WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Richard Sweet
Clearinghouse Assistant Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 07-058

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

1. Statutory Authority

Section PI 11.36 (6) (c) 2. and 3. specify that the individualized education program (IEP) team must include: (1) at least one person qualified to assess data on individual rate of progress using a reliable and valid methodology; and (2) a person qualified to assess speech and language impairments if the IEP team is concerned that a child has an insufficient rate of progress or pattern of strengths and weaknesses in oral expression or listening comprehension.

Section 115.78 (1m), Stats., enumerates who is to be on the IEP team. None of the individuals enumerated include those described in s. PI 11.36 (6) (c) 2. or 3. However, s. 115.78 (1m) (f), Stats., provides that, in addition to the individuals enumerated in the statutes, other individuals who have knowledge or expertise about the child may be on the IEP team, ***at the discretion*** of the parent or the local educational agency (LEA).

Thus, current statutes would permit the individuals described in s. PI 11.36 (6) (c) 2. and 3. to be on the IEP team if the parent or LEA desired their inclusion. However, current statutes do not require their inclusion, and it does not appear that current statutes authorize rules that would require their inclusion. Thus, it is not clear that there is a statutory basis for the requirement in s. PI 11.36 (6) (c) 2. and 3. that these individuals be on the IEP team.

Section PI 11.36 (6) (c) 2. and 3. presumably were included in an attempt to comply with 34 C.F.R. s. 300.308 which provides that, in determining whether a child suspected of having a specific learning disability (SLD) is a child with a disability, the determination must be made by the child's parents and a group of qualified professionals which includes (in addition to those

enumerated in 34 C.F.R. s. 300.306) additional group members enumerated in 34 C.F.R. s. 300.308.

However, the individuals listed in 34 C.F.R. ss. 300.306 and 300.308 are not exactly the same as the individuals described in s. PI 11.36 (6) (c) 2. and 3., as the federal regulations do not refer to a person qualified to assess rate of progress data or a person qualified to assess speech and language impairments under certain circumstances as does s. PI 11.36 (6) (c) 2. and 3. This makes it unclear as to the basis in federal law for the provisions in s. PI 11.36 (6) (c) 2. and 3.

Further, federal regulations refer to this collection of individuals as a "group" under 34 C.F.R. s. 300.306 (with additional group members under 34 C.F.R. s. 300.308) that is making a determination about whether a child has an SLD. [See, e.g., 34 C.F.R. ss. 300.306, 300.308 (title), and 300.310 (b) (intro.).] Federal regulations apparently do not refer to these individuals as having to be on the IEP team; rather, the IEP team is described in 34 C.F.R. s. 300.321. In contrast, s. PI 11.36 (6) (c) 2. and 3. refers to these individuals as having to be on the IEP team.

In summary, the statutory basis in both state and federal law to require that the individuals described in s. PI 11.36 (6) (c) 2. and 3. be on the IEP team is unclear. It appears that any language that is retained should more closely reflect the federal requirement in 34 C.F.R. ss. 300.306 and 300.308 with regard to who is part of the group that determines whether a child suspected of having an SLD is a child with a disability.

2. Form, Style and Placement in Administrative Code

a. The "Comparison with rules in adjacent states" provision in the analysis indicates that all states will be revising their law to comply with the federal language.

Two interpretations of this statement are possible. First, it could be interpreted to suggest that states have no choice about how to implement the federal regulations, thus, it is unnecessary to provide information about what adjacent states do with respect to the provisions in the proposed rule. In fact, federal law gives states options with respect to age for identification of a child with a disability based on significant developmental delay (SDD) and with respect to criteria adopted with respect to severe discrepancy and alternative research-based procedures in identifying a child with a disability based on SLD.

Second, it could be interpreted to suggest that Wisconsin is the first of the adjacent states with which it is to be compared to actually adopt rules relating to the 2004 Individuals with Disabilities Education Act (IDEA), thus any comparison would not be useful as these states have not yet updated their laws.

