

Clearinghouse Rule 21-046

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

The scope statement for this rule, SS 007-21, was published in Register No. 781A3, on January 19, 2021, and approved by State Superintendent Carolyn Stanford Taylor on February 3, 2021.

The State Superintendent of Public Instruction hereby proposes an order to amend ss. PI 49.07 (4) (a) and 49.13 (7) (a); and to create ss. PI 35.10 (3m), 48.10 (3m), and 49.09 (3m), relating to Parental Choice and Special Needs Scholarship Programs offsetting revenue, statements of actual cost, and affecting small business.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

Statute interpreted: ss. 115.7915, 118.60, and 119.23, Stats.

Statutory authority: ss. 115.7915 (10), 118.60 (11) (a), and 119.23 (11) (a), Stats.

Explanation of agency authority:

Under s. 115.7915 (10), Stats., the Department is given statutory authority to promulgate rules to implement and administer the Special Needs Scholarship Program, including rules relating to: (a) eligibility and participation of eligible schools; (b) calculation and distribution of scholarships; and (c) application and approval procedures for students and eligible schools.

Further, the Department is given statutory authority to promulgate rules under s. 118.60 (11) (a), Stats., with respect to the Racine and statewide parental choice programs:

118.60 Parental choice program for eligible school districts and other school districts.

(11) The department shall do all of the following:

(a) Promulgate rules to implement and administer this section. The department may not by rule establish standards under sub. (7) (am) that exceed the standards established by the American Institute of Certified Public Accountants.

Finally, the Department is given statutory authority to promulgate rules under s. 119.23 (11) (a), Stats., with respect to the Milwaukee parental choice program:

119.23 Milwaukee parental choice program.

(11) The department shall do all of the following:

(a) Promulgate rules to implement and administer this section. The department may not by rule establish standards under sub. (7) (am) that exceed the standards established by the American Institute of Certified Public Accountants.

Related statute or rule:

N/A

Plain language analysis:

This emergency rule will amend chs. PI 35, 48, and 49 of the Wisconsin Administrative Code to provide that loans under the Paycheck Protection Program (PPP), which are forgiven by the federal government, are not offsetting revenue in the financial audit supplemental schedule for any of the state's Parental Choice Programs or the Special Needs Scholarship Program.

Schools participating in the Special Needs Scholarship Program have the option to submit a statement of actual costs that specifies the special education expenses the school incurred for educating a Special Needs Scholarship Program pupil in the prior school year. If a school submits a statement of actual costs for a pupil, the payment amount for that pupil in the subsequent school year is based on the actual costs for the pupil in the statement. The emergency rule specifies that if an amount included in a Special Needs Scholarship Program statement of actual costs is part of a forgiven PPP loan, and the amount is forgiven on or before October 15th following the school year, the costs in the statement of actual costs must be reduced by the forgiven amount. The emergency rule also specifies that any adjustments due to forgiven PPP loans will be paid back through the Enrollment Audit certification process. Finally, it indicates that the payment amount for an actual cost pupil will not be below the Special Needs Scholarship Program payment rate for a pupil that did not submit a statement of actual costs.

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

The PPP is a loan administered by the Small Business Administration designed to provide a direct incentive for small businesses to keep their workers on payroll. Borrowers may be eligible for PPP loan forgiveness. More information on the PPP may be found here: <https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program>.

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 February 1, 2021, and received comments on the statement of scope for the proposed rule. A brief summary of comments and the Department's response to those comments are as follows:

One respondent indicated support for the proposed changes described in the statement of scope. The respondent noted that the change is necessary for private schools participating in any of the state's Parental Choice Programs or the Special Needs Scholarship Program that have received PPP loans. By exempting PPP loans from being categorized as offsetting revenue in any of the state's Parental Choice Programs and the Special Needs Scholarship Program, the respondent argues these schools will be able to get the funds promised by Congress to supplement their balance sheets rather than to replace state aid. Because the respondent notes that the private school accounting is so in flux as a result of the COVID-19 pandemic, the respondent argues state rules should not count the PPP as offsetting revenue, and the changes should apply to any and all PPP loans granted in 2020 and going forward for future years.

Agency Response: These comments were forwarded to program staff for consideration during the rulemaking process.

The respondent also noted a possible technical error in the scope statement, which references the Racine Parental Choice Program in some sections but omitted references to the Racine Parental Choice Program in other sections. The respondent requested clarification to ensure there are no technical problems with what is being proposed.

