

**ORDER OF THE
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
AMENDING RULES**

The state superintendent of public instruction hereby repeals and recreates PI 11.36 (6) relating to 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)

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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.

SECTION 1. PI 11.02 (1) is renumbered PI 11.02 (1m).

SECTION 2. PI 11.02 (1), (4e), (6t), (6m), (9), (10), (11), and (12) are created to read:

PI 11.02 (1) "Adequate fidelity" means the intervention has been applied in a manner highly consistent with its design, and was provided to the pupil at least 80 percent of the recommended number of weeks, sessions, and minutes per session.

(4e) "Evidence-based interventions" means scientific, research-based interventions with substantial evidence of their effectiveness through multiple outcome evaluations.

(6t) “Intervention” means the systematic use of a technique, program or practice designed to improve learning or performance in specific areas of pupil need.

(6m) “Intensive interventions” means interventions used with individual or small groups of pupils, focusing on single or small numbers of discrete skills, with substantial numbers of instructional minutes in addition to those provided to all pupils.

(9) “Probes” mean brief, direct measures of specific academic skills, with multiple equal or nearly equal forms, that are sensitive to small changes in pupil performance, and that provide reliable and valid measures of pupil performance during interventions.

(10) “Progress monitoring” means a scientifically-based practice to assess pupil response to interventions.

(11) “Rate of progress” during an intervention means the slope of the trend line using least squares regression on the baseline and all subsequent data points during each intervention.

(12) “Scientific, research-based” has the meaning under section 20 U.S.C. 7801 (37).

SECTION 3. PI 11.36 (6) is repealed and recreated to read:

PI 11.36 (6) (title) SPECIFIC LEARNING DISABILITY. (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 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.

(b) The LEA shall promptly request parental consent to evaluate a child to determine if the child needs special education and related services if, prior to referral, the child has not made adequate progress after an appropriate period of time when provided appropriate instruction in general education settings, delivered by qualified personnel, or whenever the child is referred for an evaluation. The LEA shall meet the timeframes under s. 115.78 (3) (a), Stats., unless extended by mutual written agreement of the child’s parents and IEP team.

(c) The IEP team may identify a child as having a specific learning disability if both of the following apply:

1. “Inadequate classroom achievement.” Upon initial identification the child does not achieve adequately for his or her 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: 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. 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.

2. "Insufficient progress." Upon evaluation, the child has made insufficient progress in one of the following areas:

a. Insufficient response to 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 referral, or as part of an evaluation, for specific learning disability. The IEP team shall consider progress monitoring data from at least two intensive, scientific, research-based or evidence-based interventions, implemented with adequate fidelity and closely aligned to individual student learning needs. The median score of three probes is required to establish a stable baseline data point for progress monitoring. IEP teams shall use weekly or more frequent progress monitoring to evaluate rate of progress during intensive, scientific, research-based or 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 same-age peers; the referred child's rate of progress is greater than that of his or her 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.

b. Significant discrepancy or insufficient progress in achievement as compared to measured ability. This subdivision paragraph does not apply three years after the effective date of this rule (legislative reference bureau inserts date). Upon initial evaluation the child exhibits a significant discrepancy between the child's academic achievement in any of the eight areas of potential specific learning disabilities under subd. 1. and intellectual ability as documented by the child's composite score on a multiple score instrument or the child's score on a single score instrument. The IEP team may base a determination of significant discrepancy only upon the results of individually administered, norm-referenced, valid and reliable diagnostic assessment of achievement. A significant discrepancy means a difference between standard scores for ability and achievement equal to or greater than 1.75 standard errors of the estimate below expected achievement, using a standard regression procedure that accounts for the correlation between ability and achievement measures. This regression procedure shall be used except when the IEP team determines that the child cannot attain valid and reliable standard scores for intellectual ability or achievement because of the child's test behavior, the child's language, another impairment of the child that interferes with the attainment of valid and reliable scores or the absence of valid and reliable standardized, diagnostic tests appropriate for the child's age. If the IEP team makes such a determination, it shall document the reasons why it was not appropriate to use the regression procedure and shall document that a significant discrepancy exists, including documentation of a variable pattern of achievement or ability, in at least one of the eight areas of potential specific learning disabilities under subd 1. using other empirical evidence. If the discrepancy between the child's ability and achievement approaches but does not reach the 1.75 standard error of the estimate cut-off for this subdivision paragraph, the child's performance in any of the eight areas of potential specific learning disabilities under subd. 1. is variable, and the IEP team determines that the child meets all other criteria under subd. 1., the IEP team may consider that a significant discrepancy exists.

