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CLEARINGHOUSE RULE 96-141

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. The rule cites as its general authority for promulgation of day care certification standards ss. 46.03 (21), 46.98 (5) (e) and 49.50 (2), Stats., as well as SECTION 275 (2) of 1995 Wisconsin Act 289. However, none of these citations appear to give the Department of Workforce Development the authority to promulgate permanent rules relating to the certification of child care providers. In fact, s. 46.03 (21), Stats., puts the authority for the promulgation of rules relating to the certification of child care providers squarely within the Department of Health and Family Services. Section 46.98 (5) (e), as amended by 1995 Wisconsin Act 27, was renumbered s. 49.132 (5) (e) by 1995 Wisconsin Act 404, and relates to rules for the recovery of overpayments for child care and not child care certification. Section 49.50 (2), Stats., which was renumbered s. 49.33 (4), by 1995 Wisconsin Act 27, relates to the promulgation of rules for the efficient administration of the Aid to Families with Dependent Children program. Finally, SECTION 275 (2) of 1995 Wisconsin Act 289 requires the Department of Health and Social Services to promulgate emergency rules before July 1, 1996, that are required by, among other things, ch. 46, Stats., which covers promulgation of certification standards. It does not, however, authorize the Department of Workforce Development to promulgate permanent rules relating to child care certification standards.

The authority of the Department of Workforce Development to promulgate this rule should be reviewed and should be more fully explained. [See also 1995 Wisconsin Act 404, SECTION 266 (2) (g).]

b. The rule purports to apply to tribal agencies and authorizes tribal agencies to certify day care providers subject to the rule. However, it appears that both ss. 48.651 and 49.155, as

affected by 1995 Wisconsin Act 289, provide that counties are responsible for certifying child care providers to which state reimbursement is made. Under what statutory authority are tribes authorized to certify child care providers receiving state reimbursement?

c. Section DWD 55.02 (13) provides a definition of “parent.” This definition does not include “treatment foster parent” as is provided by the definition of “parent” in s. 49.132 (1) (c), Stats., as affected by 1995 Wisconsin Act 404. It is not readily apparent why the rule defines parent differently. If a different definition of “parent” is not necessary, the definition of parent could be simplified by simply including a cross-reference to s. 49.132 (1) (c), Stats.

d. Section DWD 55.03 (2) provides exceptions to the requirement that state reimbursement may be made only to licensed or certified day care providers or providers contracted for by a school board. However, s. 48.651 (1) (intro.), Stats., provides that a county department must certify all providers to whom reimbursement is made except licensed providers and those contracted for by a school board. The statutes do not appear to authorize the type of exceptions authorized for reimbursement in s. DWD 55.03 (2). Upon what authority are these exceptions based?

e. Section DWD 55.04 (7) (b) 4., Stats., authorizes the Department of Workforce Development to grant an exception to the criminal background investigation contained in s. 48.651 (2), Stats., as affected by 1995 Wisconsin Act 289, if “the alternative procedure” meets the statute’s intent. Section 48.651 (2), Stats., provides that before certifying an applicant as a Level I or II provider, the county agency doing the certification shall conduct a background investigation of the applicant and the applicant’s employes and prospective employes. It does not appear that the statute provides for an “alternative procedure.” What is this “alternative procedure” and under what authority does the rule propose to provide an exception to the background investigation required under s. 48.651 (2), Stats.?

f. Section DWD 55.05 (1) (b) authorizes a county or tribal agency to withhold payment from a certified provider who has been convicted of a felony, misdemeanor or “other offense.” Under ss. 49.133 and 49.155 (7) (a) 1., Stats., as affected by 1995 Wisconsin Acts 289 and 404, payment for child care may be denied if the provider has been convicted of a felony or misdemeanor. Under what authority is payment denied for a person convicted of an “other offense”? Also, s. DWD 55.05 (1) provides that a county or tribal agency must deny, suspend, revoke or refuse to renew certification for the reasons specified in pars. (a) and (b). What authority exists for these actions regarding certification, rather than reimbursement, given the specificity of s. 48.651 (2) (g), Stats., as created by 1995 Wisconsin Act 289?

