

**WISCONSIN DEPARTMENT OF CORRECTIONS
PROPOSED RULE MAKING ORDER**

INTRODUCTORY CLAUSE

The statement of scope for this rule was approved by the Governor on August 26, 2021, published as Scope Statement No. 078-21 in Register No. 789A2 on September 13, 2021 and approved by Secretary Kevin Carr on September 29, 2021.

The Wisconsin Department of Corrections proposes an order **to repeal** DOC 374, DOC 376.03(2), (3), (6), (13), (14), (15) and (20), 376.14(4)(b), 376.17(2), 376.17(3)(f), 376.20(1)(d) and (e), **to renumber and amend** DOC 376.14(4)(a), **to amend** DOC 376.03(4), (7), (17), (19), (21), (22), (24), (25) and (29), 376.06, 376.10(1)(intro), (g), (2)(e), (7) and (8), 376.11, 376.12(2) and (4), 376.14(1), (2), (3), (5), (6), and (7)(intro), 376.17(1), (3)(a), (3)(b), (3)(e), (3)(g), (3)(h)(intro), 2., 4., and 5., 376.19, 376.20(1)(intro), (1)(a), (1)(b), (1)(c), (2), (3)(c), (3)(d), (5) and (8)(c) and 376.21(1)(intro), (a), (b), (2), (3)(c) and (4), **to repeal and recreate** DOC 376.03(10), (12), (16) and (28), 376.04, 376.05, 376.07, 376.08, 376.09, 376.13, 376.15 and 376.18 **and to create** DOC 376.03(4m), (8m), (21m), (22m) and (28m) and 376.045.

RULE SUMMARY

1. Statutes interpreted: Sections 301.025, 938.48(16), 938.533 and 938.538, Stats.

2. Statutory authority to promulgate the rule: Sections 227.11(2), 301.02, 301.025, 301.03(2), 938.48(16), Stats.

3. Explanation of agency authority: The Department has responsibilities imposed by statute to establish and enforce standards for services for youth under the supervision of the department and for implementing offender review, community supervision and the serious juvenile offender program.

4. Related statute or rule: Wisconsin Statute Chapter 938

5. Plain language analysis: This rulemaking order updates DOC 374 and 376 to reflect changes in the law, operations and best practices for security and managing youth behavior in Type 1 juvenile correctional facilities. At this time, administrative rule allows for the use of punitive room confinement, OC-spray and other chemical agents, mechanical restraints and strip searches. However, the Department's philosophy surrounding administrative confinement and uses of force has evolved significantly to align with current juvenile focused best practices and national standards. This rulemaking order updates DOC 374 and 376 to align with these philosophies and to adhere to the court order issued in *J.J. et al vs. Litscher et al*.

Currently, administrative confinement is permissible when a youth's behavior presents a danger to self or others, or poses a serious risk to institution security, including but not limited to, escape risk or disturbance and release from administrative confinement is dependent on the administrative confinement review committee hearing that occurs at least one day after placement in administrative confinement. The proposed rulemaking order would allow for placement in administrative confinement only when the youth poses a serious risk of imminent physical harm to others. Additionally, the time in initial confinement may not exceed four hours and it must be the goal to return the youth to the general population as soon as possible.

Furthermore, the proposed rulemaking order prohibits the use of oleoresin capsicum and other chemical agents. The use of chemical agents is currently allowed in certain circumstances. The proposed rulemaking order also limits the use of mechanical restraints. The proposed rulemaking order also limits the use of strip searches to

only be allowable if there is probable cause to believe that the individual youth possess drugs or weapons that could not be discovered through less intrusive means and allows for the use of body scans in certain circumstances. Current administrative rule allows for more broad use of mechanical restraints and strip searches and does not allow for the use of body scans.

Other changes in this proposed rulemaking include changes to the definition of strip search and requiring that searches of youth be conducted by a person of the same gender identity as the youth rather than a person of the same sex. Lastly, the proposed rulemaking makes changes to the circumstances allowing for staff use of force, changes to the circumstances under which a facility-wide lockdown may be imposed and changes to what constitutes a disturbance at a juvenile facility authorizing the superintendent to suspend otherwise applicable administrative rules.

6. Summary of, and comparison with, existing or proposed federal regulations that are intended to address the activities to be regulated by the proposed rule: There are no existing or proposed federal regulations that address best practices for managing youth behavior in a secured correctional facility in Wisconsin.

7. Comparison with similar rules in adjacent states:

The adjacent states have similar rules to the proposed Wisconsin rule. The adjacent states have limits on the punishments and type of force that may be used in juvenile correctional facilities. For example, in Iowa no degrading punishment such as securing the juvenile to a stationary object or enclosing a juvenile in a confined space, is allowed. In most adjacent states the use of room confinement, mechanical restraints and chemical agents is limited to certain situations and each state has specific policies on the how and when searches of youth are allowed. Additionally, some of the adjacent states require counts of youth at certain time intervals and require that behavior expectations are communicated to youth within a certain timeframe upon admission to the facility. Some states require that educational opportunities and rehabilitation plans are provided for youth within the facility. Lastly, several of the adjacent states require certain training, including trauma informed care training, for staff.

a. **Illinois:** Illinois administrative code provides standards for county juvenile detention facilities. These standards include training staff on several topics including trauma, trauma informed care, and emergency procedures, searching youth prior to leaving and entering the facility, irregularly searching youth and their quarters to detect the presence of weapons and other contraband and specifying conditions for strip searches and visual body cavity searches. Ill. Admin Code tit. 20 § 2620.20 and 2602.140. Staff members must maintain a record of visual contact with each youth no less than once every 30 minutes and at least every 10 minutes for a youth on crisis status. Ill. Admin. Code tit. § 2602.130(a)(2). Additionally, a head count must be done and recorded at least four times daily. Ill. Admin Code tit. § 2602.140(k).

There are also several standards regarding which types of punishment are allowed within county juvenile detention facilities. Youth shall not be deprived of basic rights such as clean clothes or personal hygiene items as part of a disciplinary response and corporal punishment or any punishment designed to humiliate or degrade youth is prohibited. Ill. Admin. Code tit. § 2602.170(e). The use of force can be authorized in certain circumstances but only the least amount of force necessary must be used and a complete written report must be made when force is used. Ill. Admin. Code tit. § 2602.170(f). Mechanical restraints may only be used when other methods of control are not effective and only for the time necessary for the youth to regain control. Restraints may not be used for disciplinary reasons. Ill. Admin. Code tit. § 2602.170(g). The use of chemical agents is generally prohibited but may be used if the youth's current behavior indicates that a physical hold or mechanical restraint would be impossible or insufficient to effectively diminish the imminent risk of serious harm. Ill. Admin. Code tit. § 2602.170(h). Lastly, the agency must have written policies and procedures that limit the use of room

confinement as punishment for rule violations. Room confinement must not be used for a fixed period of time, but only until the youth is calm enough to rejoin programming without being a risk to the safety of others. Ill. Admin. Code tit. § 2602.170(i).

b. Iowa: Iowa has several standards regarding the treatment of youth within correctional facilities. Per Iowa Code, a child may be placed in detention only in a juvenile detention home, any other suitable place designated by the court, a room in a facility intended or used for the detention of adults if there is probable cause to believe that the child has committed certain offenses or a place used for the detention of children prior to an adjudicatory hearing. Iowa Code § 232.22(3). Juveniles admitted to jails shall be monitored at all times and shall be observed by means of personal supervisory checks at no more than 30-minute intervals. 201 IAC 50.13(2)(a)(6). When juveniles are in jail on nonsecure holds, the juvenile is not to be physically secured to any stationary object and must be under continuous visual supervision. 201 IAC 50.24(1).

Additionally, each nonsecure site must develop a policy of posted orders which protects juveniles against degrading punishment such as corporal punishment, verbal abuse, binding or trying to restrict movement, or enclosing the juvenile in a confined space. 201 IAC 50.24(3). An attendant must make sure the juvenile is aware of the policies of the nonsecure holding area. 201 IAC 50.24(4). Within the facility all items given to the juvenile are subject to being searched and visitors to correctional facilities may be requested to submit to a personal search (pat down) or an electronic search for weapons or contraband. 201 IAC 50.24(4) and 201 IAC 20.3(14).

c. Michigan: Per Michigan administrative rule, the warden for each institution is given authority and responsibility over several aspects of their institution. These responsibilities include organizing and enforcing procedures for security, being responsible for discipline at the institution, designating a program classification committee to determine appropriate programs for prisoners, and ensuring that department standards of safety, security, and humane treatment are met. R. 791.2205.

