

***2007 ANNUAL REPORT  
LEGISLATIVE COUNCIL  
RULES CLEARINGHOUSE***

**WISCONSIN LEGISLATIVE COUNCIL**

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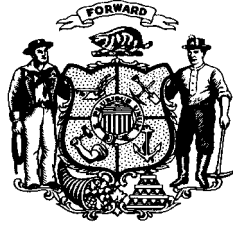
**February 2008**

State of Wisconsin  
JOINT LEGISLATIVE COUNCIL

*Co-Chairs*

**FRED RISSER**  
President, State Senate

**STEVE WIECKERT**  
Representative, State Assembly



**LEGISLATIVE COUNCIL STAFF**

**Terry C. Anderson**

*Director*

**Laura D. Rose**

*Deputy Director*

February 2008

TO: THE HONORABLE JAMES E. DOYLE, GOVERNOR, AND THE WISCONSIN  
LEGISLATURE

This report of the calendar year 2007 activity of the Legislative Council Rules  
Clearinghouse is submitted to you pursuant to s. 227.15 (5), Stats.

Sincerely,

Terry C. Anderson  
Director

TCA:jal

**JOINT LEGISLATIVE COUNCIL**  
s. 13.81, Stats.

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3820 Southbrook Lane  
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**MICHAEL HUEBSCH**  
*Speaker*  
419 West Franklin  
West Salem, WI 54669

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

*Terry C. Anderson, Director, Legislative Council Staff*  
1 East Main Street, Suite 401, P.O. Box 2536, Madison, Wisconsin 53701-2536



**WISCONSIN LEGISLATIVE COUNCIL STAFF**  
**2007 ANNUAL REPORT ON THE**  
**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE\***

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\* This Report was prepared by Ronald Sklansky, Director, and Richard Sweet, Assistant Director, Rules Clearinghouse, Legislative Council.



**FUNCTION OF THE LEGISLATIVE COUNCIL**  
**RULES CLEARINGHOUSE**

**REVIEW OF RULES**

Legislative review of proposed administrative rules begins with the submission of a rule to the Legislative Council Rules Clearinghouse. Section 227.15, Stats., requires that, prior to any public hearing on a proposed rule or prior to notification of the chief clerk of each house of the Legislature if no hearing is held, an agency must submit the proposed rule to the Legislative Council Rules Clearinghouse for staff review. (See the *Administrative Rules Procedures Manual* (January 2005), prepared by the Legislative Council and formerly the Revisor of Statutes Bureau, for more information on drafting, promulgating, and reviewing administrative rules.)

The Legislative Council is provided 20 working days, following receipt of a proposed rule, to prepare a report on its review of the rule. However, with the consent of the Director of the Legislative Council, the review period may be extended for an additional 20 working days.

Upon receipt of a proposed administrative rule, a Clearinghouse rule number is assigned and submission of the rule is recorded in the *Bulletin of Proceedings* of the Wisconsin Legislature. Two numbered rule jackets, one for the Assembly and one for the Senate, are prepared.

The Director of the Rules Clearinghouse assigns the rule to a Legislative Council staff member for review and preparation of the statutorily required report. The staff member generally prepares the report within 10 working days and transmits the report to the Director or Assistant Director for final review. When the report on the proposed rule is completed, the staff returns the rule jackets and the Clearinghouse report containing the results of the review to the agency. [See *Appendix I* for a sample Clearinghouse report.]

In accordance with s. 227.15, Stats., the Clearinghouse report:

1. Reviews the statutory authority under which the agency intends to adopt the proposed rule.
2. Reviews the proposed rule for form, style, and placement in the Wisconsin Administrative Code.
3. Reviews the proposed rule to avoid conflict with, or duplication of, existing rules.
4. Reviews the proposed rule to ensure that it provides adequate references to related statutes, rules, and forms.
5. Reviews the language of the proposed rule for clarity, grammar, and punctuation and to ensure the use of plain language.

6. Reviews the proposed rule to determine potential conflicts and to make comparisons with related federal statutes and regulations.

7. Reviews the proposed rule to determine whether the agency has specified the number of business days within which the agency will review and make a determination on an application for a business permit.

As part of this review process, staff of the Legislative Council is directed to ensure that procedures for the promulgation of the rule are followed, as required by ch. 227, Stats., and to streamline and simplify the rule-making process.