Note: Appendix A specifies the recommended regression formula for calculating significant discrepancy scores. This appendix does not apply three years after the effective date of this rule (legislative reference bureau inserts date).

(d) 1. The IEP team may not identify a child as having a specific learning disability if it determines that any of the following apply:

a. The IEP team's findings under par. (c) are primarily due to environmental or economic disadvantage; cultural factors; or any of the reasons specified under s. 115.782 (3) (a), Stats., or any of the impairments under s. 115.76 (5), Stats., except s. 115.76 (5) (a) 10., Stats.

b. The IEP team's findings under par. (c) were due to a lack of appropriate instruction in the area of potential specific learning disability in par. (c) 1.

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 instruction in reading shall include the essential components of reading instruction as defined in 20 USC 6368 (3).

3. In addition to the requirements for IEP team membership under s. 115.78, Stats., the IEP team for children being evaluated for specific learning disabilities shall include all of the following members:

a. At least one licensed person who is qualified to assess data on individual rate of progress using a psychometrically valid and reliable methodology. A psychometrically valid and reliable methodology relies on all data sources specified in par. (g), analyzing progress monitoring data that exhibit adequate statistical accuracy for the purpose of identification of insufficient progress as compared to a national sample of same-age peers.

b. At least one licensed person who has implemented scientific, research-based or evidence-based, intensive interventions with the referred pupil.

c. At least one licensed person who is qualified to conduct individual diagnostic evaluations of children.

d. The child's licensed general education teacher; or if the child does not have a licensed general education classroom teacher, a general education classroom teacher licensed to teach a child of the same age; or for a child of less than school age, an individual licensed to teach a child of the same age.

(e) 1. The LEA shall ensure that the child is systematically observed in the child's learning environment, including the general classroom setting when possible, to document the child's academic performance and behavior in any of the eight areas of potential specific learning disabilities under par. (c) 1.

2. a. The IEP team, in determining whether a child has a specific learning disability, shall use information from a systematic observation conducted by a member of the IEP team.

b. 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.

c. 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.

d. If the child has participated in a process that assesses the child's response to intensive scientific, research-based or evidence-based interventions, the IEP team shall use information from a systematic observation of pupil behavior and performance in the area or areas of potential specific learning disability during intensive intervention for that area, conducted by an individual who is not responsible for implementing the interventions with the referred pupil.

3. Each IEP team member shall certify in writing whether the evaluation report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member shall submit a separate statement presenting the member's conclusion.

4. A child determined to be eligible for special education and related services under this chapter remains eligible for special education and related services upon transfer to another school or LEA. The child continues to be eligible for special education and related services unless, upon re-evaluation, the child is no longer found eligible.

(f) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility shall contain a statement including all of the following:

1. Whether the child has a specific learning disability.
2. The basis for making the determination, including an assurance that the determination has been made in accordance with s. 115.782, Stats.
3. The relevant behavior, if any, noted during the observation 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.
4. Documentation that the intensive intervention was applied in a manner highly consistent with its design, was closely aligned to pupil need, and was culturally appropriate.
5. The educationally relevant medical findings, if any.
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 the effective date of this rule (legislative reference bureau inserts date), 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; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level.

8. If the child has participated 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:

- a. The progress monitoring data collected.
- b. Strategies for increasing the child's rate of learning including the intensive interventions used.
- c. The parents' right to request an evaluation.

(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 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 (2), 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 4. INITIAL APPLICABILITY. This rule first applies to determinations of whether a child has a specific learning disability on the effective date of this rule (legislative reference bureau inserts date).

The 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 September, 2010

Tony Evers, PhD
State Superintendent