

Clearinghouse Rule 21-011

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

The scope statement for this rule, SS 133-20, was published in Register No. 778A3, on October 19, 2020, and approved by State Superintendent Carolyn Stanford Taylor on November 2, 2020.

The State Superintendent of Public Instruction hereby proposes an order to repeal s. PI 11.02 (6t), (9), (11), and (12); to renumber and amend s. PI 11.36 (6) (d) 2.; to consolidate, renumber and amend s. PI 11.36 (6) (c) 2. (intro.) and a.; to amend s. PI 11.02 (1) and (10), 11.36 (6) (a), (d) 1. a. and b. and 3. b., (f) 3., 4., 6., 7., and 8. (intro.), (g) and (h); to repeal and recreate s. 11.02 (4e) and (6m) and 11.36 (6) (c) 1. and 2. and (e); and to create s. 11.02 (1g) and (6g) and 11.36 (6) (d) 2. a. to g. and 3. e. to g. and (f) 9., relating to changes to criteria relating to specific learning disabilities.

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:

The proposed rule seeks to update ch. PI 11 of the Wisconsin Administrative Code with respect to eligibility criteria for children with specific learning disabilities. The current rule is burdensome and does not reflect current research, recent changes in progress monitoring tools, and alignment with the Every Student Succeeds Act. The proposed revisions are more responsive to individual student needs and allow for more alignment to each area of specific learning disabilities. The proposed revisions are consistent with the federal requirements under the Individuals with Disabilities Education Act (IDEA), and in particular with sections 34 CFR §§ 300.307-311, which in part requires states to develop criteria for determining whether a child has a specific learning disability.

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

“Specific learning disability” is defined under IDEA 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 specific learning disabilities under the Individuals with Disabilities Education Act 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. 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].

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 30, 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:

One respondent indicated support for the proposed rule under this scope statement, noting how difficult it has been to implement aspects of the current rule. For example, while certain interventions have been valuable, the current rule has not led to the outcomes necessary for children close to grade level and creates situations where interventions can actually cause more harm than help. As such, the respondent requested consideration for lowering the cut score for what constitutes "inadequate classroom achievement" to 1.5 standard deviations below the mean or lower. The respondent also requested adopting the federal definition of specific learning disabilities, which may allow school psychologists and other special education or related service professionals to lead the identification of students with specific learning disabilities as is done with other disability categories.

Agency Response: The goal of the proposed rule is to provide additional flexibility for local education agencies (LEAs) to provide interventions that are more closely matched to student need. This includes students who are receiving interventions who the LEA does not suspect of having a specific learning disability. Therefore, the use of criteria measuring 1.25 versus 1.5 standard deviations criteria is not relevant, as this part of the assessment is not completed until the end of the evaluation process. Changing the eligibility criteria from 1.25 to 1.5 standard deviations is likely to result in disproportionate identification of certain groups of students. Finally, the identification of students with a disability is a collaborative team process as described in IDEA. The determination of who leads the evaluation process is a local district decision, as laid out in the law. Additional flexibility under the proposed rule allows teams to engage in a more collaborative comprehensive special education evaluation process.

Two respondents voiced concern with the proposed rule under this scope statement, acknowledging that the flexibilities granted to states in establishing criteria for specific learning disabilities may lead to an over-identification of students with learning disabilities, thus removing the focus from equitable participation of students with disabilities in a high-quality curriculum and instruction meant for all. One respondent argued that the current rules identifying a child as having specific learning disabilities are designed to be inflexible to prevent the over-identification of students that meet the criteria for specific learning disabilities. The respondents argue it is up to individual IEP teams to interpret the rule and for schools to employ a variety of measurement tools to identify progress during intervention, rather than the department amending its rules on what one respondent describes as an ad hoc basis. The respondents suggest the department needs to improve its technical support and guidance, rather than pursue a rule change.

Agency Response: With regard to the concerns relating to over-identification of students with a specific learning disability, there is no data to support this. The current research shows response to intervention as a standalone mechanism for identifying specific learning disabilities is inadequate in addressing specific learning disabilities. The proposed rule will provide individualized and student-responsive interventions and progress monitoring and allow for interventions to be implemented in a variety of educational settings. The flexibility in intervention in the proposed rule is also designed to encourage equitable participation in a high-quality curriculum and maintain time requirements in addition to those

provided to all children. Further, the department will continue providing technical support and guidance to implement the proposed rule.