Agency Response: The proposed changes described in the scope statement are intended to include private schools participating in the Racine Parental Choice Program as well as the Wisconsin and Milwaukee Parental Choice Programs and the Special Needs Scholarship Program.

Another respondent indicated opposition to the proposed rule under the statement of scope, arguing that private schools participating in any of the state's Parental Choice Programs or the Special Needs Scholarship Program should be required to decrease the school's eligible education expenses amounts by money received from the PPP. They note the PPP provides these loans to small businesses, including private schools, which are forgiven by the federal government and amounts to money that private schools receive and do not need to pay back. They also note that public schools are not eligible for loans under the PPP. They argue that while these schools were allowed to exclude the PPP payments in the 2019-20 school year from offsetting revenue, through the waiver authority given to the department at the start of the COVID-19 pandemic, that is not an argument for allowing private schools to do so in subsequent years.

Agency Response: These comments were forwarded to program staff for consideration during the rulemaking process.

Comparison with rules in adjacent states:

Illinois: Under the Invest in Kids Program, students are eligible to receive a scholarship to attend qualified, nonpublic schools in Illinois if their family is below 300% of the federal poverty level. Student scholarships cannot exceed the state's average operational expense per pupil, with exceptions and a \$75 million credit cap for scholarship awards. However, there are no comparable rules or statutes governing special needs scholarship programs in Illinois.

Iowa: The School Tuition Organization Tax Credit provides that individuals, corporations, LLCs and other partnerships that donate to School Tuition Organizations (STOs) may receive a 65% tax credit, and STOs in turn give out funds as tuition grants to lower-income students to attend an accredited, nonpublic school. However, there are no comparable rules or statutes governing special needs scholarship programs in Iowa.

Michigan: There are no rules governing private school choice or special needs scholarship programs in Michigan.

Minnesota: There are no rules governing private school choice or special needs scholarship programs in Minnesota.

Summary of factual data and analytical methodologies:

Chapters PI 35, 48, and 49 of the Wisconsin Administrative Code govern the administrative rules relating to the Milwaukee Parental Choice Program, the Racine and Wisconsin Parental Choice Programs, and the Special Needs Scholarship Program, respectively. Pursuant to chs. PI 35, 48, and 49, private schools participating in any of the state's Parental Choice Programs and Special Needs Scholarship Program must annually submit a financial audit that determines the school's net eligible education expenses. The net eligible education expenses are calculated as the school's eligible education expenses less, in part, all government assistance revenues received for eligible education expenses. Eligible education expenses are all direct and indirect costs associated with a private school's educational programming for pupils enrolled in grades K-12.

Further, pursuant to ch. PI 49, private schools participating in the Special Needs Scholarship Program may submit a statement of actual costs for services provided to each pupil participating in the Special Needs Scholarship Program. The actual cost is calculated as special education costs for the pupil less any government assistance revenue received for educational programming for the pupil. If a school submits a statement of actual cost for a pupil participating in the Special Needs Scholarship Program, the actual costs in the statement are used to calculate the per pupil payment for that pupil in the following year.

Since the rules were promulgated, the PPP provided for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP. Pursuant to the authority under s. 118.38 (4) (a) 1., Stats., on May 1, 2020, the department waived the requirement that any PPP loans that are forgiven on or before June 30, 2020, be included as offsetting revenue in the 2019-20 financial audit. The forgiveness for many of the participating schools' loans will, however, occur after the 2019-20 school year. Pursuant to ss. 115.7915 (6) (e), 118.60 (7) (am) 2m. a., and 119.23 (7) (am) 2m. a., Stats., and ss. PI 35.09 (1), 48.09 (1) and 49.08 (1), the due date for the 2020-21 school year financial audit is October 15, 2021. Further, pursuant to s. PI 49.13 (7), the due date of the 2020-21 statement of actual cost is July 16, 2021.

A rule change is needed to address the PPP loans and the forgiveness of the PPP loans for private schools participating in the Parental Choice and Special Needs Scholarship programs. The emergency rule provides that the forgiven portion of loans under the PPP are not included as offsetting revenues in the financial audit supplemental schedule for schools participating in any of the state's Parental Choice Programs and the Special Needs Scholarship Program. Without a rule, the forgiven portion of the PPP loan will be treated inconsistently between the 2019-20 school year and future school years. If a rule is not in place, the loans that are forgiven after the 2019-20 school year will reduce each participating school's eligible education expenses in the financial audit supplemental schedule.

