

MISSOURI STATE BOARD OF EDUCATION AGENDA ITEM:**September 2015**

CONSIDERATION OF AN ORDER OF RULEMAKING TO ADOPT
 RULE 5 CSR 30-640.200 EARLY LEARNING FACILITIES FUNDING FORMULA
 FOR LEASE AGREEMENTS

STATUTORY AUTHORITY:

Section 161.092 and 161.215, RSMo.

Consent
ItemAction
ItemReport
Item**DEPARTMENT GOAL NO. 2:**

All Missouri children will enter kindergarten prepared to be successful in school.

SUMMARY:

On May 19, 2015, the State Board of Education approved a notice of proposed rulemaking to adopt 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements. The notice of proposed rulemaking was published in the July 1, 2015 edition of the *Missouri Register* for comment. Eleven (11) comments were received during the 30-day comment period.

The Division of Financial and Administrative Services proposes to establish a funding formula for early learning programs with facility lease agreements when funding is requested from the Department of Elementary and Secondary Education. The formula will be used for facility lease costs incurred starting July 1, 2016. Please note, the fiscal impact may slightly decrease prior to publishing as the remaining districts submit information pertaining to applicable FTE used in the formula.

PRESENTER(S):

Ron Lankford, Deputy Commissioner, and Shelley Woods, Coordinator, Special Education Finance, Division of Financial and Administrative Services, will assist in the presentation and discussion of this agenda item.

RECOMMENDATION:

The Department recommends that the State Board of Education authorize publication of an order of rulemaking in the *Missouri Register* to adopt Rule 5 CSR 30-640.200, relating to establishing a funding formula for early learning programs facility lease agreements and that the State Board finds the adoption necessary to carry out the purposes of Sections 161.092 and 161.215.

Title 5 – DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
Division 30 – Division of Financial and Administrative Services
Chapter 640 – School Buildings

ORDER OF RULEMAKING

By the authority vested in the State Board of Education under sections 161.092 and 161.215, RSMo Supp. 2014, the board adopts a rule as follows:

5 CSR 30-640.200 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on July 1, 2015 (40 MoReg 834-837). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The Department of Elementary and Secondary Education (department) received eleven (11) comments on the proposed rule.

COMMENT #1: Renee Sagaser and Pat O’Neal, Fair Play R-II School District, indicated the rule would have a negative fiscal impact on their Exceptional Pupil Cooperative of the Ozarks program which serves children from fifteen (15) districts, because the formula was less than their lease cost, and to use a facility within the lease formula would add extra cost to the program in transportation of students and the need for additional staff to fill positions currently shared with programs in buildings adjoining the Early Childhood Special Education (ECSE) program.

RESPONSE AND EXPLANATION OF CHANGE: A new section (7) has been added to the rule which allows cooperative programs to request a waiver if they can demonstrate that complying with the lease formula will increase the total cost of the ECSE program.

COMMENT #2: Andrew Underwood, Belton School District, supports the rule and noted that without limits on lease costs, all districts should start leasing facilities with a high lease payment since the department would pay the cost. Steve Hoots supports capping the lease rates to ensure fiscal accountability. Reverend Virgil K. Hill supports the rule and believes that districts which cannot find a facility within the lease rate are not serving the public good. Thomas Gargus supports the rule to avoid paying for facilities in excess of the fair market rental value of the facility.

RESPONSE: The department agrees with the comments in support of the need for a lease formula.

COMMENT #3: Dave Wilson, Columbia Public Schools, and Dana Carroll, Springfield’s Child Advocate, supported the need for fiscal responsibility but indicated that the lease formula was inadequate to cover the cost of leasing property in Columbia and Springfield. Mr. Wilson suggested adjusting the reimbursement rate per square foot or adding an adjustment for cities over a certain population size.

RESPONSE: The department declines to make a change in response to the comment. The data shows that the current lease rate for Boone County was based almost exclusively on leases within the city of Columbia. The rate for Greene County was based only on leases within the city of Springfield.

COMMENT #4: Dave Wilson, Columbia Public Schools, requested that administrative staff be included in the itinerant staff calculation per square footage.

RESPONSE AND EXPLANATION OF CHANGE: The formula and subsections (1)(C) and (4)(C) have been amended to add in a line for administrative staff to allow one hundred twenty (120) square feet for administrative full-time equivalent employee approved in the Final Expenditure Report who is actually housed in the leased facility.

COMMENT #5: Phyllis Wolfram, Springfield R-XII School District, requested that assessment staff and assessment teams be included when determining allowable square footage.

RESPONSE: Assessment staff and assessment teams are included in the formula under subsection (1)(B) as a part of the itinerant full-time equivalent as defined in subsection (4)(F).