The analysis should clarify which interpretation is accurate. For example, if the latter is accurate, it would be more useful to include language such as: "Neither Illinois, Iowa, Michigan, nor Minnesota has yet amended its laws to reflect the changes in the 2004 amendments to IDEA relating to SLD or SDD. Since the adjacent states (as well the remaining states) will be revising their laws to do so, information about the current rules in the adjacent states before this revision would not provide an appropriate comparison."

b. The last paragraph of the plain language analysis explains only that the SDD definition is being changed with respect to age. However, the definition of SDD also is being changed with regard to the exception for considering speech and language impairments. It appears that this is a significant enough change to be noted in the analysis.

c. In the next-to-last sentence of s. PI 11.36 (6) (b) 2. c., the two references to "under this subdivision" should be changed to "under this subd. 2. c" as only subd. par. c. is being cross-referenced. [See s. 1.07 (2), Manual.]

d. In s. PI 11.36 (6) (c) 9. the two references to "must" should be changed to "shall." [See s. 1.01 (2), Manual.]

e. In s. PI 11.36 (11) (a), the phrase "3~~, 4 and 5~~ through 9" should be changed to "3~~, 4 and 5~~ to 9." [See s. 1.01 (9) (d), Manual.]

f. In the "initial applicability" provision, "on or after" should be changed to "on" as this is when it first applies. [See s. 1.02 (3m) (example), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

a. The "Statutes interpreted" provision refers to only s. 115.76 (5) (a) 10. and (b), Stats. However, s. PI 11.36 (6) (c) 2. and 3. refer to who must be on the IEP team. As discussed in Item 1. above, this may not be accurate. However, if it is included, the statutes interpreted listing should include s. 115.78 (1m), Stats., as that is the statute listing who is to be on the IEP team.

b. The "Summary of, and comparison with, existing or proposed federal regulations" provision includes a reference to only the SLD regulations. A reference to the SDD regulations also should be included, that is 34 C.F.R. ss. 300.8 (b) and 300.111 (b), as authorized under 20 U.S.C. s. 1401 (3).

c. In general, the K-12 education statutes and rules in Wisconsin refer to a "pupil," rather than a "student." It appears that s. PI 11.36 (6) (c) 1. b. should be changed from "student progress" to "pupil progress."

d. There are several references in s. PI 11.36 (6) to "state-approved grade-level standards." This term is not used in the statutes or current administrative code; nor is it defined in the proposed rule. Consideration should be given to providing a cross-reference or a definition so that it is clear what this term means.

e. The initial applicability provision indicates that the treatment of the rule first applies to determining whether a child has an SLD on or after the effective date. However, the rule also proposes changes to how children are identified as having an SDD. The initial applicability provision also should explain when the rule first applies with respect to SDD.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The analysis refers to a "four-year period" during which the significant discrepancy formula may be used. In contrast, s. PI 11.36 (6) (b) 2. c. indicates that it may not be used after

July 30, 2012. That may not be exactly four years from when the rule goes into effect. Thus, it would be more accurate to amend the analysis to refer to "approximately" four years or, preferably, to indicate that it may not be used after July 30, 2012.

b. In the plain language analysis, references to "a SLD" should be changed to "an SLD."

c. In s. PI 11.36 (6) (am) (intro.), "consent to evaluate the child" should be changed to "consent to evaluate a child" since (in contrast to the remainder of that paragraph), this clause does not refer to a specific child. The converse is true for the remainder of that paragraph, namely, in both s. PI 11.36 (6) (am) 1. and 2., the references to "a child" should be changed to "the child."

On a similar note, in s. PI 11.36 (6) (c) 3., "a child" should be changed to "the child" as a specific child is at issue.

d. In s. PI 11.36 (6) (am) (intro.), a comma should be inserted following "IEP team" in order to set off the phrase that begins with "unless extended."

e. Section PI 11.36 (6) (am) requires that an LEA promptly request parental consent to evaluate a child and meet certain timeframes "if either of the following apply: 1. Prior to the referral, a child has not made adequate progress…. 2. Whenever a child is referred for evaluation."

First, "apply" should be changed to "applies."

Second, this is confusing as the first item refers to "the" referral--which is not mentioned until the second item and, conceivably, could never happen. This wording makes it unclear whether the LEA action is required if, in fact, there never is a subsequent referral.

