

Clearinghouse Rule 19-147

PROPOSED ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION REVISING PERMANENT RULES

The scope statement for this rule, SS 087-19, was published in Register No. 764A3, on August 19, 2019, and approved by State Superintendent Carolyn Stanford Taylor on August 30, 2019.

The State Superintendent of Public Instruction hereby proposes an order to create subch. II of PI 30; to repeal and recreate s. PI 30.02; and to amend s. PI 30.07 (1), relating to clarifying high cost special education aid.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

Statute interpreted: s. 115.881, Stats.

Statutory authority: s. 227.11 (2) (a) (intro.), Stats.

Explanation of agency authority: The Department is required to implement and administer the payment of state aid pursuant to s. 115.881, Stats. Under s. 227.11 (2) (a) (intro.), Stats., “[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.” See also, *Wisconsin Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶ 42 (“statutory mandates are also statutory authorizations, and authorization of an act also authorizes a necessary predicate act.”) (internal quotation marks omitted). As such, a rule is required to administer criteria the high cost special education aid program under s. 115.881, Stats.

Related statute or rule: N/A

Plain language analysis: The proposed rule seeks to provide clarity in determining costs for providing special education related services to a child for the purpose of receiving high cost special education aid. The areas clarified by this rule are as follows: 1) determining nonadministrative costs for providing special education and related services to a child, distinct from such costs for other children; 2) determining how equipment and other capital costs are considered in the context of “the previous school year” as given in s. 115.881 (1), Stats.; 3) clarifying what is meant by “federal medicaid,” as given in s. 115.881 (1), Stats., for the purpose of determining claims under the program; and 4) determining how the \$30,000 threshold for special education costs is evaluated against the other funding sources listed in statute.

Summary of, and comparison with, existing or proposed federal regulations: N/A

Summary of any public comments and feedback on the statement of scope for the proposed rule that the agency received at a preliminary public hearing and comment period held and a description of how and to what extent the agency took those comments into account and drafting the proposed rule: The Department held a preliminary public hearing and comment period on August 23, 2019, and did not receive any comments on the statement of scope for the proposed rule.

Comparison with rules in adjacent states:

There are no comparable rules governing aid for high-cost special education students in adjacent states. However, each states’ respective formula for funding special education is as follows:

- **Illinois:** Under 105 Ill. Comp. Stat. Ann. 5/18-8.15, the formula for funding special education in Illinois is a resource-allocation and census-based system.

- **Iowa:** Under Iowa Code Ann. § 256B.9, the formula for funding special education in Iowa is a multiple student weights system in which three different weights are based on the type of classroom where the student is educated.
- **Michigan:** Under Mich. Comp. Laws Ann. § 388.1652, the formula for funding special education in Michigan is a partial reimbursement system not to exceed 75% of the total approved costs of operating special education programs.
- **Minnesota:** Under Minn. Stat. Ann. § 125A.76, the formula for funding special education in Minnesota is a hybrid system incorporating partial reimbursement plus multiple student weights based on students slotted into three categories based on learning disorder.

Summary of factual data and analytical methodologies: The high cost special education aid program provides partial reimbursement of certain special education costs for school districts, CESAs, CCDEBs, and operators of independent charter schools. Applicants are eligible for additional aid if the applicant incurred, in the previous school year, more than \$30,000 of nonadministrative costs for providing special education and related services to a child, and those costs were not eligible for reimbursement under the state special education and school age parents aid program, the federal Individual with Disabilities Education Act, or “federal medicaid.”

The funding available and number of claims submitted by eligible agencies has increased since the program was originally enacted and questions have arisen about eligible costs under s. 115.881, Stats., or PI 30. As such, a rule is needed to clarify statutory provisions governing the high cost special education aid program for the purposes of eligible agencies applying for and receiving the aid. Without a rule change, the Department will be required to administer PI 30 as it currently exists in rule, and eligible agencies may be faced with further ambiguity around administration of the program.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: N/A

Anticipated costs incurred by private sector: N/A

Effect on small business: The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114 (1) (a), Stats.

Agency contact person: (including email and telephone)

Carl Bryan
 Administrative Rules Coordinator
 Wisconsin Department of Public Instruction
adminrules@dpi.wi.gov
 (608) 266-3275

Place where comments are to be submitted and deadline for submission: Comments should be submitted to Carl Bryan, Department of Public Instruction, 125 S. Webster Street, P.O. Box 7841, Madison, WI 53707-7841 or at adminrules@dpi.wi.gov. The Department will publish a hearing notice in the *Administrative Register* which will provide information on the deadline for the submission of comments.

