

TO: Members of the Assembly Committee on Corrections and The Courts

FROM: Representative Scott Walker, Chair

DATE: March 30, 1999

RE: CLEARINGHOUSE RULE 98-193

On Tuesday, March 30, 1999 the following rule was referred to the Assembly Committee on Corrections and The Courts:

Clearinghouse Rule 98-193, relating to holding juveniles in municipal lockup facilities.

The deadline for committee action on this rule is Wednesday, April 28, 1999. If you would like a copy of this rule, please contact Ed Eberle in my office at 266-9181. If you are interested in requesting a hearing and/or submitting comments, please do so prior to the 28th of April.

Thank you.

Tommy G. Thompson
Governor

Jon E. Litscher
Secretary



State of Wisconsin
Department of Corrections

Mailing Address

149 East Wilson Street
Post Office Box 7925
Madison, WI 53707-7925
Telephone (608) 266-2471
Fax (608) 267-3661

March 25, 1999

Scott Jensen, Speaker
Wisconsin State Assembly
211 West, State Capitol
Madison, Wisconsin 53702

Fred Risser, President
Wisconsin State Senate
119 Martin Luther King Blvd., Room 102
Madison, Wisconsin 53702

Re: Clearinghouse Rule 98-193, relating to the holding in municipal lockup facilities juveniles who are alleged to have committed a delinquent act

Gentlemen:

As provided in s. 227.19 (2), Stats., notice is given that the above-mentioned rule is in final draft form. This notice and the report required under s. 227.19 (2) and (3), Stats., are submitted in triplicate.

The rule was submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about the rule, please contact Kathryn R. Anderson at (608) 266-9281.

Sincerely,

A handwritten signature in cursive script that reads "Jon E. Litscher".

Jon E. Litscher
Secretary

Enclosures

cc: Gary Poulson, Deputy Revisor of Statutes
Senator Judy Robson, JCRAR
Representative Glenn S. Grothman, JCRAR

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CLEARINGHOUSE RULE 98-193

An Order to renumber and amend DOC 349.01, to create DOC 349.01(2) and (3) and DOC 349.03(1m), (4m), (10m), and (14m), to renumber DOC 349.04(1), to number and amend DOC 349.04(2) and DOC 349.16(1)(c), to create DOC 349.16(1)(c) and DOC 349.21 (title) and (2), relating to the holding in municipal lockup facilities juveniles who are alleged to have committed a juvenile act.

FINAL DRAFT FORM

1997 Wis. Act 296, created s. 938.209(2m), Stats., which permits the holding of juveniles in municipal lockup facilities if the facilities meet certain criteria. This act took effect on July 1, 1998. A municipal lockup facility may be used to hold juveniles if the juveniles are alleged to have committed a delinquent act and if the department of corrections approves the facility for the holding of juveniles. In addition, the lockup facility may only hold the juvenile for a period not to exceed six hours. Also, there must be sight and sound separation between any juveniles and adults being held in the lockup. Finally, the lockup facility may only hold the juvenile for investigative purposes.

Under current rule a municipal lockup facility may not hold juveniles. The act authorizes the department of corrections to promulgate rules establishing minimum requirements for the approval of a municipal lockup facility as a suitable place for holding juveniles who are alleged to have committed a delinquent act and for the operation of the facility.

The proposed rule provides for including in chapter DOC 349, Municipal Lockup Facilities, the rules for holding in lockup facilities juveniles who are alleged to have committed a delinquent act. Specifically, the proposed rule:

1. Adopts the statutory definitions of adult and juvenile.
2. Defines the terms "delinquent act" and "secure custody status".
3. Establishes the purpose and authority of establishing minimum standards for the holding of juveniles in municipal lockup facilities.
4. Prohibits the holding of juveniles in municipal lockup facilities, except if the juvenile is alleged to have committed a delinquent act.
5. Requires that the lockup facility provide juveniles notification of policies and procedures of the facility regarding the holding of juveniles and facility programs, including health screening and care, suicide prevention, control and administration of medications, and communicable disease control.

6. Provides that juveniles who are alleged to have committed a delinquent act may be placed in secure custody status for a period of time not to exceed 6 hours.
7. Provides that the lockup facility administrator may authorize the holding of juveniles only if the department has approved the facility to hold juveniles.
8. Provides that the lockup administrator may authorize the holding of juveniles only if the administrator has developed and implemented policies and procedures to ensure sight and sound separation between juveniles and adults who are being held in the lockup facility.
9. Requires that the lockup administrator may authorize the holding of juveniles only if the administrator has developed and implemented policies and procedures to maintain juvenile records in a confidential manner and to keep juvenile records separate from adult records, in accordance with s. 938.396, Stats.
10. Provides that the lockup administrator may authorize the holding of juveniles who are alleged to have committed a delinquent act for investigative purposes.
11. Provides that lockup facility staff shall physically observe juveniles at least once every 20 minutes at irregular intervals. If the juvenile is exhibiting behavioral or mental problems, such as mental disturbance, suicidal tendency, or being under the influence of drugs or alcohol, the observations shall be at least once every 15 minutes at irregular intervals. The rule also requires the facility to document the observations.

