WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 08-018

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 January 2005.]

1. Statutory Authority

a. The following comments apply to s. PI 16.03 (2), which specifies that a school district operating a 4K program funded under this grant program must meet the requirements specified in s. PI 16.03 (2) (a) to (e):

(1) Listing only selected statutory requirements (such as the pertinent parts of the "20 standards" in s. PI 16.03 (2) (e)), likely would be interpreted (under the rule of legal interpretation known as *expressio unius est exclusio alterius*, that is, the expression of one thing is the exclusion of another) as meaning that such a school district is not required to comply with any statutory requirement with respect to the 4K program that is not listed (for example, subch. V of ch. 115, ss. 118.06 (1), 118.07 (1), 118.09, 118.125, 118.135, and many others). With the exception of charter schools covered by s. 118.40 (7) (b), Stats., there does not appear to be statutory authority for exempting a school district 4K program funded by this grant from other statutory requirements generally applicable to schools and school districts. Thus, in general, if the funded programs are school district operated 4K programs (as s. PI 16.03 (2) indicates they are), it is not clear why any specific statutory requirement is listed, to the exclusion of others.

Is the listing intended to specify that such a program cannot receive a grant if the school board has been granted a waiver under s. 118.38, Stats., for one of the statutory requirements listed in s. PI 16.03 (2)? This should be clarified one way or the other.

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In summary, it is not necessary (and, in fact, is problematic) to list some, but not all, statutory requirements. This dilemma could possibly be solved by substituting qualifying language in s. PI 16.03 (2) (intro.) to make it clear that the list is not exhaustive (for example, by stating that "A school district operating a 4K program funded under sub. (1) shall comply with all applicable state statutes, including all of the following:"). However, this approach is problematic in a different way unless the items listed in s. PI 16.03 (2) (a) to (e) exactly reflect current statutory requirements, which does not appear to be the case as discussed in items (3) and (4), below.

(2) Listing requirements, such as the pertinent parts of the 20 standards, for all grantees funded for a school district 4K program effectively means that a school board that established or contracted for a charter school that operated a 4K program could not receive a grant unless it complied with all of the listed requirements. However, charter schools are, in general, exempted from complying with most state education laws under s. 118.40 (7) (b), Stats. (including most of the 20 standards).

While s. 115.445, Stats., authorized the Department of Public Instruction (DPI) to promulgate rules to define "community approaches to early education" for the purpose of giving preference to 4K programs that use community approaches, neither s. 115.445 nor any other statute provides clear statutory authority for DPI to promulgate rules excluding school district charter school 4K programs from being eligible for this grant unless the school district complies with all of the requirements listed in s. PI 16.03 (2).

(3) Section PI 16.03 (2) (c) provides that a school district operating a 4K program funded by this grant must "provide transportation to and from the 4K program at no charge as required by s. 121.54 (1) and (2), Stats." (In addition, Item III. 6. of the application form refers to a school district providing transportation to and from the 4K program "as per" s. 121.54 (1) and (2), Stats.)

Because transportation sometimes is not required to be provided under s. 121.54 (1) and (2), Stats. (for example, because of the city option; because of the distance from the pupil's home to the nearest public school that the pupil is entitled to attend; or because a charter school is involved), s. PI 16.03 (2) (c) would be less ambiguous if "as required" were changed to "if required." Also, as noted in item (1) above, listing a statutory requirement that would apply anyway is unnecessary and may lead to the conclusion that all statutory requirements that are not listed (for example, s. 121.54 (3), Stats., which requires that transportation be provided to children with a disability under certain circumstances), do not apply.

However, if the intent of s. PI 16.03 (2) (c) is to require that free transportation be provided even when it is not required by s. 121.54 (1) and (2), Stats., there does not appear to be statutory authority for imposing this requirement on grant recipients.

(4) Section PI 16.03 (2) (b) requires a school district operating a 4K program funded by this grant to provide a minimum of 437 hours of instruction by a teacher who holds a license issued by DPI to teach prekindergarten or kindergarten. This requirement could be interpreted as differing slightly from the statutes in two respects.