In addition, the Department of Corrections is given certain authority and responsibility under Michigan administrative rule. The Department must conduct periodic and spontaneous searches of housing units and other areas within all institutions and facilities. R. 791.2210(1). Prisoners may also be searched in accordance with Department policy. R. 791.2210(4). Additionally, the Department may conduct a search for contraband of a person who enters a correctional facility as a visitor, volunteer, employee, contractor, or in any other capacity. R. 791.2210(5).

Michigan administrative rule also provides guidelines for the use of force and chemical agents. A facility shall establish and maintain written policies, procedures, and practices which restrict the use of physical force to instances of justifiable self-defense, protection of others, protection of property, and prevention of escapes, and then only as a last resort and in accordance with appropriate statutory authority. Furthermore, physical force shall not be used as punishment and a written report must be prepared and reviewed after force is used. R. 791.706. Chemical agents may be used by authorized personnel. These personnel shall receive appropriate training in the use of chemical agents and in the treatment of individuals exposed to a chemical agent. R. 791.703. Lastly, all staff shall be trained to respond to emergencies in accordance with written emergency plans. R. 791.714.

For youth correctional facilities, educational services shall be provided for juvenile prisoners housed at the facility who have not earned a high school diploma or received a general education certificate. MCL 791.220g(11). Additionally, the department shall develop rehabilitation plans for prisoners in the custody of the department who are approximately 18 to 22 years of age that specifically take the prisoner's age into consideration. MCL 791.262(d)(1). The department shall provide, to the extent it is able to do so, programming designed for youth rehabilitation for prisoners in the custody of the department who are approximately 18 to 22 years of age. MCL 791.262(d)(2). This programming may

include mentoring programs, career skills evaluation, and career counseling. MCL 791.262(d)(3).

d. Minnesota: Through administrative rule, the Minnesota Department of Corrections and the Minnesota Department of Human Services license and certify providers of residential care and treatment and detention and foster care services for children in out-of-home placement. For all of these types of facilities, the license holder must provide services that fulfill the basic rights of a resident, including the right to receive a public education, the right to participate in the development of the resident's treatment and case plan and the right to be free from restraint or seclusion used for a purpose other than to protect the resident from imminent danger to self or others, except for the use of disciplinary room time as it is allowed in the correctional facility's discipline plan. Minn. R. 2960.0050(1) and 2960.0080(2).

The license holder must communicate verbally and in writing to all residents the facility's rules which address which behaviors are considered acceptable and unacceptable and the reasons why, the consequences that will be applied in recognizing and rewarding acceptable behavior and modifying unacceptable behavior, and the circumstances, if any, that will result in time-out or the use of a restrictive procedure. Minn. R. 2960.0080(4). The license holder must either give a copy to or advise the resident of the facility's rules within 24 hours of admission. Minn. R. 2960.0250(3). The license holder must also have a written emergency plan that is reviewed with staff and residents at least once every six months. Minn. R. 2960.0080(14). Upon admission to a detention facility, the resident and their belongings must be examined by a staff person of the same gender as the resident. Minn. R. 2960.0250(4).

Additionally, the license holder must have discipline policies and procedures in place. In all facilities, the license holder must not subject residents to certain discipline techniques including corporal punishment and the use of restrictive techniques or procedures as punishment. Minn. R. 2960.0080(5). If the license holder uses time-out, staff must assess the resident at least every 30 minutes to determine when the resident may return to ongoing activity at the facility and must document the use of time-out. Minn. R. 2960.0080(5). Staff must have completed several specific trainings before they may use time-out on a resident. Minn. R. 2960.0080(5).

A license holder who wishes to use a restrictive procedure must have a restrictive procedure plan that includes a list of restrictive procedures, a description of the physical holding techniques which will be used by the program, a description of how the license holder will monitor and control the emergency use of restrictive procedures, and a description of the training that staff who use restrictive procedures must have prior to staff implementing the emergency use of restrictive procedures. Minn. R. 2960.0710(1) and 2960.0710(2).

Those licensed by the Department of Corrections may seek certification to use seclusion, mechanical restraints and disciplinary room time. Minn. R. 2960.0710(4). Mechanical restraints may only be used when transporting a resident or in an emergency as a response to imminent danger to a resident or others and when less restrictive interventions are determined to be ineffective. Minn. R. 2960.0710(7). The license holder must complete an administrative review of the use of a restrictive procedure within three working days after the use of the restrictive procedure. Minn. R. 2960.0710(10).

The use of chemical irritants is permitted only in secure facilities with correctional program services. Chemical irritants are not to be used except by order of the facility administrator to prevent a resident from seriously injuring the resident's self or others or to prevent damage to a substantial amount of property. Minn. R. 2960.0370(3). The use of chemical irritants must be documented and facility personnel authorized to use chemical irritants must have documented annual training on this topic. Minn. R. 2960.0370(3).

There are several other requirements that must be met to be a licensed facility. The license holder must provide training for staff that is modified annually to meet the needs of individual staff persons and staff

who will have direct contact with residents must attend and successfully complete orientation training before having unsupervised contact with residents. Minn. R. 2960.0100(3). The license holder must not assign staff in a manner that invades the privacy of residents or embarrasses or diminishes the dignity of residents by requiring staff of the opposite sex to perform strip searches or witnessing or assisting at internal body searches. Minn. R. 2960.0240(3). Finally, the license holder must know the whereabouts of each resident and there must be a resident count at least once each eight hours. Minn. R. 2960.0080(6) and Minn. R. 2960.0390.

8. Summary of the factual data and analytical methodologies: The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact analysis: Not applicable.

10. Effect on small businesses: Not applicable.

11. A copy of any comments and opinion prepared by the Board of Veterans Affairs. Not applicable.

12. Agency contact person: Caitlin Washburn, Administrative Rules Coordinator, 3099 East Washington Avenue, P.O. Box 7925, Madison, WI, 53707-7925; by phone: (608) 240-5020; or by email: DOCAdministrativeRulesCommittee@wisconsin.gov.

13. Place where comments are to be submitted and deadline for submission: Written comments on the proposed rule will be accepted and receive consideration if they are received by a date to be determined. Written comments should be addressed to: Administrative Rules Committee, c/o Caitlin Washburn, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email: DOCAdministrativeRulesCommittee@wisconsin.gov.

TEXT OF RULE

SECTION 1. DOC Chapter 374 is repealed.

SECTION 2. DOC 376.03 (2) and (3) are repealed.

SECTION 3. DOC 376.03 (4) is amended to read:

DOC 376.03 (4) “Body contents search” means a search in which a youth is required to provide a biological sample ~~which includes, but is not limited to, including~~ deoxyribonucleic acid (DNA), urine, breath, ~~or blood or stool for testing for the presence of intoxicating substances, as defined in s. DOC-373.46(1), in accordance with division procedures and methods approved by the state laboratory of~~ hygiene, or to submit to a nonsurgical physical examination by medical staff which may include, but is ~~not limited to, x-rays for detecting contraband for analysis~~. Body contents searches do not include examinations and tests requested by medical staff for medical reasons.

SECTION 4. DOC 376.03 (4m) is created to read:

DOC 376.03 (4m) “Body scan search” means a search using body scan technology to produce an image capable of revealing the presence of drugs, weapons, or other harmful materials concealed on or inside the body.

SECTION 5. DOC 376.03 (6) is repealed.

SECTION 6. DOC 376.03 (7) is amended to read:

DOC 376.03 (7) “Contraband” ~~has the meaning given in s. DOC 373.03(6)~~ means any item or items introduced or found in the facility whether illegal or legal that are expressly prohibited by the department or facility policy.

SECTION 7. DOC 376.03 (8m) is created to read:

DOC 376.03 (8m) “De-escalation” means assisting a youth to regain behavioral control and to avoid physical intervention to defuse a volatile situation.

SECTION 8. DOC 376.03 (10) and (12) are repealed and recreated to read:

DOC 376.03 (10) “Facility” means a type 1 juvenile correctional facility, as defined in s. 938.02 (19), Stats.

DOC 376.03 (12) “Group disturbance” means the disruption or interference of normal facility operations resulting from 3 or more youth participating in actions, threats, demands, or suggestions to advocate disruption or disturbance almost akin to a riot.

SECTION 9. DOC 376.03 (13), (14) and (15) are repealed.

SECTION 10. DOC 376.03 (16) is repealed and recreated to read:

DOC 376.03 (16) “Incident” means an event or crisis that may compromise the safety and security of staff or youth.

SECTION 11. DOC 376.03 (17) and (19) are amended to read:

DOC 376.03 (17) “Lockdown” means restriction of movement and programs ~~in the~~ throughout an entire institution facility to control a situation regarding safety or security of ~~an institution~~ a facility.

