

**FINAL REPORT  
CLEARINGHOUSE RULE 20-073  
CHAPTER PI 11  
CHILDREN WITH DISABILITIES**

**Analysis by the Department of Public Instruction**

**Statutory authority:** s. 227.11. (2) (a) (intro.), Stats.

**Statute interpreted:** s. 115.76 (5) (a) 5. and 115.762 (3) (a), Stats.

The proposed rule seeks to update ch. PI 11 of the Wisconsin Administrative Code with respect to the identification of children with emotional behavioral disability.

The hearing notice was published in the November 23, 2020 edition of the Wisconsin Administrative Register. A public hearing was held on December 15, 2020.

***The following persons testified at the November 23, 2020 hearing:***

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Hugh Davis	Wisconsin Family Ties			X

***The following persons submitted written testimony:***

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Joanne Juhnke	Disability Rights Wisconsin			X
Robert Todd	Racine Unified School District			X
Becky Fellman	Representing Self	X		
Olivia Berch-Radloff	Representing Self	X		
Joseph Daley	Wauwatosa School District			X

***Summary of public comments relative to the rule and the agency's response to those comments:***

- One respondent expressed concern for the rule's requirement that observable behaviors demonstrating emotional behavioral disability shall occur in both academic and non-academic settings and in the child's home or community setting is an artificial demarcation. The requirement seems to imply that a child cannot control his or her behavior in one setting or another. However, it is possible for a child to express behaviors in one setting but may not exhibit behaviors in another. If the department's intent with this provision is to limit the over-identification of pupils with an emotional behavioral disability, the respondent believes there are other parts of proposed rule are far more effective in preventing over-identification of pupils. The respondent further argues that if a complex set of facts leads to observable behaviors, where the behaviors are exhibited is immaterial; therefore, this requirement should be removed from rule.

**Agency Response:** The department received extensive preliminary feedback prior to drafting the proposed rule and found that retaining the above mentioned requirement was necessary to prevent over-identification and disproportionate representation of students in special education. Further, students that have an emotional behavioral disability exhibit behaviors across multiple settings, and maintaining this requirement is consistent with the previous rule. Therefore, no changes are needed.

- One respondent argues that the rule does not recognize unmet learning needs that cause observable behaviors which demonstrate emotional behavioral disability. The respondent points to the proposed rule's criteria demonstrating emotional behavioral disability and argues these criteria can occur when a child's learning needs are not met. If the rule does not address properly screening for and excluding pupils whose underlying cause is unmet learning needs, the respondent believes the rule cannot be considered comprehensive as required by law.

**Agency Response:** Unmet learning needs are addressed throughout the rule as part of a comprehensive special education evaluation. Assessment requirements include a review of academic records and other assessments to identify needs. Unmet learning needs on their own are unlikely to be evident in multiple environments and are unlikely to reach the level of intensity, duration and frequency that would indicate an emotional behavioral disability. Therefore, no changes are needed.

- One respondent could not find any special accommodation for children being evaluated by public school evaluation teams but who are, and have been, enrolled in a private or parochial school, which is parallel to the criteria for specific learning disabilities; as an example, response to intervention for public school pupils and discrepancy for parochial and private school pupils.

**Agency Response:** For parentally-placed private school students, delayed identification is not allowed. Further, the rule governing specific learning disabilities does not allow for discrepancy, so this comment is not germane to the proposed rule.

- One respondent argues the requirement that IEP teams must consider data from behavior rating scales obtained from a minimum of two sources from school is problematic. They argue while an emphasis should be placed upon obtaining normative data from multiple sources within the school setting where possible, various circumstances are encountered where there simply is no second respondent capable of providing a reliable normative rating. Rather than firmly requiring two normative rating scales, the respondent recommends normative rating scales still be required from the school setting, but that the rule include flexibility to allow for other methods of behavior data collection from secondary school sources who otherwise cannot provide a valid normative rating scale. As written, the respondent further argues the rule seems to require evaluators to knowingly collect potentially invalid behavior ratings when circumstances do not provide a reliable second respondent. For example, circumstances exist where secondary sources within the school have limited and less frequent contact with the student, or the only applicable secondary source has known the student for too brief a period to be able to reliably rate their behavior. While these secondary sources may be unable to complete a normative rating for the student, the respondent believes they may be able to provide other valuable behavioral data which could be considered in conjunction with the primary normative data. As such, the respondent recommends that the rule require normative ratings, but avoid the seemingly arbitrary prescriptive number of two respondents in favor of a stated emphasis on multiple behavioral data sources in varied school settings.

**Agency Response:** The department recognizes that this requirement may not be feasible for school districts in isolated instances. The department will reflect these changes in the provision to state that IEP teams will accept one valid normative rating scales when two valid scales are not possible from school district staff upon identification. The department supports the collection of other data or information from school district staff as part of a comprehensive special education evaluation.