If the intent is that the LEA must take action for two sets of children (namely: (1) those for whom there is a referral; and (2) those who have not made adequate progress, even if there is no referral), it appears that it would be more accurate to revise s. PI 11.36 (6) (am) to require an LEA to promptly request parental consent to evaluate a child and meet certain timeframes: "if either of the following applies:

1. The child has not made adequate progress after an appropriate period of time when provided instruction as described in par. (c) 1. b.

2. The child is referred for evaluation."

Third, should language be inserted about consent to evaluate a child to determine if the child ***has an SLD and*** needs special education and related services, rather than just to evaluate if the child needs special education and related services? While the language is in the SLD subsection, there is no direct linkage in par. (am) to evaluating whether the child has an SLD.

f. In s. PI 11.36 (6) (b) 1. (intro.), the phrase "or to meet" should be changed to "or meet".

g. The relationship of the three subdivision paragraphs in s. PI 11.36 (6) (b) 2. is unclear. Subdivision paragraphs a. and b. are separated by "; or". However, subd. par. paragraphs b. and c. are not separated by a conjunction. Thus, it is not clear if: (1) either a. or b. must be met, plus c.; or (2) either a. or b. or c. must be met.

If it is the former, then it would be clearer if subd. par. c. were separated into a separate subdivision since all of the subdivisions under s. PI 11.36 (6) (b) must be met according to s. PI 11.36 (6) (b) (intro.). The next-to-last sentence of s. PI 11.36 (6) (b) 2. c. implies that it is the former as that sentence indicates that the regression procedure must be used except in certain circumstances. If this implication is not correct and the intent is that the regression procedure must be used (subject to certain exceptions) only if subd. 2. c. is being used, then the beginning of that sentence could be changed to language such as: "A standard regression shall be used in making a determination under this subd. 2. c. except under any of the following conditions:".

If it is the latter, then it would be clearer if an introductory phrase were included following the title of subd. 2. (such as "At least one of the following is true:") and the phrase "intervention; or" were changed to "intervention." in subd. 2. a. The last sentence of the first paragraph of the analysis implies that it is the latter as the sentence indicates that a school district "'is permitted but not required to'" continue to use the current significant discrepancy formula in identifying children with SLD for a four-year period. However, if it was the former, then the analysis should be changed to reflect any change in the rule.

h. In the first sentence of s. PI 11.36 (6) (b) 2. c., a comma should follow "exhibits" and precede "upon" in order to set off the phrase "upon initial identification." Alternatively, the comma following "identification" could be deleted if the phrase is not set off. A consistent approach should be used.

i. Section PI 11.36 (6) (b) 2. c. is internally inconsistent. The second sentence states that the IEP team may base a determination of significant discrepancy ***only*** upon the results of individually administered, standardized achievement and ability tests that are reliable and valid. The next sentence indicates that 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. However, the following sentence then explains when not to use a standard regression procedure but, nonetheless, explains that a significant discrepancy can still be determined to exist under several circumstances.

Moreover, the next-to-last sentence in s. PI 11.36 (b) 2. c. is lengthy and difficult to follow. It is attempting to list the circumstances in which the regression procedure is not required to be used, but it inappropriately mixes into this list when documentation is to be required and when the IEP team may consider that a significant discrepancy exists.

In addition, parts of the next-to-last sentence are unnecessarily repetitive, for example, the phrase: "This regression procedure shall be used except under any of the following

conditions: the regression procedure under this subdivision may not be used to determine a significant discrepancy...."

In addition, some language could be made more consistent, for example, by referring to "the IEP team determines," rather than also referring to "the IEP makes a determination."