DOC 376.03 (19) “Mechanical restraint” means a commercially manufactured device approved by the department and applied to a youth’s wrist, arm, legs or torso to restrain or impede the free movement of a youth.

SECTION 12. DOC 376.03 (20) is repealed.

SECTION 13. DOC 376.03 (21) is amended to read:

DOC 376.03 (21) “Personal search” ~~includes~~ means a search of a ~~person’s pockets, person including the clothing, frisking a pat-down~~ of the body, an examination of shoes, coat and hat and an inspection of the mouth.

SECTION 14. DOC 376.03 (21m) is created to read:

DOC 376.03 (21m) “Psychology staff” means individuals licensed to provide behavioral health services in accordance with state law and who meet education, training, and experience requirements to perform the duties required in accordance with professional standards and licensing.

SECTION 15. DOC 376.03 (22) is amended to read:

DOC 376.03 (22) ~~“Reasonably believes”~~ “Reasonable belief” means ~~that the actor believes an actor’s belief~~ that certain facts exist and the belief, under the circumstances, is reasonable even though the belief ~~is~~ may be erroneous.

SECTION 16. DOC 376.03 (22m) is created to read:

DOC 376.03 (22m) “Room confinement” means the involuntary restriction of a youth in a room, or other area, excluding the confinement of a youth to such an area during normal sleeping hours or on observation status as defined in ch. DOC 375.

SECTION 17. DOC 376.03 (24) and (25) are amended to read:

DOC 376.03 (24) “Staff” means a state employee ~~of~~ or a person under contract with the department or the institution facility where a youth is housed.

DOC 376.03 (25) “Strip search” means a search in which a ~~person~~ youth is required to remove or rearrange clothes. Permissible inspection includes examination of the ~~person’s~~ youth’s body and clothing and visual inspection of ~~body cavities~~ the mouth, breast, buttocks, or genitalia.

SECTION 18. DOC 376.03 (28) is repealed and recreated to read:

DOC 376.03 (28) “Trauma-informed care” means staff providing care to youth by understanding how traumatic events may impact a person to better support and assist them.

SECTION 19. DOC 376.03 (28m) is created to read:

DOC 376.03(28m) “Visual monitoring” means staff directly observing youth at staggered intervals not to exceed 30 minutes, in order to prevent the possibility of harm emanating from a variety of sources.

SECTION 20. DOC 376.03 (29) is amended to read:

DOC 376.03 (29) “Youth” means a person or persons supervised by the department in ~~an institution a~~ facility consistent with the requirements of law and regardless of age.

SECTION 21. DOC 376.04 is repealed and recreated to read:

DOC 376.04 Administrative confinement. (1) In this section, “administrative confinement” means a form of room confinement, which includes the involuntary nonpunitive restriction of a youth locked alone in a room or other area because the youth poses a serious risk of imminent physical harm to others.

(2) The superintendent may place a youth in administrative confinement only when a youth poses a serious risk of imminent physical harm to others.

(3) Psychology staff shall be notified as soon as possible, and no later than 2 hours after a youth’s placement in administrative confinement.

(4) Any youth placed in administrative confinement for whom there is not already a mental health evaluation must have such an evaluation as soon as possible within 24 hours.

(5) Placements in administrative confinement will be reviewed by a psychology staff member as soon as possible within the initial 4-hour placement to determine whether that placement is a contraindication to the youth’s mental health or if other options will adequately protect the youth or staff.

(6) Staff shall engage in crisis intervention techniques designed to return the youth to the general

population as soon as possible.

(7) If at any point a youth no longer poses a risk of imminent physical harm, the youth must be immediately removed from administrative confinement.

(8) Time in an administrative confinement placement may not exceed 4 hours except under the conditions of sub. (9).

(9) One 4-hour extension to an administrative confinement placement, and one additional 4-hour extension thereafter, for a total of up to 12 hours, may occur under all of the following conditions:

(a) The superintendent determines, following review of the psychology staff's recommendation, that continued confinement is necessary due to the youth continuing to pose a risk of imminent physical harm to others.

(b) A plan is commenced to either promptly return the youth to the general population or transfer the youth to another facility.

(10) Administrative confinement time limits may be tolled from 8 p.m. to 8 a.m.

(11) Administrative confinement may only be extended beyond 24 hours, including tolled time, to effectuate transfer of a youth to another facility under a commenced plan.

(12) Any youth placed in administrative confinement for any period in excess of 24 hours, including tolled time, shall receive daily services by psychology staff.

SECTION 22. DOC 376.045 is created to read:

DOC 376.045 Conditions of room confinement. (1) Punitive room confinement is prohibited.

(2) Any room used for room confinement shall be suicide resistant and protrusion free to reduce self-harm.

(3) Staff visually monitoring youth must see the youth's face or movement each time they see the youth. Visual monitoring shall be documented by staff.

(4) Youth shall spend a minimum of 30 hours per week and no less than 3 hours per day out of their assigned room, with time spent in the general population counted toward those hours.

(5) Youth shall have additional time out of their room to engage in gross motor exercise, social interaction and sensory stimulation activities unless a determination is made by a supervisor that the youth poses an immediate and substantial risk of physical harm to others.

(6) Youth shall have prompt access to water, toilet facilities, and hygiene supplies, either in their rooms or upon request to a staff member via any readily available communication method within 15 minutes of the request.

(7) Youth shall have property items similar to or the same as items allowed in the general population unless restricted as needed for safety of the youth or staff on a case-by-case basis.

Any restriction shall only be temporary until the restricted items can be safely returned. A supervisor shall review any property restrictions on a daily basis and document the review.

(8) Youth shall have the ability to attend all regularly scheduled appointments with a social worker, psychology staff, and other health services unless it is determined by the superintendent following review of the psychology staff's recommendation that the youth continues to present immediate and substantial risk of physical harm to others.

(9) Youth shall eat their meals out of their room unless a supervisor determines the youth presents an immediate and substantial risk of physical harm to others. If a youth is served their meal in-room a supervisor will document the occurrence including a justification for authorizing the meal in-room.

(10) Youth shall continue to receive any treatment programming they would regularly attend unless a determination is made by the superintendent following review of the psychology staff's recommendation that the youth presents an immediate and substantial risk of physical harm to others or an unreasonable risk of significantly disrupting group dynamics. Treatment services may be delivered one-on-one if the youth's assigned social worker determines this to be in the best interest of the youth. The reasoning for the determination and the manner in which the

treatment is provided shall be documented in the youth's treatment record.

(11) Youth shall receive educational services with the general population except if a determination is made by staff that the youth presents an immediate and substantial risk of physical harm to others or an unreasonable risk of significantly disrupting class instruction. When this determination is made staff shall develop an alternative education plan, including any applicable special education services, within 24 hours.

(12) Youth must have access to any needed mental health treatment while in room confinement.

(13) Within 15 minutes of a youth's placement in room confinement, staff shall orally inform the youth of their rights regarding grievances and appeals as specified in ch. DOC 380. Within one hour of a youth's placement in room confinement, facility staff shall provide the youth with written notice of their rights regarding grievances and appeals.

(14) Staff shall create a written report, after room confinement of a youth is completed, documenting the necessity of room confinement, the less restrictive measures attempted to avoid room confinement, and the length of time the youth spent in room confinement. The youth shall be provided a copy of the report immediately upon completion of the report.

SECTION 23. DOC 376.05 is repealed and recreated to read:

DOC 376.05 Monitoring youth. (1) Youth at the facility shall be monitored with the use of video and audio supervision.

(2) Visual monitoring of youth shall occur at staggered intervals not to exceed 30 minutes.

(3) Video and audio supervision may include cameras, body cameras, intercoms, microphones, telephone monitoring, or other electronic recording and surveillance devices.

(4) Information obtained by video or audio supervision or both may be used by the department or law enforcement for purposes that include administrative actions, discipline, program direction, investigations under the Prison Rape Elimination Act, 42 U.S.C. 15601, et. Seq. and the standards issued thereunder, 28 C.F.R. Part 115, and criminal prosecutions.

(5) Video or audio supervision or both may not be used during private youth and psychology sessions unless informed consent is given by the youth.

(6) Video or audio supervision or both may not be used to interfere with or compromise privileged communications between a youth and their attorney.

SECTION 24. DOC 376.06 is amended to read:

DOC 376.06 Youth count. ~~A-~~ The superintendent shall establish and maintain a system for accurately accounting for the whereabouts of all youth ~~under the superintendent's supervision~~ at all times. The system shall interfere as little as practical with school, work, program and recreational activities. The system shall be described in writing. All ~~institution~~ facility staff shall be familiar with the system.

