Report From Agency

FINAL REPORT
CLEARINGHOUSE RULE 10-002
CHAPTER PI 11
THE IDENTIFICATION OF CHILDREN WITH SPECIFIC LEARNING DISABILITIES

Analysis by the Department of Public Instruction

Statute interpreted: Sections 115.76 (5) (a) 10. and (b) and 115.78 (1m), Stats.

Statutory authority: Sections 115.76 (5) (b) and 227.11 (2) (a), Stats.

Explanation of agency authority:

Section 115.762 (3) (a), Stats., requires the department to ensure that all children with disabilities are identified, located and evaluated.

Section 227.11 (2) (a), Stats., gives an agency rule-making authority to interpret the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

Related statute or rule:

Subchapter V of Chapter 115, Stats. Chapter PI 11, Wis. Admin. Code.

Plain language analysis:

In 2004, the Individuals with Disabilities Education Act (IDEA) modified the evaluation procedures for the identification of children with specific learning disabilities (SLD) under 20 U.S.C. 1414 (b) (6). As specified in IDEA, the evaluation procedures relating to the identification of specific learning disabilities provide that: states may not require the use of significant discrepancy as part of a determination of SLD, and must permit the use of a process based on a child's responses to scientifically-based intervention, commonly known as response to intervention (RTI), as part of its determination of SLD. IDEA also added reading fluency skills as an area of identification for SLD. Because the department's current rule under s. PI 11.36 (6), relating to specific learning disabilities is not consistent with the federal requirements, the rule will be recreated to align with the U.S. Code. The proposed rules will allow a three-year period during which a school district is permitted but not required to continue to use the significant discrepancy formula in identifying children with SLD. After that time, IEP teams must use data from a child’s response to intervention.

The department submitted a rule modifying the SLD criteria and significant developmental delay (SDD) criteria to the Legislative Clearinghouse for review on June 4, 2007 (See CHR 07-058). The SLD criteria has changed significantly from the version in CHR 07-058, and therefore, was re-submitted for Clearinghouse review and public

hearings. The information relating to the SLD criteria will be removed from CHR 07-058 before that rule is submitted to the chief clerk of each house of the legislature in final draft form under s. 227.19 (2), Stats.

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

The proposed rules are consistent with and add necessary clarification to the SLD language under 34 ss. CFR 300.307 to 300.311 as authorized under 20 U.S.C. s. 1221e-3, 1401 (30), and 1414 (b) (6).

Comparison with rules in adjacent states:

Illinois - Beginning in 2010-2011 Illinois will require school districts to use a process based on a child's response to scientific, research-based interventions as part of SLD evaluations.
Iowa - Beginning August 2010 Iowa will require the use of a process based on the child's response to scientific, research-based intervention or the use of other alternative research-based approaches and prohibits the use of a severe discrepancy between intellectual ability and achievement.
Michigan - Language that went to public hearings in November 2009 proposed the use of methods for determining SLD eligibility based on the use of scientific, research-based interventions and patterns of strengths and weaknesses.
Minnesota - The SLD criteria states that the child does not achieve adequately, has a disorder in one or more of the basic psychological processes, and demonstrates a severe discrepancy or inadequate rate of progress.

Summary of factual data and analytical methodologies:

See the plain language analysis.

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)

Stephanie Petska, Director, Special Education, stephanie.petska@dpi.state.wi.us, 608/266-1781

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

The department published a hearing notice in the *Administrative Register* which included this information.

Public hearings to consider the proposed rule were conducted by the department on March 16 and 18 and April 7 and 14, 2010, in Madison, Oshkosh, Chippewa Falls, and Brookfield, respectively. Persons were asked to register in favor, generally in favor (except for . . .), against, generally against (except for . . .), or for information only.