In summary, s. PI 11.36 (6) (b) 2. c. should be redrafted by cross-referencing its own exceptions or by reconfiguration to make clear all of the circumstances under which a significant discrepancy can be determined to exist.

j. Section s. PI 11.36 (6) (b) 2. c. indicates that it does not apply after July 30, 2012. Does that mean that a child who was identified as a child with a disability based on SLD before that date is no longer considered to be a child with a disability after that date? Or does it mean that that criteria can no longer be used to identify a child as a child with a disability after that date but that previously identified children continue to be considered children with a disability after that date? This should be clarified.

k. The recommended significant discrepancy regression formula referred to in the Note to s. PI 11.36 (6) (b) 2. c. is included in ch. PI 11, Appendix A. It appears that Appendix A also should be amended to indicate that it is repealed effective July 30, 2012, since s. PI 11.36 (6) (b) 2. c. does not apply after that date.

l. Section PI 11.36 (6) (c) 1. a. would be easier to follow if it were restructured to set off the three major items in the series with semicolons and to use commas to separate the items in the secondary series within the first major item. This means that that "disadvantage or any" should be changed to "disadvantage; any".

m. In the last sentence in s. PI 11.36 (6) (c) 1. b., the semicolon should be deleted. However, it may be preferable to separate the last sentence into two sentences, that is, by changing "by qualified personnel; and shall document" to "by qualified personnel. The IEP team also shall document."

In addition, a comma should be inserted following the last use of the word "instruction."

n. Section PI 11.36 (6) (c) 2. and 3. create ambiguity because, while they are included in s. PI 11.36 (6) (relating to SLD), no language in the rule specifically limits this requirement of who should be on the IEP team to the SLD context. Moreover, it somewhat begs the question of whether SLD is involved in order to be under s. PI 11.36 (6) to begin with.

o. In s. PI 11.36 (6) (c) 4., the phrase "meets criteria for speech and language under sub. (5)" should be changed to "meets criteria for speech or language impairment under sub. (5)."

p. Section PI 11.36 (6) (c) 6. (intro.) requires the IEP team to meet "all" of the following, that is, s. PI 11.36 (6) (c) 6. a. (which refers to observations in the general classroom) and b. (which refers to observations of a child less than school age in an appropriate environment or out of school). For any specific child, it would be impossible to do both. It appears that this should be restructured to delete the introductory clause and have subd. 6. read something like:

6. a. If the child is less than school age or out of school, the IEP team shall have an IEP team member observe the child in an environment appropriate for the child's age.

b. For other children, the IEP team shall have an IEP team member conduct ….

q. In s. PI 11.36 (c) 9., there are two references to the "member's conclusion" and then a reference to the "member's conclusions." Either the singular or plural should be used consistently.

r. Section PI 11.36 (11) (a) defines "significant developmental delay" as children who have certain characteristics. It seems inappropriate to equate a child and a delay. Moreover, this is in contrast to other subsections of s. PI 11.36 which define certain disabilities but do not define the disability as a child. It appears that it would be more appropriate to use language such as: "Significant developmental delay means that a child, age 3 to 9, is experiencing…."

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

a. 34 C.F.R. s. 300.309 (a) (3) (intro.) refers only to findings under 34 C.F.R. s. 300.309 (a) (1) and (2). These correlate, respectively, with s. PI 11.36 (6) (b) 1. and 2. a. and b., but not with s. PI 11.36 (6) (b) 2. c. (which relates to significant discrepancy) in the SLD context.

In contrast, the reference in s. PI 11.36 (6) (c) 1. a. to the "IEP team's findings under par. (b)" includes not only s. PI 11.36 (6) (b) 1. and 2. a. and b., but ***also*** includes the significant discrepancy finding under s. PI 11.36 (6) (b) 2. c.

Does federal law provide a linkage to the severe discrepancy method of making an SLD determination and the reasons the SLD determination cannot be made if there are findings as noted in s. PI 11.36 (6) (c) 1. a.? If so, which federal regulation provides that linkage? If not, it appears that s. PI 11.36 (6) (c) 1. a. should be changed to refer to the "findings under par. (b) 1. and 2. a. and b.," rather than to the "findings under par. (b)."

b. 34 C.F.R. s. 300.309 (a) (3) refers to certain findings not being primarily the result of several items, including "cultural factors" or "environmental or economic disadvantage." The federal regulation does not refer to "cultural disadvantage."

In contrast, s. PI 11.36 (6) (c) 1. a. refers to "environmental, cultural or economic disadvantage." It is not clear what is meant by a "cultural disadvantage," and from which culture's viewpoint another culture is deemed to have a cultural disadvantage. It appears that it would be more appropriate to be consistent with the federal regulations and refer to cultural factors.