- Two respondents expressed support for the updated criteria to the identification of pupils with emotional behavioral disabilities. The respondents argued the emphasis on cultural considerations will help prevent the over-identification of pupils in the state. The respondents express hope this proposed rule will help IEP teams reflect on what it means to need special education, and the best practices that are required for pupils to get the services they need.

***Agency Response:*** No changes are needed.

- One respondent expressed the following concerns about the proposed changes to s. PI 11.36 (7) (c), which would require a more prescriptive and extensive array of current data: 1) the respondent argues PI 11.36 (7) (c) 1. is somewhat unclear as to whether the evidence-based positive behavioral interventions referenced are interventions that have already been attempted, or whether the interventions must be tried prospectively as part of the evaluation, which may be used to delay decision-making; 2) the respondent requested consideration for mechanisms which could assist interviewers to minimize bias when conducting interviews under s. PI 11.36 (7) (c) 3., such as interview questions for gathering relevant cultural information, or alternatively, interview guidance; and 3) the respondent notes “ecological factors,” as mentioned both in ss. PI 11.36 (7) (c) 3. and 4., is new terminology that was not previously used in the definition, and requests explanation in accompanying guidance. In sum, the respondent argues that the number of required evaluation elements in s. PI 11.36 (7) (c) has increased enough to give educators pause about the balance between insufficient protections and over-identification of pupils with emotional behavioral disability.

***Agency Response:*** The department was specific in its use of data elements to ensure the IEP team has as much data as possible to make an informed decision. The comments concerning the timing of evidence-based positive behavioral interventions will be specified further in guidance. Regarding the comments concerning bias, the department has accompanying guidance assisting IEP teams to minimize bias in identifying students with an emotional behavioral disability. Regarding the comments concerning ecological factors, the term “ecological” is referenced in standard dictionaries as meaning of or relating to the environments of living things or to the relationships between living things and their environments. Therefore, no changes are needed.

***Changes made as a result of oral or written testimony:***

- Amending s. PI 11.36 (7) (c) 6. to state that IEP teams will accept one valid normative rating scales when two valid scales are not possible from school district staff upon identification.

***Changes to the analysis or the fiscal estimate:***

No changes were made.

***Responses to Clearinghouse Report:***

**1. Statutory Authority:**

The department has amended the provision to state the IEP team for a child being evaluated for emotional behavioral disabilities may, rather than shall, include the LEA staff member, identified by the child when possible, as having a positive or the most positive relationship with the child. The department also modified s. PI 11.36 (7) (c) to require that the IEP team shall interview an LEA staff member, identified by the child when possible, as having the most positive or a positive relationship with the child, that includes gathering information regarding the child’s strengths and ecological factors that may impact the child’s behavior.

**2. Form, Style and Placement in Administrative Code:**

The changes are accepted.

5. Clarity, Grammar, Punctuation and Plainness:

a. The department has amended the provision to state “mental health condition” rather than “medical mental health condition.”

b. The department has amended the provision to state “community” rather than “community setting,” to rely on the dictionary definition of the term in the rule.

c. The department’s response to the comments in this section is as follows:

(1) As stated above, the term “ecological” is referenced in standard dictionaries and no changes are needed.

(2) The department has rephrased the provision to state the IEP team shall consider results of standardized behavior rating scales, which are normed using nationally representative samples, from a minimum of two sources from school and one source from the home or community.

(3) The department has removed this provision.

***Changes deemed necessary by the department to improve implementation of the rule:***

Made the following revisions to the proposed rule following conversations with the Legislature:

**PI 11.36 (7) (b) 1.** Behaviors that interfere with the development and maintenance of age and ~~culturally~~grade appropriate interpersonal relationships.

**PI 11.36 (7) (b) 2.** Observable affective or behavioral responses during routine daily activities inconsistent with the ~~cultural or ethnic~~ norms of the child or the child’s community.

**PI 11.36 (7) (c)** The IEP team shall conduct a comprehensive evaluation ~~that includes only assessments and other evaluation materials selected and administered so as not to be discriminatory on a racial or cultural basis. The IEP team shall consider~~and shall consider current data from all of the following:

**PI 11.36 (7) (c) 7.** Results of standardized behavior rating scales, which are normed using nationally representative samples, from a minimum of two sources from school and one source from the home or community. If only one source from the school is familiar enough with the student to obtain valid rating scale results, as defined by publisher recommendations for the individual rating scale, then that shall be documented in the evaluation report. Nationally normed behavior rating scales shall include, when available, normative data that reflects the child’s ~~cultural~~ background. If the child’s ~~cultural~~ background is not included in the normative data of a standardized rating scale used, the evaluation report shall include an explanation.

**PI 11.36 (7) (e)** The IEP team shall discuss and determine, based on information and data collected in par. (c), whether behaviors are a result of ~~cultural difference~~a difference between the norms of the child’s family and community or an emotional behavioral disability. The IEP team may not identify a child as a child with an emotional behavioral disability when there is evidence that ~~cultural difference~~ the difference in norms is a the primary causal factor of the behaviors.