Madison Hearing, March 16, 2010

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Judy Ellickson	Self		X	
Mami Ginsberg	Self	X		
Perry Ed Lucas, Jr	Self	X		
Gwynne F. Peterson	Self	X		
Jeff Spitzer-Resnick	Disability Rights Wis			X
Katherine L. Strong	Self	X		
Karen Wydeven	Self	X		

Oshkosh Hearing, March 18, 2010

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Sue Koch	Self		X	
Michael Lackas	Wis School Psychologists (WSPA)	X		
Michelle Polzon	Self	X		

Chippewa Falls Hearing, April 7, 2010

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Dave Burke	Self	X		
Barb Gluch	Self	X		
Lynda Gruber-Suskey	Self	X		
Sherry K. Holt	Self	X		
Kathleen Laffin	Self	X		
Greg Nyen	WCASS	X		
Julie Warmke	Self	X		

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Jacalyn W. Weissenburger	UW-Stout	X		
Linda Zeman	Chetek School District	X		

Brookfield Hearing, April 14, 2010

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Mardi Freeman	WCASS	X		
Marlene Gross-Ackeret	Menomonee Falls School District	X		
Mark Hochmuth	Burlington Area School District	X		
Howard Kauio	Self	X		
Phil Knobel	School Administrators Alliance	X		
Gary E. Myrah	Wis Council & Administrators of Special Services	X		
Marie Ohm	Self		X	
Tom Phillipson	Wis Exceptional Children Advocacy Network	X		
Jenny Stonemeier	Quality Education Coalition			X
Barb Van Haren	WCASS	X		
Cheryl Ward	Wis Branch of the International Dyslexia Assoc.			X
Patricia A. Yahle	Milwaukee Public Schools	X		

The following persons submitted written testimony:

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Norm Andrews and Kathy Champau	Wis State Reading Assoc			X
Nanette L. Bunnow	Self		X	
Deborah Cromer	Self		X	
Joanne Curry	Self			X
C. Feral	Self			X
Tom Fritsche	Self			X
Lynn Johnson	Self			X
Amy Mizialko	Self	X		
Scott A. Moline	Self	X		
Jenna Schieffer	Self			X
Kathryn Shug	Self			X
Sandy Vander Velden	Self		X	
Debra A. Zarling	Self	X		

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

Comments – Timeline for Elimination of IQ-Achievement Discrepancy. There was no clear consensus as to an appropriate timeline for elimination of the IQ-Achievement discrepancy analysis. One group testified that allowing five years would give school districts the necessary time to build a strong RTI system. Two organizations felt that since the use of RTI data was authorized by Congress in IDEA 2004, school districts have had enough time to implement RTI. These groups felt a one year window was adequate. One commenter wanted five years from the publication of guidance.

Discussion – IDEA 2004 specifies that a state cannot require an LEA to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in determining whether a child has an SLD. An LEA is currently permitted to use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures. Considering the time span, LEAs have had adequate opportunity to begin building strong RTI models.

Changes – The sunset has been changed from five years to three years.

Comments – Discrepancy vs. RTI—Notice of Implementation. Two organizations were concerned about the possibility of inconsistent approaches to SLD evaluation. They foresee that a school could use a discrepancy model for one student and RTI for another without a rational basis for the decision and without notifying parents what to

expect from the evaluation process. The comments suggested that the rule require LEAs to choose one method for all SLD evaluations, and use that method until the sunset period expires. Further, in its Letter to Massanari, OESP states that if RTI, "…is not required but is permitted by the LEA, a school would not have to wait until RTI is fully implemented in all schools in the LEA before using RTI as part of the identification of SLD. That is, if the LEA is allowing, but not requiring the use of RTI, and a particular school, using the criteria adopted by the State for determining whether the child has an SLD is identified under 34 CFR §300.8(c)(10), is implementing an RTI process, consistent with the LEA's guidelines, it would not have to wait until RTI is implemented in all schools in the LEA before it could use information from an RTI process as part of the identification of children with SLD" (emphasis added).

Discussion – The department believes that each school should select one method for identification of SLD, and that once a school begins using RTI, they should use it for all evaluations of SLD. Furthermore, parents should be informed in advance of the change in methodology.

Changes – Section PI 11.36 (6) (c) 2. a. has been modified to reflect this change.

Comments – Scientific Research-Based or Evidence-Based Interventions. Two organizations commented that the proposed rule was appropriate in this area. One organization wanted to eliminate evidence-based interventions because they felt allowing evidence-based interventions would allow for the use of anecdotal information rather than rigorous data in disability determination. Another group wanted to require both research-based *and* evidence-based interventions.