g. Section DWD 55.06 provides that appeals of decisions made by counties or tribes relating to the denial, revocation, suspension or nonrenewal of child care certification is appealable under ch. 68, Stats. On its face, ch. 68, Stats., does not apply to tribes. Under what authority are tribes required to provide an appeal under ch. 68, Stats.? Is this done through some sort of a contract with the tribal agency? In addition, ch. 68, Stats., provides that a municipality may opt out of the ch. 68 review procedure through an ordinance having an alternative process. For counties that have or will opt out of ch. 68 in lieu of another review process, the rule should recognize such an alternative process.

2. Form, Style and Placement in Administrative Code

a. In s. DWD 55.03 (1), the phrase “of health and family services” is unnecessary and should be deleted because the term “department” is defined in s. DWD 55.02 (5).

b. In s. DWD 55.03 (2), and throughout the rule, subunits of the rule preferably should end with a period, rather than a comma or semicolon or the word “and” or “or” (except for introductory material which ends with a colon). This facilitates insertion or deletion of subunits in the future without having to move the word “and” or “or” in the next-to-the-last subunit. [See s. 1.03, Manual.]

c. In s. DWD 55.04 (3) (d) 2., the phrase “of health and family services” is unnecessary and should be deleted because the term “department” is defined.

d. Section DWD 55.04 (3) contains two paragraphs lettered “(d).”

e. In s. DWD 55.04 (7) (b), the titles to subdivisions should be enclosed in single quotation marks. [See s. 1.05 (2) (e), Manual.]

f. It is not clear that s. DWD 55.04 (7) (b) 3. b. is necessary in light of subpar. a., and, therefore, it could be deleted.

g. The phrase “meets any of the following criteria” should be inserted immediately prior to the colons in s. DWD 55.05 (1) and (2), and the phrase “any of the following apply” should be inserted before the colon in sub. (3).

h. Because the title of a rule section is not considered a substantive provision of the rule, the introductory clause of s. DWD 55.08 (2) should be clarified to provide that it does not apply, in its entirety, to a certified in-home provider. Similarly, sub. (3) ought to be clarified to provide that the items listed therein are the only items that apply to certified in-home providers, if that is the rule’s intent.

i. Section DWD 55.08 (2), identifies requirements for a certified provider’s home and outside play areas. Paragraph (h), however, relates to forms that a provider must use. It does not seem that par. (h) fits in sub. (2) and should be moved.

j. Because both subdivisions of s. DWD 55.09 (4) (d) seem to apply to schoolage programs that have a swimming pool, the paragraph should be rewritten as follows: “(d) Swimming pool. A school-age program that has a swimming pool on its premises shall do all of the following:

1. Comply with the requirements of . . .

2. Maintain a ratio of”

k. There is no par. (c) in s. DWD 55.09 (4).

l. It appears that the effective date of the rule is intended to be the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22

(2) (intro.), Stats. Accordingly, the effective date provision of the rule should reflect that fact. [See s. 1.02 (4) (a), Manual.]

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

a. In s. DWD 55.01 (1) and elsewhere throughout the rule, the rule refers to “this subchapter.” However, the rule does not create subchapters, only chapter DWD 55. Accordingly, all such references to subchapters should be corrected. In addition, the word “It” at the beginning of the second sentence of sub. (1) should be replaced by “This chapter.”

b. Section DWD 55.04 (1) provides that in order to be certified, a provider shall be exempt from having to be licensed under “subchs. I and II, III or IV.” Since there are no subchapters in ch. DWD 55, it is not clear what these subchapter references mean. This provision of the rule should be reviewed and appropriate cross-references provided.

