



School Law FYI

New Eligibility Criteria for Emotional Behavioral Disability, Deaf, Blind, and Deafblind Now in Effect

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The administrative rules addressing special education eligibility criteria for two different educational disabilities were recently revised and a newly added disability category are now in effect. The revised PI 11.36 (Areas of Impairment), modifies the definition of the categories of blind and visually impaired and deaf and hard of hearing (DHH) and further modifies the evaluation requirements associated with each of those disability categories. Also, the revised rules add a new required Individualized Education Program (IEP) team member when determining eligibility for deaf and hard of hearing.

The revised rules also now include, for the first time, the disability category of deafblind. Finally, the revised rules substantially revise the criteria related to emotional behavioral disabilities (EBD), including a new definition of that disability, a prescriptive list of data that must be considered when determining eligibility for EBD, and the potential for an additional IEP team member when making EBD eligibility determinations.

Each of the changes is explored below and may also be reviewed in the following comparison charts authored by the Department of Public Instruction (DPI): <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/vi-rule-change-comp-chart.pdf>, <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/dhh-rule-change-comp-chart.pdf>, <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/ebd-rule-change-comp-chart.pdf>.

Deaf and Hard of Hearing

The changes to PI 11.36(4), which apply to all special education referrals received on or after August 2, 2021, revise the definition of DHH to include students who have a “decreased ability to detect sound.” Compare this new definition to the prior definition which was a “significant

impairment in hearing.” DPI noted that the prior definition was too restrictive and did not recognize that there are differences between students who are deaf and students who are hard of hearing. Consequently, some students who previously did not qualify under the old definition of DHH may now qualify.

The revised rule continues to require that the impairment have an adverse effect on educational performance. However, “educational performance” is now defined as academic performance, speech perception, speech production, or communication including language acquisition or expression. Under the prior rule, educational performance was defined as academic performance, speech perception, and production, or language and communication skills. As a result, if a student’s speech is adversely affected, the student need only demonstrate that impact in speech perception or production, not both.

The new DHH rule also adds a requirement that a teacher for the deaf or hard of hearing must be a member of the IEP team when determining eligibility. Finally, when reevaluating a student for continuing eligibility under the revised DHH rule, a student who initially meets criteria and continues to need special education will continue to be a child with a disability.

Blind and Visually Impaired

The changes to PI 11.36(3)(Blind and Visually Impaired) also apply to all special education referrals received on or after August 2, 2021. The revised blind and visually impaired rule was deemed necessary to recognize the differences between blindness and visual impairment. Specifically, the new definition states that “blind and visually impaired means even after correction a child’s visual functioning adversely affects educational performance.” The prior rule stated that the student’s visual functioning “significantly adversely affects his or her educational performance.” The change from “significantly adversely affects” to “adversely affects” may result in more students qualifying under the new criteria.

A student may now qualify as a student with a disability under this category even if the student does not need orientation and mobility services. Finally, the revised rule no longer requires specific findings by an ophthalmologist or optometrist to establish eligibility.

Deafblind

The changes to PI 11.36(4m) (Deafblindness) also apply to all special education referrals received on or after August 2, 2021. Prior to the current revisions, Wisconsin’s special education administrative rules did not contain a disability category of “deafblind.” DPI notes that Wisconsin was the “only state that did not recognize deafblindness as a separate disability category.” PI 11.36(4m) defines deafblindness as “concomitantly deaf or hard of hearing and blind or visually impaired, the combination of which causes severe communication and other developmental and educational needs such that the individual disability-related needs of the student extend beyond the instruction and supports required for a student who is solely deaf or hard of hearing or blind or visually impaired.”

The deafblind rule does not contain additional eligibility criteria. However, DPI has established a list of documentation necessary to determine a child eligible as deafblind. Those requirements are set forth in the document entitled *Required Documentation of Criteria for Deafblind*. Such documentation includes meeting the eligibility criteria for both blind or visually impaired and deaf or hearing impaired or demonstrating hearing and vision losses that do not meet the state criteria, and adverse effects on communication, developmental performance, and educational performance.

Emotional Behavioral Disability

The revised emotional behavioral disability (EBD) rule applies to all special education referrals received on or after December 1, 2021. PI 11.36(7) substantially revises the definition of EBD and the new definition is as follows:

“a condition in which a child demonstrates frequent and intense observable behaviors, either over a long period of time or of sudden onset due to an emerging mental health condition which includes a diagnosis by a licensed mental health professional, which adversely affects the child’s educational performance. The behaviors shall occur in an academic setting in school, in a non-academic setting in school, and in the child’s home or community.”

The “severe” and “chronic” requirement set forth in the old rule is replaced with “intense” and a “long period of time.” The revised definition also encompasses situations where a student’s frequent and intense observable behaviors have a “sudden onset.” Such “sudden onset” behaviors may be supported by a diagnosis by a “licensed mental health professional,” but DPI notes that a diagnosis is not, by itself, evidence of EBD but must be considered by the IEP team when determining eligibility. Finally, the revised definition separates the school environment into academic and non-academic settings, and to meet the definition, students must demonstrate frequent and intense observable behaviors in both of those school settings and in the student’s home or community.