> First, s. 121.02 (1) (f) 2., Stats., requires scheduling at least 437 hours of direct pupil instruction in kindergarten, with that time including recess and time to transfer between classes. The acknowledgement of recess time is not included in s. PI 16.03 (2) (b). To the extent the requirement in s. PI 16.03 (2) (b) is the same as s. 121.02 (1) (f) 2., there is no need to repeat it in s. PI 16.03 (2) (b) (as well as repeating it in s. PI 16.03 (2) (e) which also requires meeting the standard under s. 121.02 (1) (f), Stats.). To the extent the requirement differs from s. 121.02 (1) (f) 2., there does not appear to be statutory authority for imposing a different requirement.
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> Second, ss. 118.19 and 121.02 (1) (a) 1. and 2., Stats., require that teachers in public schools hold a license or permit to teach from DPI. While most licenses are at particular developmental levels, some licenses or permits (including some that may be pertinent to 4K) are not--for example, a substitute teacher license and a charter school instructional staff license (and in limited circumstances, a substitute teacher permit, charter school instructional staff permit, emergency license, and emergency permit) could be used in a public school to provide some hours of instruction in 4K even if the person did not have a license or permit to explicitly teach prekindergarten or kindergarten. Again, s. PI 16.03 (2) (b) requires that the 437 hours of instruction must be provided by a teacher who holds a DPI license to teach prekindergarten or kindergarten. To the extent the requirement in s. PI 16.03 (2) (b) is the same as s. 121.02 (1) (a) 1. and 2., there is no need to repeat it in s. PI 16.03 (2) (b) (as well as repeating it in s. PI 16.03 (2) (e) which also requires meeting the standard under s. 121.02 (1) (a), Stats.). To the extent the requirement differs from s. 121.02 (1) (a) 1. and 2., there does not appear to be statutory authority for imposing a different requirement.

<u>2. Form, Style and Placement in Administrative Code</u>

a. In s. PI 16.04 (1) (b), the reference to "sub. (1) (a)" should be changed to "par. (a)." [See s. 1.07 (2), Manual.]

b. In s. PI 16.04 (2) (b), the reference to "this subdivision" should be changed to "this subsection." [See s. 1.07 (2), Manual.]

c. In s. PI 16.04 (2) (d), the reference to "subd. (1)" is incorrect as there is no subdivision (1) in that paragraph. It appears that the intent was to refer to "sub. (1)." [See s. 1.07 (2), Manual.]

<u>3. Conflict With or Duplication of Existing Rules</u>

The last sentence of the second paragraph of the plain language analysis states that if the funds are insufficient, DPI "may" prorate the payments. However, the statutes and the text of the rule specify that if the funds are insufficient, DPI "shall" prorate payments. Therefore, in the analysis, "may" should be changed to "must" or "shall."

<u>4. Adequacy of References to Related Statutes, Rules and Forms</u>

a. Section PI 16.02 (1) defines "age eligible" as a child who turns four years old on or before September 1 in the year that he or she proposes to enter school. Section PI 16.03 (1) (b) 2. f. then

provides that the recruitment and enrollment practices must assure the program is open to all "age eligible" children.

As noted in s. 118.14 (1) (intro.), Stats., school boards are required, under s. 120.12 (25), Stats., to prescribe procedures, conditions, and standards for early admission to kindergarten (and first grade). If a school board permits early admission to 4K under s. 121.12 (25), was the intent that the program also be open to all who meet the school board's standards for early admission?

b. Section PI 16.02 (2) defines a "community based provider" as "head start and licensed group based child care and preschool centers." Chapter HFS 46 requires a license for group child care centers, which includes head start programs, preschool, day care centers, and others. (It does not use the term group "based.") Is this the license being referred to? Or, is a licensee under ch. HFS 45 (family child care center for four to eight children) enough of a group? Is a day care program established by a school board under ch. HFS 55 part of licensed group based child care?

The rule would be clearer if it included a specific cross-reference to the administrative rule or rules under which the required license is issued were included.

c. In s. PI 16.03 (2) (e), the reference to "s. 121.02 (2)" should be changed to "s. 121.02 (1)."

