

**ORDER OF THE
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
ADOPTING EMERGENCY RULES**

The scope statement for this rule, SS 086-21, 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 amend s. PI 11.36 (6) (c) 2. b. and (Note), relating to specific learning disability evaluations in homeschool and private school settings.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

Statute interpreted: ss. 115.76 (5) (a) 10. 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) 10., Stats., includes learning disabilities 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) 10. and 115.762 (3) (a), Stats.

Related statute or rule:

N/A

Plain language analysis:

This emergency rule seeks to update ch. PI 11 of the Wisconsin Administrative Code with respect to evaluations for specific learning disabilities (SLD) of children in homeschool and private school settings. The emergency rule will provide that when evaluating a child in a private school or home-based private education program, IEP teams may use the significant discrepancy method as an alternate procedure for identifying a child with an SLD.

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

“Specific learning disability” is defined under the Individuals with Disabilities Education Act as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disabilities, however, do not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage [34 CFR § 300.8(c)(10)].

Regulations pertaining to the identification of children with an SLD under IDEA must also include the following: (1) the identifying criteria must not require the use of a severe discrepancy between intellectual ability and achievement for

determining whether a child has a specific learning disability; (2) the identifying criteria must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) the identifying criteria may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability. [34 CFR § 300.307 (a)]. A public agency must use the State criteria adopted pursuant to 34 CFR § 300.307 (a) in determining whether a child has a specific learning disability. [34 CFR § 300.307 (b)].

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 October 25, 2021 and received comments on the statement of scope for the proposed permanent and emergency rules. A summary of comments and the Department's response to those comments are as follows:

- The majority of respondents submitted comments in favor of the proposed change under the statement of scope. They argue that permitting alternate methods of identifying an SLD would better serve children in private school or homeschool settings, due to the difficulties faced by school districts to implement interventions for those children and the limited capacity of private schools to do so. Without such a change, the respondents argue most schools will be out of compliance with the rule and students will continue to face lengthy delays in identification.

Agency Response: These comments were forwarded to program staff for consideration during the rulemaking process. No further changes are necessary.

- Some respondents wrote in support of creating alternate methods of identifying an SLD for children in private school or homeschool settings but voiced concern for the level of research to support the use of pattern of strengths and weaknesses (PSW) as one such method. Some further argued that significant discrepancy method be the only alternative method for determining eligibility for SLD for private and homeschooled students, believing that the PSW method, as originally proposed in the scope statement for this rule, is ambiguous and may be misinterpreted and misapplied. In creating an option for identifying an SLD, they believe questions may arise, such as who gets to decide which one to use, whether the parent or guardian may give input in evaluations, what do school districts do when the IEP team cannot come to a consensus on which method to use, or when does the decision to test get made.

Agency Response: Based on feedback from public comments, the agency will not include the option of using the PSW method for private school and homeschool students.

- One respondent argued that while the rule needs clarification with respect to the identification of children with an SLD in private schools, the rule raises questions around the identification of a student's special education needs and how the IEP interacts with eligibility for the Special Needs Scholarship Program. Additionally, the respondent requests consideration for defining the PSW method in rule to ensure it is applied consistently across districts and the state and asks whether the department will provide training on these metrics and who will conduct the assessments. Finally, the respondent questions how the department will help ensure the most consistency possible without placing mandates on private schools.

Agency Response: The use of significant discrepancy will be available for evaluations considering an SLD for students in private and homeschool settings. The agency will provide information regarding best practice on using this method. The LEA remains responsible for Child Find activities, including conducting special education evaluations, for private school students attending private elementary and secondary schools located in the LEA. Due to the many difficulties with implementing the current rule in private school settings, the agency has proposed the use of significant discrepancy as a means of evaluating students in private and homeschool settings. This method will be adequate in the identification of students in private school settings. Private school students identified as having a disability and an IEP or services plan that meet certain eligibility requirements defined in the application for the Special Needs Scholarship Program will be able to apply for the Special Needs Scholarship Program. Based on feedback received from public comments, the agency will not include the option of using the PSW method for private school and homeschool students.

