

Report From Agency
FINAL REPORT
CLEARINGHOUSE RULE 18-004
CHAPTER PI 11
CHILDREN WITH DISABILITIES

Analysis by the Department of Public Instruction

Statutory authority: s. 115.28 (9) and 227.11 (2) (a), Stats.

Statute interpreted: s. 115.28 (9), Stats., and 20 USC 1416(b) and 1418(d)

The proposed rule amends Chapter PI 11 of the Wisconsin Administrative Code and establishes standards and/or criteria related to significant disproportionality in special education and local education agency (LEA) determinations under the Individuals with Disabilities Education Act (IDEA).

The hearing notice was published in the January 29, 2018 edition of the Wisconsin Administrative Register. A public hearing was held on February 23, 2018.

No persons provided oral or written testimony at the February 23, 2018, public hearing. However, the following persons submitted written testimony:

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
CJ Szafir/Libby Sobic	Wisconsin Institute of Law and Liberty, Inc.		X	

Summary of public comments relative to the rule and the agency's response (bolded) to those comments:

The respondent offered the following comments on the rule:

1. The Department did not cite to the necessary statutory authority in the promulgation of this rule.

This citation for the original proposed rule was incorrectly used and is being changed to Wis. Stat. § 227.11(2)(a), per the comments received by the Legislative Council Rules Clearinghouse.

2. In the proposed rule's explanation for agency authority, the Department cites to federal regulations. This suggests that the Department believes it has authority to interpret or implement federal law. But only the Wisconsin legislature can grant the Department authority to promulgate rules and the Department cannot do so without the legislature "explicitly require[ing] or explicitly permit[ing] by statute." Wis. Stat. § 227.10(2m).

The Department must accept federal funds for any function over which the state superintendent has jurisdiction. Wis. Stat. § 115.28(9). The Department has jurisdiction over special education in Wisconsin. The federal government provides funding for special education through the Individuals with Disabilities Education Act (IDEA). The IDEA requires, in part, that each state that receives funding under the IDEA must "provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and local educational agencies of the State" with respect to the identification of pupils as pupils with disabilities, educational placements, and disciplinary actions. 20 USC 1416(b) and 1418(d).

Therefore, legislative authority to promulgate the rules as proposed is provided by the Wisconsin Legislature through Wis. Stat. §§ 115.28(9) and 227.11(2)(a), rather than an interpretation of federal law.

3. The Department cites to implicit authority which is prohibited by 2011 Wisconsin Act 21. However, state law makes clear that rulemaking is not premised on implied agency authority.

The Wisconsin legislature has made it the duty of the Department to accept funds for any function over which the state superintendent has jurisdiction and act as the agent for the receipt and disbursement of such funds. Wis. Stat. § 115.28(9). Under Wis. Stat. § 227.11(2)(a), "[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." As recently determined by the Wisconsin Supreme Court, "statutory mandates are also statutory authorizations, and authorization of an act also authorizes a necessary predicate act." *Wisconsin Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶ 42 (internal citations omitted).

Without the ability to promulgate the rules as proposed, the Department would be prohibited from fulfilling its statutory duty to accept federal funds as set forth by Wis. Stat. § 115.28(9). Therefore, Wis. Stat. § 227.11(2)(a) expressly confers the authority on the Department to promulgate the rules as proposed as a necessary predicate act to the receipt and disbursement of federal funds.

4. The Department's plain language analysis lacks detail.

The plain language analysis for the proposed rule will be revised to include the following:

The proposed rule amends Chapter PI 11 of the Wisconsin Administrative Code and establishes standards and/or criteria related to significant disproportionality in special education and local

education agency (LEA) determinations under the Individuals with Disabilities Education Act (IDEA). Specifically, the rule related to significant disproportionality in special education defines significant disproportionality in special education identification, placement and discipline; identifies the data collection and methodology used to calculate significant disproportionality; and identifies requirements for LEAs that meet the threshold for significant disproportionality.