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

a. In s. PI 16.02 (2), "centers" should not be plural as the term being defined is not plural.

b. In s. PI 16.02 (3), "with interest and relevance to" should be changed to "with an interest in and relevance to." Also, "business," should be changed to "businesses" to be consistent with the rest of the items in the definition and the term being defined.

c. In s. PI 16.02 (7) and (8), "meaning defined in" should be changed to "meaning given in."

d. In s. PI 16.03 (1) (a) (intro.), "4th" should be written as "fourth." A similar comment applies to the ordinal numbers in s. PI 16.04 (1) (a) and (b) and (2) (b).

e. In s. PI 16.03 (1) (a) (intro.), "subsequent years" should be changed to "subsequent school years."

f. Section PI 16.03 (1) (a) (intro.) provides that "eligible" school districts may "apply" for a grant. It also indicates that an "eligible" school district must meet certain requirements, one of which is to complete the application. However, the section never explicitly states what a school district must do to be eligible in the first instance in order to apply.

This confuses eligibility for the grant (which may be a misnomer if there are insufficient funds to distribute to programs not using a community approach) and eligibility to apply. Would it be more accurate to state in the second sentence that: "A school district is eligible to apply if it meets all of the following requirements:…"? (In that case, subdivisions 1. and 2. should be included (with slight modifications to match the introductory language) and what is now subdivision 3. could be redrafted as a statement that DPI may not consider an application that is not fully and accurately completed and submitted to DPI before the deadline.)

Any revision of this provision should be consistent with changes, if any, made to s. PI 16.04 (1) (a) which refers to eligible school districts and eligible applicants.

g. In s. PI 16.03 (1) (a) 2., "the community based provider" should be changed to "a community based provider."

h. Section PI 16.03 (1) (b) (intro.) refers to giving priority to school districts that use community approaches to early education. However, it does not specify what the priority relates to. It appears that it should specify that: "In awarding the grant, the department shall give priority to…."

i. In the second sentence of s. PI 16.03 (1) (b) (intro.), "the school district" should be changed to "a school district." Also, because this provision is defining a community approach, it should not be written as imposing requirements; thus, "shall do" should be changed to "does." (Appropriate changes should be made to the tenses used in s. PI 16.03 (1) (b) 1. and 2. to be grammatically consistent with the latter change.)

j. The first sentence of s. PI 16.03 (1) (b) 1. refers to a "committee, council, or advisory group." However, two subsequent provisions in s. PI 16.03 (1) (b) 1. refer only to "this group." To be consistent, these two provisions should also refer to "this committee, council, or group."

A similar comment applies to references to the group in Item IV. 3. of the application form.

k. The first sentence of s. PI 16.03 (1) (b) 2. (intro.) refers to "written contracts or agreements." The word "written" is redundant and should be deleted inasmuch as the definition of "contract or agreement" in s. PI 16.02 (4) provides that it is a written document.

l. The first sentence of s. PI 16.03 (1) (b) 2. (intro.) refers to "contracts or agreements that define the partnerships between the school district and community based provider." Unless the intent is that there be more than one partnership defined by more than one contract or agreement with each community based provider, these plural terms should be changed to singular terms.

m. In the third sentence of s. PI 16.03 (1) (b) 2. (intro.), the reference to "off-site" is not clear. The prior sentence refers to a "non-school district site." If "off-site" has the same meaning, that same phrase should again be used to avoid ambiguity. However, if "off-site" is intended to mean outside the school district's boundaries (which appears to be the case), then that phrase should be substituted for "off-site."

Also, the phrase "off-site" is used in s. PI 16.03 (2) (d). From the context, it appears that this should be changed to refer to "non-school district site."

n. In s. PI 16.03 (1) (b) 2. a., "school district" should be changed to "school district's."

o. In s. PI 16.03 (1) (b) 2. b., "community provider" should be changed to the defined term "community based provider." Also, that term should be in the possessive case as it modifies "process."

p. In s. PI 16.03 (1) (b) 2. a., the reference is to compliance with "state and federal" laws. In s. PI 16.03 (1) (b) 2. b., the reference is to "state or federal" laws. It appears that "or" should be changed to "and" in s. PI 16.03 (1) (b) 2. b. In addition, "their" program should be changed to "its" program as only one provider is being referred to.

