

Report From Agency

WISCONSIN DEPARTMENT OF CORRECTIONS REPORT FROM AGENCY

CR 24-040 RULEMAKING REPORT TO LEGISLATURE

BASIS AND PURPOSE OF PROPOSED RULE

The Wisconsin Department of Corrections proposes an order **to repeal** DOC 373.03(1), (3), (4), (13), (17) to (22), 373.11(title), 373.11(1) to (6) , 373.13, 373.27(2), 373.52, 373.57, 373.62, 373.63, 373.67(4), 373.68(3)(b), (10)(a)1., and (10)(d), 373.69 to 373.78, 373.80, 373.81(3)(d) and (5) and 373.82, **to renumber and amend** DOC 373.11(7) and (8), **to amend** DOC 373.01(1), (2), and (4)(intro.), (e) and (f), 373.03(25), (26), and (29), 373.04(intro.), (5), (6), 373.05, Subchapter III(title), 373.22(1), 373.24(1), 373.26(1) and (3), 373.33, 373.38, 373.45(1)(b), 373.46(2), 373.47(1) and (3), 373.49(2) and (4), 373.58, 373.59(1) and (2), 373.60, 373.65, 373.66(1), 373.67(1)(intro.), 373.68(1), (4), (10)(intro.), and (10)(c), 373.79(1) and (3), 373.81(1) and (4) and 373.83(1), **to repeal and recreate** DOC 373.03(6), (9) and (10), 373.29, 373.32, 373.34, 373.35 and 373.66(2) **and to create** DOC 373.03(10m), (24m) and (27m), 373.205, 373.24(3), 373.505 and 373.68(14), relating to youth conduct in Type 1 secured correctional facilities.

SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSE

The agency did not receive any public comments during the public hearing and public comment period.

MODIFICATIONS MADE TO THE PROPOSED RULE AS A RESULT OF PUBLIC COMMENT OR TESTIMONY RECEIVED

No changes to the proposed rule were made as a result of public comment or testimony received as the Department received no public comments or testimony on this proposed rule.

PERSONS APPEARING OR REGISTERING AT PUBLIC HEARINGS

A public hearing was held on June 3rd, 2024 from 3:00 pm – 4:00 pm via Teams and teleconference. No persons appeared or registered at this public hearing.

CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE

No changes were made to the rule analysis or the fiscal estimate and economic impact analysis.

RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

Legislative Council Comment/Suggestion	Department Response
In the caption for the proposed rule, a relating clause should be inserted following the enumeration of treated provisions in order to identify the subject matter of the proposed rule. Consider for example, “, relating to youth conduct in Type 1 secured correctional facilities.”	This section has been updated to reflect the recommended edit.
In the treatment clause for SECTION 5 of the proposed rule, the sequential list of affected rule subsections could be shown as “DOC 373.03(13) and (17) to (22).”	This section has been updated to reflect the recommended edit.
In SECTION 11 of the proposed rule, amending s. DOC	This section has been updated to reflect the recommended