### **OTHER RELATED RESPONSIBILITIES**

Other primary rule review responsibilities of the Legislative Council include:

1. Working with and assisting the appropriate legislative committees throughout the rule-making process.

2. Notifying the Joint Committee for Review of Administrative Rules (JCRAR) and appropriate committees of the Legislature whenever the rule-making authority of an agency is eliminated or significantly changed by the repeal, amendment, or creation of a statute, by the interpretive decision of a court of competent jurisdiction, or for any other reason.

3. Assisting the public in resolving problems related to administrative rules. This function includes providing information, identifying agency personnel who may be contacted in relation to rule-making functions, describing locations where copies of rules, proposed rules, and forms are available, and encouraging and assisting participation in the rule-making process.

4. Creating and maintaining an Internet site that includes a copy of each proposed rule in a format that allows the site to be searched using keywords.

The final responsibility of the Legislative Council is the submission of an annual report to the chief clerk of each house of the Legislature and to the Governor summarizing any action taken by the staff and making recommendations to streamline the rule-making process and to eliminate obsolete, duplicative, and conflicting rules. This report is the *28th Annual Report* submitted by the Legislative Council and covers the staff's activities during calendar year 2007. It has been preceded by an initial report to the 1979 Legislature, which covered the staff's activities from November 2, 1979 to April 1, 1980 (i.e., from the effective date of Ch. 34, Laws of 1979, which initiated the omnibus rule review process, to the end of Floorperiod IV of the 1979 Session) and annual reports for calendar years 1980 to 2006.

### **RECORDKEEPING SYSTEM**

The Legislature's *Bulletin of Proceedings* is used for recording actions relating to the review of administrative rules. The Legislative Council, the Senate and Assembly Chief Clerks, and the Legislative Reference Bureau cooperate in a computerized recordkeeping system.

Commencing with the 1979 Session, action on administrative rules has been shown in a separate part of the *Bulletin of Proceedings*.

Under this system, each proposed rule is assigned a number and entered in the computer by the staff of the Legislative Council. A copy of the Clearinghouse report is placed in a Senate and Assembly rule jacket (similar to bill jackets) and the rule is then transmitted to the agency promulgating the rule for its review. After transmittal, all legislative actions taken on the rule are entered on the face of the jacket and are reported to the chief clerk of each house. The chief clerk enters the actions in the computerized system, thereby compiling a history of all legislative actions taken on the rule.

At the beginning of each biennial session, the administrative rule portion of the *Bulletin of Proceedings* is updated by deletion of all records relating to rules which, in the preceding session, have become effective, have been withdrawn, or have been permanently objected to by law. Also removed from the *Bulletin of Proceedings* annually and withdrawn from the rule-making process is any proposed rule that, in accordance with s. 227.14 (6) (c), Stats., has been pending for at least four years, but no more than five years, after the date of its receipt by the Legislative Council under s. 227.15 (1), Stats. The final *Bulletin of Proceedings* printed for the preceding session then serves as the permanent record of the disposition of those rules. The remaining rules, which are still in the promulgation process, are carried over into the new *Bulletin of Proceedings* for the following biennial session.

Access to rules and agency reports over the Internet became available in 2001 for all rules initiated after the year 2000. These materials may be found at the Legislative Council's website, [www.legis.state.wi.us/lc](http://www.legis.state.wi.us/lc). A useful executive branch website for information about administrative rules is <https://apps4.dhfs.state.wi.us/admrules/public/Home>.



**2007 ACTIVITIES OF THE RULES CLEARINGHOUSE**

During 2007, 117 proposed administrative rules were submitted to the Legislative Council by 17 state agencies.

As of December 31, 2007, Clearinghouse reports had been completed on 109 of the 117 proposed rules and eight rules were in the process of review. In addition to the 109 rule reports completed on 2007 rules, reports were prepared in 2007 on five rules received in late 2006. Of the 114 reports completed in 2007, no rule required an extension of the review process by the Director of the Legislative Council. Clearinghouse activities in 2007 are summarized below:

Rules Received in 2007		117
Withdrawn	0	
No report required	0	
Pending	8	
		-8
2007 Reports Completed		109
2006 Reports Completed in January 2007		5
<b>Total Reports in 2007</b>		<b>114</b>

The table below shows that, from November 2, 1979 (the beginning of the omnibus rule review process) through December 31, 2007, the Clearinghouse has received 5,646 rule submissions and completed reviews on 5,548 proposed rules. Of the total rule submissions, 90 were exempt from the reporting process for various reasons and 8 were under review at the end of 2007.