SECTION 25. DOC 376.07, 376.08 and 376.09 are repealed and recreated to read:

DOC 376.07 Use of force. (1) The superintendent shall enact a use of force continuum related to the use of physical force based on juvenile-focused best practices, including a physical force intervention training that is consistent with the provisions of this section.

(2) Corporal punishment of youth is not permitted under any circumstances.

(3) Only the minimum force that is reasonably necessary to achieve a proper objective may be used. Excessive force shall not be used.

(4) Staff may use physical force only if the individual staff member using force reasonably believes that it is immediately necessary to accomplish one of the following purposes:

(a) To prevent a youth who poses an imminent and substantial risk of physical harm from harming themselves or others.

(b) To regain control of all or part of a facility during a disturbance as defined in s. DOC

376.20 (1) or an emergency as defined in s. DOC 376.21 (1).

(c) To prevent the escape of a youth.

(5) After the use of physical force, the youth who were involved shall be checked for injury and provided appropriate medical services. Staff shall submit a written report to the superintendent regarding any medical services provided.

(6) If physical force is used, each staff member involved shall submit a separate written report regarding the incident to the superintendent.

(7) All facility staff shall be trained in de-escalation practices at least annually.

(8) Deadly force is not a part of the use of force continuum in a facility. Staff shall not be trained in the use of deadly force. Staff may use the physical force necessary to prevent death or great bodily injury.

(9) Youth may not use physical force at any time.

DOC 376.08 Use of chemical agents. The use of oleoresin capsicum and other chemical agents is prohibited.

DOC 376.09 Mechanical restraints. Mechanical restraints may only be used if staff determine that they are the least restrictive means of addressing an imminent threat of physical harm to self or others and must be removed immediately when the threat of harm or safety concern has abated. The use of mechanical restraints shall be consistent with the provisions of this section and subject to all of the following:

(1) Under all circumstances, there is a presumption that youth shall not be mechanically restrained.

(2) No mechanical restraint device other than handcuffs may be used on youth while they are in the facility except under any of the following conditions:

(a) When ordered by psychology staff to attempt to prevent active self-harm.

(b) If the youth poses an immediate and substantial threat of physical harm to others.

(c) During transportation additional restraints such as waist chains or leg restraints may be used when necessary to prevent an imminent threat of harm to the youth or others.

(3) Mechanical restraints shall never be used for punishment or discipline.

(4) Youth may never be mechanically restrained to a fixed object unless specifically ordered by a qualified mental health professional to attempt to prevent active self-harm.

(5) Only staff trained in the use of physical force, mechanical restraints, and de-escalation techniques may place a youth in mechanical restraints.

(6) Mechanical restraints may be used during transportation when there is a documented reason to prevent an imminent threat of physical harm to the youth or others.

(7) When youth are being transported for release to a nonlocked environment, mechanical restraints may not be used unless to prevent a threat of harm to the youth or others.

(8) Any use of mechanical restraints, except during transportation or authorized by psychology staff, shall be authorized by a supervisor.

(9) Staff shall be present and observing youth at all times while a youth is in mechanical restraints.

(10) Facility staff must document all uses of mechanical restraints in the facility, including a description of the events leading up to the use of mechanical restraints, the less restrictive alternatives attempted, and the length of time the youth spent in mechanical restraints.

(11) Mechanical restraints in excess of 45 minutes may be used only if all of the following apply:

(a) The use is approved by the superintendent.

(b) The use is approved by psychology staff.

(c) The superintendent and psychology staff shall review use every 45 minutes thereafter.

(12) When psychology staff approves additional 45 minutes of mechanical restraint use, as soon as possible and no later than 2 hours following this approval, psychology staff shall evaluate the youth and provide therapeutic interventions to the youth as needed.

SECTION 26. DOC 376.10 (1) (intro.), (g), (2) (e), (7), (8), 376.11 and 376.12 (2) and (4) are amended to read:

DOC 376.10 (1) PLAN. (intro.) ~~Each institution~~ The facility shall have a written plan approved by the superintendent to be implemented in the event an escape occurs or is attempted. The plan shall be updated annually and shall be filed with the administrator. The plan shall provide for all of the following:

(g) A search of the ~~institution~~ facility and grounds.

DOC 376.10 (2) (e) Action taken by the ~~institution~~ facility, including procedures initiated.

DOC 376.10 (7) CRIMINAL CONVICTIONS. A youth who is in ~~an institution~~ a facility because of an adult criminal court conviction who escapes from ~~an institution~~ a facility shall be treated as an adult in regard to confidentiality of information.

DOC 376.10 (8) PUBLIC INFORMATION RELEASE. After 12 hours, the department may release information to the public if permitted under s. 938.78 (3), Stats., for youth adjudicated for certain criminal offenses. The information may include the youth's name, age, physical description, including clothing, the date and time of the escape and the ~~institution~~ facility where the escape occurred.

DOC 376.11 SEARCH OF ~~INSTITUTION~~ FACILITY GROUNDS. Staff may conduct a search of any area within the buildings or grounds of ~~an institution~~ a facility at any time. There is no requirement that evidence exists that contraband is concealed on ~~institution~~ facility grounds before such a search is conducted. Upon completion of the search, staff shall complete ~~an institution~~ a facility incident report describing the search including any discovery of contraband.

DOC 376.12 (2) If property was seized or damaged pursuant to the search of a youth's living quarters, staff shall inform the youth in writing. The ~~institution~~ facility shall pay for the cost of repair of personal property that is not contraband. In the alternative, and at the discretion of the superintendent, damaged personal property that is not contraband shall be replaced or the youth shall receive the fair market value of the property at the time it was damaged.

DOC 376.12 (4) Staff shall not read materials that they know or have reason to believe are legal materials.

SECTION 27. DOC 376.13 is repealed and recreated to read:

DOC 376.13 Search of youth. (1) The following categories of youth searches may be conducted as follows:

(a) *Personal search.* Staff may conduct a personal search of a youth under any of the following circumstances:

1. At the direction of a supervisor.
2. If staff have a reasonable belief that the youth possesses contraband.
3. Before a youth enters or leaves the security enclosure of a facility.
4. Before and after a youth has been with a visitor.
5. As part of a lockdown or a search of a housing unit under s. DOC 376.12 or facility under s. DOC 376.11.
6. When a youth is apprehended after an escape or an attempted escape.

(b) *Body scan search.* A body scan search of a youth may occur only if there is probable cause to believe that the individual youth possesses or has ingested contraband or other harmful materials that could not be discovered through less intrusive means. Body scan searches of youth are subject to all of the following:

1. A body scan search may only be conducted in a private location not in view of other youth or staff members not involved in the search.
2. Body scan searches may only be conducted by a person of the same gender identity as the youth being searched unless the search is conducted by medical staff.
3. Body scan searches may not be conducted in view of others not directly involved in the search and must be conducted away from video recording.
4. Psychology staff shall be notified as soon as practicable when a youth has been body scan searched.
5. Body scan searches shall be documented by staff.
6. a. Images produced utilizing body scanner technology may be viewed only when necessary by supervisors, psychology staff, or the health services unit.
b. Images produced utilizing body scanner technology may not be stored on any external storage device or copied in any manner, unless authorized by the superintendent.

(c) *Strip search.* A strip search of a youth may occur only if there is probable cause to believe that the individual youth possesses contraband that could not be discovered through less intrusive means. Strip searches, when permitted, are subject to all of the following:

1. A strip search may only be conducted in a private location. No unintended individuals including youth and staff shall be able to view the search, including by video or audio recording.
2. Strip searches may only be conducted by a person of the same gender identity as the youth being searched unless the search is conducted by a medical professional.
3. Less intrusive search methods shall be attempted before a strip search is conducted, unless it is determined by psychology staff in consultation with the youth that less intrusive searches, which may include physical contact, would cause greater trauma to the youth.
4. Strip searches may only be conducted by staff trained in trauma-informed care in accordance with facility policy.
5. Psychology staff shall be consulted prior to a strip search.
6. Strip searches shall be documented by staff.

(d) *Body contents search.* Only staff assigned by the superintendent may obtain samples as part of a body contents search. Staff of the same gender identity as the youth being searched shall collect urine specimens. Trained staff may conduct breath specimen tests. Assigned staff may conduct a body contents search under any of the following circumstances, and only after approval by the superintendent:

1. For security reasons.
2. For program reasons.
3. For investigation purposes if one or more staff, from direct observation or reliable sources, have a reasonable belief that a youth has used, possesses, or is under the influence of intoxicating substances.
4. As part of a random testing program.
5. As required by a court for DNA analysis under s. 973.047, Stats., or any other biological specimen analysis.

