

Report From Agency

FINAL REPORT CLEARINGHOUSE RULE 07-057 SECTION PI 8.01 (2) (T) 2. GIFTED AND TALENTED PUPIL IDENTIFICATION

Analysis by the Department of Public Instruction

Statute interpreted: Section 121.02 (1) (t), Stats.

Statutory authority: Sections 118.35 (2) and 121.02 (5), Stats.

Explanation of agency authority:

Section 118.35 (2) requires the state superintendent to establish guidelines for the identification of gifted and talented pupils by rule.

Section 121.02 (5), Stats., requires the department to promulgate rules to implement and administer the 20 school district standards under s. 121.02 (1), Stats. Gifted and talented is one of those standards.

Related statute or rule: Section 118.35, Stats., programs for gifted and talented pupils.

Plain language analysis:

In *TODD PALMER V. THE STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION* (Dane County Circuit Case No. 06 C 0672), the Court instructed the department to promulgate a rule establishing guidelines for identifying gifted and talented pupils as required under s. 118.35 (2), Stats., because its current rule under s. PI 8.01 (2) (t), is not sufficient.

Therefore, the department is modifying s. PI 8.01 (2) (t) to establish more specific guidelines for the identification of gifted and talented pupils. The rule requires the school district board to identify pupils in grades kindergarten through 12 in the five areas specified in statute. Multiple measures must be used to build a pupil profile, and the identification tools must be responsive to the pupil's economic conditions, race, gender, culture, native language, developmental differences, and identified disabilities as described under Subch. V of Chapter 115, Stats. The rules give examples of multiple measures that may be used.

The rules also clarify that school boards must provide an opportunity for parents to participate in their child's identification and resultant programming.

Summary of, and comparison with, existing or proposed federal regulations: n/a.

Comparison with rules in adjacent states:

- **Illinois** – Illinois' rules apply only to locally developed GT programs for which state funding are sought. Illinois State Code requires the use of multiple measures (3 or more); the measures must be valid for their purpose; the process must be fair and impartial; and assessment instruments must be sensitive to inclusion of underrepresented

groups. Illinois also requires an appeals process. Illinois' State Code allows any "area of aptitude" to be identified, but there is "an emphasis on" language arts and math (the top 5% locally must be identified in these two areas). The identification process must be of equal rigor in each area of aptitude but does not specify identification can be in more than one area. Finally, a procedure for notifying parents of identification results must be provided and there must be an annual report to the parents and community.

- **Iowa** – Iowa requires a school improvement plan be in place for each district. The plan must include valid and systematic procedures including multiple selection criteria and goals and performance measures. GT policies must be free from discrimination practices in the education program. Iowa does not specify areas of identification; and does not specify whether identification can be in more than one category.
- **Michigan** – No rule requirements for gifted identification criteria or programs.
- **Minnesota** – No rule requirements to identify or serve gifted students.

Summary of factual data and analytical methodologies:

The primary reference source for developing the proposed rule is the document, *Pre-K-Grade 12 Gifted Program Standards*, published by the National Association for Gifted Children (NAGC). The NAGC supports and develops policies and practices that encourage and respond to the diverse expressions of gifts and talents in children and youth from all cultures, racial and ethnic backgrounds, and socioeconomic groups. It supports and engages in research and development, staff development, advocacy, communication, and collaboration with other organizations and agencies who strive to improve the quality of education for all students. The NAGC standards were developed in 1998 and represent consensus from professionals in the field on critical practice in gifted education. In addition, the proposed rule is consistent with the state superintendent's commitment to the children and youth of Wisconsin found in *The New Wisconsin Promise*.

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: None.

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)

Chrystyna Mursky, Gifted and Talented Coordinator, (608) 267-9273, chrystyna.mursky@dpi.state.wi.us.