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.

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.

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.

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.

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 (SLD). 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 current rules qualifying a child with an SLD are inflexible for schools. The implementation and measures required by the current rule do not match the measurement tools available to school districts. The current SLD criteria identifies eight areas for identification and requires scientific, research-based interventions. There are no scientific, research-based interventions in all eight areas in the rule. Current rules further require an individualized education plan to determine if a student is making insufficient progress in one or more areas following intensive interventions. The current eligibility criteria, however, are difficult for schools to implement with fidelity across various educational settings. As such, the proposed rule will update criteria identifying children that have specific learning disabilities by reducing the rules’ prescriptive nature and creating flexibility across educational settings. The rule change is designed 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
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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 11.02 (1) is amended to read:

PI 11.02 (1) “Adequate fidelity” means the evidence-based intervention has been applied in a manner highly consistent with its design, for the duration and was provided to the pupil at least 80 percent the level of the recommended number of weeks, sessions, and minutes per session intensity that is in accordance with the design of the identified evidence base that supports effective results.

SECTION 2. PI 11.02 (1) (g) is created to read:

PI 11.02 (1g) “Area of potential specific learning disability” means one of the following:

- (a) Basic reading skill.
- (b) Listening comprehension.
- (c) Mathematics calculation.
- (d) Mathematics problem solving.
- (e) Oral expression.
- (f) Reading comprehension.
- (g) Reading fluency skills.
- (h) Written expression.

SECTION 3. PI 11.02 (4e) is repealed and recreated to read:

PI 11.02 (4e) “Evidence-based intervention,” has the meaning given in 20 USC 7801 (21) (A) (i).

SECTION 4. PI 11.02 (6g) is created to read:

(6g) “Intensive, evidence-based intervention” means an evidence-based intervention that is also an intensive intervention.

SECTION 5. PI 11.02 (6m) is repealed and recreated to read:

(6m) “Intensive intervention” means the systematic use of a technique, program or practice designed to improve learning or performance of individual or small groups of children, focusing on small numbers of discrete skills, matched to student need, with substantial numbers of instructional minutes in addition to those provided to all children.

SECTION 6. PI 11.02 (6t) and (9) are repealed.

SECTION 7. PI 11.02 (10) is amended to read:

PI 11.02 (10) “Progress monitoring” means a scientifically based practice to assess pupil response to interventions and evidence-based practice used to assess the effectiveness of intensive interventions in accordance with the specifications of the progress monitoring tool or process on a schedule that allows a comparison of the child’s progress to the performance of peers, is appropriate to the child’s age and grade placement, and is appropriate to the skill area being monitored.

SECTION 8. PI 11.02 (11) and (12) are repealed.

SECTION 9. PI 11.36 (6) (a) is amended to read:

PI 11.36 (6) (a) Specific learning disability, pursuant to s. 115.76 (5) (a) 10., Stats., 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~~the imperfect ability to listen, think, speak, read, write, spell or ~~perform~~do 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 due to the resultpresence of ~~visual, hearing, motor disabilities, cognitive disabilities, emotional disturbance~~other areas of impairment under this chapter, or cultural, linguistic, environmental, or economic disadvantagefactors.

SECTION 10. PI 11.36 (6) (c) 1. and 2. are repealed and recreated to read:

(c) 1. ‘Inadequate classroom achievement.’ Upon initial identification, both of the following apply:

a. The child does not achieve adequately for the child’s age, or meet state-approved grade-level standards in one or more area of potential specific learning disability when provided with learning experiences and instruction appropriate for the child’s age or grade.

