

## Clearinghouse Rule 18-004

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

The scope statement for this rule, SS 068-17, was published in Register No. 739B on July 31, 2017, and approved by State Superintendent Tony Evers on August 10, 2017. Pursuant to *Coyne v. Walker*, the Department of Public Instruction is not required to obtain the Governor's approval for the statement of scope for this rule. *Coyne v. Walker*, 368 Wis.2d 444.

The State Superintendent of Public Instruction hereby proposes to create s. PI 11.38 and 11.39, relating to standards for disproportionality in special education and LEA determinations.

---

## ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

**Statute interpreted:** 34 CFR 300.602 and 34 CFR 300.646

**Statutory authority:** s. 227.10 (1), Stats.

**Explanation of agency authority:**

Under s. 227.10 (1), Stats., "each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. A statement of policy or an interpretation of a statute made in the decision of a contested case, in a private letter ruling under s. 73.035 or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render it a rule or constitute specific adoption of a rule and is not required to be promulgated as a rule." As such, a rule is required for the enforcement of special education law under 34 CFR 300.602 and 34 CFR 300.646.

**Related statute or rule:** None.

**Plain language analysis:**

The proposed rule amends Chapter PI 11 of the Wisconsin Administrative Code and establishes standards and/or criteria related to disproportionality in special education and local education agency (LEA) determinations under the Individuals with Disabilities Education Act (IDEA).

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

Related to disproportionality in special education, "[e]ach State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to - (1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act; (2) The placement in particular educational settings of these children; and (3) The incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions." 34 CFR 300.646.

Related to LEA determinations, "[e]ach State must use the targets established in the State's performance plan under § 300.601 and the priority areas described in § 300.600(d) to analyze the performance of each LEA." 34 CFR 300.602(a).

**Comparison with rules in adjacent states:**

Similar to Wisconsin, each state that receives funding under IDEA is required by federal law to 1) provide for the collection and examination of data to determine significant disproportionality in the state and LEAs of the state, and 2) use the targets established in the state's performance plan to analyze the performance of each LEA.

**Summary of factual data and analytical methodologies:**

The amendment related to disproportionality in special education sets criteria and establishes procedures related to determining disproportionality in special education identification, placement, and discipline. The Department followed recommendations from the IDEA Data Center, "Methods for Assessing Racial/Ethnic Disproportionality in Special Education." The Department solicited external feedback from stakeholders and considered multiple factors in defining significant disproportionality, including the population size, size of individual LEAs, and composition of State population. The determination of significant disproportionality by race or ethnicity is based solely on a collection and examination of data and not on policies, procedures, or practices. Procedures related to enforcement of LEA determinations under IDEA are also set based on these findings. No other policy alternatives than a rule are available as the Department is required by statute to promulgate rules in setting criteria that enforce federal law.

**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  
Budget and Policy Analyst  
Wisconsin Department of Public Instruction  
[adminrules@dpi.wi.gov](mailto:adminrules@dpi.wi.gov)  
(608) 267-9127

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

Comments should be submitted to Carl Bryan, Department of Public Instruction, 125 S. Webster Street, P.O. Box 7841, Madison, WI 53707-7841 or at [adminrules@dpi.wi.gov](mailto:adminrules@dpi.wi.gov). The Department will publish a hearing notice in the *Administrative Register* which will provide information on the deadline for the submission of comments.

---

**SECTION 1. PI 11.38 is created to read:**

**PI 11.38 Racial disproportionality.**

(1) DEFINITIONS. In this section:

- (a) "Alternate risk ratio" means a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA or independent charter school by the risk of that outcome for children in all other racial or ethnic groups in the state.
- (b) "Comparison group" means the children in all other racial or ethnic groups within an LEA or independent charter school or within the state, when reviewing a particular racial or ethnic group within an LEA or independent charter school for significant disproportionality.
- (c) "Independent charter school" means a charter school established under s. 118.40 (2r) and (2x), Stats.
- (d) "Minimum cell size" means the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