Place where comments are to be submitted and deadline for submission:

Written comments on the proposed rules received no later than September 24, 2007, were given the same consideration as testimony presented at the hearing. Comments were submitted via email to lori.slauson@dpi.state.wi.us or by writing to Lori Slauson, Administrative Rules and Federal Grants Coordinator, Department of Public Instruction, 125 South Webster Street, P.O. Box 7841, Madison, WI 53707.

Public hearings to consider the proposed rule were conducted by the department on August 20, 22, and 23, 2007, in Eau Claire, Stevens Point and Madison, respectively. Persons were asked to register in favor, generally in favor (except for . . .), against, generally against (except for . . .), or for information only.

Eau Claire, August 20, 2007

| NAME | ORGANIZATION | IN FAVOR OR GENERALLY IN FAVOR | OPPOSED OR GENERALLY OPPOSED | OTHER |
|-----------------------|-------------------------------------|---|---|--------------|
| Arleen (Arlo) Cairo | Self | X | | |
| Pamela Cernocky | Eau Claire Area School District | | | X |
| Jan Engelsgerd | Altoona School District | | | X |
| Carolyn Haas | Self | X | | |
| Darren Kern | Somerset School District | X | | |
| Penny Britton Kolloff | Self | X | | |
| Beth McRae | Melrose-Mindoro Schools | | | X |
| Susan Savolainen | Self | X | | |
| Anne Sheridan | PTA | | | X |
| Dana Sommerfeld | Chippewa Falls Area School District | X | | |

Stevens Point Hearing, August 22, 2007

| NAME | ORGANIZATION | IN FAVOR OR GENERALLY IN FAVOR | OPPOSED OR GENERALLY OPPOSED | OTHER |
|------------------------|---|---|---|--------------|
| Ginny Carlton | Self | | X | |
| Dr. J. Christine Gould | Self | X | | |
| Jeanette Handrich | Stevens Point Area School District | | | X |
| Jean Hayden | Self | | X | |
| Rod Henke | Wis Rapids School District | | | X |
| Cara Hermans | Self | | X | |
| Sandi Jarvis | Wautoma Area Schools | | | X |
| Grehlen Nochles | Wausau School District GT Comm | | | X |
| Grey Nyen | Stevens Point Area Public School District | | | X |
| Dr. Wanda Routier | Self | | X | |
| Linda Staff | Self | | | X |
| Carole Wett Starck | | | | X |
| Barbara Tuszynski | Self | | | X |
| Steven A. Wermund | Self | X | | |

Madison Hearing, August 23, 2007

| NAME | ORGANIZATION | IN FAVOR OR GENERALLY IN FAVOR | OPPOSED OR GENERALLY OPPOSED | OTHER |
|-----------------------|--|---|---|--------------|
| Janila S. Behnke | Self | | X | |
| Laura Borsecnik | Self | | | X |
| Cynthia Clark | Self | X | | |
| Pam Clinkenbeard | Self | | X | |
| Barbara Dolan-Wallace | Ashwaubenon School District | X | | |
| Lavrie Frost, Ph.D. | Self | X | | |
| Lori Gehring | Ashwaubenon School District | X | | |
| Amy Gilgenbach | Self | | X | |
| Debie Kucek | Self | | X | |
| Greg Maass | Fond du Lac Schools | X | | |
| Mara Manning | Ashwaubenon School District | X | | |
| Tom Marten | CESA 3 | | | X |
| Lynda Olernik | Self | | | X |
| Ruth Robinson | Janesville School District | X | | |
| Tracey Schwalbe | Self | X | | |
| Welda Simousek | Madison Metropolitan School District | | | X |
| Carole Trone | Wisconsin Center for Academically Talented Youth (WCATY) | X | | |
| Kira Wehn | Self | X | | |
| Sally Wolfe | Self | | | X |
| Thomas Zigan | Wis Assoc for Talented and Gifted | | | X |