373.05, the title for the rule section should be shown in the text.	edit.
In the treatment clause for SECTION 12 of the proposed rule, the sequential list of affected rule subsections could be shown as “(title) and (1) to (6).”	This treatment clause has been updated to reflect the recommended edit.
SECTION 34 of the proposed rule, amending ss. DOC 373.58, 373.59(1) and (2), and 373.60, should be divided into three treatment SECTIONS. Consecutively numbered rule sections may be included in a single treatment SECTION only if each rule section is affected in its entirety. Section DOC 373.59 is not treated in its entirety.	These sections have been updated to reflect the recommended edit.
In the treatment clause for SECTION 39 of the proposed rule, the designation “(intro.)” should be inserted following “(1)”. The designation should also be inserted in the rule caption’s enumeration of treated provisions.	This treatment clause has been updated to reflect the recommended edit.
In SECTION 47 of the proposed rule, creating s. DOC 373.68(14), the abbreviation “s.” should be revised to “ch.”, unless a cross-reference to a specific provision within ch. DOC 379 is intended.	This section has been updated to reflect the recommended edit.
In the treatment clause for SECTION 48 of the proposed rule, the sequential list of affected rule sections could be shown as “DOC 373.69 to 373.78”.	This treatment clause has been updated to reflect the recommended edit.
A number of instances within the existing text of ch. DOC 373 refer to the agency adopting policies and procedures for regulating youth behavior in DOC Type 1 facilities (i.e., Lincoln Hills). The existing text also includes rules of conduct that prohibit youth from violating a facility’s rules or policies. The proposed rule amends other aspects of some of these provisions, but retains the references to “policies”. Any policy that has the force of law – meaning that the legal rights of a youth may be affected – is by definition a rule, and should be promulgated through the administrative rulemaking process. Depending on the contents of a facility’s policy, it could raise questions on whether a policy has been properly promulgated. Consider whether rules and regulations currently contained only in agency policies should also be promulgated as administrative rules. Alternatively, consider elaborating in the rule summary to explain the reasoning for why the referenced policies are not promulgated as rules, such as whether a policy does not have the force of law or is exempt from rulemaking, or whether ch. DOC 373, as promulgated, adequately puts a youth on notice of the prohibited conduct.	The Department believes that, as promulgated, ch. DOC 373 adequately puts a youth on notice of prohibited conduct.
SECTION 21 of the proposed rule amends the conduct rule of “Inappropriate sexual conduct”, but broadly prohibits any contact with another person unless it is appropriate and permissible under facility policy. SECTION 25 creates the conduct rule of “Violating boundaries”, and prohibits the intentional touching of any part of another person with a body part or object without consent. There seems to be significant overlap between these two conduct rules, but any conflict or duplication cannot be fully assessed as the particular differences in prohibited behavior depend on what is contained in a policy outside of the administrative rules.	s. DOC 373.27(2) is now being repealed which eliminates this conflict or duplication.

In the rule summary's listing of related statutes or rules, the agency refers to "Wisconsin Administrative Code Chapter 301". However, there is no ch. DOC 301. Is this intended to refer to ch. 301, Stats.?

This error has been corrected.

SECTION 3 of the proposed rule creates a new definition of "disturbance" to mean that a "group disturbance" occurred, an "incident" occurred, or a youth has taken a hostage. Neither existing ch. DOC 373 nor the proposed amended rule create a definition for "incident". The rule should create a definition or include a reference to the definition given in s. DOC 376.03(16).

The reference to the definition of "incident" in s. DOC 376.03(16) has been added to this section.

SECTION 17 of the proposed rule amends the conduct rule of "participating in a disturbance" in s. DOC 373.22(1), which is described as intentionally or recklessly participating in a disturbance, "including disruptive behavior, throwing items, or language that includes hate or conflict." This language is different from the definition of "disturbance" that the proposed rule creates in s. DOC 373.03(9), which means either a group disturbance, an incident, or taking a hostage. The department should address the difference between the definition and the language in s. DOC 373.22(1) that includes disruptive behavior, throwing items, or using language of conflict or hate as constituting a disturbance.

s. DOC 373.22(1) has been updated to reference the definition of "disturbance" in s. DOC 373.03(9).

SECTION 15 of the proposed rule create the conduct rule of "bullying", and defines it as unwanted aggressive behavior that involves a real or perceived power imbalance through "verbal behavior, physical, or social behavior or both..." The word "physical" should be revised to the phrase "physical behavior", to make the terms consistent. The sentence also includes three types of behavior but refers to "or both". This should be revised to read either "or a combination", or as "or both physical behavior and social behavior", depending on the intended meaning of the sentence.

This section has been updated to reflect the recommended edits.

In SECTION 17 of the proposed rule, amending s. DOC 373.22(1), the comma between "including" and "disruptive" should be deleted.

This section has been updated to reflect the recommended edit.

In SECTION 25 of the proposed rule, s. DOC 373.35 creates the conduct rule of "unauthorized forms of communication", which applies when a youth "communicates with persons whom the department has prohibited contact". The provisions should read "with persons with whom" the department has prohibited contact.

This section has been updated to reflect the recommended edit.

FINAL REGULATORY FLEXIBILITY ANALYSIS

The Department of Correction has determined that the rule will not have a significant economic impact on a substantial number of small business since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.