(2) Staff shall preserve the dignity of youth to the extent reasonably possible in all searches conducted under this section and are required to conduct all searches utilizing trauma-informed care.

(3) Before a search is conducted pursuant to this section, a youth shall be informed that a search is about to occur and of the nature of the search and the location where the search is to occur.

(4) Results of searches, and any contraband or test results obtained under sub. (1), may be retained as evidence for consideration in response to addressing noncompliant behaviors.

(5) All searches conducted under sub. (1) shall be documented by staff and include all of the following:

- (a) The identity of the staff member who conducted the search.
 - (b) The date and time of the search.
 - (c) The identity of the youth searched.
 - (d) The reason for the search. If the search was a random search the report shall so state.
 - (e) Any objects seized pursuant to the search.
 - (f) The identity of all staff present when the search was conducted.
 - (g) When a body scan search is conducted, the documentation shall assert how the limitations and requirements in sub. (1) (b) are met.
 - (h) When a strip search is conducted, the documentation shall assert how the limitations and requirements in sub. (1) (c) are met.
- (6) Contraband seized as the result of any search under sub. (1) shall be disposed of in accordance with s. DOC 376.17. All contraband seized shall be documented by staff along with searches required by sub. (1) and include the place and time contraband was seized and the identity of the person possessing the contraband. If the contraband was not found in possession of a person, the report shall state that fact.

SECTION 28. DOC 376.14 (1), (2), and (3) are amended to read:

DOC 376.14 (1) Before a visitor is permitted in ~~an institution~~ a facility, staff responsible for the admission of visitors shall be satisfied that the visitor is not carrying an unauthorized object into the ~~institution~~ facility.

(2) Each ~~institution~~ facility shall have information readily available to visitors informing them of the objects they may carry into the ~~institution~~ facility. Each ~~institution~~ facility shall have a place for the safekeeping of objects that may not be carried into the ~~institution~~ facility and shall permit visitors to store objects in these places.

(3) Before admitting a visitor, staff responsible for admission of visitors may request visitors to empty pockets and containers, permit the inspection of containers or submit themselves and objects they carry into the ~~institution~~ facility to inspection by a device designed to detect metal or unauthorized objects.

SECTION 29. DOC 376.14 (4) (a) is renumbered DOC 376.14 (4) and amended to read:

DOC 376.14 (4) Before admitting a visitor, staff responsible for admission of visitors may request a visitor to submit to a personal search, which the superintendent and the administrator must authorize, if there ~~are reasonable grounds to believe~~ is a reasonable belief the visitor is concealing an unauthorized object.

SECTION 30. DOC 376.14(4)(b) is repealed.

SECTION 31. DOC 376.14 (5), (6) and (7) (intro.) are amended to read:

DOC 376.14(5) Before an inspection or search is conducted pursuant to ~~sub.~~ subs. (3) or (4), the visitor shall be informed orally and in writing, either by a sign posted in a prominent place or on a notice, that the visitor need not permit the inspection or search and that if the visitor does not give permission, the visitor shall not be admitted to the ~~institution~~ facility.

(6) If staff find an unauthorized object under sub. (3) or (4), the visitor may be denied entry to the ~~institution~~ facility and visiting privileges may be suspended.

(7) (intro.) If a visitor is denied entry to ~~an institution~~ a facility for refusal to permit a search or if a

search is conducted of a visitor under sub. (4), the staff involved shall submit a written report to the superintendent that states all of the following:

SECTION 32. DOC 376.15 is repealed and recreated to read:

DOC 376.15 Search of staff. (1) Each facility shall give staff written notice of the objects that they may not carry into or out of the facility.

(2) The superintendent may require that staff regularly submit to a personal search before they enter or leave a facility. As part of the personal search, the superintendent may require staff to submit themselves and objects they carry into or out of the facility to inspection by a device designed to detect metal or unauthorized objects.

(3) The superintendent may require that staff vehicles and personal possessions be searched while on facility grounds.

(4) Staff who refuse to submit to a search shall not be admitted to the facility and may be subject to disciplinary action.

(5) If an unauthorized object is found pursuant to a search conducted under this section, the superintendent shall dispose of the object consistent with s. DOC 376.17.

(6) All searches shall be conducted in a courteous manner. Staff shall strive to protect the dignity of staff who are searched.

SECTION 33. DOC 376.17 (1) is amended to read:

DOC 376.17. Seizure and disposal of contraband. (1) Staff who reasonably believe that an item is contraband may seize the item. Items seized shall be sent to the superintendent ~~accompanied by the written report required under ss. DOC 376.13(4) and 376.14(7) and documented in accordance with s. DOC 376.13 (6).~~ Items that are not contraband shall be returned to the owner consistent with ~~institution facility policy and procedure.~~ Contraband shall be returned to the owner, given to the ~~sheriff or local appropriate~~ law enforcement agency or disposed of in accordance with this section.

SECTION 34. DOC 376.17 (2) is repealed.

SECTION 35. DOC 376.17 (3) (a), (b) and (e) are amended to read:

DOC 376.17(3) (a) Except as otherwise provided in this subsection, if the owner can be determined, the superintendent may direct that the contraband be returned to the owner. ~~Contraband may not be returned to a youth unless its return is consistent with this section and the institution's policies and procedures.~~

(b) Property Contraband that is unlawful to possess under state or federal law shall be given to the ~~sheriff or a local appropriate~~ law enforcement agency.

(e) Currency, checks, and other negotiable instruments shall be returned to the owner ~~if the owner is known, except that if a youth is the owner of currency, it shall be deposited in the youth's account unless the owner is determined to be a youth, in which case, these items shall be held in the youth's account.~~ Currency If the owner cannot be determined, currency shall be placed in the state's general fund ~~if the owner cannot be determined and checks and other negotiable instruments shall be given to the appropriate law enforcement agency.~~

SECTION 36. DOC 376.17(3)(f) is repealed.

SECTION 37. DOC 376.17 (3) (g) is amended to read:

DOC 376.17 (3) (g) Other property, whose ownership is unknown, shall be sold through the department's purchasing office and proceeds of the sale shall be placed in the state's general fund. ~~Items~~

having an apparent value of \$5.00 or less shall be destroyed in accordance with the policies and procedures of the institution.

SECTION 38. DOC 376.17 (3) (h) (intro.), 2., 4. and 5. are amended to read:

DOC 376.17 (3) (h) (intro.) If it is determined that a youth is the owner of contraband that is lawful to possess, other than currency, but return of the contraband is inconsistent with the department's rules or the ~~institution's~~ institution's facility's policies and procedures, the superintendent shall do one of the following:

2. Store the contraband in the ~~institution~~ facility until the youth is discharged or otherwise released from the ~~institution~~ facility.
4. Deliver the contraband to a person on the youth's visiting list when the person visits the ~~institution~~ facility.
5. Destroy the contraband, consistent with ~~institution~~ facility policy and procedure.

SECTION 39. DOC 376.18 is repealed and recreated to read:

DOC 376.18 Incident review process. Committee review of incidents involving the use of physical force, room confinement, mechanical restraints applied for more than 45 minutes, and any strip searches shall be consistent with all of the following:

- (1) The review committee will include all staff directly involved in an incident, their supervisors, the case manager assigned to the youth, the psychology staff who are familiar with the youth, the facility director of security, the deputy superintendent, and the superintendent.
- (2) Within 24 hours of the incident, all available members of the review committee shall meet to assess whether physical force, room confinement, or mechanical restraints were used appropriately, to discuss less restrictive alternative strategies that staff could have used, and to provide an opportunity for staff training or redirection or both if needed.
- (3) If not all members of the review committee are available for the meeting within 24 hours of the incident, the full review committee shall meet or confer as soon as possible and no later than one week after the incident.
- (4) The review committee shall also review all uses of strip searches weekly to ensure that any such searches were conducted only upon probable cause.

SECTION 40. DOC 376.19, 376.20 (1) (intro.), (a), (b), and (c), are amended to read:

DOC 376.19 Lockdown. In the event of a an extraordinary safety or security need, the superintendent may at any time lockdown ~~an institution a facility~~ to investigate and control ~~the situation~~ an imminent threat to the safety and security of staff and youth. The superintendent shall give the secretary and the administrator advance notice, ~~when possible~~, of any lockdown. If advance notice cannot be given, the superintendent shall notify the secretary and the administrator of a lockdown as soon as possible.

DOC 376.20 (1) (intro.) In this section, a disturbance means any of the following ~~have~~ has occurred:

- (a) ~~Two or more youth assault any person.~~ A group disturbance.
- (b) ~~A youth has taken a hostage.~~ An incident.
- (c) ~~Two or more youth destroy state property or the property of another person.~~ A youth has taken a hostage.

