

**Clearinghouse Rule 10-002**

**PROPOSED ORDER OF THE  
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION  
AMENDING RULES**

The state superintendent of public instruction hereby proposes to repeal and recreate PI 11.36 (6) relating to the identification of children with specific learning disabilities.

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**ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION**

**Statute interpreted:** Sections 115.76 (5) (a) 10. and (b) and 115.78 (1m), Stats.

**Statutory authority:** Sections 115.76 (5) (b) and 227.11 (2) (a), Stats.

**Explanation of agency authority:**

Section 115.762 (3) (a), Stats., requires the department to ensure that all children with disabilities are identified, located and evaluated.

Section 227.11 (2) (a), Stats., gives an agency rule-making authority to interpret the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

**Related statute or rule:**

Subchapter V of Chapter 115, Stats. Chapter PI 11, Wis. Admin. Code.

**Plain language analysis:**

In 2004, the Individuals with Disabilities Education Act (IDEA) modified the evaluation procedures for the identification of children with specific learning disabilities (SLD) under 20 U.S.C. 1414 (b) (6). As specified in IDEA, the evaluation procedures relating to the identification of specific learning disabilities provide that: States may not require the use of significant discrepancy as part of a determination of SLD, and must permit the use of a process based on a child's responses to scientifically-based intervention as part of its determination of SLD. IDEA also added reading fluency skills as an area of identification for SLD. Because the department's current rule under s. PI 11.36 (6), relating to specific learning disabilities is not consistent with the federal requirements, the rule will be recreated to align with the U.S. Code. The proposed rules will allow a five-year period during which a school district "is permitted but not required" to continue to use the significant discrepancy formula in identifying children with SLD. After that five-year period, the significant discrepancy formula may not be used.

The department submitted a rule modifying the SLD criteria and significant developmental delay (SDD) criteria to the Legislative Clearinghouse for review on June 4, 2007 (See CHR 07-058). The SLD criteria has changed significantly from the version in CHR 07-058, and therefore, is being re-submitted for Clearinghouse review and public hearings. The information relating to the SLD criteria will be removed from CHR 07-058 before the rule is submitted to the chief clerk of each house of the legislature in final draft form under s. 227.19 (2), Stats.

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

The proposed rules directly reflect the SLD language under 34 ss. CFR 300.307 to 300.311 as authorized under 20 U.S.C. s. 1221e-3, 1401 (30), and 1414 (b) (6).

**Comparison with rules in adjacent states:**

Illinois- Beginning in 2010-2011 Illinois will require school districts to use a process based on a child's response to scientific, research-based interventions as part of SLD evaluation.

Iowa-Beginning August, 2010, Iowa will require the use of a process based on the child's response to scientific, research-based intervention or the use of other alternative research-based approaches and prohibits the use of a severe discrepancy between intellectual ability and achievement.

Michigan-Language going to public hearings in November, 2009 proposes the use of methods for determining SLD eligibility based on the use of scientific, research-based interventions and patterns of strengths and weaknesses. At this point the discrepancy model or a sunset clause is not mentioned.

Minnesota-The SLD criteria states that the child does not achieve adequately, has a disorder in one or more of the basic psychological processes, and the demonstration of a severe discrepancy or the demonstration of inadequate rate of progress.

**Summary of factual data and analytical methodologies:**

In 2004, the Individuals with Disabilities Education Act (IDEA) modified the evaluation procedures for the identification of children with specific learning disabilities (SLD) under 20 U.S.C. 1414 (b) (6). As specified in IDEA, the evaluation procedures relating to the identification of specific learning disabilities provide that: 1) States may not require the use of significant discrepancy as part of a determination of SLD, 2) States must permit the use of a process based on a child's responses to scientifically-based intervention as part of its determination of a SLD, and 3) States may permit the use of other alternative research-based procedures to determine whether a child has a SLD. IDEA also added reading fluency skills as an area of identification for SLD. Because the department's current rule under s. PI 11.36 (6), relating to specific learning disabilities is not consistent with the federal requirements, the rule will be modified to align with the U.S. Code. The proposed rules will allow a five-year period during which a school district "is permitted but not required to" continue to use the significant discrepancy formula in identifying children with SLD.

**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)**

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**Place where comments are to be submitted and deadline for submission:**

The department will publish a hearing notice in the *Administrative Register* which will include this information.

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**SECTION 1.** PI 11.36 (6) is repealed and recreated to read:

PI 11.36 (6) (title) SPECIFIC LEARNING DISABILITY. (a) Specific learning disability, pursuant to s. 115.76 (5) (a) 10., Stats., means a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or perform mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing, motor disabilities, cognitive disabilities, emotional disturbance, cultural factors, environmental, or economic disadvantage.

