

## Clearinghouse Rule 21-095

# PROPOSED ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION AMENDING PERMANENT RULES

The scope statement for this rule, SS 085-21, was published in Register No. 790A3, on October 18, 2021, and approved by State Superintendent Jill K. Underly on November 1, 2021.

The State Superintendent of Public Instruction hereby proposes an order to renumber s. PI 11.36 (2) (a); and to create s. PI 11.36 (2) (b), (9) (e), and (11) (e), relating to reevaluation criteria for orthopedic impairment, traumatic brain injury, and significant developmental delay disability categories.

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## ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

**Statute interpreted:** ss. 115.76 (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), Stats., includes orthopedic impairments and traumatic brain injuries as categories of disability in which a child may receive special education and related services. Section 115.76 (5) (b) allows a local educational agency, consistent with department rules, to include developmental delay as a category of disability for which a child may receive special education and related services as a child with a disability. Further, 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). A rule is therefore required to establish criteria for the identification and service of children with disabilities under ss. 115.76 (5) and 115.762 (3) (a), Stats.

### **Related statute or rule:**

N/A

### **Plain language analysis:**

The objective of the proposed rule is to conform sections of ch. PI 11 of the Wisconsin Administrative Code, relating to orthopedic impairment, traumatic brain injury, and significant developmental delay disability categories, to other disability categories under ch. PI 11 that address the reevaluation criteria for special education. The reevaluation criteria are needed to address continuing eligibility for special education services and to ensure that students who may be making progress and may no longer meet initial criteria are still eligible to receive services if they continue to need specially designed instruction and other special education supports to address the child’s disability related needs.

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

20 U.S.C. 1401(3)(A) defines a child with a disability as a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional

disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.

Further, 20 U.S.C. 1401(3)(B) provides that a child with a disability, for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the state and the local educational agency, include a child experiencing developmental delays, as defined by the state and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and who, by reason thereof, needs special education and related services.

### **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 in drafting the proposed rule:**

The Department held a preliminary public hearing and comment period on October 25, 2021 and did not receive any comments on the statement of scope for the proposed rule.

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

**Illinois:** Ill. Admin. Code tit. 23 § 226.120 governs the reevaluation of children that are eligible for special education and related services and provides that procedures for the completion of reevaluations of children for whom special education and related services are currently being provided shall conform to the requirements of 34 CFR 300.303, 300.304, 300.305, 300.306 and 300.309, as well as Ill. Admin. Code tit. 23 § 226.110. Additionally, Ill. Admin. Code tit. 23 § 226.75 identifies 13 disabilities for which children are eligible for special education and related services, pursuant to the federal Individuals with Disabilities Education Act, and includes autism, deaf-blindness, deafness, emotional disability, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment.

**Iowa:** Iowa Admin. Code r. 281-41.303 governs the reevaluation of each child with a disability and provides that a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with rules 281-41.304 (256B, 34 CFR 300) to 281-41.311 (256B, 34 CFR 300), if: 1) the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or 2) if the child's parent or teacher requests a reevaluation. A reevaluation conducted under subrule 41.303(1) may occur not more than once a year, unless the parent and the public agency agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. Additionally, Iowa Admin. Code r. 281-41.8 provides that “child with a disability” refers to a person under 21 years of age, including a child under 5 years of age, who has a disability in obtaining an education. The term includes an individual who is over 6 and under 16 years of age who, pursuant to the statutes of this state, is required to receive a public education; an individual under 6 or over 16 years of age who, pursuant to the statutes of this state, is entitled to receive a public education; and an individual between the ages of 21 and 24 who, pursuant to the statutes of this state, is entitled to receive special education and related services. Further, “disability in obtaining an education” refers to a condition, identified in accordance with this chapter, which, by reason thereof, causes a child to require special education and support and related services.

**Michigan:** There are no rules governing reevaluation criteria for children with disabilities in Michigan. However, Mich. Admin. Code R. 340.1721a governs the initial evaluation of each child suspected of having a disability, which is defined under Mich. Admin. Code R. 340 as a person who has been evaluated according to the Individuals with Disabilities Education Act and the Mich. Admin. Code, and is determined by an IEP team, an individualized family service plan team, or an administrative law judge to have 1 or more of the following impairments that necessitates special education or related services, or both, who is not more than 25 years of age as of September 1 of the school year of enrollment, and who has not graduated from high school: cognitive impairment, emotional impairment, deaf or hard of hearing, visual impairment including blindness, physical impairment, other health impairment, speech and language impairment, early childhood developmental delay, specific learning disability, severe multiple impairment, autism spectrum disorder, traumatic brain injury, and deaf-blindness.