q. In s. PI 16.03 (1) (b) 2. c., "design to include" should be changed to "design, including."

r. In s. PI 16.03 (1) (b) 2. e. and (2) (a), "district" should be changed to "school district."

s. In s. PI 16.03 (1) (b) 2. f, "community provider" should be changed to the defined term "community based provider."

t. Section PI 16.03 (1) (b) 2. f. refers to having the program open to all "age eligible children." In contrast, s. PI 16.03 (2) (a) refers to having the program open to all "age eligible residents of the [school] district." Unless a difference is intended, the same term should be used in order to avoid ambiguity.

u. In s. PI 16.03 (2) (d), it appears that "children" should be changed to "pupils."

v. The first sentence of s. PI 16.04 (1) (a) indicates that DPI must give preference in awarding grants to school districts that use a community approach. The next sentence specifies that the "eligible applicant" must receive up to $3,000 per pupil. Section PI 16.04 (1) (b) then indicates that after the first year grants under s. PI 16.04 (1) (a) are awarded, "all other applicants" must receive up to $3,000 per pupil. (Proration provisions are included in both.)

The reference to "eligible" applicants and "all other" applicants implies that some applicants who are not "eligible" may still receive a grant. It appears that what is intended is that the second sentence of s. PI 16.04 (1) (a) applies only to school districts using a community approach. If so, the phrase "The eligible applicant" should be changed to "An [eligible] applicant that uses a community approach to early education." (See the comment above regarding whether "eligible" should be included.)

w. Section PI 16.04 (1) (a) and (b) and (2) (b) refer to the "third Friday in September pupil count under s. 121.05 (1), Stats." All should specify which year's count is being referred to--for example, the "third Friday in September pupil count under s. 121.05 (1), Stats., in the previous school year" or "third Friday in September pupil count under s. 121.05 (1), Stats., in the current school year."

x. In s. PI 16.04 (1) (b), "pre pupil" should be changed to "per pupil."

y. The following comments apply to s. PI 16.04 (2) (d), which provides that DPI must give preference in "awarding and distributing funds" to second year grant applicants "as described under [sub.] (1)."

(1) The term "awarding and distributing funds" is confusing. Under s. PI 16.04 (1), grants are "awarded." The title of s. PI 16.04 (2) includes the term "grant awards." Unless something different from awarding grants is intended by the phrase "awarding and distributing funds," one phrase should be selected and used consistently to avoid ambiguity.

(2) Giving preference to applicants "as described under [sub.] (1)" is confusing.

This phrase could be interpreted as modifying "applicants," which would include both those under s. PI 16.04 (1) (a) who were given preference for the first year grant and those under s. PI 16.04 (1) (b) who were not given preference for the first year grant. This would result in giving preference to all second year grantees, which means that second year grant payments would be a first draw on the appropriation before remaining moneys are distributed to first year grantees. Is this the intended result?

This phrase could also be interpreted as modifying "preference," which would mean that the same process should be used for giving preference to those using a community

approach for purposes of the second year grant as for the first year grant. Is this the intended result?

In either case, this should be clarified by more clearly explaining how grants are distributed if the funds in the appropriation are insufficient and, in the same year, some school districts are eligible for first year grants and other school districts are eligible for second year grants. Are all first and second year grantees with a community approach awarded grants before any first or second year grantees without a community approach?

z. School districts that use a community approach are given preference in funding. Section PI 16.03 (1) (b) provides, in pertinent part, that a "community approach" means that the school district has at least one site of the 4K program at a non-school district site ***or*** at a school district site administered by a community based provider. However, Section IV. of the application form ("4K Eligibility—Preference under Community Approaches" and Section V. of the application form ("Additional Required Documentation, Complete Only if Community Approach") refer only to community sites or community settings and do not request any documentation or specific information if the community approach taken is at a school district site administered by a community based provider. (For example, a copy of the contract with a letter from a community-based site is required in Section V. 2., but no similar documentation is required if there is a community-based provider at a school district site; also Section IV. 1. and 2. require information only about a community site.) In general, in contrast to s. PI 16.03 (1) (b) 2., the application form does not make it clear that a school district site administered by a community-based provider is an acceptable community approach.