The following persons submitted written testimony:

| NAME | ORGANIZATION | IN FAVOR OR GENERALLY IN FAVOR | OPPOSED OR GENERALLY OPPOSED | OTHER |
|---|---------------------|---|---|--------------|
| Cynthia Bagley | Self | | | X |
| Nancy Beszhak | Self | | X | |
| Allyson Crowley | Self | | | X |
| J. Terry Downen | Self | | | X |
| Jacquelyn Drummer | Self | | | X |
| Marcia Engen | Self | | | X |
| Susan Henn | Self | | | X |
| Jeffrey B. Henriques and Laurie A. Frost | Self | | | X |
| Kristin Hesselbacher | Self | | | X |
| Randy Holschbach | Self | | | X |
| Katherine Johnson- Becklin | Self | | | X |
| Benjamin Kossow | Self | | | X |
| Leo and Debbie Kucek Donna Blonski Rich and Laurie Hintz Kathy Bue Vijaya V. Bandaru Alan and Amy Gilgenbach Christine M. Murphy Joseph Cunningham Bryn Kirk Tom and Katie Flanagan Kathy Gale Lise Zwisler Mary Lou Finman Kevin and Debby Wilderman Jane M. Schneider Paul A. Sundheim | Self | | | X |
| Sue Masterson | Self | | | X |
| Olaf Meding | Self | | | X |
| Lynda S. Oleinik | Self | | | X |
| Beth O'Rourke | Self | | | X |
| Todd Palmer | Self | | | X |
| Shirley Paulson | Self | | | X |
| Judy Schultz Kelly Egan Pam Hein Jeanne-Marie Ciriacks | Self | | | X |

| NAME | ORGANIZATION | IN FAVOR OR GENERALLY IN FAVOR | OPPOSED OR GENERALLY OPPOSED | OTHER |
|------------------------------------|--------------|--------------------------------------|------------------------------------|-------|
| Carmen Klenner Mary Jane Burdge | | | | |
| Gina Villa-Grimsby | Self | | | X |

Summary of public comments, the agency’s response to those comments, and changes made as a result of those comments:

The following comments were received as a result of testimony presented at the department’s public hearings or written testimony received by the September 24, 2007, deadline. Several testified that the state should appropriate the funding necessary to support gifted and talented programs. Additional funding requests cannot be addressed through this rule modification and; therefore, will not be listed and discussed. It should be noted the department has made requests for additional funds for gifted and talented and advanced placement programs in its biennial budget requests.

Comment – The rules must provide more detailed and objective guidelines for the identification of gifted and talented pupils. In the state court action *Todd Palmer v. State of Wisconsin Department of Public Instruction*, the Court ordered that the amended rules “provide more detailed and objective guidelines than are currently set forth in Wis. Admin. Code s. PI 8.01 (t).” Although the rule instructs school boards to use “multiple measures” and “identification processing tools” that are responsive to a pupil’s unique circumstance, the proposal fails to provide any detailed or objective guidance as to what these things might be nor how they will be implemented.

Discussion – The department attempted to provide additional guidance on multiple measures and identification process and tools by referring to the *Gifted and Talented Resource Guide* in a note in the rule. Because the information in the guide changes frequently, the department did not want to list its contents in the rule but wanted readers to be able to refer to the guide for additional information.

Changes – Because several individuals were concerned about the meaning of “multiple measures,” the rules have been modified to reference examples of commonly used multiple measures and identification processing tools. Such examples include, but are not limited to standardized test data, nominations, rating scales or inventories, products, portfolios, and demonstrated performance.

Comment – The rules should provide detailed and objective guidelines like those provided for children with disabilities.

Discussion – Neither the U.S. Congress nor the Wisconsin Legislature has established the same kind of detailed and demanding statutory mandates for gifted students that exist for students with disabilities. To do so in the rule may be considered over-stepping an agency’s authority to promulgate a rule under s. 227.11 (2), Wis. Stats. Further a significant amount of funds are tied to the proper identification and programming needs of children with disabilities. No such funding is provided for gifted and talented identification or program needs.

Changes – None.