- (e) “Minimum n-size” means the minimum number of children enrolled in an LEA or independent charter school with respect to identification, and the minimum number of children with disabilities enrolled in an LEA or independent charter school with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.
- (f) “Risk” means the likelihood of a particular outcome for a specified racial or ethnic group, calculated by dividing the number of children from a specified racial or ethnic group experiencing that outcome by the total number of children from that racial or ethnic group or groups enrolled in the LEA or independent charter school.
- (g) “Risk ratio” means a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA or independent charter school by the risk for children in all other racial and ethnic groups within the LEA or independent charter school.
- (h) “Risk ratio threshold” means the threshold over which there is significant disproportionality based on race or ethnicity.
- (2) DATA COLLECTION. Consistent with 20 USC 1418(d) and the regulations promulgated thereunder, the department shall collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in LEAs or independent charter schools with respect to the following:
  - (a) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in ss. PI 11.36 (1), (5), (6), (7), (8), and (10).
  - (b) The placement in particular educational settings of these children; and
  - (c) The incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions.
- (3) METHODOLOGY.
  - (a) Consistent with 20 USC 1418(d) and the regulations promulgated thereunder, in determining whether significant disproportionality exists in a LEA or independent charter school, the department shall establish the following:
    1. Reasonable risk ratio thresholds.
    2. Reasonable minimum cell size.
    3. Reasonable minimum n-size.
  - (b) Except as provided in paragraph (3) (d) and subsection (4) of this section, the department shall annually calculate risk ratios for each LEA or independent charter school with respect to the following:
    1. The identification of children with disabilities.
    2. The identification of children with any of the following impairments:
      - a. Intellectual disabilities.
      - b. Specific Learning disabilities.
      - c. Emotional disturbance.
      - d. Speech or language impairments.
      - e. Other health impairments.
      - f. Autism.
  - (c) Except as provided in par. (d) and sub. (4) of this section, the department shall annually calculate risk ratios for each LEA or independent charter school in placements into particular educational settings, including disciplinary removals.
  - (d) The department shall calculate alternate risk ratios for a LEA or independent charter school if an applicable comparison group in the LEA or independent charter school does not meet the minimum cell size or the minimum n-size determined under par. (3) (a) of this section.
- (4) EXCEPTION. The department may decline to calculate a risk ratio or alternate risk ratio to determine significant disproportionality if:
  - (a) The particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size; or
  - (b) In calculating the alternate risk ratio under par. (3) (d) of this section, the comparison group for the state does not meet the minimum cell size or minimum n-size.
- (5) DETERMINING SIGNIFICANT DISPROPORTIONALITY. The department shall identify an LEA or independent charter school as having significant disproportionality based on race or ethnicity if the LEA or independent charter school has exceeded a risk ratio threshold set by the department for a racial or ethnic group for three or more prior consecutive years preceding the identification.
- (6) REVIEW AND REVISION OF POLICIES, PRACTICES, AND PROCEDURES. If the department determines significant disproportionality with respect to the identification of children as children with disabilities or the placement in particular educational settings, including disciplinary removals of such children, in accordance with this section, the department shall do the following:
  - (a) Provide for the annual review and, if appropriate, revision of the policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure that the policies, practices, and procedures comply with the requirements of IDEA.

- (b) Require the LEA or independent charter school to publicly report on the revision of policies, practices, and procedures described under paragraph (6) (a) of this section consistent with the requirements of 20 USC 1232g and 1413(f).
- (7) COORDINATED EARLY INTERVENING SERVICES. The department shall require any LEA or independent charter school identified as having significant disproportionality to reserve the maximum amount of funds under 20 USC 1413(f) to provide coordinated early intervening services to address factors contributing to the significant disproportionality. This subsection shall not apply to any LEA or independent charter school that serves only children with disabilities to reserve funds to provide comprehensive coordinated early intervening services.
- (8) RULE OF CONSTRUCTION. Nothing in this section authorizes the department or any LEA or independent charter school to develop or implement policies, practices, or procedures that result in actions that violate the requirements of IDEA, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

**SECTION 2. PI 11.39 is created to read:**

**PI 11.39 LEA Determinations.**

- (1) ENFORCEMENT. Consistent with 20 USC 1416(a) and (e) and the regulations promulgated thereunder, if the department determines that an LEA is not meeting the requirements of 20 USC 1411 to 1419 of the IDEA or is identified as having significant disproportionality under s. PI 11.38, the department shall prohibit the LEA from reducing the LEA's maintenance of effort under 20 USC 1413(a)(2)(C) for any fiscal year.
- (2) Nothing in this section shall be construed to restrict the department from utilizing any other authority available to it to monitor and enforce the requirements of IDEA.

**SECTION 3. 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 \_\_\_\_\_, 2018

---

Tony Evers, PhD  
State Superintendent