

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), and 11.36 (6) (c) 2. b.; 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), (c) 1., (d) 1. a. 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) (e); and to create s. 11.02 (6r) and 11.36 (6) (d) 2. a. 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.

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

“Specific learning disability” is defined under the Individuals with Disabilities Education Act (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 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 students with a specific learning disability. 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 is designed to be inflexible to prevent the over-identification of students that meet the criteria for specific learning disabilities. Rather, 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 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. There is, however, current research that 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. The proposed rule also allows for interventions to be implemented in a variety of educational settings. The flexibility in intervention in the proposed encourages, rather than discourages, equitable participation in a high quality curriculum and maintains the requirement for "substantial numbers of minutes in addition to those provided to all children." The department will continue to provide ongoing 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
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.

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 (4e) and (6m) are repealed and recreated to read:

PI 11.02 (4e) “Evidence-based intervention,” as described in 20 USC 7801 (21), means an activity, strategy, or intervention that demonstrates a statistically significant effect on improving student outcomes or other relevant outcomes based on one of the following:

- (a) Strong evidence from at least one well-designed and well-implemented experimental study.
- (b) Moderate evidence from at least one well-designed and well-implemented quasi-experimental study.
- (c) Promising evidence from at least one well-designed and well-implemented correlational study with statistical controls for selection bias.

(6m) “Intensive interventions” 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 3. PI 11.02 (6r) is created to read:

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

SECTION 3. PI 11.02 (6t) and (9) are repealed.

SECTION 4. 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~~ 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 5. PI 11.02 (11) and (12) are repealed.

SECTION 6. PI 11.36 (6) (a) and (c) 1. are 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 result~~due to the result~~ presence of ~~visual, hearing, motor disabilities, cognitive disabilities, emotional disturbance~~other categories of disability under this chapter, or cultural, linguistic, environmental, or economic disadvantage factors.

(c) 1. 'Inadequate classroom achievement.' Upon initial identification the child does not achieve adequately for ~~his or her~~the child's age, or meet state-approved grade-level standards in one or more of the following eight areas of potential specific learning disabilities when provided with learning experiences and instruction appropriate for the child's age or grade: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. A child's achievement is inadequate when the child's score, after intensive intervention, on one or more assessments of achievement is equal to or more than 1.25 standard deviations below the mean in one or more of the eight areas of potential specific learning disabilities. Assessments used under this subdivision shall be individually administered, norm-referenced, valid, reliable, and diagnostic of impairment in the area of potential specific learning disabilities. The 1.25 standard deviation requirement under this subdivision 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 standardized achievement testing, and shall document that inadequate classroom achievement exists in at least one of the eight areas of potential specific learning disabilities using other empirical evidence. The IEP team may consider scores within 1 standard error of ~~the~~ measurement of the 1.25 standard deviation criterion above to meet the inadequate classroom achievement criteria under this subdivision if the IEP team determines the child meets all other criteria.

SECTION 7. 11.36 (6) (c) 2. (intro.) and a. are consolidated, renumbered PI 11.36 (6) (c) 2. and amended to read:

PI 11.36 (6) (c) 2. 'Insufficient progress.' ~~Upon evaluation, the child has made insufficient progress in one of the following areas: a. Insufficient response to~~during intensive, ~~scientific, research-based or evidence-based~~ intervention.' The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the eight areas of potential specific learning disabilities under subd. 1. when using a process based on the child's response to intensive ~~scientific, research-based or evidence-based~~ interventions. Intensive interventions may be implemented prior to, ~~or as part of an evaluation, for specific learning disability~~ 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, ~~scientific, research-based or evidence-based~~ interventions, ~~implemented with adequate fidelity and closely aligned that are matched to individual student learning~~ the child's needs and implemented with adequate fidelity. The median score of three probes is required ~~to~~IEP team shall establish a stable baseline data point for progress monitoring. ~~IEP teams shall use weekly or more frequent~~in accordance with the progress monitoring ~~to evaluate~~tool or process specifications. Progress monitoring shall be conducted at regular intervals that accurately assess the rate of progress during intensive, scientific, research-based or the evidence-based interventions. Rate of progress during intensive 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 ~~his or her~~the child's same-age peers; the referred child's rate of progress is greater than that of ~~his or her~~the child's same-age peers but will not result in the referred child reaching the average range of his or her same-age peer's achievement for that area of potential disability in a reasonable period of time; or the referred child's rate of progress is greater than that of ~~his or her same-age peers, but the intensity of the resources necessary to obtain this rate of progress cannot be maintained in general education.~~ If an LEA ~~uses insufficient response to intensive, scientific, research-based or evidence-based intervention under this subdivision~~

~~paragraph for any child being evaluated for specific learning disabilities enrolled in a school, the LEA shall use insufficient response to intensive, scientific, research-based or evidence-based intervention for all such evaluations of children enrolled in that school. At least ten days in advance of beginning to use insufficient response to intensive, scientific, research-based or evidence-based intervention in a school, the LEA shall notify parents of all children enrolled in that school of the intent to use insufficient response to intensive, scientific, research-based or evidence-based intervention 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.~~

SECTION 8. PI 11.36 (6) (c) 2. b. is repealed.

SECTION 9. PI 11.36 (6) (d) 1. a. is 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.

SECTION 10. 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 11. PI 11.36 (6) (d) 2. a. to f. 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 12. 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 13. PI 11.36 (6) (d) 3. e. and f. are created to read:

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

f. 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 14. 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 intervention. At least one observation shall be conducted in the regular classroom setting and one observation shall be conducted during an intensive 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 of routine classroom instruction and monitoring of the child's performance in at least one of the eight areas of potential specific learning disabilities under par. (c) 1. may be conducted before the child was referred for evaluation, or the systematic observation of the child's academic performance in at least one of the eight areas of potential specific learning disabilities under par. (c) 1. 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 15. 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. (c) 1~~under par. (e) 1. to 4.

4. Documentation that the intensive 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 areas of 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. (c) 1. and intellectual ability consistent with par. (c) 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 16. 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 17. PI 11.36 (6) (g) and (h) are amended to read:

PI 11.46 (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 18. 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