SECTION 1. PI 30.02 is repealed and recreated to read:

PI 30.02 Definitions. In this chapter:

- (1) “Aid eligible” means either a cost that is eligible for reimbursement directly to the applicant under s. 115.88, 115.93, or 118.255, Stats., or a cost that is contracted from another agency, eligible for reimbursement to that agency under s. 115.88, 115.93, or 118.255, Stats., and for which a rebate under s. 121.76 (2) (c), Stats. is due to the applicant.
- (2) “Applicant” means a school district, cooperative educational service agency, county children with disabilities education board, or operator of a charter school established under s. 118.40 (2r) or (2x), Stats.
- (3) “Child” means one specific child with disabilities served by the applicant, having an individualized education program and receiving special education and related services.

- (4) “Department” means the department of public instruction.
- (5) “Depreciation” means 20 percent of the original acquisition and setup cost of an item of equipment used by a child or program during the school year in which it was purchased or in any of the four subsequent school years, whether the item was purchased with cash or the proceeds of a capital lease, and provided that the item has been used exclusively for the provision of special education and related services since its acquisition.
- (6) “Equipment” means vehicles or other items of movable property with a unit cost of \$5,000 or more and an expected service life of more than one year.
- (7) “Extended school year” means required special education and related services provided at no cost beyond the limits of the school term in accordance with the child’s individualized education program.
- (8) “Federal medicaid” means the total amount of claims for services provided to the child during the school year under subch. IV of ch. 49, Stats., and DHS 107.36 that have been or will be submitted by the applicant to the department of health services.
- (9) “FTE” means the average fraction of a school day during which a child is enrolled in a placement or served by a program, such that 1.0 is a full school day.
- (10) “Grant funded” means an expenditure that is reimbursed under 20 USC 1400 et seq. or by a private gift or grant specified for that expenditure.
- (11) “Nonadministrative costs” means the costs of providing special education and related services to an individual child with disabilities, excluding clerical or administrative costs. Excluded clerical or administrative costs include salaries and fringe benefits of principals, special education directors or pupil services directors, and costs related to the documentation and management of individualized education programs or caseloads.
- (12) “Placement” means the enrollment of a child by an entity other than the applicant, to whom the applicant pays tuition and other costs of special education and related services.
- (13) “Program” means one of the following:
- (a) A program of special education and related services for the child and other children identified with the same disability-related needs.
 - (b) A cross categorical program that includes instruction by an educator licensed under PI 34.049.
 - (c) A program for transition services as defined by s. 115.76 (17), Stats.
 - (d) An early childhood program for the child and other children with disabilities 3 years of age or older who, if enrolled by a school district, would be eligible to be counted under s. 121.004 (7) (d), Stats.
- (14) “Purchased services” means contracted instructional, professional, and technical services, and rental of equipment.
- (15) “Open enrollment revenue” means a transfer amount for the actual costs of providing special education and related services to a nonresident child enrolled under s. 118.51, Stats.
- (16) “Special education fund” means a fund or cost center used to account for the applicant’s excess costs of providing special education and related services.
- (17) “Specified services” means nursing, social work, psychology, guidance counseling, speech-language pathology, and audiology.
- (18) “State superintendent” means the superintendent of public instruction.
- (19) “Student information system” means the system established by the department under s. 115.383 (1), Stats.
- (20) “Supplies” means consumable items and other movable property not defined as equipment under par. (6).
- (21) “Threshold” means the dollar amount in excess of which an applicant is paid under s. 115.881 (2), Stats., for the costs of providing special education and related services to a child.
- (22) “Transportation” means special or additional transportation as defined under s. 115.88 (2m) (a), Stats.

SECTION 2. Subchapter II of PI 30 is created to read:

Subchapter II — Additional (High Cost) Special Education Aid

PI 30.03 Purpose and construction.

- (1) This subchapter specifies the method to determine the nonadministrative costs for providing special education and related services to a child under s. 115.881 (2), Stats.
- (2) To the extent feasible, this subchapter shall be construed such that the nonadministrative costs for providing special education and related services to a child are determined in a manner consistent with subch. V of ch. 121, Stats.

PI 30.04 Application for reimbursement.

