

Report From Agency

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	Comment noted.

commitments in <i>J. J. v. Litscher</i> , and a developing body of 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

Department Response

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

on the contents of the policy, it could trigger required 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”), and 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

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

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?

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

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.

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?

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.