Proposed Rule:

SECTION 1. DOC 349.01 is renumbered DOC 349.01(1), and as renumbered is amended to read:

DOC 349.01 Purpose and authority. (1) The purpose of this chapter is to establish minimum standards for the design, construction and security of municipal lockup facilities, for maintaining sanitary and safe conditions in lockups and for the development of inmate written program standards for municipal lockup facilities relating to holding inmates and juveniles who are alleged to have committed a delinquent act. ~~The rules are promulgated under the authority of ss. 227.11(2)(a), 301.03(5), 301.37, and 302.365, Stats.~~

SECTION 2. DOC 349.01(2) and (3) are created to read:

DOC 349.01(2) The purpose of this chapter as it applies to juveniles is to protect the health, safety and welfare of juveniles held in municipal lockup facilities, and to ensure compliance with 42 USC 5601 to 5761 and 28 CFR Part 31.

(3) This chapter is promulgated under the authority of ss. 227.11(2)(a), 301.03(5), 301.36, 301.37, 302.365, and 938.209(2m), Stats.

SECTION 3. DOC 349.03(1m), (4m), and (10m) are created to read:

DOC 349.03(1m) "Adult" means a person who is 18 years of age or older, except that for purposes of investigating or prosecuting a person who is alleged to have violated any

state or federal criminal law or any civil law or municipal ordinance, "adult" means a person who has attained 17 years of age.

DOC 349.03(4m) "Delinquent act" means an act which is committed by a juvenile who is 10 years of age or older and which is a violation of any state or federal criminal law, except as provided in ss. 938.17, 938.18, and 938.183, Stats., or which constitutes a contempt of court, as defined in 785.01(1), Stats., as specified in s. 938.355(6g), Stats.

DOC 349.03(10m) "Juvenile" means a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, "juvenile" does not include a person who has attained 17 years of age.

DOC 349.03(14m) "Secure custody status" means the status of a juvenile in a lockup facility, which begins when the juvenile is placed in a cell, holding room, or other locked or secure room within the lockup and which ends when the juvenile is released from custody or is removed from the secure portion of a police station.

SECTION 4. DOC 349.04(1) is renumbered to DOC 349.04.

SECTION 5. DOC 349.04(2) is renumbered DOC 349.21(1), and as renumbered is amended to read:

DOC 349.21(1) A lockup may not be used for the secure detention of juveniles ~~as defined under s. DOC 346.03(4)~~, except a lockup may be used to hold juveniles who are alleged to have committed a delinquent act.

SECTION 6. DOC 349.16(1)(c) is renumbered DOC 349.16(1)(d), and as renumbered is amended to read:

DOC 349.16(1)(d) Statement of the procedure for notification of inmates and juveniles of each policy under par. (b) and (c).

SECTION 7. DOC 349.16(1)(c) is created to read:

DOC 349.16(1)(c) Statement of policies and procedures for detention of juveniles who are alleged to have committed a delinquent act, consistent with s. DOC 349.21.

SECTION 8. DOC 349.21(title) and (2) are created to read:

DOC 349.21 Detention of juveniles.

(2) A lockup administrator may authorize the holding of a juvenile who is alleged to have committed a delinquent act only if all of the following criteria are met:

(a) Except as provided in this section, the lockup facility meets the provisions of this chapter and has been approved by the department as a suitable place for holding juveniles in custody.

(b) The lockup administrator shall have developed and implemented policies and procedures which ensure sight and sound separation between juveniles and adult inmates in all areas of the lockup facility, including entrances, booking, intake, elevators, staircases, cells, holding rooms, and all other areas in which juveniles could have contact with adult inmates.

(c) The lockup administrator shall have established and implemented policies and procedures to ensure that juvenile records are maintained in a confidential manner and kept separate from adult inmate records in accordance with s. 938.396, Stats.

(3) The lockup administrator may only authorize that a juvenile who is alleged to have committed a delinquent act be placed in secure custody status for a period of time not to exceed 6 hours.

(4) The lockup administrator may only authorize that a juvenile who is alleged to have committed a delinquent act be placed in secure custody status for investigative purposes.

(5) Lockup facility staff shall physically observe each juvenile and document each observation. The observations shall be at irregular intervals in accordance with the following schedule:

(a) Every juvenile at least once every 20 minutes.

(b) Every juvenile exhibiting behavioral or mental problems, such as mental disturbance, suicidal tendency, or being under the influence of alcohol or drugs, at least once every 15 minutes.

Effective Date

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Fiscal Estimate

The department anticipates an increase in workload associated with the review of municipal lockup facilities but is able to absorb the workload without additional resources.

