capital assistance from the Department.

Establishes a simplified process for the Department to review challenges to an application for elderly and disabled capital assistance.

Revises and clarifies criteria, relative weights, and minimum point totals for evaluating applications for elderly and disabled transportation capital assistance.

Provides the Department with greater discretion to determine the types of vehicles that may be provided under the elderly and disabled capital assistance program.

Eliminates the option of allowing applicants awarded capital assistance to purchase vehicles. The proposed rule will continue to authorize the Department to procure vehicles on behalf of applicants awarded capital assistance, but will eliminate the option of allowing applicants to purchase vehicles on their own.

Establishes record and reporting requirements.

Allows for greater flexibility in membership requirements of transportation coordinating committees.

(b) **Modifications as a Result of Testimony at Public Hearing.** Public hearings were held in Madison and Wausau on May 12 and 13, 1999, respectively. Although there were no modifications made to the proposed rule change as a result of testimony

at the public hearings or written comments received after the hearing, two areas within the proposed administrative rule change process received considerable comments: (1) whether to require that all vehicles purchased under the program be lift-equipped and (2) eliminating the need for applicants to give private transportation providers the opportunity to submit proposals to provide service. The following is a synopsis of the issues:

Accessible Vehicles

On January 14, 1999, the Department issued a Statement of Scope for the proposed amendment of ch. Trans 2. In the Statement of Scope, the Department stated that it was contemplating a requirement that all program vehicles be lift-equipped. As a result of the number of negative responses to that statement from various agencies, the Department did not include it in its Notice of Hearing and Text of Proposed Rule of March 25, 1999.

Subsequent to the hearings, a number of individuals and organizations sent written comments for the record stating their support for all vehicles purchased under the program being lift-equipped.

The Section 5310 Elderly & Disabled (E&D) Capital Assistance Program utilizes state and federal funds to purchase vehicles for private non-profit agencies and local public bodies under certain circumstances. Grantees use these vehicles to provide E&D transportation for their own clients, contracted service for other public or private organizations and some limited general E&D transportation.

The Federal Transit Administration (FTA) which administers the federal program funds allocated to the states allows the purchase of non-accessible vehicles for demand responsive transportation services in accordance with 49 CFR Part 37 (Certification of Equivalent Service). Such certification, which is signed by the applicant, states that the service offered to individuals with disabilities, including individuals who use wheelchairs, is equivalent to the level and quality of service offered to individuals without disabilities. Chapter Trans 2, which specifies the manner in which the Department administers the state and federal funds under this program, does not require that all vehicles be lift-equipped.

The primary reasons why agencies support the option to purchase non-accessible vehicles are the loss of vehicle seating capacity, increased vehicle cost and increased maintenance costs, all resulting in reduced service because of limited funds to run their programs. A number of agencies that have received non-accessible vehicles operate sheltered workshops which serve the needs of persons with developmental disabilities who, in a lot of instances, are ambulatory.

Only 22% of the active vehicles purchased under the Section 5310 program do not have lifts. The vast majority (80%) of these non-accessible vehicles are vans. The Department has not received equivalent service complaints against grantees who have

received non-accessible vehicles. In fact, the Department, on occasion, denies agency requests for non-accessible vehicles where it believes that the fleet ratio is inappropriate for the persons to be served.

The Department believes that the option to purchase non-accessible vehicles should be retained as long as the federal program regulations which comply with the Americans with Disabilities Act are followed. Accordingly, no change will be made to the current rule regarding this issue.

Competitive Proposals for Transportation Service

A couple of private for-profit transportation providers object to the elimination of the requirement that applicants provide an opportunity for private transportation providers to submit proposals to the applicant for the transportation services to be provided with the applied-for vehicles. This is part of the procedures which were implemented in 1988 to comply with federal private sector participation regulations at the time. Since then, a number of changes to these requirements have been made at the federal level.