<i>Year</i>	<i>Received</i>	<i>Completed</i>	<i>Exempt</i>
1979	70	45	12
1980	252	227	24
1981	252	234	9
1982	251	254	3
1983	222	220	4
1984	255	247	2
1985	213	206	4
1986	251	252	4
1987	182	186	1
1988	219	216	5
1989	212	208	1
1990	264	254	3
1991	199	205	2
1992	225	228	0
1993	241	232	1
1994	225	234	0
1995	236	224	2
1996	194	201	1
1997	158	159	1
1998	208	200	2
1999	170	177	1
2000	189	176	1
2001	157	158	1
2002	155	160	1
2003	126	127	2
2004	142	142	0
2005	122	123	0
2006	139	139	3
2007	117	114	0
<b>Total</b>	<b>5,646</b>	<b>5,548</b>	<b>90</b>

In 2007, rules were received from the following 17 state agencies:

***Number of Proposed Rules, by Submitting Agency***

Department of Administration	4
Department of Agriculture, Trade and Consumer Protection	10
Department of Commerce	12
Department of Employee Trust Funds	3
Department of Health and Family Services	10
Department of Natural Resources	28
Department of Public Instruction	2
Department of Regulation and Licensing	10
Department of Revenue	5
Department of Transportation	7
Department of Veterans Affairs	2
Department of Workforce Development	11
Elections Board	2
Employment Relations Commission	1
Insurance Commissioner	6
Public Service Commission	3
<b>Total Number of Rules Submitted</b>	<b>117</b>

Although the statistics presented in this report give some indication of the workload of the Legislative Council staff in reviewing proposed administrative rules, it should be noted that rules vary in length. Similarly, Clearinghouse reports vary from completion of a simple checklist to large reports. In summary, for all rule reports completed in 2007, the Legislative Council staff commented on:

1. The *statutory authority* of a proposed administrative rule on 20 occasions.
2. The *form, style and placement* of proposed administrative rules in the Wisconsin Administrative Code on 83 occasions.
3. A *conflict* with, or *duplication* of, existing rules on 7 occasions.
4. The *adequacy of references* of proposed administrative rules to related statutes, rules and forms on 46 occasions.
5. *Clarity, grammar, punctuation and use of plain language* in proposed administrative rules on 89 occasions.
6. The *potential conflicts* of proposed administrative rules with, and their comparability to, related federal statutes and regulations on one occasion. In addition, the Legislative Council staff has adopted a policy of noting when proposed rules are based on federal “*guidelines*,”

which do not have the force of law, as opposed to rules based on federal “*regulations*,” which do have the force of law and with which the state may have a legal obligation to comply.

7. The *permit action deadline requirement* on no occasions.

**WORKING WITH AND ASSISTING COMMITTEES**

A Legislative Council staff attorney or analyst works with each standing committee and statutory committees, except Joint Finance. When a committee has a proposed rule referred to it by the presiding officer of the house, the staff member will participate in the committee’s oversight.

During 2007, legislative committees held hearings or requested meetings on **48 proposed rules**. Modifications to rules were either requested or received in the legislative review of **16 proposed rules**. **Two proposed rules** were objected to by committees.

As a result of committee activities, **two rule objections** were subject to JCRAR jurisdiction in 2007. The JCRAR took no action on the two rules and the rule-making process regarding these rules was allowed to proceed.

The table below reviews legislative committee activity in the review of proposed administrative rules beginning on November 2, 1979 and ending on December 31, 2007.

LEGISLATIVE REVIEW OF PROPOSED ADMINISTRATIVE RULES (November 2, 1979 Through December 31, 2007)*						
Year	Rules Submitted	Rules Subject to Modification	Committee Review Objections	JCRAR Rule Objections	Enacted Laws Following Rule Objections	Enactments by Session Law and Other Description of Bills Introduced Following Rule Objections
11/2/79–80	322	18	5	1	0	No bill introduced, rule withdrawn
1981	252	29	10	4	4	Chapters 20 (SEC. 1561), 26, 31 and 180, Laws of 1981
1982	251	31	4	1	1	1983 Wisconsin Act 94
1983	222	30	5	0	0	—
1984	255	26	2	2	2	1983 Wisconsin Act 310 and 1985 Wisconsin Act 29 (SEC. 826)
1985	213	37	8	3	2	◆ 1985 Wisconsin Act 29 (SECS. 1059r and 2238ng to 2238or) ◆ 1985 Assembly Bill 460, passed and vetoed; override failed
1986	251	30	1	0	0	—
1987	182	30	5	0	0	—
1988	219	38	4	0	0	—
1989	212	22	6	2	0	◆ 1989 Senate Bill 89 and 1989 Assembly Bill 171 (failed to pass) ◆ 1989 Senate Bill 248 and 1989 Assembly Bill 457 (failed to pass)
1990	264	29	2	1	0	◆ 1991 Senate Bill 24 and 1991 Assembly Bill 71 (failed to pass)
1991	199	19	5	1	0	◆ 1991 Senate Bill 442 and 1991 Assembly Bill 840 (failed to pass after rule objected to withdrawn by agency)
1992	225	33	3	2	1	◆ 1993 Wisconsin Act 9 ◆ 1993 Senate Bill 3 and 1993 Assembly Bill 17 (failed to pass)
1993	241	24	1	0	0	—