**Minnesota:** Minn. R. 3525.2710 Subp. 2 governs the reevaluation of each child with a disability and provides that a school district shall ensure that a reevaluation of each pupil is conducted if conditions warrant a reevaluation or if the pupil's parent or teacher requests a reevaluation, but at least once every three years and in accordance with Minn. R. 3525.2710 Subps. 3 and 4. Additionally, Minn. R. 3525.1325 – 3525.1356 governs the entrance and exit criteria of children with disabilities and includes autism spectrum disorders, deaf-blindness, emotional or behavioral disorders, deaf and hard of hearing, developmental cognitive disability, other health disabilities, physically impaired, severely multiply impaired, specific learning disability, speech or language impairments, visually impaired, and traumatic brain injury.

### **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 orthopedic impairments, traumatic brain injuries, and significant developmental delay. Under current rule, orthopedic impairment, traumatic brain injury, and significant developmental delay are defined as the following:

- Orthopedic impairment (s. PI 11.36 (2)): Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes, but is not limited to, impairments caused by congenital anomaly, such as a clubfoot or absence of some member; impairments caused by disease, such as poliomyelitis or bone tuberculosis; and impairments from other causes, such as cerebral palsy, amputations, and fractures or burns that cause contractures.
- Traumatic brain injury (s. PI 11.36 (9)): Traumatic brain injury means an acquired injury to the brain caused by an external physical force resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; speech and language; memory; attention; reasoning; abstract thinking; communication; judgment; problem solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and executive functions, such as organizing, evaluating and carrying out goal-directed activities. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.
- Significant developmental delay (s. PI 11.36 (11)): Significant developmental delay means children, ages 3 through 9 years of age, who are experiencing significant delays in the areas of physical, cognition, communication, social-emotional, or adaptive development.

The current rules qualifying children for special education services under any of these categories do not address reevaluation criteria for special education. As such, the department proposes to amend ch. PI 11 to create reevaluation criteria for the purpose of addressing continuing eligibility for special education services and ensuring that students who may be making progress and may no longer meet initial criteria are still eligible to receive services if they continue to need specially designed instruction. The proposed rule is intended to conform the reevaluation criteria for services under these categories with that of criteria that exist for other disability categories, including blind and visually impaired, deaf and hard of hearing, and deafblind (which became effective August 1, 2021, under Clearinghouse Rule 20-072); and speech and language impairment criteria (which became effective on August 1, 2021, under Clearinghouse Rule 20-074). Without a rule change, the department would be required to implement ch. PI 11 as it currently exists, and there would be no reevaluation criteria to determine continuing eligibility for special education services for children that have an orthopedic impairment, traumatic brain injury, or significant developmental delay

### **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  
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Wisconsin Department of Public Instruction  
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**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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**RULE TEXT**

**SECTION 1. PI 11.36 (2) is renumbered PI 11.36 (2) (a).**

**SECTION 2. PI 11.36 (2) (b) is created to read:**

**PI 11.36 (2) (b)** Upon re-evaluation, a child who met initial identification criteria and continues to demonstrate a need for special education under s. PI 11.35, including specially designed instruction, is a child with a disability under this subsection.

**SECTION 3. PI 11.36 (9) (e) is created to read:**

**PI 11.36 (9) (e)** Upon re-evaluation, a child who met initial identification criteria and continues to demonstrate a need for special education under s. PI 11.35, including specially designed instruction, is a child with a disability under this subsection.

**SECTION 4. PI 11.36 (11) (e) is created to read:**

**PI 11.36 (11) (e)** Upon re-evaluation, a child who met initial identification criteria and continues to demonstrate a need for special education under s. PI 11.35, including specially designed instruction, is a child with a disability under this subsection. In conducting the re-evaluation, the IEP team shall consider all other suspected impairments under this section before continuing to identify the child's primary impairment as significant developmental delay.

**SECTION 5. 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

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Jill K. Underly, PhD

State Superintendent