- One respondent offered comment in general agreement with the need for changes to the current rule, but asked the following questions with regard to the proposed rule: 1) what information is required for the PSW method for an assessment, and whether training would be provided in carrying out this method; 2) whether private schools could use federal dollars, like Title I or Title II, towards staff training or PSW assessment requirements; 3) when a private school student is determined to need an assessment, will the LEA be able to choose whether to use the response to intervention (RTI) method or PSW method; 4) when a private school student is determined to need an assessment, does the LEA or the private school do the assessment; 5) do other states provide an alternative assessment method to RTI for private school and homeschool students; 6) will the alternative assessment be applied for a homeschool or private school student who subsequently enrolls in an LEA, and how will the student be assessed by the LEA during the next re-evaluation period; and 7) if a student is assessed and it is determined that they have an SLD and require services, will the assessment result in 504 plan or IEP.

Agency Response: In response to the questions received regarding the use of the PSW method for private school and homeschool students, the agency has considered all feedback from public comments and will not include this option in the proposed rule.

Regarding the question about who is responsible for completing the evaluation and assessments of a private school student, it is the responsibility of the LEA in which the private school is located to complete the evaluation and any assessments needed to complete the evaluation.

In terms of how Wisconsin's SLD rule compares to other states, none of the surrounding states' rules for evaluating for an SLD list criteria for private schools. Some of our surrounding states encourage the use of RTI data from private and homeschool students when it is available. It is important to note that none of the surrounding states' rules for evaluating for an SLD are nearly as prescriptive or specific in their requirements for providing interventions, including staff licensure requirements for providing interventions, and conducting progress monitoring assessments. Such requirements make it very difficult for LEAs to use data from interventions and progress monitoring conducted in private schools, as private schools may not have appropriately licensed staff delivering interventions.

If the IEP team determines a student has met eligibility criteria for an SLD, the team will also then decide if the student requires special education, which would result in the team developing an IEP. If a student met the SLD criteria and was found eligible for special education during the initial evaluation through the use of significant discrepancy, the IEP team would determine continuing eligibility upon re-evaluation. During the review of existing data, the IEP team would determine if any additional assessments are needed to complete the re-evaluation. To determine if a student still requires special education services, the IEP team considers all data collected from multiple sources, relies on an analysis of continued need for special education and whether exclusionary factors have become the primary reason for continued achievement delays. When determining if a student continues to have an SLD impairment, the IEP team considers whether the student performs to generally accepted grade level expectations in the general education environment without specially designed instruction.

- Another respondent offered general support changes to the current rule but asked the following questions: 1) whether any other states do this within the two tier system of identifications, and if this is allowable by the federal government; 2) not offering RTI when the parents really just want their student to get help in reading or math; and 3) what happens to a private school or homeschool student who goes back to public school; and 4) requiring in rule that the school offers a service plan outlining an IEP if the student chooses to enroll in a school district.

Agency Response: The most recent data available indicates that of the 39 states that continue to allow LEAs to use the significant discrepancy method, 29 use a two-tiered approach in which districts can choose discrepancy and/or RTI. The other 10 have a three-tiered model in which they can choose one or a combination of any of the 3 methods allowed under IDEA (significant discrepancy, PSW, RTI). While no information was found regarding different assessment methods being used for private and homeschool students than what is used for public school students, it is certain, given that individual LEAs in 39 states can choose among 2 or 3 options, that many districts use separate methods for these separate populations.

Regarding the question about help in reading or math, RTI or Multilevel Systems of Support are designed to provide help in academic areas such as reading or math. Parents of students who attend private or home schools have a variety of options if the private or home school is not meeting the child's needs.