SECTION 41. DOC 376.20(1) (d) and (e) are repealed

SECTION 42. DOC 376.20 (2), (3) (c), (3) (d), (5), and (8) (c) are amended to read:

DOC 376.20 (2) Each ~~institution~~ facility shall have a written plan, a copy of which shall be filed with the administrator, to control and stop a disturbance. The plan shall be prepared by the superintendent and shall be reviewed at least once a year.

(3) (c) To maintain and restore order to the ~~institution~~ facility.

(d) To identify any person who participated in the disturbance, ~~to provide for disciplinary action to be taken according to ch. DOC 373~~ and to provide relevant information to the sheriff or local law enforcement agency so that participants may be prosecuted.

(5) To ensure the safety and security of youth, staff, the facility and the community, ~~If~~ if a major disturbance occurs that prevents the normal functioning of the ~~institution~~ facility, the superintendent may suspend the administrative rules of the department that relate to the division, except ss. DOC 376.05 to 376.09 and 376.13, until the disturbance is ended and order is restored to the ~~institution~~ facility.

(8) (c) One member to be designated by the superintendent of the ~~institution~~ facility where the incident occurred from the ~~institution~~ facility staff.

SECTION 43. DOC 376.21 (1) (intro.), (a), (b), (2), (3) (c), and (4) are amended to read:

DOC 376.21 Emergencies. (1) (intro.) In this section, “emergency” means an immediate threat to the safety of the staff or youth of ~~an institution~~ a facility, as determined by a superintendent, other than a disturbance as defined in s. DOC 376.20 (1). An emergency may include, but is not limited to:

(a) An epidemic or pandemic.

(b) A malfunctioning of ~~institution~~ facility systems including the water, electrical or telephone system.

(2) Each ~~institution~~ facility shall have a written plan, a copy of which shall be filed with the administrator, to be implemented in the event of an emergency.

(3) (c) To maintain or restore order to the ~~institution~~ facility.

(4) To ensure the safety and security of youth, staff, the facility and the community, ~~If~~ if an emergency occurs that prevents the normal functioning of the ~~institution~~ facility, the superintendent may suspend the administrative rules of the department that relate to the division, except ss. DOC 376.05 to 376.09 and 376.13, until the emergency is ended and order is restored to the ~~institution~~ facility.

SECTION 44. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

**WISCONSIN DEPARTMENT OF CORRECTIONS
REPORT FROM AGENCY**

CR 24-003 RULEMAKING REPORT TO LEGISLATURE

BASIS AND PURPOSE OF PROPOSED RULE

The Wisconsin Department of Corrections proposes an order **to repeal** DOC 374, DOC 376.03(2), (3), (6), (13), (14), (15) and (20), 376.14(4)(b), 376.17(2), 376.17(3)(f), 376.20(1)(d) and (e), **to renumber and amend** DOC 376.14(4)(a), **to amend** DOC 376.03(4), (7), (17), (19), (21), (22), (24), (25) and (29), 376.06, 376.10(1)(intro), (g), (2)(e), (7) and (8), 376.11, 376.12(2) and (4), 376.14(1), (2), (3), (5), (6), and (7)(intro), 376.17(1), (3)(a), (3)(b), (3)(e), (3)(g), (3)(h)(intro), 2., 4., and 5., 376.19, 376.20(1)(intro), (1)(a), (1)(b), (1)(c), (2), (3)(c), (3)(d), (5) and (8)(c) and 376.21(1)(intro), (a), (b), (2), (3)(c) and (4), **to repeal and recreate** DOC 376.03(10), (12), (16) and (28), 376.04, 376.05, 376.07, 376.08, 376.09, 376.13, 376.15 and 376.18 **and to create** DOC 376.03(4m), (8m), (21m), (22m) and (28m) and 376.045.

SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSE

Public Comment or Testimony	Department Response
We encourage DOC, however, to ensure that youth continue to have sufficient time out of their rooms to meet their social and developmental needs. To that end, we encourage adding a provision to DOC 376.045 that provides, “Youth shall have additional time out of their room to engage in gross motor exercise, social interaction and sensory stimulation activities unless a determination is made by a supervisor that the youth poses an immediate and substantial risk of physical harm to others.”	Agree. This will be added as a provision into DOC 376.045.
We also encourage DOC to work toward eliminating the use of solitary confinement altogether to truly ensure the safety and well being of all youth.	Comment noted.
We appreciate that the proposed DOC amendments present a complete ban on the use of chemical agents in youth facilities, which also aligns with the Departments’ commitments to <i>J.J. v. Litscher</i> , which resulted in successfully eliminating use of chemical agents at Lincoln Hills and Copper Lake several years ago.	Comment noted.
We recommend, however, that DOC continue to ensure adequate training and oversight of any forms of physical interventions to ensure compliance with the Consent Decree and other legal mandates.	Comment noted.
We thus support DOC’s proposed amendments that create a presumption against the use of mechanical restraints, including prohibiting mechanical restraints other than handcuffs in most circumstances, and ensures mechanical restraints are only used as the least restrictive means to address an imminent threat of physical harm to oneself or others, offers limitations and guidance on how long such restraints can be used, and requires de-escalation training of staff. This too aligns with DOC’s commitments in <i>J. J. v. Litscher</i> , and a developing body of	Comment noted.

research that affirms restraints generally only make things worse.	
We continue to encourage DOC to employ non-physical behavioral interventions and de-escalation techniques to further improve the safety and well-being of young people and staff.	Comment noted.
We continue to recommend, however, that DOC rely on less intrusive means such as wand scans or metal detectors rather than imposing harmful strip searches.	Comment noted.
We appreciate the DOC's commitment to documenting, reviewing, and monitoring the use of confinement, restraints, and body and strip searches to ensure proper compliance with our shared goals.	Comment noted.
We commend DOC for recognizing the need to codify in the Administrative Code greater restrictions on the use of punitive measures against youth in its facilities, and for its commitment to overseeing and ensuring compliance with these new policies and procedures. Since the <i>J.J. v. Litscher</i> Consent Decree was entered in 2018, we have continued to see the positive improvements such changes have had in existing facilities and are eager to work with the Department to continue to protect the safety and well-being of youth.	Comment noted.

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

The following provision was added to the proposed rule as 376.045(5): Youth shall have additional time out of their room to engage in gross motor exercise, social interaction and sensory stimulation activities unless a determination is made by a supervisor that the youth poses an immediate and substantial risk of physical harm to others.

PERSONS APPEARING OR REGISTERING AT PUBLIC HEARINGS

A public hearing was held on February 2nd, 2024 from 11:00 am – 12:00 pm via Teams and teleconference. Breanne Schuster with the Juvenile Law Center 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

In Section 25, s. DOC 376.07(1) provides that the superintendent shall enact policies and procedures related to the use of physical force based on juvenile-focused best practices, including training consistent with the provisions of the section. Any policy that has the force of law – meaning the legal rights of the juveniles may be affected – meets the definition of “rule” and must be promulgated through the administrative rule process. Thus, depending on the contents of the policy, it could trigger required

Department Response

The Department has updated this language regarding the use of physical force.

rulemaking.

In Sections 42 and 43 s. DOC 376.20(5) authorizes a facility superintendent to suspend administrative rules that relate to the Division of Juvenile Corrections (with some exclusions) in the event of a disturbance and s. DOC 376.21(4) authorizes a facility superintendent to suspend administrative rules that relate to the division (with some exclusions) in the event of an emergency. While the substance of the current administrative rule is largely unchanged by the proposed rule revisions, the department should more clearly explain the authority it believes would enable suspension of any administrative rule on an *ad hoc* basis, without subsequent rulemaking.

The Department has included additional language regarding this authority.

Section 11 creates a broad definition of “mechanical restraint”, which means a commercially manufactured device approved by the department and applied to impeded the free movement of youth. Should the definition more explicitly specify that the device be attached or applied “to the youth”, or specify that the device is one used as a behavioral restraint?

The Department believes that this definition is appropriate as is given its use in the context of the rule.

In Section 14, the proposed rule created a definition of “psychology staff”, and defines it to mean individuals licensed to provide behavioral health services...and who meet education training, and experience to perform the duties required. The definition appears to be missing the word “requirements” after the phrase “meet the education, training, and experience”.

This definition has been updated appropriately.