5. The Department does not compare its rule to neighboring states.

The plain language analysis for the proposed rule will be revised to state the following with respect to comparisons of the proposed rule to rules in neighboring states:

Iowa: Iowa Admin. Code r. 281-41.646 and 281-41.647 provides that the state shall collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the state and the LEAs of the state with respect to the following: a) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in Section 602(3) of the Act; b) The placement in particular educational settings of these children; and c) The incidence, duration, and type of disciplinary actions, including suspensions and expulsions. In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, the state must provide for the review and revision of policies and procedures used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of IDEA; require any LEA identified to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified; and require the LEA to publicly report on the revision of policies, practices, and procedures described under 41.646(2)“a.”

Illinois: Illinois Admin. Code tit. 23, § 226.760 provides that the extent to which a school district is fulfilling its responsibilities to children with disabilities shall be determined by the State Board of Education. Evaluation by the State Board of Education focuses on the district's provision of special education services, on each special education cooperative organization of which it is a participant, and on community resources utilized by the district. According to the rule, evaluation of special education services shall be based in part by the performance of those services, as evidenced by data that state education agencies must collect pursuant to disproportionality requirements under IDEA.

Michigan: There are currently no rules governing significant disproportionality or LEA determinations in the Michigan Administrative Code. However, the state has issued informal guidance with respect to the collection and examination of data for determining disproportionality at http://www.michigan.gov/mde/0,4615,7-140-6598_48005-309139--,00.html.

Minnesota: There are currently no rules governing significant disproportionality or LEA determinations in the Minnesota Administrative Code.

6. The Department did not submit the statement of scope to the Department of Administration for review. Wis. Stat. § 227.135(2) requires all agencies to submit the statement of scope to the Department of Administration (“DOA”) for review of the agency’s explicit authority to promulgate the rule.

The Department submitted the statement of scope for the proposed rule on July 26, 2017. The requirement to submit statements of scope to the Department of Administration for review of statutory authority was created by 2017 Wisconsin Act 57. The provisions of Act 57 first applied to proposed rules whose statements of scope were submitted on or after September 1, 2017. Therefore, this scope statement and proposed rule are not subject to provisions created by Act 57.

7. The Department did not submit the statement of scope for approval by the Governor. All administrative agencies must obtain the Governor’s approval per Wis. Stat. § 227.135(2) for the statement of scope because the administrative rule-making process has changed since *Coyne v. Walker*. See 368 Wis.2d 444 (Wis. 2016)

The Dane County Circuit Court enjoined the application of the Governor’s veto authority to rulemaking of the Superintendent of Public Instruction. *Coyne v. Walker*, No. 11-CV-4573 (Wis. Cir. Ct. Dane County Oct. 30, 2012). The Wisconsin Supreme Court upheld that injunction in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520. The Governor’s veto under Wis. Stat. § 227.135(2) has not been modified in any material way since the *Coyne* decision, and the Department therefore remains prohibited from submitting proposed rules to the Governor.

Responses to Clearinghouse Report:

1. Statutory Authority:

The change was accepted.

2. Form, Style and Placement in Administrative Code:

The changes were accepted.

4. Adequacy of References to Related Statutes, Rules and Forms:

With regard to comment a., the Department reviewed the proposed rule and agreed that this provision is unnecessary for implementation of the rule. Therefore, the Department will repeal s. PI 11.38 (6) (b) and renumber and amend s. PI 11.38 (6) (intro.) and (a).

The change in b. was accepted.

5. Clarity, Grammar, Punctuation and Plainness:

The changes a. through c. were accepted.

With regard to comment d., the Department reviewed the proposed rule and concluded that this provision is necessary for implementation of the rule. PI 11.38(7) requires identified LEAs or independent charter schools to reserve the maximum amount of funds under 20 USC 1413(f) to provide comprehensive coordinated early intervening services to address factors contributing to the significant disproportionality. Coordinated early intervening services are services provided to students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral supports to succeed in a general education environment. These students are not enrolled in LEAs or independent charter schools that serve only children with disabilities, therefore this clause is necessary.

Changes deemed necessary by the Department to improve implementation of the rule:

- The Department is revising s. PI 11.38 (7) to replace two references to “coordinated early intervening services” with “comprehensive coordinated early intervening services” to be consistent with 20 USC 1418(d).
- The Department is revising s. PI 11.38 to be entitled, “Significant disproportionality” to be consistent with 20 USC 1418(d).
- The Department is revising the plain language analysis of the proposed rule to replace references to “disproportionality” or “racial disproportionality” with “significant disproportionality” to be consistent with 20 USC 1418(d).