

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

The scope statement for this rule, SS 068-17, was published in Register No. 739B on July 31, 2017, and approved by State Superintendent Tony Evers on August 10, 2017. Pursuant to *Coyne v. Walker*, the Department of Public Instruction is not required to obtain the Governor's approval for this rule. *Coyne v. Walker*, 368 Wis.2d 444.

The State Superintendent of Public Instruction hereby proposes to create s. PI 11.38 and 11.39, relating to standards for significant disproportionality in special education and LEA determinations.

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## **ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION**

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

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

### **Explanation of agency authority:**

Pursuant to 115.28 (9), Stats., the State Superintendent of Public Instruction has a duty to accept federal funds for any function over which the State Superintendent has jurisdiction and act as the agent for the receipt and disbursement of such funds. Federal funds appropriated for the State under the Individuals with Disabilities Education Act are, in part, conditioned upon compliance with 20 USC 1416(b) and 1418(d). 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." As such, a rule is necessary to ensure the receipt and disbursement of federal aids.

**Related statute or rule:** None.

### **Plain language analysis:**

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.

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

Related to significant disproportionality in special education, 34 CFR 300.646 and 300.647 regulate compliance with 20 USC 1418(d), requiring states to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to: (1) the identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment; (2) the placement in particular educational settings of these children; and (3) the incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions.

Related to LEA determinations, 34 CFR 300.602 regulates compliance with 20 USC 1416(b), requiring the use of targets established in the State's performance plan under 34 CFR 300.601 and the priority areas described in 34 CFR 300.600(d) to analyze the performance of each LEA.

### **Comparison with rules in adjacent states:**

Similar to Wisconsin, each state that receives funding under IDEA is required by federal law to 1) provide for the collection and examination of data to determine significant disproportionality in the state and LEAs of the state, and 2) use the targets established in the state's performance plan to analyze the performance of each LEA.

**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](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.

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

The amendment related to significant disproportionality in special education sets criteria and establishes procedures related to determining significant disproportionality in special education identification, placement, and discipline. The Department followed recommendations from the IDEA Data Center, "Methods for Assessing Racial/Ethnic Disproportionality in Special Education." The Department solicited external feedback from stakeholders and considered multiple factors in defining significant disproportionality, including the population size, size of individual LEAs, and composition of State population. The determination of significant disproportionality by race or ethnicity is based solely on a collection and examination of data and not on policies, procedures, or practices. Procedures related to enforcement of LEA determinations under IDEA are also set based on these findings. No other policy alternatives than a rule are available as the Department is required by statute to promulgate rules in setting criteria that enforce federal law.

**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  
Budget and Policy Analyst

**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](mailto: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.

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**SECTION 1. PI 11.38 is created to read:**

**PI 11.38 Significant disproportionality.**

(1) DEFINITIONS. In this section:

- (a) “Alternate risk ratio” means a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA or independent charter school by the risk of that outcome for children in all other racial or ethnic groups in the state.
- (b) “Comparison group” means the children in all other racial or ethnic groups within an LEA or independent charter school or within the state, when reviewing a particular racial or ethnic group within an LEA or independent charter school for significant disproportionality.
- (c) “Independent charter school” means a charter school established under s. 118.40 (2r) or (2x), Stats.
- (d) “Minimum cell size” means the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.
- (e) “Minimum n-size” means the minimum number of children enrolled in an LEA or independent charter school with respect to identification, and the minimum number of children with disabilities enrolled in an LEA or independent charter school with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.
- (f) “Risk” means the likelihood of a particular outcome for a specified racial or ethnic group, calculated by dividing the number of children from a specified racial or ethnic group experiencing that outcome by the total number of children from that racial or ethnic group or groups enrolled in the LEA or independent charter school.
- (g) “Risk ratio” means a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA or independent charter school by the risk for children in all other racial and ethnic groups within the LEA or independent charter school.
- (h) “Risk ratio threshold” means the threshold over which there is significant disproportionality based on race or ethnicity.

(2) DATA COLLECTION. Consistent with 20 USC 1418(d) and the regulations promulgated thereunder, the department shall collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in LEAs or independent charter schools 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 ss. PI 11.36 (1), (5), (6), (7), (8), and (10).
- (b) The placement in particular educational settings of these children; and
- (c) The incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions.

(3) METHODOLOGY.

- (a) Consistent with 20 USC 1418(d) and the regulations promulgated thereunder, in determining whether significant disproportionality exists in a LEA or independent charter school, the department shall establish the following:
  - 1. Reasonable risk ratio thresholds.
  - 2. Reasonable minimum cell size.
  - 3. Reasonable minimum n-size.
- (b) Except as provided in par. (d) and sub. (4) of this section, the department shall annually calculate risk ratios for each LEA or independent charter school with respect to the following:
  - 1. The identification of children with disabilities.
  - 2. The identification of children with any of the following impairments:
    - a. Intellectual disabilities.
    - b. Specific learning disabilities.

- c. Emotional disturbance.
  - d. Speech or language impairments.
  - e. Other health impairments.
  - f. Autism.
- (c) Except as provided in par. (d) and sub. (4), the department shall annually calculate risk ratios for each LEA or independent charter school in placements into particular educational settings, including disciplinary removals.
- (d) The department shall calculate alternate risk ratios for a LEA or independent charter school if an applicable comparison group in the LEA or independent charter school does not meet the minimum cell size or the minimum n-size determined under par. (a).
- (4) EXCEPTION. The department may decline to calculate a risk ratio or alternate risk ratio to determine significant disproportionality if:
- (a) The particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size; or
  - (b) In calculating the alternate risk ratio under sub. (3) (d), the comparison group for the state does not meet the minimum cell size or minimum n-size.
- (5) DETERMINING SIGNIFICANT DISPROPORTIONALITY. The department shall identify an LEA or independent charter school as having significant disproportionality based on race or ethnicity if the LEA or independent charter school has exceeded a risk ratio threshold set by the department for a racial or ethnic group for three or more consecutive years immediately preceding the identification.
- (6) REVIEW AND REVISION OF POLICIES, PRACTICES, AND PROCEDURES. If the department determines significant disproportionality with respect to the identification of children as children with disabilities or the placement in particular educational settings, including disciplinary removals of such children, in accordance with this section, the department shall provide for the annual review and, if appropriate, revision of the policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure that the policies, practices, and procedures comply with the requirements of IDEA.
- (7) COMPREHENSIVE COORDINATED EARLY INTERVENING SERVICES. The department shall require any LEA or independent charter school identified as having significant disproportionality 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. This subsection shall not apply to any LEA or independent charter school that serves only children with disabilities to reserve funds to provide comprehensive coordinated early intervening services.
- (8) RULE OF CONSTRUCTION. Nothing in this section authorizes the department or any LEA or independent charter school to develop or implement policies, practices, or procedures that result in actions that violate the requirements of IDEA, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

**SECTION 2. PI 11.39 is created to read:**

**PI 11.39 LEA Determinations.**

- (1) ENFORCEMENT. Consistent with 20 USC 1416(a) and (f) and the regulations promulgated thereunder, if the department determines that an LEA is not meeting the requirements of 20 USC 1411 to 1419 of the IDEA or is identified as having significant disproportionality under s. PI 11.38, the department shall prohibit the LEA from reducing the LEA's maintenance of effort under 20 USC 1413(a)(2)(C) for any fiscal year.
- (2) Nothing in this section shall be construed to restrict the department from utilizing any other authority available to it to monitor and enforce the requirements of IDEA.

**SECTION 3. 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 \_\_\_\_\_, 2018

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Tony Evers, PhD  
State Superintendent