A rule change is further required for the statement of actual costs to clarify when expenses in the statement of actual costs need to be reduced because a portion of a PPP loan is forgiven. Additionally, a rule change is required to clarify that if an amount is forgiven between the due date of the statement of actual costs and October 15th, the change in the per pupil payment will be made through the Enrollment Audit certification process. Finally, this rule change ensures that schools

will not receive less than then the standard payment rate for a pupil included in a statement of actual costs due to costs that are subsequently forgiven. If these rule changes are not made, the forgiven portion of a PPP loan that was used for eligible education expenses would be included in offsetting revenue and decrease a school's eligible education expenses, resulting in an increase in the school's Parental Choice Programs and/or Special Needs Scholarship reserve balance.

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

An analysis conducted by the department indicates that the emergency rule may impact small businesses in the state, specifically private schools participating in any of the state's Parental Choice Programs or the Special Needs Scholarship Program that have received loans under the PPP. Chapters PI 35, 48, and 49 of the Wisconsin Administrative Code govern the administration of private schools participating in the Milwaukee Parental Choice Program, the Racine and Wisconsin Parental Choice Programs, and the Special Needs Scholarship Program, respectively, including fiscal requirements for schools participating in any of these programs. Under current rule, private schools participating in the Parental Choice Programs and Special Needs Scholarship Program must annually submit a financial audit that determines the school's net eligible education expenses. Further, under current rule, private schools participating in the Special Needs Scholarship Program may submit a statement of actual costs for services provided to a pupil participating in the Special Needs Scholarship Program.

Pursuant to s. 118.38 (4) (a) 1., Stats., the department was given the authority to waive the requirement that any PPP loans received under the CARES Act that are forgiven on or before June 30, 2020, be included as offsetting revenue in the 2019-20 financial audit. However, the forgiveness for some of the participating schools' loans will not be included in the school's financial audit until after the 2019-20 school year. Further, the federal government has made additional PPP loans available. These loans would also be forgiven at a later date. In analyzing the economic impact of this rule, PPP loans that are forgiven will not result in a reduction in each participating private school's net eligible education expenses in the financial audit supplemental schedule. Additionally, private schools participating in the Special Needs Scholarship Program will not receive less than then the standard payment rate for a pupil included in a statement of actual costs due to costs that are subsequently forgiven. More specific information on the impact of the emergency rule on small businesses are provided below.

Effect on small business (initial regulatory flexibility analysis):

An analysis conducted by the department indicates that the emergency rule may impact small businesses in the state. Pursuant to s. 227.114, Stats., a small business means a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000. The department finds that some participating private schools in the state's Parental Choice Programs or the Special Needs Scholarship are independently owned and operated, not dominant in its field, and employ fewer than 25 full-time employees, which meet the criteria listed under s. 227.114, Stats. Many participating private schools received loans under the PPP, which may be forgiven after the 2019-20 school year.

Sections 1, 2, and 4 of the emergency rule provide that the forgiven portion of loans under the PPP are not included as offsetting revenues in the financial audit supplemental schedule for schools participating in any of the state's Parental Choice Programs and the Special Needs Scholarship Program. It is the department's understanding that most schools participating in the Parental Choice Programs or the Special Needs Scholarship had a PPP loan. The effect on small businesses as a result of this rule is indeterminate because the department does not have: 1) the PPP loan amounts; 2) the amounts forgiven; and 3) when the amounts will be forgiven for each private school participating in the Parental Choice Programs or Special Needs Scholarship Program. According to the Small Business Administration, First Draw PPP loans made to eligible borrowers qualify for full loan forgiveness if during the 8- to 24-week covered period following loan disbursement:

- Employee and compensation levels are maintained;
- The loan proceeds are spent on payroll costs and other eligible expenses; and
- At least 60% of the proceeds are spent on payroll costs.

The department anticipates that schools participating in the Parental Choice Programs or Special Needs Scholarship Program will meet the above criteria and have their PPP loan forgiven in whole or part. Without this rule, the forgiven portion of a PPP loan that was used for eligible education expenses would be included in offsetting revenue and decrease a school's eligible education expenses, resulting in an increase in the school's Parental Choice Programs and/or Special Needs Scholarship reserve balance. The reserve balance is the remaining balance of Parental Choice Programs or Special Needs Scholarship revenue that hasn't been spent on eligible education expenses. Private schools participating in the Parental Choice Programs or Special Needs Scholarship Program are required to have a cash and investment balance that is at least as much as the reserve balances with certain adjustments. As a result, the increase in the reserve balances would result in schools being required to have a higher cash and investment balance.