Comment – The proposal is so lacking in substance that it does not qualify as a rule and is an attempt to delegate DPI’s executive authority to school boards. By failing to promulgate guidelines and instead simply making vague reference to the need for school boards to use “multiple measures,” DPI has attempted to shift its rulemaking responsibility to each of Wisconsin’s 426 school boards.

Discussion – The rule establishes guidelines for the identification of gifted and talented pupils. Wisconsin has a strong history of supporting local control of public schools. The proposed rules provide sufficient guidance while preserving local districts flexibility to respond to the needs and resources of their communities.

Changes – None.

Comment – The rules eliminate the requirement that parents participate in the gifted identification process and the planning of an appropriate education program. The rules only require that parents be notified.

Discussion – It was not the department’s intent to eliminate parental involvement in a pupil’s gifted and talented programming and identification process. The original rule lacked clarity as to how parents should be involved. By requiring that parents be notified upon the pupil’s identification, it was intended to get them involved as soon as possible.

Changes – For clarity, the rules have been modified to read “The school district board shall provide an opportunity for parental participation in the identification process and resultant programming.”

Comment – The rules appear to eliminate nominations as a basis for identifying a student as gifted and talented. Testing and other multiple measures which a school board may use to determine a child’s giftedness may not be sufficient. The rule must provide for ability measures and an opportunity for teachers, parents or other individuals who know the student’s capability to nominate that child for gifted status and services.

Discussion – It was not the department’s intent to eliminate nominations as a basis for identifying a student as gifted and talented. Apparently language relating to “instruments and measures” being validated gave readers the impression that standardized data should be emphasized in the identification of gifted children.

Changes – For clarity, the rules have been modified to 1) eliminate the phrase “and instruments and measures shall be validated for the specific purpose for which they are being employed” and 2) add examples of commonly used multiple measures and identification processing tools. Such examples include, but are not limited to standardized test data, nominations, rating scales or inventories, products, portfolios, and demonstrated performance.

Comment – The rules would perpetuate the lack of uniformity in gifted education which exists across school districts. To ensure uniformity across school districts in the area of identification, the amended rule must contain the “more detailed and objective guidelines” required by the Court’s Order.

Discussion – The Court Order did not require the department to ensure uniformity among districts. Uniformity suggests a one-size-fits-all approach ignoring our strong tradition of local control and the unique conditions of 426 school districts and their pupils’ needs.

Changes – To provide more detailed and objective guidelines, the rules have been modified to reference examples of commonly used multiple measures and identification processing tools.

Comment – The rule’s reference to the “Gifted and Talented Resource Guide” in a note has no legal effect.

Discussion – The Gifted and Talented Resource Guide is a resource that is available to school districts to refer to when developing identification procedures. School districts are not “required” to use it and therefore it is not a part of the official rule, but listed as a note for information.

Changes – None.

Comment – The fiscal note is inadequate. The fiscal note states the rules are “not expected to have significant local or state fiscal impact” even though it finds “the size of the population of children identified as gifted and talented as a result of this [amended] rule is indeterminate.” These two conclusions are incongruent. DPI’s most recent estimates are that 51,000 students enrolled in Wisconsin public schools are gifted. Assuming that each of these students were to receive appropriate programming, the total fiscal impact could be substantial.

Discussion – The fiscal note is an estimate based on assumptions of the rule’s anticipated fiscal effect on school districts’ procedures and guidelines used to *identify* gifted and talented children *not to provide programming services*. Based on the information available, the department concluded that the size of the population of children identified as gifted and talented as a result of the amended rule is indeterminate. While the population of identified gifted and talented pupils could increase or decrease, it is assumed the number of identified pupils will not change greatly. Therefore, the rules are not expected to have a significant local fiscal effect.

Changes – None.

Comment – The rules lack due process protections for parents and students aggrieved by the gifted identification determination.