Regarding what happens to a private school or homeschool student who goes back to public school, the receiving LEA, in consultation with the parent, must provide a free appropriate public education (FAPE) without delay, including special education and related services comparable to those described in the most recent IEP developed by the sending LEA until one of the following three things occurs: 1) the receiving LEA adopts the child's IEP, including the evaluation and eligibility determination, from the most recent evaluation and provides the parents with an updated placement notice; 2) the receiving LEA adopts the child's evaluation and eligibility determination from the previous LEA and conducts an IEP team meeting to review and revise the IEP; or 3) the receiving LEA develops, adopts, and implements a new IEP. The receiving LEA may pursue a reevaluation without informed consent if the receiving LEA has documented reasonable attempts to obtain consent for evaluation and the parent fails to respond. The receiving LEA may implement the special education and related services in the new IEP after providing proper notice to the parent.

Finally, regarding the request to require in rule that the school offer a service plan outlining an IEP if the student chooses to enroll in a school district, the development of an IEP happens after an initial eligibility determination. The proposed rule addresses the method for evaluating students for an SLD, not the subsequent programming that is developed when a child is identified to be eligible for special education services. The requested changes are therefore outside the scope of the proposed rule, so no further changes with respect to the comments above are necessary.

- Some respondents requested consideration for rule changes which would permit the use of significant discrepancy and PSW methods for public school students, in addition to private school and homeschooled students. They argue expanding this option to public school students could address difficulties faced by school districts to verify adequate instruction because of the pandemic last school year, especially in the case of recent homeschool students that are now enrolled in a public school.

Agency Response: Making changes to current rule with respect to the comment above would require changes to how evaluations are conducted with public school students and is therefore outside the scope of this rule proposal. No further changes are necessary.

- One respondent requested consideration of the following changes which would bring consistency to the rule with that of adjacent states: 1) requiring school districts to conduct Child Find in the same manner for families of children enrolled in private schools as they would for families of children enrolled in public schools, similar to that of Illinois; 2) not requiring intensive interventions to take place prior to considering a cut score valid, similar to that of Iowa; 3) allowing school districts to choose whether they will conduct evaluations based on scientific, research-based interventions or PSW, but requiring that evaluations must be conducted the same way for all students once the evaluation method has been chosen, similar to that of Minnesota; and 4) requiring school districts to consider both PSW and scientific, research-based interventions, similar to that of Michigan. Additionally, since private schools and homeschools are not required to have multi-tiered systems of support for providing high-quality interventions, like that of public schools, the respondent argues that the local educational agency should include in its evaluation report information on multi-tiered systems of support available or high-quality interventions available if the student were to enroll.

Agency Response: School districts in Wisconsin are required to conduct Child Find activities in a similar manner for children in public schools and in private schools under 34 CFR 300.131. The proposed rule would not change this requirement. Additionally, the proposed rule would not require the implementation of intensive interventions for private school or homeschool students. Allowing the use of significant discrepancy for all evaluations would fall outside the scope of the proposed rule.

Further, the department reviewed each surrounding state's rules and has determined none of them are consistent with one another, thus making it impossible for Wisconsin to create a rule that would be consistent with each of them. Many of the suggested changes also fall outside of the scope of the proposed rule. LEAs are required to

make an offer of FAPE to private or homeschool students identified as having a disability under IDEA unless the parent intends to have their child remain enrolled in the home or private school. This offer of FAPE generally includes a description of the specially designed instruction, related services, accommodations and modifications that would be provided to the student in the public school setting or developing and presenting the parent with a copy of the IEP that would be implemented in the public school. For information related to the universal or targeted interventions available for public school districts within the general education multilevel system of supports, parents could simply ask for that information.

Additionally, it is important to note that none of the surrounding states' rules for evaluating for an SLD are nearly as prescriptive or specific in their requirements for providing interventions and conducting progress monitoring assessments. Comparing Wisconsin's rule to neighboring states is not an appropriate comparison, as there is little consistency across any of the 50 states. No further changes are necessary.