c. Section DWD 55.04 (3) (c) requires providers seeking certification to submit a completed notarized background verification form. Is this form obtained from the county or tribal agency or from some other source? The addition of a note to the rule explaining where this form can be obtained would clarify the rule. [See s. 227.14 (3), Stats.]

d. Section DWD 55.04 (4) provides that the certification fee may include the costs of criminal record checks. An appropriate rule or statutory cross-reference should be provided to properly identify the criminal record checks that are being referred to.

e. Section DWD 55.04 (5) (a) and (b) require providers seeking certification to demonstrate compliance with “certification standards.” Cross-references should be provided to clarify which standards are required and to guide the reader to the appropriate standards.

f. Section DWD 55.04 (5) (b) contains a cross-reference to s. HSS 55.61 (1) (b). However, the rule repeals s. HSS 55.61 (1) (b). A correct cross-reference should be provided.

g. Section DWD 55.09 (12) (b) requires a driver to hold a valid operator’s license of “whatever type is required.” The rule should contain some indication, by way of a note or statutory cross-reference, of who is requiring the type of operator’s license, e.g., the department of transportation, and the statutory authority under which a particular type of license is required.

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

a. In s. DWD 55.03 (1), the rule addresses the criteria for the purchase of child care services. Subsection (2), however, talks about exemptions for reimbursement. What is the difference between purchase and reimbursement? If there is no difference, the rule should use uniform terminology.

b. Section DWD 55.03 (2) refers to “a regulated provider.” Is a regulated provider limited to those providers listed in sub. (1)? The rule should be clarified.

c. In s. DWD 55.04 (5) (a), the phrase “the provider’s” should be inserted between the words “in” and “care” in the last sentence.

d. What does s. DWD 55.04 (6) (a) mean? In addition, what is its significance in light of s. DWD 55.04 (3) (a)? Is the “geographic area” being referred to the geographic area that the Department of Workforce Development must establish under the Wisconsin Works program? If so, a cross-reference or other explanation ought to be provided to clarify the rule’s intent.

e. It seems that s. DWD 55.04 (7) (b) 2. d. should be modified so that it is clear that the inspection is of the place where child care will be provided by a provider who has applied for certification or has been certified.

f. What are the “relevant files” that a certifying agency needs to check in s. DWD 55.04 (7) (b) 2. f.?

g. Section DWD 55.04 (7) (b) 3. d. refers to a “certified home.” What is a certified home? The rule appears to apply to the certification of providers of child care and does not mention a certification process for homes. Perhaps the rule should refer to children who are cared for by a certified provider under ch. DWD 55. Also, what does it mean to “complete and return” the checklist? Is this merely an acknowledgment that the parents received the information contained in the checklist? This should be clarified. Also, will the parents retain the information in the checklist if the list is returned?

h. In s. DWD 55.04 (8), the phrase “is convinced” should be replaced by the word “determines.” In addition, must the “alternative means” be something that is actually used or proposed for use by an applicant for certification? This should be clarified.

i. Section 49.155 (7) (a) 1. and 2., Stats., as affected by 1995 Wisconsin Act 289, authorizes a county department to refuse payment to a certified day care provider if certain pending charges or convictions relate to the care of the children. Section DWD 55.05 (1) also allows for the refusal of payment if the charges or convictions relate to “activities of the home.” What are the activities of the home? Are these limited to activities of the home related to caring for children? In addition, par. (b) also includes convictions for “other offenses” that relate to the activity of the home. What are these other offenses? May a conviction for an ordinance violation for not controlling noxious weeds on a corner of a property be grounds for denying payment?

j. Section DWD 55.08 (1) (c) requires a provider to report certain changes to the certifying county or tribal agency. Does this require employees of a certified provider to report changes or is the obligation intended to be placed upon the certified provider? If the latter is the case, the word “provider” should be preceded by the word “certified” or, in the alternative, the phrase “certified under this chapter” could be inserted after “provider.” In addition, the phrase “changes related to certification rules” is somewhat vague. Perhaps this phrase could be replaced by a phrase similar to the following: “changes that affect the certified provider’s eligibility for certification under this chapter.”