Additionally, sections 3 and 5 of the emergency rule specify that any amount forgiven for a PPP loan until October 15th in the following school year reduces the costs in the Special Needs Scholarship Program statement of actual cost. The emergency rule provides if an amount is forgiven between the due date of the statement of actual costs and October 15th, the change in the per pupil payment will be made through the Enrollment Audit certification process. Finally, this rule change ensures that schools will not receive less than the standard payment rate for a pupil included in a statement of actual costs due to changes in the actual cost, such as costs that are subsequently forgiven.

Forgiven PPP loans will not be counted as government assistance revenue and will therefore not increase the cash and investment balance required for participating in a Parental Choice Program or the Special Needs Scholarship Program as a result of this rule. There are no anticipated compliance costs associated with the emergency rule or anticipated additional costs to small businesses. The emergency rule helps small businesses by ensuring a private school does not receive a payment for a pupil below the standard payment rate due to costs in the statement of actual cost that are subsequently forgiven. The effect on small businesses as a result of the rule is indeterminate.

Agency contact person:

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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.

RULE TEXT

SECTION 1. PI 35.10 (3m) is created to read:

PI 35.10 (3m) PAYCHECK PROTECTION PROGRAM LOANS. Notwithstanding sub. (3) (a) 2., the forgiven portion of Paycheck Protection Program loans administered by the U.S. small business administration under 15 USC 636 may not be included as offsetting government assistance revenue in the supplemental schedule.

SECTION 2. PI 48.10 (3m) is created to read:

PI 48.10 (3m) PAYCHECK PROTECTION PROGRAM LOANS. Notwithstanding sub. (3) (a) 2., the forgiven portion of Paycheck Protection Program loans administered by the U.S. small business administration under 15 USC 636 may not be included as offsetting government assistance revenue in the supplemental schedule.

SECTION 3. PI 49.07 (4) (a) is amended to read:

PI 49.07 (4) (a) Upon review of the enrollment audits, the department shall certify an amount due from a school or an amount due to the school. The certifications shall include any adjustments identified in the financial ~~audit~~ audits submitted under ss. PI 49.08 and 49.09 to the ~~actual~~ actual costs incurred for a pupil or government assistance revenue received for educational programming for a pupil in the reports submitted under s. PI 49.13 (7). If, based on the financial audit, the payment amount calculated under s. 115.7915 (4m) (cm), Stats., for a pupil in a report submitted under s. PI 49.13 (7) is less than the payment amount calculated under s. 115.7915 (4m) (a) 2. b., Stats., the payment for the pupil shall be calculated as specified under s. 115.7915 (4m) (a) 2. b., Stats. If a school fails to file an enrollment audit with the department, the department may determine that all special needs scholarship program pupils are ineligible.

SECTION 4. PI 49.09 (3m) is created to read:

PI 49.09 (3m) PAYCHECK PROTECTION PROGRAM LOANS. Notwithstanding sub. (3) (a) 2., (b) 2., and (c) 4., the forgiven portion of Paycheck Protection Program loans administered by the U.S. small business administration under 15 USC 636 may not be included as offsetting government assistance revenue in the supplemental schedule.

SECTION 5. PI 49.13 (7) (a) is amended to read:

PI 49.13 (7) (a) By the third Friday in July, a school may submit a statement of actual costs on a form provided by the department for a special needs scholarship program pupil. The statement of actual costs shall calculate the actual costs for the pupil as the costs for the pupil under par. (b) less any government assistance revenue received for educational programming for the pupil. Government assistance revenue under this paragraph shall include the forgiven portion of Paycheck Protection Program loans administered by the U.S. small business administration under 15 USC 636 if the amount is forgiven by October 15 following the school year the expenses were incurred. If the payment amount for the pupil based on the statement of actual costs is less than the payment amount calculated under s. 115.7915 (4m) (a) 2. b., Stats., the payment for the pupil shall be calculated as specified under s. 115.7915 (4m) (a) 2. b., Stats.

SECTION 6. 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 _____, 2021

Carolyn Stanford Taylor
State Superintendent