Discussion – The department disagrees with the suggestion that this proposal will allow for decision-making based on anecdotal information. In fact, as stated in previous discussions of the proposed rule, the professional literature indicates that evidence-based interventions are more rigorous than scientific research-based interventions. The request to require both types of interventions would controvert federal law.

Changes – In order to improve clarity "evidence-based interventions" has been defined under s. PI 11.02 (4e).

Comments – Appropriate Instruction and Intervention. Four organizations requested direct quotation of federal regulations defining appropriate instruction, stating that this would improve adherence to this element.

Discussion – Because the department already requires documentation of appropriate instruction as part of the evaluation process, we do not believe this is necessary. It is also unnecessary to quote all relevant elements of federal law in state rules because LEAs must follow federal law regardless of the content of state rule.

Changes – No changes are proposed in this regard.

Comments – One commenter shared that there are additional aspects of appropriate instruction beyond the essential components listed in the federal definition, stating, "…effective instruction includes adapting to the individual needs of students rather than a one size fits all approach…"

Discussion – Interventions are required to be closely aligned to student need in s. PI 11.36 (6) (f) 4. However, the department agrees that ensuring that interventions are culturally appropriate is important. We have added additional requirements to this section.

Changes – The phrase, "and were culturally appropriate" has been added to s. PI 11.36 (6) (f) 4.

Comments – Insufficient Progress. Three groups were concerned about the lack of specificity of the term "insufficient progress." In particular, they wanted it to be made clear that a child who is not closing the gap with his or her peers would be considered to be making insufficient progress. Another organization affirmed the use of insufficient progress as one element of the rule. A few individuals agreed with the proposed definition.

Discussion – It is technically challenging to create a mathematical criterion for insufficient progress, and comments from previous stakeholder groups have indicated that guidance can adequately direct LEAs in this regard. However, the department agrees that additional specificity about conditions where progress is insufficient would be useful, without creating a new mathematical formula.

Changes – Section PI 11.36 (6) (c) 2. a. has been modified to clarify these situations. New language has been added to s. PI 11.36 (6) (d) 3. a. to clarify the methodology used for determination of insufficient progress, including a comparison with national norms. In addition to ongoing research reviews, the department has analyzed data on achievement and rate of progress using individual student data from two Wisconsin districts. Between the additional specificity in the proposed rule and future guidance about criteria on rate of progress, it is anticipated that IEP teams will be able to accurately and consistently identify students with specific learning disabilities.

Comments – Percent Fidelity to Intervention Design. Three groups were concerned about the amount of instruction that could be lost using an 80 percent fidelity criterion. One group supported the use of integrity data in general, and another specifically supported the 80 percent criterion. One commenter wanted language that was less specific, leaving decision-making about fidelity up to the IEP team.

Discussion – The department believes the proposed rule creates an appropriate, multiple-element criterion. Raising the 80 percent criterion could substantially reduce the number of students who are identified with impairments. The proposed 80 percent criterion is a permissive minimum, and LEAs have a vested interest in exceeding that level to ensure they accurately identify only those students with disabilities, rather than students who adequately benefit from support available in general education settings alone.

Changes – No changes are proposed in this area.

Comments – Patterns of Strengths and Weaknesses. A few individuals and two groups called for the option of examining information processing scores for a pattern of strengths and weaknesses. They cite the definition of a learning disability in federal regulation: "a disorder in one of more of the basic psychological processes..." They state that since psychological processing is in the federal definition, our criteria should include an analysis of those

processes. A few individuals specifically opposed the inclusion of an examination of strengths and weaknesses in information processing.

Discussion – Comments to the federal regulations (Federal Register Vol. 71, No. 156, Monday, August 14, 2006) address this issue directly. OSEP "does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. There is no current evidence that such assessments are necessary or sufficient for identifying SLD." This issue has been thoroughly addressed by the department in previous discussions, and our proposal has been publicly supported by national SLD assessment experts. The proposal is consistent with research, supported by published implementation projects, and meets all federal requirements.

Changes – No changes are proposed in this area.