Because of the limited funding available, only vehicles are procured under the Section 5310 Elderly & Disabled Capital Assistance Program in Wisconsin. It does not provide funds for contracting transportation services, preventive maintenance and other such expenditures allowed under the federal regulations, FTA Circular 9070.1E. As part of Transit Express, Inc.'s, recent appeal to the FTA, the Federal Transit Administration issued a decision that transportation service proposals are not subject to its review where no program dollars are involved. Since our program funds are limited to the purchase of vehicles, the requirement for all applicants to provide an opportunity for other transportation providers to submit proposals and our review of any proposal rejections is no longer necessary.

While the proposed changes do eliminate the requirement for the opportunity to submit proposals, it still maintains the requirement that an applicant notify all known transportation providers in its service area of its intent to apply and request comments. There is nothing to preclude a private for-profit provider from contacting the applicant to discuss the possibility of providing the transportation service either utilizing the applied-for vehicle or using its own vehicle.

Transit Express, Inc., also took exception to the Initial Regulatory Flexibility Analysis statement that the proposed rule has no significant impact on small businesses. Transit Express states that the program has a profound negative impact on most private for-profit paratransit providers because it gives the non-profit grantee a significant competitive advantage.

Private for-profit transportation providers are not eligible to apply for a Section 5310 grant. They can participate in the program in an indirect way by contracting with a

grantee for the transportation services utilizing the vehicle that is awarded. The grant only covers the cost of the vehicle, not the operating expenses.

Even under the existing rule, there are very few private providers that submit proposals to applicants each year. Of the approximate 40 applications that are filed in an average year on a statewide basis, only about five proposals are submitted to applicants for consideration. Of the 100 active grantee agencies, there are currently only seven (7) instances in which providers are contracting with grantees for their transportation service, all of which are leasing the grant vehicle from the grantee.

Because of the limited scope of this program as well as the number of small businesses that participate, the proposed rule has no significant impact on small businesses.

(c) **List of Persons who Appeared or Registered at Public Hearing.** The following two persons attended the public hearing held in Madison on May 12, 1999:

Tracy Harrington Operations Manager Goodwill Industries 6055 N. 91 st Street Milwaukee, WI 53225	In support
Frank E. Potts 2302 Prairie Road Madison, WI 53711	In support

No persons appeared or registered at the public hearing held in Wausau on May 13, 1999.

Written comments on the proposed rule were accepted until May 27, 1999. Comments received in writing are available upon request. Written comments were received from the following persons:

Lee Schulz, Executive Director Independence <i>First</i> 600 West Virginia, Suite 301 Milwaukee, WI 53204-1516	Supports lifts on all vehicles
Thomas M. Jacobs Independent Living Coordinator Independence <i>First</i> 600 West Virginia, Suite 301 Milwaukee, WI 53204-1516	Supports lifts on all vehicles

<p>Stan Spence Independence <i>First</i> 600 West Virginia, Suite 301 Milwaukee, WI 53204-1516</p>	<p>Supports lifts on all vehicles</p>
<p>Arnold Mahlik, President Medi-Vans 1846 Industrial Drive Green Bay, WI 54307</p>	<p>Opposes changes to opportunity for competition</p>
<p>John Nousaine, Director North Country Independent Living 2231 Catlin Avenue P. O. Box 1245 Superior, WI 54880-5137</p>	<p>Supports lifts on all vehicles</p>
<p>Pam S. Edyburn, Program Manager Creative Employment Opportunities, Inc. 219 North Milwaukee Street, 3rd Floor Milwaukee, WI 53202</p>	<p>Supports lifts on all vehicles</p>
<p>John Nedden-Durst HCR 64, Box 8-2 Cornucopia, WI 54827</p>	<p>Supports lifts on all vehicles</p>
<p>Ms. Merle Cohen Advocacy-Madison Multiple Sclerosis Support Group 7405 Tree Lane Madison, WI 53717-1553</p>	<p>Supports lifts on all vehicles</p>
<p>John V. Doherty Operations Manager Transit Express 424 West Cherry Street Milwaukee, WI 53212</p>	<p>Opposes the statement in the Initial Regulatory Flexibility Analysis that the proposed rule has no significant impact on small business</p> <p>Opposes any change in the opportunity for competition provisions</p>
<p>Shelley Peterman Schwarz 933 Chapel Hill Road Madison, WI 53711-2405</p>	<p>Supports lifts on all vehicles</p>
<p>Diana Sullivan 3257 South Delaware Avenue Milwaukee, WI 53207</p>	<p>Supports lifts on all vehicles</p>
<p>Tom Langham Rehabilitation Services Director Badger Association of the Blind, Inc. 912 North Hawley Road Milwaukee, WI 53213</p>	<p>Supports lifts on all vehicles</p>