Discussion – Upon receipt of a complaint, the department shall conduct an inquiry into a district’s compliance with any of the 20 standards, including gifted and talented. This is already provided for in s. PI 8.02, Wis. Admin. Code. Additional due process rights are not provided for in statute and cannot be created in rule.

Changes – None.

Comment – A uniform gifted and talented identification rule must be *enforced* at the state level.

Discussion – The provision that required the department to monitor school districts for compliance with the 20 school district standards was expressly removed by a statutory amendment in 1995 Wisconsin Act 27, s. 4038. Because of the Act, the audit team was eliminated and annual audits of the 20 standards are no longer conducted. However, the department shall conduct an inquiry into compliance with any of the 20 standards, including gifted and talented, upon receipt of a complaint or may conduct an audit on its own initiative as provided for under s. PI 8.02, Wis. Admin. Code.

Changes – None.

Comment – Although the rules appear to require only a bit more assessment, it will require additional staff time and training at an additional cost to some districts. Due to budget cuts, some districts do not have a designated gifted and talented staff person to perform these additional activities.

Discussion – The department recognizes that some school districts are challenged to staff gifted and talented programs due to budget constraints. However, the rule is not the direct cause of these circumstances. School districts are currently required to identify gifted and talented pupils using multiple measures. The more detailed and objective guidelines provided in the rule are not anticipated to have a significant fiscal effect.

Changes – None.

Comment – The rule should provide for greater local control of how gifted and talented services are provided. Resources are scarce with budget restraints and hiring additional staff/resources to comply with the rule is not an option for many districts.

Discussion – Wisconsin has a strong history of supporting local control of public schools. The proposed rules allow local districts flexibility to respond to the needs and resources of their communities.

Changes – None.

Comment – Wisconsin is to be commended for requiring five areas for consideration and measurement in identifying gifted and talented pupils.

Discussion – N/A.

Changes – None.

Comment – Support the inclusion of reference to “economic conditions, race, gender, culture, native language, developmental differences, handicapping conditions, and other factors that mitigate against fair practice.” This provision addresses issues that are long overdue.

Discussion – N/A.

Changes – The phrase “. . . and other factors that mitigate against fair practice” has been eliminated because some found the phrase unclear. Elimination of this phrase does not change the intent of the sentence. Also, the term “handicapping conditions” has been replaced with “identified disabilities as described under Subch. V. of Chapter 115, Wis. Stats.”

Comment – Support the explicit reference to identify pupils in grades kindergarten through twelve. Late identification can diminish a child’s interest in learning forever.

Discussion – N/A.

Changes – None.

Changes to the analysis or the fiscal estimate:

There are no changes to the fiscal estimate.

The following changes have been made to the analysis:

- A reference has been made to Dane County Circuit Case No. 06 C 0672.
- The second reference to “grade” in the phrase “grades kindergarten through grade 12” has been deleted.
- The phrase “instruments and measures must be validated for the specific purposes for which they are being used” has been deleted.

- The term “handicapping conditions” has been replaced with “identified disabilities as described under Subch. V of Chapter 115, Stats.”
- The phrase “The rules give examples of multiple measures that may be used” has been added to the analysis.
- The phrase “The rules also clarify that school boards must provide an opportunity for parents to participate in their child’s identification and resultant programming” has been added to the analysis.

Responses to Clearinghouse Report:

2. Form, Style and Placement in Administrative Code:

a. The court decision (*Todd Palmer v. State of Wisconsin Department of Public Instruction*) is an unpublished Dane County Circuit Court Case No. 06 C 0672. This information will be added to the analysis of the rule.

b. Recommendation accepted, changes made.

5. Clarity, Grammar, Punctuation and Plainness:

The phrase “...and other factors that mitigate against fair practice” has been eliminated. Elimination of this phrase does not change the intent of the sentence.

FINAL REGULATORY FLEXIBILITY ANALYSES

Summary of Final Regulatory Flexibility Analysis:

The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114(1)(a), Stats.

Summary of Comments:

No comments were reported.