

**REVISED STATEMENT OF SCOPE
DEPARTMENT OF CORRECTIONS**

This revised statement of scope modifies, SS 057-19, which was approved by the Governor on June 14, 2019, published in Register No. 762B, on June 24, 2019, and approved by Department of Corrections Secretary Carr on September 3, 2019, relating to Chapter DOC 376, Security in Type 1 Secured Correctional Facilities.

Rule Number: DOC 376

Relating to: Ch. DOC 376, Security in Type I Secured Correctional Facilities and Ch. DOC 374, Administrative Confinement in Type 1 Secured Correctional Institutions

Rule Type: Permanent

1. DETAILED DESCRIPTION OF THE OBJECTIVE OF THE PROPOSED RULE.

The objective of the rule is to review the entire chapter of DOC 376 to reflect changes in the law and changes in the operations and practices of the department as they affect security in Type 1 juvenile correctional facilities, and to review and update language to reflect best practices for managing youth behavior and promoting facility security, and to include non-punitive involuntary confinement of youth in a Type 1 secured correctional facility.

The objective of the rule is to also review Chapter DOC 374 to determine if the changes that may be made to Chapter DOC 376 would render Chapter DOC 374 duplicative and obsolete, and if so, then repeal the entire rule chapter of DOC 374.

2. DESCRIPTION OF EXISTING POLICIES AND NEW POLICIES INCLUDED IN PROPOSED RULE AND AN ANALYSIS OF POLICY ALTERNATIVES.

The current rule chapter of DOC 376 outlines the department's primary security objectives as being to protect the public, staff and youth and to afford youth a safe setting to participate in activities that prepare them to be successfully reintegrated into the community.

The department needs to review the current rule of DOC 376 for changes to reflect system upgrades and current best practices for managing youth behavior including as they are related to room confinement, OC-Spray and other chemical agents, mechanical restraints, and strip searches.

The department's philosophy surrounding administrative confinement has evolved significantly to further align with juvenile focused best practices and national standards. As a result of the proposed changes to DOC 376, DOC 374 may become obsolete, which would necessitate the DOC to repeal the chapter as it updates DOC 376.

Current policies and procedures allow for the use of punitive room confinement, OC-Spray and other chemical agents, mechanical restraints, and strip searches.

Updates to the rules would reflect current best practices for managing youth behavior.

There are no alternative means to address the need for revisions as discussed above.

3. STATUTORY AUTHORITY.

Section 227.11 (2): Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or non-statutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

(b) Each agency may prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.

(c) Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules which the agency shall follow until they are amended or repealed. A rule promulgated in accordance with this paragraph is valid only to the extent that the agency has discretion to base an individual decision on the policy expressed in the rule.

Section 301.02: The department shall maintain and govern the state correctional institutions.

Section 301.025: The division of juvenile corrections shall exercise the powers and perform the duties of the department that relate to juvenile correctional services and institutions, juvenile offender review, community supervision under s. 938.533, and the serious juvenile offender program under s. 938.538.

Section 301.03 (2): Supervise the custody and discipline of all prisoners and the maintenance of state correctional institutions and the prison industries under s. 303.01.

Section 938.48 (16): Standards for Services. (a) Based on research into effective correctional programs and practices, establish and enforce standards for services for juveniles under the supervision of the department under s. 938.183, 938.34, or 938.345.

(b) Promulgate rules governing services and programming for juveniles in a secured residential care center for children and youth. The department shall include uniform data reporting standards for counties or Indian tribes that operate or contract with a child welfare agency for a secured residential care center for children and youth in rules promulgated under this paragraph. The department shall base the rules it promulgates under this paragraph on the recommendations provided by the juvenile corrections study committee under 2017 Wisconsin Act 185, section 110 (6) (c) 1.

4. ESTIMATE OF AMOUNT OF TIME THAT STATE EMPLOYEES WILL SPEND DEVELOPING THE RULE AND OTHER RESOURCES NECESSARY TO DEVELOP THE RULE.

The Department estimates that it will take approximately 3000 hours to develop this rule, including drafting the rule, cost estimates, public hearings, and complying with rule making requirements.

5. LIST WITH DESCRIPTION OF ALL ENTITIES THAT MAY BE AFFECTED BY THE PROPOSED RULE.

This rule will affect youth under the department supervision as well as department staff.

6. SUMMARY AND PRELIMINARY COMPARISON WITH ANY EXISTING OR PROPOSED FEDERAL REGULATION THAT IS INTENDED TO ADDRESS THE ACTIVITIES TO BE REGULATED BY THE PROPOSED RULE.