LEGISLATIVE REVIEW OF PROPOSED ADMINISTRATIVE RULES (November 2, 1979 Through December 31, 2007)*						
Year	Rules Submitted	Rules Subject to Modification	Committee Review Objections	JCRAR Rule Objections	Enacted Laws Following Rule Objections	Enactments by Session Law and Other Description of Bills Introduced Following Rule Objections
1994	225	29	3	0	0	—
1995	236	19	0	0	0	—
1996	194	19	1	1	1	◆ 1997 Assembly Bill 5 and 1997 Senate Bill 20 (failed to pass) ◆ 1997 Wisconsin Act 237 (SECS. 320s, 322d and 322e)
1997	158	19	6	0	0	—
1998	208	15	0	0	0	—
1999	170	18	2	1	0	—
2000	189	20	2	1	1	◆ 1999 Wisconsin Act 178
2001	157	14	5	2	0	◆ 2001 Assembly Bill 18 and Senate Bill 2 (failed to pass); ◆ 2001 Assembly Bill 524 and Senate Bill 267 (failed to pass) ◆ 2001 Assembly Bill 697 and Senate Bill 361 (failed to pass)
2002	155	35	2	1	0	◆ 2003 Assembly Bill 25 and Senate Bill 19 (failed to pass)
2003	126	20	2	2	0	◆ 2003 Assembly Bill 253 and Senate Bill 123 (failed to pass)
2004	142	21	4	2	1	◆ 2003 Wisconsin Act 240
2005	122	20	4	3	0	◆ 2005 Assembly Bill 8 and Senate Bill 8 (failed to pass) ◆ 2005 Assembly Bill 12 and Senate Bill 12 (failed to pass) ◆ 2005 Assembly Bill 401 and Senate Bill 200 (failed to pass) ◆ 2005 Assembly Bill 404 and Senate Bill 201 (failed to pass) ◆ 2005 Assembly Bill 442 and Senate Bill 220 (failed to pass)
2006	139	21	8	4	0	2005 Assembly Bill 1225 and Senate Bill 732 (failed to pass, late introduction in 2005 Session and reintroduction in 2007 session as Assembly Bill 37 and Senate Bill 9) 2005 Assembly Bill 1226 and Senate Bill 733 (failed to pass; late introduction in 2005 Session and reintroduction in 2007 session as Assembly Bill 27 and Senate Bill 10)
2007	117	16	2	0	0	—
TOTAL	5,646	682	102	34	13 (PLUS ONE BILL PASSED AND VETOED; VETO NOT OVERRIDDEN)	

\* The general system of legislative review of proposed administrative rules, primarily embodied in ss. 227.15 and 227.19, Stats., took effect on November 2, 1979, as part of Ch. 34, Laws of 1979.

### **ELECTRONIC ACCESS**

In 2001, the Legislature, through its service agencies, began providing electronic access to all proposed administrative rules submitted to the Clearinghouse. The system mirrors the process already in place for legislative proposals. That is, interested persons are able to use the Internet to search for proposed rules directly or to link to them from the Legislature's Bulletin of Proceedings. The site holds the initial version of the proposed rule, the Clearinghouse report on the proposed rule, all modified versions of the proposed rule submitted to the Legislature, and the related agency report to the Legislature. Electronic access is available for proposed rules submitted to the Clearinghouse after the year 2000. [The Clearinghouse also has given advice to the Department of Health and Family Services regarding a searchable rules website operated by the Executive Branch. The website is <https://apps4.dhfs.state.wi.us/admrules/public/Home>.]

### **NOTICE OF CHANGE IN RULE-MAKING AUTHORITY**

To date, no court decisions or changes in legislation have been brought to the attention of the Legislative Council staff that would require notification of JCRAR or appropriate standing committees of a change in, or the elimination of, agency rule-making authority. However, action at the federal level caused the staff to discuss with JCRAR the continuing validity of ch. NR 462, relating to institutional boilers and process heaters.