- One respondent wrote in opposition to the proposed rule under this statement of scope, arguing that the proposed changes undermine the data that shows interventions to be an effective tool to identify an SLD. The individual argued that if private or homeschool students want the support given to them from a public school, then they should attend the public school and get those services.

Agency Response: The proposed rule change would not impact the RTI practices and procedures or data collected when evaluating students attending public schools. This rule would only apply to students attending private schools or home-based private education programs. The option of using significant discrepancy for these students is in response to changes in federal law which permit the use of alternate procedures for identifying SLD in private or homeschool settings, including significant discrepancy. No further changes are necessary.

Comparison with rules in adjacent states:

Illinois: Under Illinois Admin. Code Title 23, Chap. 1, Subchapter F, Sect. 226.130, the school district shall adhere to the procedures set forth at 34 CFR 300.307, 300.308, 300.309, 300.310, and 300.311 when evaluating a student who is suspected of, or who has previously been identified as having, a specific learning disability as described in 34 CFR 300.8. Further, Illinois Admin. Code requires school districts to carry out Child Find responsibilities in the same manner for families of children enrolled in parentally-placed private schools as they would for families of children enrolled in public schools.

Iowa: Under Iowa Admin. Code Ch. 41 281.41.50(10), "specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage. Further, Iowa Admin. Code requires that for the identification of students with a specific learning disability, the state's area education agencies, or, if applicable, the state education agency must undertake activities similar to the activities undertaken for public school children.

Michigan: Under Michigan Admin. Code R. 340.1713 (1), "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of cognitive impairment, of emotional impairment, of autism spectrum disorder, or of environmental, cultural, or economic disadvantage. Further, Michigan Admin. Code permits school districts to consider either patterns of strengths and weaknesses and scientific, research-based interventions in identifying children with a specific learning disability.

Minnesota: Under Minnesota Admin. Rules 3525.1341, "specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including

conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Further, Minnesota Admin. Rules allows school districts to choose whether they will conduct evaluations based on scientific, research-based interventions or patterns of strengths and weaknesses but requiring that evaluations must be conducted the same way for all students once the evaluation method has been chosen.

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 specific learning disabilities. Under current rule, a specific learning disability “means a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or perform mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing, motor disabilities, cognitive disabilities, emotional disturbance, cultural factors, environmental, or economic disadvantage.”

The department’s experience with implementing the current rule has shown that the current criteria qualifying a child with an SLD is difficult to implement with evaluations of private school and homeschool students. For example, local education agencies cannot assure or require a private school to provide instruction that meets the standards of “appropriate instruction” or “qualified personnel” within the current rule. Local educational agencies have found it difficult to determine and document many requirements in the rule, including: whether the child’s private school provided “appropriate instruction delivered by qualified personnel, including appropriate instruction in reading,” as defined in the current rule; the relevant behavior of the child, and the relationship of that behavior to the child’s academic functioning in the area of potential learning disability; and whether the intensive intervention was applied in a manner highly consistent with its design, was closely aligned to pupil need, and was culturally appropriate. Further, since the licensing requirements for private schools are different than that of public schools, private schools and homeschools may not have the appropriately licensed staff members to deliver scientific, research-based interventions to children suspected of having an SLD or may choose not to provide them. Finally, private schools and homeschools are not required to have multi-tiered systems of support for providing high quality interventions, like that of public schools. Therefore, these interventions may not exist in private schools and homeschools when conducting an SLD evaluation and conducting these interventions in the public school require the student to potentially miss a significant part of instruction in the private school. Additionally, the United States Department of Education, Office of Special Education Programs has stated that an LEA cannot require a private school to implement an RTI process before evaluating private school children. The need to conduct evaluations of private school children with fidelity is not only to meet federal Child Find requirements but has increased importance to support school districts and private schools in implementing the Special Needs Scholarship Program.