There are no federal regulations which address current best practices for managing youth behavior in a secured correctional facility in Wisconsin. However, federal standards set by the Juvenile Justice and Delinquency Prevention Act (JJDP) and the Prison Rape Elimination Act (PREA) includes the following provisions which may affect best practices for managing youth behavior in a secured correctional facility:

34 U.S.C. § 11133(a)(7)(B)(ii): a plan for providing needed gender-specific services for the prevention and treatment of juvenile delinquency;

34 U.S.C. § 11133(a)(9)(D): programs that provide treatment to juvenile offenders who are the victims of child abuse or neglect, and to their families, in order to reduce the likelihood that such juvenile offenders will commit subsequent violations of law;

34 U.S.C. § 11133(a)(9)(L): programs for positive youth development that assist delinquent and other at-risk youth in obtaining

- (i) a sense of safety and structure;
- (ii) a sense of belonging and membership;
- (iii) a sense of self-worth and social contribution;
- (iv) a sense of independence and control over one's life; and
- (v) a sense of closeness in interpersonal relationships;

28 C.F.R. § 115.315 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) The agency shall not conduct cross-gender pat-down searches except in exigent circumstances.

(c) The facility shall document and justify all cross-gender strip searches, cross-gender visual body cavity searches, and cross-gender pat-down searches.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering a resident housing unit. In facilities (such as group homes) that do not contain discrete housing units, staff of the opposite gender shall be required to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

(e) The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status. If the resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

28 C.F.R. § 115.341 Obtaining information from residents.

(a) Within 72 hours of the resident's arrival at the facility and periodically throughout a resident's confinement, the agency shall obtain and use information about each resident's personal history and behavior to reduce the risk of sexual abuse by or upon a resident.

(b) Such assessments shall be conducted using an objective screening instrument.

- (c) At a minimum, the agency shall attempt to ascertain information about:
- (1) Prior sexual victimization or abusiveness;
 - (2) Any gender nonconforming appearance or manner or identification as lesbian, gay, bisexual, transgender, or intersex, and whether the resident may therefore be vulnerable to sexual abuse;
 - (3) Current charges and offense history;
 - (4) Age;
 - (5) Level of emotional and cognitive development;
 - (6) Physical size and stature;
 - (7) Mental illness or mental disabilities;
 - (8) Intellectual or developmental disabilities;
 - (9) Physical disabilities;
 - (10) The resident's own perception of vulnerability; and
 - (11) Any other specific information about individual residents that may indicate heightened needs for supervision, additional safety precautions, or separation from certain other residents.

(d) This information shall be ascertained through conversations with the resident during the intake process and medical and mental health screenings; during classification assessments; and by reviewing court records, case files, facility behavioral records, and other relevant documentation from the resident's files.

(e) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

28 C.F.R. § 115.342 Placement of residents in housing, bed, program, education, and work assignments.

(a) The agency shall use all information obtained pursuant to § 115.341 and subsequently to make housing, bed, program, education, and work assignments for residents with the goal of keeping all residents safe and free from sexual abuse.

(b) Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged. During any period of isolation, agencies shall not deny residents daily large-muscle exercise and any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.

(c) Lesbian, gay, bisexual, transgender, or intersex residents shall not be placed in particular housing, bed, or other assignments solely on the basis of such identification or status, nor shall agencies consider lesbian, gay, bisexual, transgender, or intersex identification or status as an indicator of likelihood of being sexually abusive.

(d) In deciding whether to assign a transgender or intersex resident to a facility for male or female residents, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the resident's health and safety, and whether the placement would present management or security problems.

(e) Placement and programming assignments for each transgender or intersex resident shall be reassessed at least twice each year to review any threats to safety experienced by the resident.

(f) A transgender or intersex resident's own views with respect to his or her own safety shall be given serious consideration.

(g) Transgender and intersex residents shall be given the opportunity to shower separately from other residents.

(h) If a resident is isolated pursuant to paragraph (b) of this section, the facility shall clearly document:

- (1) The basis for the facility's concern for the resident's safety; and
- (2) The reason why no alternative means of separation can be arranged.

(i) Every 30 days, the facility shall afford each resident described in paragraph (h) of this section a review to determine whether there is a continuing need for separation from the general population.

7. ANTICIPATED ECONOMIC IMPACT OF IMPLEMENTING THE RULE. NOTE IF THE RULE IS LIKELY TO HAVE AN ECONOMIC IMPACT ON SMALL BUSINESSES.

The department anticipates that the proposed rule will have minimal to no economic impact statewide or locally.

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