COMMENT #6: Nixa Public Schools, represented by Lowell Pearson, opposes the rule asserting it violates the contract clauses in the *United States and Missouri Constitutions*, the *Hancock Amendment*, and the decision in *Rolla 31 School District v. State of Missouri*. In addition, they state that the fiscal note is not accurate and the rule is inconsistent with public policy. The comments provide detail about how the Nixa Public Schools arrived at a lease rate and maintain that Nixa Public Schools determined the rate based on a lack of objection from the department when they inquired about leasing.

RESPONSE: The Department disagrees. The *Rolla 31 School District* decision requires the state to pay for the cost of ECSE programs. The state pays for the program using general revenue i.e. taxpayer dollars. Public policy compels the department to be a good steward of those funds. In the past the lease expenses, while increasing, were not excessive. When the department received a request from Nixa Public Schools to pay a lease of \$875,000 per year for a program that served only one-hundred sixteen (116) children (a cost of \$7543.10 per child and \$35 per square foot) it became apparent that change was needed to control the excessive costs of the program. Previously, it has been the department's procedure to pay the actual cost of leases negotiated by the district. When presented with an unusually high lease, the department determined that it was necessary to place reasonable and cost-efficient restrictions on a bill the state was required to pay. There is no justification for the state to pay for a lease substantially outside the fair market value, nor to fund a lease with extra space beyond that needed for the number of students served. Protecting taxpayer dollars is a significant and legitimate public purpose which supports the regulation and does not violate the contract clauses.

The *Rolla 31 School District* case requires the state to pay for the full cost of the program. This regulation identifies one (1) part of the full cost of the program. Excessive lease costs are not necessary to conduct an early childhood program. Local districts should not be permitted to disregard prudent purchasing practices when the funding is required to come from the state. The regulation is good public policy.

The regulation does not impair the existing Nixa Public Schools lease, as a limit on lease cost is contemplated in the lease. The lease states “landlord agrees that in the event that these applicable federal, state or local laws or regulations change ...which restrict, reduce or eliminate the state or federal ECSE program funding which pays for the rental payment for the Leased Premises, the tenant shall have the right to terminate the Lease at any time...”

The regulation does not require shifting of payment for ECSE to the local district as prohibited by the *Hancock Amendment*, nor does it prohibit the local district from supplementing the ECSE program.

5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements

- (1) The department uses the following formula to determine the maximum allowable cost per fiscal year for early learning programs facility lease agreements:
 - (A) Standard amount of square footage per child multiplied by the total number of eligible pupils educated at the facility multiplied by the cost per square foot by county; and
 - (B) Standard amount of square footage per itinerant full-time equivalent (FTE) position multiplied by the total itinerant FTE multiplied by the cost per square foot by county; and
 - (C) Standard amount of square footage per administrative FTE position multiplied by the total administrative FTE actually housed in the leased facility multiplied by the cost per square foot by county.

- (4) For purposes of this rule, the following terms mean:
 - (A) Standard amount of square footage per child is sixty (60) square feet. This may encompass educational and ancillary space;
 - (B) Standard amount of square footage per itinerant FTE position is one hundred twenty (120) square feet; and
 - (C) Standard amount of square footage per administrative staff is one hundred twenty (120) square feet.
 - (D) Eligible pupils—
 1. For Early Childhood Special Education (ECSE) programs—the number of students with disabilities who are educated at the leased facility and have instructional services in their Individualized Education Program (IEP) plus the number of non-disabled integrated peers who are educated at the leased facility. The number shall be determined based on the pupil enrollment on April 30 in the year for which facility lease payment is requested;

2. For the Missouri Preschool Program (MPP)—the number of slots approved by the department in the grant award for the program; and
3. For Elementary and Secondary Education Act (ESEA) preschools—the number of slots determined by the district and approved within the budget application for children who are educationally disadvantaged and are three (3), four (4), or five (5) years of age;

(E) Cost per square foot by county—

1. The highest rate per square foot for the county where the facility is located as computed based on the state lease facility space information per county obtained from the Office of Administration (OA) and posted on the department website annually; or
2. If there is no rate for an individual county, the lowest rate from the contiguous counties is used in the formula;

(F) Itinerant positions are instructional, diagnostic, and related services staff that travel from one (1) building/facility to a separate building/facility in order to provide instructional and related services as set forth in an IEP, or who provide services to eligible pupils outside the ECSE classroom, and are identified in the approved ECSE Final Expenditure Report (FER);

(G) Administrative positions are director and coordinator staff that are identified in the approved ECSE FER;

(H) FTE is the number of total hours worked divided by the maximum number of compensable hours in a full-time schedule as defined by law; and

- (7) Early Childhood Special Education multi-district cooperative programs can request a waiver of the use of the formula from the Department if the cooperative can validate that using a facility that exceeds the formula amount reduces the total cost of the cooperative Early Childhood Special Education Program for that year.
- (8) Requests for payment shall be submitted to the department's finance section handling the costs for the specific early learning program in accordance with the deadlines for that program.
- (9) Districts can have multiple early learning programs in the same building but the facility lease costs must be prorated among the programs based on a method approved by the department.