In Section 25, s. DOC 376.09(2)(c) provides that only handcuffs may be used on youth while in the facility, except that during transportation, additional restraints such as waist chains or leg restraints may be used when necessary to prevent imminent threat of harm “to youth or others”. Should this be harm to “the” youth meaning a threat of self-harm? Or, is it meant to apply to a threat of harm only to other youth and adults? Similarly, s. DOC 376.09(6) addresses use of mechanical restraints during transportation but limits their use to situations where there is a documented reason to prevent an imminent threat of harm to “youth and staff”. Is there an intentional distinction being made about when mechanical restraints can be used in the facility while preparing for transportation (threat of harm to “youth or others”), ad when they can be used during active transportation (threat of harm to “youth and staff”)? The language difference should be clarified to resolve these questions.

The language has been updated to be consistent throughout the different provisions.

As treated in Sections 42 and 43, s. DOC 376.20 authorizes a superintendent to suspend the administrative rules in the case of a “major disturbance” at a facility, except that a superintendent cannot suspend ss. DOC 376.05 to 376.09 (monitoring youth, youth count, use of force, use of mechanical agents, and mechanical restraints). The proposed rule adds s. DOC 376.13 (searches) to the list of administrative rules that cannot be suspended, even in the event of a disturbance. Section DOC 376.21 includes a similar language authorizing a superintendent to suspend administrative rules in the case

S. DOC 376.13 has been added to s. DOC 376.21.

of an emergency at a facility, except that the superintendent cannot suspend ss. DOC 376.05 to 376.09. Subject to the department response to comment 1.b., above, should the proposed rule similarly add s. DOC 376.13 (searches) to the list of administrative rules that cannot be suspended, even in the case of an emergency? Or, was the exclusion of the section intentional?

In the plain language analysis, the department explains that the rule changes are meant to reflect changes in law and best practices. The proposed rule changes also seem to reflect prohibitions related to OC spray, punitive solitary confinement, use of mechanical restraints, and strip searches mandated by the federal court's consent decree in *J.J. et al. v. Litscher et al.* (W.D. Wis. 17-cv-47), the federal class action lawsuit filed by juveniles at Lincoln Hills. If this was an additional intent in amending the existing rule chapter including this explanation in the plain language analysis would be helpful.

This additional explanation has been added to the plain language analysis.

In the plain language analysis, the department provides a brief summary of most, but not all, changes made by the proposed rule. It would be useful to also summarize certain additional topics potentially of interest to the Legislature, including changes to the definition of "strip search", changes to circumstances allowing for staff use of force, a requirement that searches of youth be conducted by a person of the same gender identity as the youth rather than a person of the same sex, changes to circumstances under which a facility-wide lockdown may be imposed, and changes to what constitutes a "disturbance" at a juvenile facility authorizing the superintendent to suspend other applicable administrative rules.

This additional information has been added to the plain language analysis.

In Section 25, s. DOC 376.09(intro.) uses the term "mechanical restraints" as well as the term "restraints", and prohibits the use of "restraints" unless staff determine they are the least restrictive means of addressing an imminent threat of physical harm. The chapter defines "mechanical restraints" but does not define the more general "restraints". Is the reference intended to limit the use of "mechanical restraints"? If so, the language should be changed to use this defined term.

The language in s. DOC 376.09 has been updated to use the term "mechanical restraints" throughout.

In Section 27, s. DOC 376.13(1)(b)2., the language should refer to "medical staff" or "a medical staff person".

This language has been updated to reflect the recommended edit.

In Section 32, s. DOC 376.15(2) authorizes the superintendent to require staff to submit to a "personal search" before entering or leaving a facility. However, the proposed rule defines "personal search", amends the prior language referring certain searches of "a person", and instead, defines it to mean certain searches of a "youth's person". Either the amended definition or the subsection text should be changed to provide clarity.

The amended definition of "personal search" has been updated to remove the term "youth."

In Section 32, s. DOC 376.15(3) provides that the superintendent may require searches of staff vehicles and personal possessions while on facility grounds. The subsection also states that "staff who refuse to submit to a search shall not be admitted to the facility and may be subject to disciplinary action. A separate subsection, s.

The language in s. DOC 376.15 has been updated so that staff may be denied admission and subjected to discipline if they refuse to submit to a personal search and also if they refuse so submit to a search of vehicles and personal possessions.

DOC 376.15(2), authorizes the superintendent to require staff to submit to a personal search before they enter or leave a facility. The language regarding staff being denied admission and subjected to discipline appears to apply only to staff refusing searches of vehicles and personal possessions, and not to those refusing personal searches. Is that the intent?

In Section 35, s. DOC 376.17(3)(e) is amended with respect to treatment of checks. While the first sentence says a check shall be returned to the owner, the last sentence states that a check shall be given to law enforcement. Context suggests that the last sentence should be modified by “If the owner cannot be determined”, and if so, the provision should be amended to reflect that intent.

s. DOC 376.17(3)(e) has been amended for the last sentence to include the modifying language regarding “if the owner cannot be determined.”

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.



Wisconsin Legislative Council

RULES CLEARINGHOUSE

Scott Grosz
Clearinghouse Director

Anne Sappenfield
Legislative Council Director

Margit Kelley
Clearinghouse Assistant 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 **24-003**

AN ORDER to repeal DOC 374, 376.03 (2), (3), (6), (13), (14), (15) and (20), 376.14 (4) (b), 376.17 (2), 376.17 (3) (f), and 376.20 (1) (d) and (e); to renumber and amend DOC 376.14 (4) (a); to amend DOC 376.03 (4), (7), (17), (19), (21), (22), (24), (25) and (29), 376.06, 376.10 (1) (intro), (g), (2) (e), (7) and (8), 376.11, 376.12 (2) and (4), 376.14 (1), (2), (3), (5), (6), and (7) (intro), 376.17 (1) and (3) (a), (b), (e), (g), and (h) (intro), 2., 4., and 5., 376.19, 376.20 (1) (intro), (a), (b), and (c), (2), (3) (c) and (d), (5) and (8) (c) and 376.21 (1) (intro), (a) and (b), (2), (3) (c) and (4); to repeal and recreate DOC 376.03 (10), (12), (16) and (28), 376.04, 376.05, 376.07, 376.08, 376.09, 376.13, 376.15 and 376.18; and to create DOC 376.03 (4m), (8m), (21m), (22m) and (28m) and 376.045, relating to security in Type 1 secured correctional facilities.

Submitted by **DEPARTMENT OF CORRECTIONS**

01-03-2024 RECEIVED BY LEGISLATIVE COUNCIL.

01-31-2024 REPORT SENT TO AGENCY.

SG:KBO

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

Scott Grosz
Clearinghouse Director

Anne Sappenfield
Legislative Council Director

Margit Kelley
Clearinghouse Assistant Director

CLEARINGHOUSE RULE 24-003

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. In SECTION 25, s. DOC 376.07 (1) provides that the superintendent shall enact policies and procedures related to the use of physical force based on juvenile-focused best practices, including training consistent with the provisions of the section. Any policy that has the force of law – meaning the legal rights of the juveniles may be affected – meets the definition of “rule” and must be promulgated through the administrative rule process. Thus, depending on the contents of the policy, it could trigger required rulemaking.

b. In SECTIONS 42 and 43, s. DOC 376.20 (5) authorizes a facility superintendent to suspend administrative rules that relate to the Division of Juvenile Corrections (with some exclusions) in the event of a disturbance, and s. DOC 376.21 (4) authorizes a facility superintendent to suspend administrative rules that relate to the division (with some exclusions) in the event of an emergency. While the substance of the current administrative rule is largely unchanged by the proposed rule revisions, the department should more clearly explain the authority that it believes would enable suspension of any administrative rule on an *ad hoc* basis, without subsequent rulemaking.

2. Form, Style and Placement in Administrative Code

a. SECTION 11 creates a broad definition of “mechanical restraint”, which means a commercially manufactured device approved by the department and applied to impede the free movement of a youth. Should the definition more explicitly specify that the device be attached or applied “to the youth”, or specify that the device is one used as a behavioral restraint?

b. In SECTION 14, the proposed rule creates a definition of “psychology staff”, and defines it to mean individuals licensed to provide behavioral health services...and who meet education, training, and experience to perform the duties required. The definition appears to be missing the word “requirements” after the phrase “meet the education, training, and experience”.

c. In SECTION 25, s. DOC 376.09 (2) (c) provides that only handcuffs may be used on youth while in the facility, except that during transportation, additional restraints such as waist chains or leg restraints may be used when necessary to prevent imminent threat of harm “to youth or others”. Should this be harm to “the” youth, meaning a threat of self-harm? Or, is it meant to apply to a threat of harm only to other youth and adults? Similarly, s. DOC 376.09 (6) addresses use of mechanical restraints during transportation but limits their use to situations where there is a documented reason to prevent an imminent threat of harm to “youth and staff”. Is there an intentional distinction being made about when mechanical restraints can be used in the facility while preparing for transportation (threat of harm to “youth and others”), and when they can be used during active transportation (threat of harm to “youth and staff”)? The language differences should be clarified to resolve these questions.