b. The child’s score, after intensive, evidence-based interventions, on one or more assessments of achievement is equal to or more than 1.25 standard deviations below the mean in one or more areas of potential specific learning disability when provided with learning experiences and instruction appropriate for the child’s age or grade. Assessments used under this subdivision paragraph shall be individually administered, norm-referenced, valid, reliable, and diagnostic of impairment in the area of potential specific learning disability. The criterion under this subdivision paragraph may not be used if the IEP team determines that the child cannot attain valid and reliable standard scores for academic achievement because of the child’s test behavior, the child’s language proficiency, an impairment of the child that interferes with the attainment of valid and reliable scores, or the absence of individually administered, norm-referenced, standardized, valid and reliable diagnostic assessments of achievement appropriate for the child’s age and cultural and linguistic background. If the IEP team makes such a determination, it shall document the reasons why it was not appropriate to consider assessments of standardized achievement and shall document that inadequate classroom achievement exists in at least one area of potential specific learning disability using other empirical evidence. The IEP team may consider scores within 1 standard error of measurement of the 1.25 standard deviation criterion under this subdivision paragraph to meet the inadequate classroom achievement criteria under this subdivision if the IEP team determines the child meets all other criteria.

2. ‘Insufficient progress during intensive, evidence-based intervention.’ Upon initial identification, either of the following apply:

a. The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more area of potential specific learning disability when using a process based on the child’s response to intensive, evidence-based interventions. Intensive, evidence-based interventions may be implemented prior to or after referral for special education. The IEP team shall consider progress monitoring data from a progress monitoring tool or practice during at least two intensive, evidence-based interventions that are matched to the child’s needs and implemented with adequate fidelity. The IEP team shall establish a stable baseline in accordance with the progress monitoring tool or process specifications. Progress monitoring shall be administered on a weekly or other schedule supported by empirical research that results in a reliable, valid and diagnostically accurate trend line of the rate of progress during intensive, evidence-based interventions. Rate of progress during intensive, evidence-based intervention is insufficient when any of the following are true: the rate of

progress of the referred child is the same or less than that of the child's same-age peers; the referred child's rate of progress is greater than that of the child's same-age peers but will not result in the referred child reaching the average range of the child's same-age peer's achievement for that area of potential specific learning disability in a reasonable period of time; or the referred child's rate of progress is greater than that of the child's same-age peers, but the intensity of the resources necessary to continue this rate of progress cannot be maintained in general education.

b. When evaluating a child in a parentally-placed private school or home-based private education program, the IEP team may use a pattern of strengths and weaknesses as documented by each of the following: academic need in one or more area of potential specific learning disability; one or more areas of cognitive weakness that have an evidence-based link to problems in an identified area of potential specific learning disability; cognitive areas which are average or above; and an analysis of the findings for a pattern that will rule out or confirm the presence of a specific learning disability.

SECTION 11. PI 11.36 (6) (d) 1. a. and b. are amended to read:

PI 11.36 (6) (d) 1. a. The IEP team's findings under par. (c) are primarily due to cultural, linguistic, environmental, or economic disadvantage; cultural, factors; or any of the reasons specified under s. 115.782 (3) (a), Stats., or any of the impairments/disability categories under s. 115.76 (5), Stats., except s. 115.76 (5) (a) 10., Stats.

b. The IEP team's findings under par. (c) were due to a lack of appropriate instruction in the area of potential specific learning disability ~~in par. (c) 1.~~

SECTION 12. PI 11.36 (6) (d) 2. is renumbered PI 11.36 (6) (d) 2. (intro.) and amended to read:

2. The IEP team shall consider data demonstrating that prior to, or as a part of, an evaluation, the child was provided appropriate instruction in general education settings, delivered by qualified personnel. Appropriate Grade-level, appropriate instruction in reading, in order to comprehend and create text, shall include the following essential components of reading instruction as defined in 20 USC 6368 (3):

SECTION 13. PI 11.36 (6) (d) 2. a. to g. are created to read:

PI 11.36 (6) (d) 2. a. Reading comprehension.

b. Writing.

c. Vocabulary development.

d. Speaking.

e. Listening.

f. Reading foundational skills, including phonemic awareness and phonics through explicit, systematic instruction.

g. Reading fluency, including oral reading skills.

SECTION 14. PI 11.36 (6) (d) 3. b. is amended to read:

PI 11.36 (6) (d) 3. b. At least one licensed person who has implemented ~~scientific, research-based or evidence-based, an intensive interventions,~~ evidence-based intervention with the referred pupil child.

