

Clearinghouse Rule 20-073

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

The scope statement for this rule, SS 106-20, was published in Register No.776A2, on August 10, 2020, and approved by State Superintendent Carolyn Stanford Taylor on August 21, 2020.

The State Superintendent of Public Instruction hereby proposes an order to repeal and recreate s. PI 11.36 (7), relating to emotional behavioral disability criteria.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

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

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

Explanation of agency authority:

Under s. 115.762 (3) (a), Stats., the division for learning support within the department is required to ensure that all children with disabilities, including children who are not yet 3 years of age, who reside in this state and who are in need of special education and related services are identified, located and evaluated. Section 115.76 (5) (a) 5., Stats., includes emotional behavioral disability as a category of disability in which a child may receive special education and related services. 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.” See also, *Wisconsin Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶ 42 (“statutory mandates are also statutory authorizations, and authorization of an act also authorizes a necessary predicate act.”) (internal quotation marks omitted). As such, a rule is required to establish criteria for the identification and service of children with disabilities under ss. 115.76 (5) (a) 5. and 115.762 (3) (a), Stats.

Related statute or rule:

N/A

Plain language analysis:

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.

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

“Emotional disturbance” is defined under the Individuals with Disabilities Education Act as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) Inappropriate types of behavior or feelings under normal circumstances; 4) A general pervasive mood of unhappiness or depression; and 5) A tendency to develop physical symptoms or fears associated with personal or school problems. “Emotional disturbance” also includes schizophrenia but does not apply to children who are socially maladjusted unless it is determined that the child has one of the characteristics stated above [34 CFR § 300.8(c)(4)].

Summary of any public comments and feedback on the statement of scope for the proposed rule that the agency received at a preliminary public hearing and comment period held and a description of how and to what extent the agency took those comments into account and drafting the proposed rule:

The Department held a preliminary public hearing and comment period on August 20, 2020, and received comments on the statement of scope for the proposed rule. A brief summary of comments and the Department's response to those comments are as follows:

- The respondent agrees with the Department's efforts to promote researched-based interventions such as response to intervention and positive behavioral interventions and supports as well as promoting best practices regarding trauma, mental health and social emotional learning. However, the respondent argues that these practices and methods not be used to delay identification for special education eligibility. Eligibility for special education is very important for students with emotional behavioral disabilities because of the added services and supports they qualify for as well as the disciplinary protections under the Individuals with Disabilities Education Act.

Agency Response: The Department agrees with the importance of the supports and protections offered to students with emotional behavioral disabilities, and agrees that the use of positive behavioral intervention and supports should not lead to a delay in appropriate identification under the impairment area of emotional behavioral disability. The criteria will ensure that comprehensive evaluations can be completed within the 60 day timeline. The Department will prioritize that documentation of evidence based positive behavioral interventions and supports will not lead to delays in the identification process for special education eligibility. In addition, the Department will ensure a pathway for identification for those students that require immediate support as documented by a sudden onset of a serious mental health disorder diagnosed by a licensed mental health professional.

Comparison with rules in adjacent states:

- Illinois: In Illinois, "emotional disability" (including schizophrenia but does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance) means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior or feelings under normal circumstances; 4) a general pervasive mood of unhappiness or depression; or 5) a tendency to develop physical symptoms or fears associated with personal or school problems.
- Iowa: In Iowa, "behavior disorder" (or emotional disturbance) means any condition that exhibits one or more of the following five characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior or feelings under normal circumstances; 4) a general pervasive mood of unhappiness or depression; or 5) a tendency to develop physical symptoms or fears associated with personal or school problems.
- Michigan: In Michigan, "emotional impairment" shall be determined through manifestation of behavioral problems primarily in the affective domain, over an extended period of time, which adversely affect the student's education to the extent that the student cannot profit from learning experiences without special education support. The problems result in behaviors manifested by one or more of the following characteristics: 1) inability to build or maintain satisfactory interpersonal relationships within the school environment; 2) inappropriate types of behavior or feelings under normal circumstances; 3) general pervasive mood of unhappiness or depression; 4) tendency to develop physical symptoms or fears associated with personal or school problems. Emotional impairment also includes students who, in addition to the characteristics specified above, exhibit maladaptive behaviors related to schizophrenia or similar disorders. The term "emotional impairment" does not include persons who are socially maladjusted, unless it is determined that the persons have an emotional impairment. Finally, emotional impairment does not include students whose behaviors are primarily the result of intellectual, sensory, or health factors.
- Minnesota: In Minnesota, "emotional or behavioral disorder" means an established pattern of one or more of the following emotional or behavioral responses: 1) withdrawal or anxiety, depression, problems with mood, or feelings of self-worth; 2) disordered thought processes with unusual behavior patterns and atypical communication