k. The rule should be reviewed for use of the term “provider.” Although the definition of provider is broad, it seems that the term is often used to refer to a provider certified under ch. DWD 55 rather than just someone who provides care. For example, s. DWD 55.08 (4) requires a provider to have a current physician’s report on file for each child. This would seem to apply to a certified provider rather than employees of the certified provider who would also properly be

termed providers under the rule. Efforts to distinguish between providers who are certified and employes of certified providers would aid in the understanding and clarity of the rule.

l. In s. DWD 55.08 (4) (b), the phrase “HealthCheck provider” should not be capitalized and, according to the definition in s. DWD 55.02 (9), should be three words, rather than two.

m. To enhance the rule’s clarity, the phrase “Notwithstanding s. DWD 55.02 (19),” should be added at the beginning of the second sentence of s. DWD 55.08 (4) (d). In addition, it is clear from s. DWD 55.08 (4) (a) that the paragraph does not apply to school-age children because it applies to providers. The first sentence of par. (d) should be rewritten in a manner similar to the following: “A provider may not be required to comply with par. (a) with respect to school-age children.”

n. In s. DWD 55.08 (4) (g), the phrase “his or her” should be inserted between “wash” and “hands.”

o. For purposes of consistency, s. DWD 55.08 (4) (h) should be rewritten in a manner similar to the following: “The provider shall require all children in the provider’s care to wash their hands”

p. Section DWD 55.08 (5) (d) should be rewritten to require an affirmative duty of the provider to provide or ensure that a child has adult supervision at all times. In addition, in light of par. (d), is par. (e) necessary?

q. It appears that s. DWD 55.08 (5) (h) could be simplified by providing that: “A provider may not allow any person whom the provider determines to be a threat to the safety of the children to have contact with the children in the provider’s care.”

r. In s. DWD 55.08 (8) (b), the beginning of the first sentence should be rewritten as follows: “A provider may use television only to supplement”

s. Section DWD 55.08 (12) (e) should end with a period rather than a semi-colon and the word “Display” should be replaced by the word “Displaying.”

t. For purposes of clarity, s. DWD 55.08 (13) should specify that the prohibited discrimination is related to the child care functions such as in accepting children or in the employment of employes, if that is the intent of the rule. [See s. DWD 55.08 (5) (h) for a permitted form of discrimination.]

u. To enhance the clarity of s. DWD 55.09 (2) (d), the paragraph should be divided into at least two subunits. The first subunit could provide the general requirement of needing a similarly qualified substitute, and the second subunit could provide the exception.

v. In s. DWD 55.09 (2) (e) (intro.), the word “is” should be replaced by the phrase “shall be.”

w. In s. DWD 55.09 (3) (intro.), the second sentence should be rewritten to avoid vagueness as follows: “The orientation program shall include all of the following:”. Also, the refer-

ence in the first sentence to “Each program” should be modified by inserting “school-age” before the word “program.”

x. In s. DWD 55.09 (3) (e), it is not clear which program is being referred to. Thus, either “school-age” or “orientation” should be inserted before the word “program’s.” In addition, the entirety of s. DWD 55.09 should be reviewed for use of the term “program.” Where appropriate, the term “program” should be modified by the term “school-age” or, in the alternative, a definition of program applicable to the section should be provided at the beginning of the section.

y. In s. DWD 55.09 (4) (a) 2., where is the report of inspection to be found? Is it filed with the county or tribal agency? With the department? The rule should be clarified.

z. Section DWD 55.09 (5) (e) should be rewritten for clarity as follows: “Each staff member shall wash his or her hands with soap and”

aa. Section DWD 55.09 (6) (b) should be rewritten as follows: “No group may contain more than 32 children.”

ab. In s. DWD 55.09 (6) (d), the word “are” should be replaced by the words “shall be.”

ac. To whom must the evidence be provided in s. DWD 55.09 (12) (d)?