(b) The LEA shall promptly request parental consent to evaluate a child to determine if the child needs special education and related services if, prior to referral, the child has not made adequate progress after an appropriate period of time when provided appropriate instruction in general education settings, delivered by qualified personnel, or whenever the child is referred for an evaluation. The LEA shall meet the timeframes under s. 115.78 (3) (a), Stats., unless extended by mutual written agreement of the child's parents and IEP team.

(c) The IEP team may identify a child as having a specific learning disability if all of the following are true:

1. "Inadequate classroom achievement." Upon initial identification the child does not achieve adequately for his or her age, or to meet state-approved grade-level standards in one or more of the areas under subd. 1. a. to h., when provided with learning experiences and instruction appropriate for the child's age. A child's achievement is inadequate when level of performance, after intervention, on one or more individually administered, standardized, valid and reliable diagnostic assessments of achievement is equal to or more than 1.25 standard deviations below the mean in one or more of the areas under subd. 1. a. to h. The 1.25 standard deviation requirement under this subdivision may not be used if the IEP team determines that the child cannot attain valid and reliable standard scores for academic achievement because of the child's test behavior, the child's language, or another impairment of the child that interferes with the attainment of valid and reliable scores, or the absence of individually administered, standardized, valid and reliable diagnostic assessments of achievement appropriate for the child's age. If the IEP team makes such a determination, it shall document the reasons why it was not appropriate to consider standardized achievement testing, and shall document that inadequate classroom achievement exists in at least one of the areas under subd. 1. a. to h. using other empirical evidence. If the child's achievement is more than 1.0 standard deviation below the mean but does not reach the 1.25 standard

deviation level, and the IEP team determines that the child meets all other criteria, the IEP team may consider scores within 1 standard error of the measurement to meet criteria for inadequate classroom achievement under this subdivision.

- a. Oral expression.
- b. Listening comprehension.
- c. Written expression.
- d. Basic reading skill.
- e. Reading fluency skills.
- f. Reading comprehension.
- g. Mathematics calculation.
- h. Mathematics problem solving.

2. "Additional indicators of underachievement." Upon evaluation, the child has additional indicators of underachievement in one of the following areas:

a. Insufficient progress. The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the eight areas identified under subd. 1. a. to h. when using a process based on the child's response to scientific, research-based or evidence-based intervention. Interventions are implemented prior to referral, or as part of a referral, for specific learning disability. Data from at least two intensive, scientific, research-based or evidence-based interventions, implemented with adequate fidelity and closely aligned to individual student learning needs, are required. Adequate fidelity means the intervention has been applied in a manner highly consistent with its design, and was provided to the pupil at least 80 percent of the recommended number of weeks, sessions, and minutes per session. The median score of three equivalent probes is required to establish a stable baseline data point. Additional data points collected at least weekly are required to establish rate of progress in each intervention. Rate of progress during intervention is measured through progress monitoring, using reliable and valid progress monitoring instruments to measure skills in the areas in subd. 1. a. to h. Rate of progress during intervention means the slope of the trend line using reliable and valid progress monitoring tools for each area of potential specific learning disability in subd. 1. a. to h. Rate of progress during intervention is insufficient when the resources necessary to maintain an adequate rate of progress cannot be provided in general education as structured.

b. Significant discrepancy. Beginning five years after the effective date of this subsection (REVISOR INSERT DATE), this subd. 2. b. may no longer be used. Upon initial evaluation the child exhibits a significant discrepancy between the child's academic achievement in any of the areas under subd. 1. a. to h. and intellectual ability as documented by the child's composite score on a multiple score instrument or the child's score on a single score instrument. The IEP team may base a determination of

significant discrepancy only upon the results of individually administered, standardized achievement and ability tests that are reliable and valid. A significant discrepancy means a difference between standard scores for ability and achievement equal to or greater than 1.75 standard errors of the estimate below expected achievement, using a standard regression procedure that accounts for the correlation between ability and achievement measures. This regression procedure may not be used if the IEP team determines that the child cannot attain valid and reliable standard scores for intellectual ability or achievement because of the child's test behavior, the child's language, another impairment of the child that interferes with the attainment of valid and reliable scores or the absence of valid and reliable standardized, diagnostic tests appropriate for the child's age. If the IEP team makes a determination that a significant discrepancy exists without using the regression procedure, it shall document the reasons why it was not appropriate to use the regression procedure and shall document that a significant discrepancy exists, including documentation of a variable pattern of achievement or ability, in at least one of the areas under subd. 1. a. to h. using other empirical evidence. If the discrepancy between the child's ability and achievement approaches but does not reach the 1.75 standard error of the estimate cut-off for this subd. 2. b., the child's performance in any of the areas in subd. 1. a. to h. is variable, and the IEP team determines that the child meets all other criteria under subd. 1., the IEP team may consider that a significant discrepancy exists.