The criteria applicable to EBD were also revised to remove subjective language and “reduce the impact of implicit or explicit bias” in EBD eligibility determinations. Under the revised criteria a student must demonstrate at least one of the following to qualify as a student with a disability:

- Behaviors that interfere with the development and maintenance of age and grade appropriate interpersonal relationships.
- Observable affective or behavioral responses during routine daily activities inconsistent with the norms of the child or the child’s community.
- Pervasive unhappiness, depression, or anxiety.
- Physical symptoms or fears associated with personal or school problems.

- Insufficient progress toward meeting age or grade level academic standards that cannot be explained by intellectual, sensory, or health factors.
- Isolation from peers or avoidance of social interactions impacting the child's access and engagement in instructional activities.
- Patterns of behaviors across settings and individuals presenting risks to the physical safety of the child or others.

The new criteria is similar to the prior criteria but decreases the use of subjective, ambiguous language. For example, certain criterion utilize age and grade level expectations or require "observable" behavioral responses. Also, the revised rule eliminates the "catch-all" category from the prior rule. The old rule allowed eligibility for "other inappropriate behaviors that are so different from children of similar age, ability, educational experiences and opportunities." The revised rule eliminates that provision due to the "high potential that implicit or explicit bias, stereotypes or cultural differences could result in inappropriate identification and disproportionate representation of racial and ethnic groups."

The revised rule also adds several evaluation requirements. Under the prior rule, the IEP team was required to rely on a variety of sources of information. However, the only specific data requirements were "systematic observations" and "a review of prior, documented interventions." By contrast, the revised rule contains seven categories of data that must be considered to conduct a comprehensive EBD evaluation. The new data that shall be considered are:

- The results of evidence-based positive behavioral interventions implemented within general education settings.
- Systematic observations of the child in both academic and nonacademic settings documenting intensity, frequency, rate, or duration of observable target behaviors, as well as other ecological factors that may be impacting the child's behavior.
- Interviews of the child and parent or family that include gathering information regarding the child and family's norms and values, as well as other ecological factors that may impact the child's behavior.
- Interviews of the child's teachers that include gathering information regarding the child's strengths and ecological factors that may impact the child's behavior.
- Interview of an LEA staff member, identified by the child, when possible, as having the most positive or a positive relationship with the child, that includes gathering information regarding the child's strengths and ecological factors that may impact the child's behavior.
- Review of educational information maintained by the LEA, including health, academic, and disciplinary records.

- Results of standardized behavior rating scales, which are normed using nationally representative samples, from a minimum of two sources from school and one source from the home or community.

The new EBD evaluation requirements demonstrate a significant shift towards utilizing more objective data and greater consideration of variables in the environment that may affect a student's behavior. When conducting either systematic observations or interviews, evaluators must gather information on "ecological factors" influencing a student's behavior.

The new evaluation requirements also require increased input from the student and the family, including obtaining information regarding the family's "norms and values." Gathering such information is crucial to complying with another newly added provision requiring the IEP team to "discuss and determine ... whether behaviors are a result of a difference between the norms of the child's family and community or an emotional behavioral disability." That same provision prohibits identifying a student as a student with a disability "when there is evidence that the difference [in norms] is the primary causal factor of the behaviors." DPI notes that this new provision is included to address the "extreme racial disproportionality in emotional behavioral disability identification in Wisconsin," and the IEP team's "consensus determination" must be documented in the evaluation documents.

Another new consideration for the IEP team is "the effects of any known history of trauma or mental health disorder on the child's functioning." The revised EBD rule notes that IEP teams may not identify a student, or not identify a student, with an EBD based "solely" on a history of trauma or mental health disorder.

Finally, based upon the revised rule, IEP teams making EBD eligibility determinations may include an additional member. A student may identify a staff member who has "a positive or the most positive relationship with the child" as an IEP team member. If the student identifies such a person, that same person must be interviewed by an evaluator as part of the data to be considered during the evaluation.

Conclusion

The administrative rules governing special education eligibility criteria have undergone substantial changes. Blind and visually impaired and deaf and hard of hearing were revised to acknowledge the significant variability that may occur between blindness and a visual impairment and between deafness and a hearing impairment. A new category, deafblindness, was also added to acknowledge and address the disability-related needs of students experiencing both blindness or a visual impairment and deafness or a hearing impairment. Finally, the EBD administrative rule was significantly revised to address longstanding disproportionality within the category of EBD and to create objective, trauma informed, and culturally responsive evaluation practices. Interpreting and implementing the new rules may

initially present challenges for districts. The Boardman Clark School Law Team is available and prepared to assist districts in working through those challenges.

One more note:

Come See Us at the Convention!

In addition to Doug Witte of our firm serving as parliamentarian and legal counsel at the Convention's Delegate Assembly and related activities, multiple members of our School Law Practice Group will be on hand at the Wisconsin State Education Convention in Milwaukee on January 19 and January 20, 2022. Matt Bell will be presenting on Wednesday, January 19 on Seclusion and Restraint. Others will be at Booth 838 during exhibit hours. We look forward to seeing you there!

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