

Clearinghouse Rule 20-072

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

The scope statement for this rule, SS 107-20, was published in Register No. 776A2, on August 10, 2020, and approved by State Superintendent Carolyn Stanford Taylor on August 21, 2020.

The State Superintendent of Public Instruction hereby proposes an order to repeal and recreate s. PI 11.03 (3) and (4); and to create s. PI 11.03 (4m), relating to sensory impairment terminology and deafblindness.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

Statute interpreted: s. 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. 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 s. 115.762 (3) (a), Stats.

Related statute or rule:

N/A

Plain language analysis:

The proposed rule seeks to amend ch. PI 11 with respect to the following:

- 1) Revising s. PI 11.36 (3) to update terminology and eligibility criteria for pupils that are blind and visually impaired.
- 2) Revising s. PI 11.36 (4) to update terminology and eligibility criteria for pupils that are deaf and hard of hearing.
- 3) Creating a section recognizing deafblindness as an additional area of impairment under s. PI 11.36.

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

Deaf-blindness is defined under the Individuals with Disabilities Education Act (IDEA) as concomitant hearing and visual impairments, the combination of hearing and visual impairments causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness. [34 CFR § 300.8(c)(2)].

Regulations pertaining to annual reporting requirements under IDEA also include the following with respect to the identification of children with deaf-blindness: (1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category

“deaf-blindness.” (2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category “multiple disabilities” [34 CFR § 300.641(d)].

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 August 20, 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:

The respondents support changing the existing terminology in the rules as they better represent the individuals covered, and creating a deafblind category as it allows for better, more direct provision of services for students needing support. One respondent’s preferred language to identify the affected disability categories are: deafblind, blind and visually impaired, and deaf and hard of hearing.

Agency Response: The department agrees and will incorporate the respondent’s suggested terminology of deafblind, blind and visually impaired, and deaf and hard of hearing into the proposed rule.

Comparison with rules in adjacent states:

- Illinois: Illinois uses the terms deafness, hearing impairment, and visual impairment including blindness. Illinois also recognizes deafblindness as a separate disability category. See 23 Illinois Administrative Code 226.75
- Iowa: Iowa uses the terms deafness, hearing impairment, and visual impairment. Iowa also recognizes deafblindness as a separate disability category. See Iowa Administrative Code 281-41.50(3) for deafblindness, 281-41.50(4) for deafness, 281-41.50(5) for hearing impairment, and 281-41.50(13) for visual impairment.
- Michigan: Michigan uses the terms visual impairment and deaf or hard of hearing. Michigan also recognizes deafblindness as a separate disability category. See Michigan Administrative Rules for Special Education (MARSE) 340.1710 for deaf or hard of hearing, 340.1708 for visual impairment, and 340.1717 for deaf-blindness.
- Minnesota: Minnesota uses the terms visually impaired and deaf/hard of hearing. Minnesota also recognizes deafblindness as a separate disability category. See Minnesota Administrative Rules 3535-1345 for visually impaired, 3525.1331 for deaf and hard of hearing, and 3525.1327 for deafblind.

Summary of factual data and analytical methodologies:

Chapter PI 11 of the Wisconsin Administrative Code contains the current administrative rules governing the education of children with disabilities, including rules around the identification of specific areas of impairment which may receive special education and related services. Section PI 11.36 (3) relates to identification of pupils that are visually impaired and s. PI 11.36 (4) relates to identification of pupils that are hearing impaired. The labels “visual impairment” and “hearing impairment” are restrictive and do not recognize the difference between blindness and visual impairments or deafness and hard of hearing, respectively. As such, the department proposes to update terminology and eligibility criteria relating to these areas of impairment in identifying pupils that are blind and visually impaired and pupils that are deaf and hard of hearing. Without a rule change, the department will continue to implement ch. PI 11 as written.

Federal special education law also recognizes deaf-blindness as concomitant hearing and visual impairments. The combination of hearing and visual impairments causes severe communication and other developmental and educational needs, thus making it challenging for special education programs to accommodate those needs under the current rule, which solely recognizes children with deafness or children with blindness. While there are currently 153 pupils in Wisconsin that are on the Wisconsin Deafblind Registry, Wisconsin is the only state that does not recognize deafblindness as a separate disability category. A rule change will ensure a more appropriate identification of pupils who are deafblind. Without a rule, the department will 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
Administrative Rules Coordinator
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.

SECTION 1. PI 11.03 (3) and (4) are repealed and recreated to read:

PI 11.03 (3) BLIND AND VISUAL IMPAIRED. (a) Blind and visual impaired means even after correction a child's visual functioning adversely affects educational performance. The IEP team may identify a child as blind and visually impaired after all of the following events occur:

1. A teacher of the blind and visually impaired licensed under s. PI 34.051 conducts a functional vision evaluation which includes a review of medical information from an ophthalmologist or optometrist, formal and informal tests of visual functioning, and a determination of the implications of the blindness or visual impairment on the educational and curricular needs of the child.

2. An orientation and mobility specialist licensed under s. PI 34.089 evaluates the child to determine if there are related orientation and mobility needs in home, school, or community environments. A child may meet this criteria even if they do not have orientation and mobility needs.

(b) 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.

(4) DEAF AND HARD OF HEARING. (a) Deaf and hard of hearing means a decreased ability to detect sound in one or both ears with or without amplification, whether permanent or chronically fluctuating, which adversely affects a child's educational performance. This includes academic performance, speech perception, speech production, or communication including language acquisition or expression. A current evaluation by an audiologist licensed under ch. 459, Stats., shall be one of the components for an initial evaluation of a child with suspected hearing loss. A teacher of the deaf or hard of hearing licensed under s. PI 34.050 must be a member of the IEP team when determining eligibility.

(b) 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.

SECTION 2. PI 11.03 (4m) is created to read:

PI 11.03 (4m) DEAFBLIND. (a) Deafblind means concomitantly deaf and hard of hearing under s. PI 11.03 (4) and blind or visually impaired under s. PI 11.03 (3), the combination of which causes severe communication and other developmental and educational needs such that the individual disability-related needs of the student extend beyond the instruction and supports required for a student who is solely deaf and hard of hearing or blind or visually impaired.

(b) 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.

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 _____, 2020

Carolyn Stanford Taylor
State Superintendent