styles; or 3) aggression, hyperactivity, or impulsivity. The established pattern of emotional or behavioral responses must adversely affect educational or developmental performance, including intrapersonal, academic, vocational, or social skills; be significantly different from appropriate age, cultural, or ethnic norms; and be more than temporary, expected responses to stressful events in the environment. The emotional or behavioral responses must be consistently exhibited in at least three different settings, two of which must be educational settings, and one other setting in either the home, child care, or community. The responses must not be primarily the result of intellectual, sensory, or acute or chronic physical health conditions.

Summary of factual data and analytical methodologies:

Chapter PI 11 of the Wisconsin Administrative Code contains the current rules governing the education of children with disabilities, including rules around the identification of children with emotional behavioral disability. Under current rule, emotional behavioral disability is defined as “social, emotional or behavioral functioning that so departs from generally accepted, age appropriate ethnic or cultural norms that it adversely affects a child’s academic progress, social relationships, personal adjustment, classroom adjustment, self-care or vocational skills.” The current rules qualifying a child with an emotional behavioral disability do not require any research-based interventions in addressing behaviors prior to identification, such as Response to Intervention (RtI), Positive Behavior Intervention and Support (PBIS), or Functional Behavior Assessment. Additionally, the current rules do not reference best practices and research in the areas of trauma, mental health, Social Emotional Learning, or RtI/PBIS. As such, the department proposes to update criteria relating to identifying pupils that have emotional behavioral disability in order to recognize current knowledge and best practices and to properly address student needs. Without a rule change, the department will continue to implement ch. PI 11 as written.

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
Administrative Rules Coordinator
Wisconsin Department of Public Instruction
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(608) 266-3275

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. The Department will publish a hearing notice in the *Administrative Register* which will provide information on the deadline for the submission of comments.

RULE TEXT

SECTION 1. PI 11.36 (7) is repealed and recreated to read:

PI 11.36 (7) EMOTIONAL BEHAVIORAL DISABILITY.

(a) Emotional behavioral disability, pursuant to s. 115.76 (5) (a) 5., Stats., means a condition in which a child demonstrates frequent and intense observable behaviors, either over a long period of time or of sudden onset due to an emerging mental health condition which includes a diagnosis by a licensed mental health professional, which adversely affects the child's educational performance. The behaviors shall occur in an academic setting in school, in a non-academic setting in school and in the child's home or community.

(b) The IEP team may identify a child as having an emotional behavioral disability under par. (a) if the child exhibits at least one of the following:

1. Behaviors that interfere with the development and maintenance of age and culturally appropriate interpersonal relationships.
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.
3. Pervasive unhappiness, depression or anxiety.
4. Physical symptoms or fears associated with personal or school problems.
5. Insufficient progress toward meeting age or grade level academic standards that cannot be explained by intellectual, sensory, or health factors.
6. Isolation from peers or avoidance of social interactions impacting the child's access and engagement in instructional activities.
7. Patterns of behaviors across settings and individuals presenting risks to the physical safety of the child or others.

(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 current data from all of the following:

1. The results of evidence-based positive behavioral interventions implemented within general education settings.
2. Systematic observations of the child in both academic and non-academic settings documenting intensity, frequency, rate or duration of observable target behaviors, as well as other ecological factors that may be impacting the child's behavior.
3. Interviews of the child and parent or family that include gathering information regarding the child and family's cultural and ethnic norms and values, as well as other ecological factors that may impact the child's behavior.
4. Interviews of the child's teachers that include gathering information regarding the child's strengths and ecological factors that may impact the child's behavior.
5. Interview of 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. This subdivision does not apply if the LEA staff member described in this subdivision has already been interviewed under subd. 4.
6. Review of educational information maintained by the LEA, including health, academic and disciplinary records.
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.

(d) The IEP team shall consider the effects of any known history of trauma or mental health disorder on the child's functioning. The IEP team may not identify or refuse to identify a child as a child with an emotional behavioral disability based solely on a known history of trauma or mental health disorder.

(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 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 is a causal factor of the behaviors.

(f) The IEP team for a child being evaluated for emotional behavioral disabilities may include the LEA staff member, identified by the child when possible, as having a positive or the most positive relationship with the child.

SECTION 2. 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 _____, 2021

Carolyn Stanford Taylor
State Superintendent