### **ASSISTING ADMINISTRATIVE AGENCIES**

The Legislative Council staff has responded to numerous questions from agency personnel, relating to both the process and the law governing legislative review of proposed rules.

### **PUBLIC LIAISON**

To date, the Legislative Council staff has received minimal requests from the public. These infrequent questions have either concerned aspects of the rule review procedure or have related to the status of specific rules.

### **ADDITIONAL ACTIVITIES**

On May 4, 2004, the Co-Chairs of the Joint Legislative Council directed the Legislative Council staff to examine current laws relating to the procedures used for the promulgation of administrative rules and to develop proposed legislation that modifies current statutory language, codifies practices used in the process, coordinates statutory changes made in the 2003 Session of the Legislature, and makes minor substantive changes to the law.

In order to fulfill this request, the Legislative Council staff sought comments from rule-promulgating state agencies, the chief clerks of the Legislature, and the Revisor of Statutes. The Joint Legislative Council introduced 2005 Senate Bill 150 in order to respond to many of the comments the Legislative Council staff received as well as to issues noted by the experience of

the Legislative Council staff itself. The bill was enacted as 2005 Wisconsin Act 249 and took effect on July 1, 2006.

On June 14, 2007, Assembly Bill 410 was introduced as a trailer bill to correct minor errors that occurred through the enactment of 2005 Wisconsin Act 249.

RS:RNS:tlujal



***APPENDIX 1***  
***SAMPLE CLEARINGHOUSE REPORT***





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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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**Terry C. Anderson**  
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*Clearinghouse Assistant Director*

**Laura D. Rose**  
*Legislative Council Deputy Director*

### CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

#### CLEARINGHOUSE RULE **07-058**

AN ORDER to repeal PI 11.36 (6) (b) 3.; to amend PI 11.36 (6) (b) and (c) 1., and (11) (a) and (b); to repeal and recreate PI 11.36 (6) (b) 2. and (6) (c) 2. to 4.; and to create PI 11.36 (6) (am) and (c) 5. to 9, relating to the identification of children with specific learning disabilities and significant developmental delays.

Submitted by **DEPARTMENT OF PUBLIC INSTRUCTION**

06-05-2007 RECEIVED BY LEGISLATIVE COUNCIL.

07-02-2007 REPORT SENT TO AGENCY.

RNS:JLK

## **LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached            YES             NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached            YES             NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached            YES             NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached            YES             NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached            YES             NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached            YES             NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached            YES             NO



## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### 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.



***APPENDIX 2***

***PROCESSING INSTRUCTIONS TO AGENCY HEADS***





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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### PROCESSING INSTRUCTIONS TO AGENCY HEADS

[ENCLOSED ARE THE SENATE AND ASSEMBLY RULE JACKETS CONTAINING THE LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT. AN ADDITIONAL COPY OF THE CLEARINGHOUSE REPORT IS ENCLOSED FOR YOUR FILES.]

**PLEASE NOTE:** Your agency must complete the following steps in the legislative process of administrative rule review:

1. On the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Report Received by Agency."
2. On the appropriate line or lines on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date or dates and, in column 2, "Public Hearing Held" OR "Public Hearing Not Required."
3. Enclose in both clearinghouse rule jackets, in triplicate, the notice and report required by s. 227.19 (2) and (3), Stats. [The report includes the rule in final draft form.]
4. Notify the presiding officer of the Senate and Assembly that the rule is in final draft form by hand delivering the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk. At the time of this submission, on the appropriate line on the face of the clearinghouse rule jacket, each Chief Clerk will enter, in column 1, the appropriate date and, in column 2, "Report Received from Agency." Each clearinghouse rule jacket will be promptly delivered to each presiding officer for referral of the notice and report to a standing committee in each house.
5. If the agency does not proceed with the rule-making process on this rule, on the appropriate line on the face of both clearinghouse rule jackets, enter, in column 1, the appropriate date and, in column 2, "Rule Draft Withdrawn by Agency" and hand deliver the Senate clearinghouse rule jacket to the Senate Chief Clerk and the Assembly clearinghouse rule jacket to the Assembly Chief Clerk.

**FOR YOUR INFORMATION:** A record of all actions taken on administrative rules is contained in the Bulletin of Proceedings of the Wisconsin Legislature. The clearinghouse rule jackets will be retained by the Legislature as a permanent record.

[See reverse side for jacket sample.]