Comments – A Consistent Statewide Approach to SLD Identification. Numerous groups and individuals commented that the rule should ensure a consistent approach to identification of SLD regardless of where a student lives. One group suggested that the rule be optional, allowing districts to use it until "better alternatives" are available.

Discussion – The department has a strong interest in ensuring the consistent use of one approach to the identification of disabilities statewide.

Changes – In an effort to ensure this consistency, references to the use of national norms have been added to s. PI 11.36 (6) (d) 3. a. and language relating to the needs of culturally diverse learners has been added to s. PI 11.36 (6) (f) 4.

Comments – Assessments in RTI. Numerous comments were made about assessment issues in general, and about specific assessment tools in particular. The Legislative Council Rules Clearinghouse Report states that the rule uses numerous technical terms that are not defined or described in either the rule or the analysis, specifically requesting a definition of "probes" among other terms. Three groups and numerous individuals supported weekly progress monitoring using technically sound instruments. One group and a few individuals suggested that the rule should allow for "a broader array of instructionally relevant assessments."

Discussion – The proposed rule allows for great latitude in the selection of instructionally relevant assessments (multiple measures) while requiring certain types of data for specific purposes. The department has added clarifications and definitions of the following terms in response to the Legislative Council Report and in the interest of further clarity: probes, progress monitoring, requirements for data analysis and the statistical process of trend line analysis, clarification of the psychometrically valid and reliable methodology including comparison to an appropriate peer group.

Changes – These additions and clarifications appear as new definitions under s. PI 11.02 and new language under s. PI 11.36 (6) (d) 3. a.

Comments – One group expressed concern that Wisconsin does not have state-approved grade-level standards that are specifically aligned to the eight areas of SLD. The Legislative Council Report concurs, stating "State-Approved Grade-Level Standards" should be defined or described.

Discussion – Wisconsin has never had state-approved grade-level standards for statewide assessments that are specifically aligned to the eight areas of SLD required in federal regulation. After proposed changes to statewide assessments are made, the department will create proficiency standards. These standards can be correlated with inadequate achievement or insufficient progress in a manner that would easily support disability determination. The department believes this can be adequately addressed in guidance when those assessments are available.

Changes – No changes are proposed in this area.

Changes to the analysis or the fiscal estimate:

The "Plain language analysis" and "Summary of, and comparison with, existing or proposed federal regulations" portion of the analysis has been re-written for clarity.

Responses to Clearinghouse Report:

2. Form, Style and Placement in Administrative Code:

a. Because subdivision paragraphs cannot be further divided, some of those subdivision paragraphs have full multi-sentences that can be hard to understand. Creating a separate section for specific learning disabilities (SLD) may allow some of those sentences to subdivided into short clauses. However because all the areas of special education impairment are located under s. PI 11.36 [including SLD under sub. (6)], the department does not want to separate the SLD criteria by creating a new section.

b. Recommendation accepted, changes made.

c. Recommendation accepted, changes made.

5. Clarity, Grammar, Punctuation and Plainness:

a. Recommendation accepted. The analysis has been re-written for clarity.

b. Wisconsin has never had state-approved grade-level standards for statewide assessments that are specifically aligned to the eight areas of SLD required in federal regulation. After proposed changes to statewide assessments are made, DPI will create proficiency standards. These standards can be correlated with inadequate achievement or insufficient progress in a manner that would easily support disability determination. The department believes this can be adequately addressed in guidance when those assessments are available. No changes are proposed in this area.

c. Clearinghouse Rule 07-058 contains only the provisions relating to significant developmental delay (SDD) and is still being reviewed at the department level. There is no interaction between this current rule which contains only SLD criteria and CHR 07-058.

d. Recommendation accepted. The department has added definitions for intervention; intensive interventions; scientific, research-based; progress monitoring and probes and given further descriptions of other information.

e. Recommendation accepted. Section PI 11.36 (6) (g) has been modified for clarity.

f. Recommendation accepted, changes made.

g. The initial applicability applies to both the evaluation and determination. The evaluation is used to make a determination of whether the child has a disability. The IEP team then develops a plan to serve that child. Therefore the current initial applicability section is sufficient.

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.