- (1) An applicant shall apply for reimbursement under s. 115.881, Stats. on a form specified by the department, which shall include each child for whom the applicant believes it has incurred nonadministrative costs for providing special education and related services that are eligible for reimbursement.
- (2) The applicant shall identify the following nonadministrative costs incurred by the applicant in its special education fund during the school year:
 - (a) The costs of salary and fringe benefits, purchased services, placement, transportation, supplies, depreciation, and extended school year that are particular to each child, specifying the portions of those costs that are aid eligible and grant funded.
 - (b) The costs of salary and fringe benefits, purchased services, transportation, supplies, and depreciation that are particular to each program, specifying the portions of those costs that are aid eligible and grant funded.
 - (c) The costs of salary and fringe benefits, purchased services, and supplies for the provision of specified services, specifying the portions of those costs that are aid eligible and grant funded.
- (3) The applicant may not identify a cost under more than one of pars. (2) (a), (b), or (c).
- (4) If a cost includes both nonadministrative and clerical or administrative components which cannot be separated, then the nonadministrative component to be identified under sub. (2) is 90 percent of that cost.
- (5) The applicant shall identify for each child:
 - (a) The identifying number for the child in the student information system.
 - (b) The program or programs that served the child and the number of days and the FTE the child was served by each.
 - (c) The amounts of federal medicaid and open enrollment revenue for the child, if any.
- (6) The applicant shall identify for each program the total number of days and the FTE for all the children with disabilities served by that program.

PI 30.05 Determination of costs.

- (1) The department shall determine the following:
 - (a) The total number of days of enrollment for each child identified by the applicant, using data reported and certified in the student information system.
 - (b) The total number of days of enrollment for all children with disabilities enrolled by the applicant, using data reported and certified in the student information system.
 - (c) A rate for each program, calculated by dividing its costs by the product of the total number of days and the FTE of all the children with disabilities that it served, specifying the portions of the rate that are aid eligible and grant funded.
 - (d) A rate for specified services, calculated by dividing their costs by the number of days of enrollment for all children with disabilities, specifying the portions of the rate that are aid eligible and grant funded.
 - (e) The rate at which costs eligible under s. 115.88, Stats., are reimbursed from the funds appropriated under s. 20.255 (2) (b), Stats.
- (2) The total nonadministrative costs for providing special education and related services to a child are the sum of:
 - (a) The amount identified for costs particular to the child;
 - (b) For each program that served the child, the rate under PI 30.05 (1) (c) multiplied by the product of the number of days and the FTE that the child was served; and
 - (c) For specified services, the rate under PI 30.05 (1) (d) multiplied by the total number of days of enrollment for the child.
- (3) The nonadministrative costs for providing special education and related services to a child that are eligible for reimbursement under s. 115.88, 115.93, or 118.255, Stats., 20 USC 1400 et seq., or federal medicaid are the sum of:
 - (a) The amount reimbursed under s. 115.88, 115.93, or 118.255, which is calculated as follows:
 1. Take the sum of:
 - a. The amount of aid eligible costs particular to the child;
 - b. For each program that served the child, the aid eligible portion of the rate under PI 30.05 (1) (c) multiplied by the product of the number of days and the FTE that the child was served; and
 - c. For specified services, the aid eligible portion of the rate under PI 30.05 (1) (d) multiplied by the total number of days of enrollment for the child.
 2. Multiply the sum calculated under subpar. 1 by the rate determined under par. (1) (e).
 - (b) The amount reimbursed under 20 USC 1400 et seq., which is the sum of:
 1. The amount of grant funded costs particular to the child;
 2. For each program that served the child, the grant funded portion of the rate under PI 30.05 (1) (c) multiplied by the product of the number of days and the FTE that the child was served; and
 3. For specified services, the grant funded portion of the rate under PI 30.05 (1) (d) multiplied by the total number of days of enrollment for the child.

(c) The amount of federal medicaid for the child.

(d) The amount of open enrollment revenue for the child.

(4) The nonadministrative costs for providing special education and related services to a child under s. 115.881 (1), Stats., that are not eligible for reimbursement under s. 115.88, 115.93, or 118.255, Stats., 20 USC 1400 et seq., or federal medicaid are:

(a) The difference between the total calculated under sub. (2) and the threshold, if positive;

(b) Minus the difference between the amount eligible for reimbursement calculated under sub. (3) and the threshold, if positive.

SECTION 3. PI 30.07 (1) is amended to read:

PI 30.07 (1) Under s. 115.88 (1m) (a) and (b), Stats., the state superintendent shall certify to the department of administration in favor of each county, cooperative educational service agency, school district, and operator of a charter school established under s. 118.40 (2r) or (2x), Stats., maintaining a special education program, if he or she is satisfied that the special education program has been maintained during the preceding school year in accordance with applicable state and federal law, for costs eligible for reimbursement from the appropriation under s. 20.255 (2) (b), Stats. These costs include the percentage of the salaries of personnel established under sub. (2).

SECTION 4. EFFECTIVE DATE:

The proposed rules contained in this order shall take effect on the first day of the month commencing after the date of publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2) (intro.), Stats.

Dated this _____ day of _____, 2020

Carolyn Stanford Taylor
State Superintendent