Scott Anderson Benefits Specialist North Country Independent Living 2231 Catlin Avenue P. O. Box 1245 Superior, WI 54880-5137	Supports lifts on all vehicles
Jeffrey Glick, et al. Alexander Hamilton High School 6215 West Warnimont Avenue Milwaukee, WI 53220-1399	Supports lifts on all vehicles

Written comments were also received from persons following publication of the Statement of Scope. These persons are listed below including their position of the proposed changes to the rule:

Thomas R. Bergerud, Executive Director The Threshold, Inc. 600 Rolfs Road West Bend, WI 53090	<i>Supports all issues</i>
Dan Witt, executive Director New Hope Center, Inc. 443 Manhattan Street Chilton, WI 53014	<i>Opposes lifts on all vehicles</i> <i>Opposes elimination of "Cash Grant"</i>
Eugene Chuzles, Director Challenge Center 39 N. 25 th Street East Superior, WI 54880-5269	<i>Opposes lifts on all vehicles</i>
Dorene Pawlak, Transportation Coordinator Marinette County Elderly Services P. O. Box 456 Crivitz, WI 54114-0456	<i>Opposes lifts on all vehicles</i>
Dale McAllister American Red Cross - Lakeland Chapter P. O. Box 8295 Green Bay, WI 54308-8295	<i>Opposes lifts on all vehicles</i>
Kristine K. Lindstedt, Director Polk County Adult Development Center 400 Polk County Plaza Balsam Lake, WI 54810	<i>Opposes lifts on all vehicles</i>

Marvin Schneider, Administrator Chippewa County Dept. of Human Services Room 306 711 North Bridge Street Chippewa Falls, WI 54729-1877	<i>Opposes lifts on all vehicles</i>
John Gast, Director Pepin County Office of Aging 606 W. Madison Street Durand, WI 54736	<i>Opposes lifts on all vehicles</i>
Charlene Oftedahl, Director Carla Radtke, Chair Barron County Office on Aging 330 E. Lasalle Avenue Barron, WI 54812	<i>Opposes lifts on all vehicles</i>
Don Kush West Central WI Regional Plng. Comm. 800 Wisconsin Street Mailbox 9 Eau Claire, WI 54703-3606	<i>Opposes lifts on all vehicles</i>
Richard Sicchio, Director Northern Agency on Aging Rhinelander, WI	<i>Opposes lifts on all vehicles</i>
David Titus, Director Dodge Co. Human Serv. & Health Dept. 143 East Center Street Juneau, WI 53039-1371	<i>Supports lifts on all vehicles</i>

(d) **Response to Legislative Council Recommendations.** The Rules Clearinghouse asked the Department to identify the authority for human service vehicles and school buses to be issued municipal registration under s. Trans 2.09. The authority for municipal registration is s. 341.26(2m), Stats.

The Rules Clearinghouse asked the Department to clarify why requests for review under s. Trans 2.055 are not subject to Chapter 227 contested case and judicial review provisions. This has been done in a note following s. Trans 2.055(6) and in a note following s. Trans 2.055(9).

The Rules Clearinghouse asked the Department to provide more specific information about the report required in s. Trans 2.11. This has been done in a note following s. Trans 2.11. The Department has also deleted the reference to "governing federal regulations" in s. Trans 2.11.

All of the remaining Rules Clearinghouse recommendations have been incorporated into the proposed rule.

(e) **Final Regulatory Flexibility Analysis.** This proposed rule has no significant impact on small businesses.