As such, the department proposes to update criteria for identifying children with an SLD by allowing IEP teams to use significant discrepancy for the evaluation of private school and home-based private education students. The use of significant discrepancy in rule aligns ch. PI 11 with federal law, which permits the use of the significant discrepancy method for identifying a child with an SLD. Without a rule change, the department will continue to implement ch. PI 11 as written, and school districts would be required to conduct SLD evaluations of private school and homeschool students using the criteria in current rule.

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
adminrules@dpi.wi.gov
(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 (6) (c) 2. b. and (Note) are amended to read:

PI 11.36 (6) (c) 2. b. Significant discrepancy or insufficient progress in achievement as compared to measured ability. ~~This subdivision paragraph does not apply three years after December 1, 2010.~~ The method set out in this subdivision paragraph may be used only to evaluate a child attending a private school or participating in a home-based private educational program. The method set out in this subdivision paragraph shall not be used to evaluate a child attending a public school, including a public charter school. Upon initial evaluation the child exhibits a significant discrepancy between the child's academic achievement in any of the eight areas of potential specific learning disabilities under subd. 1. and intellectual ability as documented by the child's composite score on a multiple score instrument or the child's score on a single score instrument. The IEP team may base a determination of significant discrepancy only upon the results of individually administered, norm-referenced, valid and reliable diagnostic assessment of achievement. A significant discrepancy means a difference between standard scores for ability and achievement equal to or greater than 1.75 standard errors of the estimate below expected achievement, using a standard regression procedure that accounts for the correlation between ability and achievement measures. This regression procedure shall be used except when the IEP team determines that the child cannot attain valid and reliable standard scores for intellectual ability or achievement because of the child's test behavior, the child's language, another impairment of the child that interferes with the attainment of valid and reliable scores or the absence of valid and reliable standardized, diagnostic tests appropriate for the child's age. If the IEP team makes such a determination, it shall document the reasons why it was not appropriate to use the regression procedure and shall document that a significant discrepancy exists, including documentation of a variable pattern of achievement or ability, in at least one of the eight areas of potential specific learning disabilities under subd. 1. using other empirical evidence. If the discrepancy between the child's ability and achievement approaches but does not reach the 1.75 standard error of the estimate cut-off for this subdivision paragraph, the child's performance in any of the eight areas of potential specific learning disabilities under subd. 1. is variable, and the IEP team determines that the child meets all other criteria under subd. 1., the IEP team may consider that a significant discrepancy exists.

(Note) Appendix A ~~specifies the recommended regression formula~~ includes a resource for manually calculating significant discrepancy scores. ~~This appendix does not apply three years after December 1, 2010.~~

SECTION 2. STATEMENT OF EMERGENCY

The Department of Public Instruction finds an emergency exists and that a rule is necessary for the immediate preservation of the public welfare. A statement of the facts constituting the emergency is:

Local education agencies across the state are experiencing difficulties with implementing current rule criteria with respect to identifying children with a specific learning disability (SLD). Local education agencies cannot assure or require private schools to implement certain practices within their educational program, including scientific, research-based interventions or instruction and curriculum that meets "state-approved grade-level standards." Further, local education agencies report

difficulties in determining and documenting several requirements in the rule related to the child's instruction and academic functioning. These difficulties have strained school district resources in implementing the current rule and have disrupted the educational experience of private school and homeschool children in the state. An emergency rule is needed to update criteria for identifying children with an SLD to remove these barriers in conducting SLD evaluations of private school and home school students. The promulgation of emergency rules will ensure that private school evaluations remain consistent through the permanent rule making process.

SECTION 3. EFFECTIVE DATE:

The rules contained in this order shall take effect upon publication as emergency rules pursuant to the authority granted by s. 227.24, Stats.

Dated this _____ day of _____, 2021

Jill K. Underly, PhD
State Superintendent