(d) 1. The IEP team may not identify a child as having a specific learning disability if it determines that any of the following apply:

a. The IEP team's findings under par. (c) are primarily due to environmental or economic disadvantage; cultural factors; or any of the reasons specified under s. 115.782 (3) (a), Stats., or any of the impairments under s. 115.76 (5), Stats., except s. 115.76 (5) (a) 10., Stats.

b. The IEP team's findings under par. (c) were due to a lack of appropriate instruction in the area of potential specific learning disability in par. (c) 1. a. to h.

2. The IEP team shall consider data demonstrating that prior to, or as a part of, the referral process, the child was provided appropriate instruction in general education settings, delivered by qualified personnel. Appropriate instruction in reading shall include the essential components of reading instruction as defined in 20 USC 1414 (b) (5) (A). The IEP team shall consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of pupil progress during instruction, which was provided to the child's parents. Repeated assessments of achievement must provide information on rate of progress over time and must be valid and reliable for this purpose.

3. The IEP team shall include at least one person qualified to assess data on individual rate of progress using a psychometrically valid and reliable methodology, and at least one person who has implemented scientific, research-based or evidence-based, intensive interventions with the referred pupil.

(e) 1. The LEA shall ensure that the child is systematically observed in the child's learning environment, including the general classroom setting when possible, to document the child's academic performance and behavior in any of the eight areas of par. (c) 1. a. to h.

2. The IEP team, in determining whether a child has a specific learning disability, shall use either the information under subdivision paragraph a., and c., if appropriate, and d., if appropriate; or b. and, c., if appropriate, and d., if appropriate:

a. A systematic observation in routine classroom instruction and monitoring of the child's performance in at least one of the eight areas of par. (c) 1. a. to h. that was conducted before the child was referred for an evaluation.

b. A systematic observation, conducted by a least one member of the IEP team, of the child's academic performance in the potentially disabling area from par. (c) 1. a. to h., in the general education classroom after the child has been referred for an evaluation and parental consent is obtained.

c. In the case of a child of less than school age or out of school, have at least one member of the IEP team conduct a systematic observation of the child in an environment appropriate for a child of that age.

d. If the child has participated in a process that assesses the child's response to scientific, research-based or evidence-based intervention, use information from a structured observation of pupil behavior and performance in the area or areas of potential specific learning disability during intensive intervention for that area, conducted by an individual who is not responsible for implementing the interventions with that pupil.

3. Each IEP team member shall certify in writing whether the evaluation report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member shall submit a separate statement presenting the member's conclusion.

4. A child determined to be eligible for special education and related services under this subsection remains eligible for special education and related services upon transfer to another school or LEA. The child continues to be eligible for special education and related services unless, upon re-evaluation, the child is no longer found eligible.

(f) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility shall contain a statement including all of the following:

1. Whether the child has a specific learning disability.

2. The basis for making the determination, including an assurance that the determination has been made in accordance with s. 115.782, Stats.

3. The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning in the area of potential learning disability in par. (c) 1. a. to h.

4. Documentation that the intervention was applied in a manner highly consistent with its design and was closely aligned to pupil need.

5. The educationally relevant medical findings, if any.

6. Whether the child does not achieve adequately for the child's age or to meet state-approved grade-level standards consistent with par. (c) 1.; and the child does not make sufficient progress to meet age or state-approved grade-level standards consistent with par. (c) 2. a.; or the child exhibits a significant discrepancy between the child's academic achievement in any of the areas of par. (c) 1. a. to h. and intellectual ability consistent with par. (c) 2. b.

7. The determination of the IEP team concerning the effects of a visual, hearing, or motor disability; cognitive disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level.

8. If the child has participated in a process that assesses the child's response to scientific, research-based or evidence-based intervention, the instructional strategies used and the pupil-centered data collected and the documentation that the child's parents were notified about all of the following:

a. The amount and nature of pupil performance data collected and the general education services provided.

b. Strategies for increasing the child's rate of learning.

c. The parents' right to request an evaluation.

(g) The IEP team shall base its decision of whether a child has a specific learning disability on formal and informal assessment data regarding academic achievement and learning behavior from sources such as standardized tests, error analysis, criterion referenced measures, curriculum-based assessments, pupil work samples, interviews, observations, and an analysis of the child's response to previous interventions, classroom expectations, and curriculum in accordance with s. 115.782, Stats.

(h) Upon re-evaluation, a child who met initial identification criteria and continues to demonstrate a need for special education under s. PI. 11.35 (2), including specially designed instruction, is a child with a disability under this section, unless the provisions under par. (d) 1. now apply. If a child with a specific learning disability performs to generally accepted expectations in the general education classroom without specially designed instruction, the IEP team shall determine whether the child is no longer a child with a disability.

**SECTION 2. INITIAL APPLICABILITY.** The treatment of this rule first applies to determining whether a child has a specific learning disability on the effective date of this rule (REVISOR INSERT 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 January, 2010

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Tony Evers, PhD  
State Superintendent