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

As treated in SECTIONS 42 and 43, s. DOC 376.20 authorizes a superintendent to suspend the administrative rules in the case of a “major disturbance” at a facility, except that a superintendent cannot suspend ss. DOC 376.05 to 376.09 (monitoring youth, youth count, use of force, use of mechanical agents, and mechanical restraints). The proposed rule adds s. DOC 376.13 (searches) to the list of administrative rules that cannot be suspended, even in the event of a disturbance. Section DOC 376.21 includes similar language authorizing a superintendent to suspend administrative rules in the case of an emergency at a facility, except that the superintendent cannot suspend ss. DOC 376.05 to 376.09. Subject to the department response to comment 1. b., above, should the proposed rule similarly add s. DOC 376.13 (searches) to the list of administrative rules that cannot be suspended, even in the case of an emergency? Or, was the exclusion of the section intentional?

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

a. In the plain language analysis, the department explains that the rule changes are meant to reflect changes in law and best practices. The proposed rule changes also seem to reflect prohibitions related to OC spray, punitive solitary confinement, use of mechanical restraints, and strip searches mandated by the federal court’s consent decree in *J.J. et al. v. Litscher et al.* (W.D. Wis. 17-cv-47), the federal class action lawsuit filed by juveniles at Lincoln Hills. If this was an additional intent in amending the existing rule chapter, including this explanation in the plain language analysis would be helpful.

b. In the plain language analysis, the department provides a brief summary of most, but not all, changes made by the proposed rule. It would be useful to also summarize certain additional topics potentially of interest to the Legislature, including changes to the definition of “strip search”, changes to circumstances allowing for staff use of force, a requirement that searches of youth be conducted by a person of the same gender identity as the youth rather than a person of the same sex, changes to circumstances under which a facility-wide lockdown may be imposed, and changes to what constitutes a “disturbance” at a juvenile facility authorizing the superintendent to suspend otherwise applicable administrative rules.

c. In SECTION 25, s. DOC 376.09 (intro.) uses the term “mechanical restraints” as well as the term “restraints”, and prohibits the use of “restraints” unless staff determine they are the least restrictive means of addressing an imminent threat of physical harm. The chapter defines “mechanical restraints” but does not define the more general “restraints”. Is the reference intended

to limit the use of “mechanical restraints”? If so, the language should be changed to use this defined term.

d. In SECTION 27, s. DOC 376.13 (1) (b) 2., the language should refer to “medical staff”, or “a medical staff person”.

e. In SECTION 32, s. DOC 376.15 (2) authorizes the superintendent to require staff to submit to a “personal search” before entering or leaving a facility. However, the proposed rule defines “personal search”, amends the prior language referring certain searches of “a person”, and instead, defines it to mean certain searches of a “youth’s person”. Either the amended definition or the subsection text should be changed to provide clarity.

f. In SECTION 32, s. DOC 376.15 (3) provides that the superintendent may require searches of staff vehicles and personal possessions while on facility grounds. The subsection also states that “staff who refuse to submit to a search shall not be admitted to the facility and may be subject to disciplinary action”. A separate subsection, s. DOC 376.15 (2), authorizes the superintendent to require staff to submit to a personal search before they enter or leave a facility. The language regarding staff being denied admission and subjected to discipline appears to apply only to staff refusing searches of vehicles and personal possessions, and not to those refusing personal searches. Is that the intent?

g. In SECTION 35, s. DOC 376.17 (3) (e) is amended with respect to treatment of checks. While the first sentence says a check shall be returned to the owner, the last sentence states that a check shall be given to law enforcement. Context suggests the last sentence should be modified by “If the owner cannot be determined”, and if so, the provision should be amended to reflect that intent.

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

<p>1. Type of Estimate and Analysis <input checked="" type="checkbox"/> Original <input type="checkbox"/> Updated <input type="checkbox"/> Corrected</p>	<p>2. Date 7/20/22</p>
<p>3. Administrative Rule Chapter, Title and Number (and Clearinghouse Number if applicable) DOC 374 and 376</p>	
<p>4. Subject Repeal of DOC 374 (Administrative Confinement in Type 1 Secured Correctional Institutions) and revisions to DOC 376 (Security in Type 1 Secured Correctional Facilities)</p>	
<p>5. Fund Sources Affected <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S</p>	<p>6. Chapter 20, Stats. Appropriations Affected None</p>
<p>7. Fiscal Effect of Implementing the Rule <input checked="" type="checkbox"/> No Fiscal Effect <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Increase Costs <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Indeterminate <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Could Absorb Within Agency's Budget</p>	
<p>8. The Rule Will Impact the Following (Check All That Apply) <input type="checkbox"/> State's Economy <input type="checkbox"/> Specific Businesses/Sectors <input type="checkbox"/> Local Government Units <input type="checkbox"/> Public Utility Rate Payers <input type="checkbox"/> Small Businesses (if checked, complete Attachment A)</p>	
<p>9. Estimate of Implementation and Compliance to Businesses, Local Governmental Units and Individuals, per s. 227.137(3)(b)(1). \$N/A</p>	
<p>10. Would Implementation and Compliance Costs Businesses, Local Governmental Units and Individuals Be \$10 Million or more Over Any 2-year Period, per s. 227.137(3)(b)(2)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>	
<p>11. Policy Problem Addressed by the Rule DOC seeks to repeal DOC 374, DOC 376.03(2), (3), (6), (12), (13), (14), (15) and (20), to amend DOC 376.03(4), (7), (17), (19), (21), (22), (24), (25) and (29), 376.06, 376.10(1), (2)(e), (7) and (8), 376.11, 376.12(2) and (4), 376.14, 376.19, 376.20(1), (2), (3)(c), (3)(d), (5), (7) and (8)(c) and 376.21, to repeal and recreate DOC 376.03(10), (11), (16) and (28), 376.04, 376.05, 376.07, 376.08, 376.09, 376.13, 376.15, 376.17 and 376.18 and to create DOC 376.03(1m), (4m), (8m), (21g), (21r) and (22m) and 376.045. This rulemaking order updates DOC 374 and 376 to reflect changes in the law, operations, and best practices for security and managing youth behavior in Type 1 juvenile correctional facilities.</p>	
<p>12. Summary of the Businesses, Business Sectors, Associations Representing Business, Local Governmental Units, and Individuals that may be Affected by the Proposed Rule that were Contacted for Comments. N/A</p>	
<p>13. Identify the Local Governmental Units that Participated in the Development of this EIA. N/A</p>	
<p>14. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred) This rule does not regulate small businesses as that term is defined in s.227.114, Stats, and therefore DOC has determined the changes will not have a significant economic impact on a substantial number of small businesses.</p>	
<p>15. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule DOC's philosophy surrounding administrative confinement and uses of force has evolved significantly to align with current juvenile focused best practices and national standards, and implementation of these rulemaking updates to DOC 374 and 376 will bring them into alignment with these philosophies.</p>	
<p>16. Long Range Implications of Implementing the Rule</p>	

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

As above, these changes will be beneficial with respect to aligning these administrative rules with changes in the law, operations, and best practices for security and managing youth behavior in Type 1 juvenile correctional facilities.

17. Compare With Approaches Being Used by Federal Government

There are no existing or proposed federal regulations that address best practices for managing youth behavior in a secured correctional facility in Wisconsin.

18. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

All adjacent states have similar rules to the proposed Wisconsin rule. The adjacent states have limits on the punishments and type of force that may be used in juvenile correctional facilities. In most adjacent states the use of room confinement, mechanical restraints and chemical agents is limited to certain situations and each state has specific policies on the how and when searches of youth are allowed. Additionally, some of the adjacent states require counts of youth at certain time intervals and require that behavior expectations are communicated to youth within a certain timeframe upon admission to the facility. Some states require that educational opportunities and rehabilitation plans are provided for youth within the facility. Lastly, several of the adjacent states require certain training, including trauma informed care training, for staff.

19. Contact Name

Michael Slana

20. Contact Phone Number

608-240-5414

This document can be made available in alternate formats to individuals with disabilities upon request.

ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

ATTACHMENT A

1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

2. Summary of the data sources used to measure the Rule's impact on Small Businesses

3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
 - Less Stringent Schedules or Deadlines for Compliance or Reporting
 - Consolidation or Simplification of Reporting Requirements
 - Establishment of performance standards in lieu of Design or Operational Standards
 - Exemption of Small Businesses from some or all requirements
 - Other, describe:
-

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

5. Describe the Rule's Enforcement Provisions

6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes No
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