SECTION 15. PI 11.36 (6) (d) 3. e. to g.. are created to read:

PI 11.36 (6) (d) 3. e. A speech-language pathologist licensed under ch. PI 34 if inadequate classroom achievement in the areas of oral expression or listening comprehension are being considered.

f. A reading teacher or reading specialist licensed under ch. PI 34 if inadequate classroom achievement in the areas of reading comprehension, basic reading or reading fluency are being considered.

g. An educator with foundational knowledge in first and second language instruction and second language acquisition if the student is identified as an English Learner under 20 USC 7801 (20).

SECTION 16. PI 11.36 (6) (e) is repealed and recreated to read:

11.36 (6) (e) 1. Prior to determining whether or not a student has a specific learning disability, the LEA shall conduct at least two systematic observations to document the child's access to and engagement in and behavior during general education instruction and during an intensive, evidence-based intervention. At least one observation shall be conducted in

the regular classroom setting and one observation shall be conducted during an intensive, evidence-based intervention. An additional observation is required if the child is an English Learner under 20 USC 7801 (20).

2. Systematic observations shall be conducted by the following individuals:

a. A member of the IEP team other than the individual providing the instruction or intervention.

b. A member of the IEP team with knowledge in first and second language instruction and second language acquisition, if the child is an English Learner under 20 USC 7801 (20).

3. The systematic observation during general education instruction may be conducted before the child was referred for evaluation. The systematic observation during intensive, evidence-based intervention shall be conducted after the child has been referred for an evaluation and parental consent is obtained.

4. If the child is less than school age or out of school, at least one member of the IEP team shall conduct a systematic observation of the child in an environment appropriate for a child of that age.

SECTION 17. PI 11.36 (6) (f) 3., 4., 6., 7., and 8. (intro.) are amended to read:

PI 11.36 (6) (f) 3. The relevant behavior, if any, noted during the ~~observation~~observations of the child ~~and the relationship of that behavior to the child's academic functioning in the area of potential learning disability in par. (e) 1~~under par. (e) 1. to 4.

4. Documentation that the intensive, evidence-based intervention was ~~applied in a manner highly consistent with its design, was closely aligned~~matched to pupil~~child~~ need, ~~and~~ was culturally appropriate, and was applied in accordance with the identified evidence base that supports effective results and that the interventions implemented were at the highest level of evidence base available for the area of potential specific learning disability being assessed under par. (c) 1.

6. Whether the child does not achieve adequately for the child's age or to meet state-approved grade-level standards consistent with par. (c) 1.; and the child does not make sufficient progress to meet age or state-approved grade-level standards consistent with par. (c) 2. a.; ~~or until three years after December 1, 2010, the child exhibits a significant discrepancy between the child's academic achievement in any of the eight areas of potential specific learning disabilities under par. (e) 1. and intellectual ability consistent with par. (e) 2. b.~~

7. The determination of the IEP team concerning the effects of ~~a visual, hearing, or motor disability; cognitive disability; emotional disturbance~~other impairment areas under this chapter; cultural, linguistic factors; environmental, or economic disadvantage factors; or limited English proficiency on the child's achievement level.

8. If the child has participated prior to referral in a process that assesses the child's response to ~~scientific, research-based or~~ evidence-based intervention, documentation that the child's parents were notified about all of the following:

SECTION 18. PI 11.36 (6) (f) 9. is created to read:

PI 11.36 (6) (f) 9. Each IEP team member shall certify in writing whether the evaluation report reflects the member's conclusion. If the evaluation report does not reflect the member's conclusion, the group member shall submit a separate statement presenting the member's conclusion.

SECTION 19. PI 11.36 (6) (g) and (h) are amended to read:

PI 11.36 (6) (g) In addition to all other determinations, the IEP team shall base its decision of whether a child has a specific learning disability on a comprehensive evaluation using formal and informal assessment data regarding academic achievement and learning behavior from sources such as standardized tests, error analysis, criterion referenced measures, curriculum-based assessments, ~~pupil~~child's work samples, interviews, systematic observations, analysis of the child's response to previous interventions, and analysis of classroom expectations, and curriculum in accordance with s. 115.782, Stats.

(h) 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 section, unless the provisions under par. (d) 1. now apply. ~~If a child with a specific learning disability performs to generally accepted expectations in the general education classroom without specially designed instruction, the IEP team shall determine whether the child is no longer a child with a disability.~~

SECTION 20. 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