This rule will not increase municipal governments' costs and may, in fact, reduce costs. The rule requires lockup facility staff to physically observe the juvenile at least every 20 minutes while in a lockup. Until the rule is in place, municipalities must continue to operate as before, with facility staff required to physically observe the juvenile 100% of the time the juvenile is on site. This often results in the arresting officer being pulled from patrol to supervise the juvenile. Allowing municipalities the leeway to assign a single staff person to observe a group of juveniles in lockup status and to free up officers to continue patrol assignments may reduce officer overtime costs.

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ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES UNDER SECTION
227.19(3), STATS.

Need for Rule

1997 Wis. Act 296, created s. 938.209(2m), Stats., which permits the holding of juveniles in municipal lockup facilities if the facilities meet certain criteria. This act took effect on July 1, 1998. A municipal lockup facility may only hold juveniles who are alleged to have committed a delinquent act if the department of corrections approves the facility for the holding of juveniles. In addition, the lockup facility may only hold the juvenile for no more six hours. Also, there must be sight and sound separation between any juveniles and adults being held in the lockup. Finally, the lockup facility may only hold the juvenile for investigative purposes.

Under current rule a municipal lockup facility may not hold juveniles. The act authorizes the department of corrections to promulgate rules establishing minimum requirements for the approval of a municipal lockup facility as a suitable place for holding juveniles who are alleged to have committed a delinquent act and for the operation of the facility.

This rule:

1. Adopts the statutory definitions of adult and juvenile.
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5. Requires that the lockup facility provide juveniles notification of policies and procedures of the facility regarding the holding of juveniles and facility programs, including health screening and care, suicide prevention, control and administration of medications, and communicable disease control.
6. Provides that juveniles who are alleged to have committed a delinquent act may be placed in secure custody status for a period of time not to exceed 6 hours.

7. Provides that the lockup facility administrator may authorize the holding of juveniles only if the department has approved the facility to hold juveniles.
8. Provides that the lockup administrator may authorize the holding of juveniles only if the administrator has developed and implemented policies and procedures to ensure sight and sound separation between juveniles and adults who are being held in the lockup facility.
9. Requires that the lockup administrator may authorize the holding of juveniles only if the administrator has developed and implemented policies and procedures to maintain juvenile records in a confidential manner and to keep juvenile records separate from adult records, in accordance with s. 938.396, Stats.
10. Provides that the lockup administrator may authorize the holding of juveniles who are alleged to have committed a delinquent act for investigative purposes.
11. Provides that lockup facility staff shall physically observe juveniles at least once every 20 minutes at irregular intervals. If the juvenile is exhibiting behavioral or mental problems, such as mental disturbance, suicidal tendency, or being under the influence of drugs or alcohol), the observations shall be at least once every 15 minutes at irregular intervals. The rule also requires the facility to document the observations.

Response to Clearinghouse Report Recommendations

The Department of Corrections accepted all of the Recommendations contained in the Clearinghouse Report except Recommendation 5e which the Department accepts in part and rejects in part.

Clearinghouse Report Recommendation 5.e. In s. DOC 349.21(2); it may be helpful to the reader to include the statutory requirements that a juvenile may only be held in a lockup while he or she is awaiting a custody hearing under s. 938.21(1)(a), Stats., and that a juvenile may be held for investigative purposes only.

The Department of Corrections accepts the recommendation to insert the requirement that a juvenile may be held only for investigative purposes. (See proposed rule Section 8, s. DOC 349.21(4).) However, the Department of Corrections rejects the recommendation to insert the requirement that a juvenile may only be held in a lockup facility while he or she is awaiting a custody hearing under s. 938.21(1)(a), Stats. The language cannot be read alone and inserting it as suggested would take it out of context and impose a requirement which was not intended. The phrase "while he or she is awaiting a custody hearing" was intended to identify a time period which begins when a juvenile is arrested or taken into physical custody by the police and ends no later than the custody hearing. It is not limited to the time after the juvenile is into physical custody under the authorization of an intake worker under s. 938.205(1), Stats. Inserting the language into the rule would imply that the juvenile is in fact awaiting a custody hearing, that is, an intake worker has already approved the custody under s. 938.205(1). This step is not required and would thwart the very purpose of the new statutory language. In fact, there is no requirement that an intake worker be contacted in the situation of detaining a juvenile under this provision. (See s. 938.205(1), Stats., which does not include s. 938.209(2m), Stats., in the enumeration of when an intake worker must be involved.)

Response to Public Hearings

The Department held one public hearing on the Emergency rule and proposed rule. The public hearing was held on February 15, 1999, in Waukesha, Wisconsin. One person appeared to testify in favor of the rule at the public hearing, three people registered in favor of the rule. No one submitted written comments during the open comment period.

No modifications were made to the proposed rules in response to comments received during the public review of this rule.

Additional Modifications Made By Department of Corrections

The Department of Corrections made several minor changes to the proposed rule before submitting the rule in Final Draft Form. Those changes are:

1. DOC 349.03(4m) "Delinquent act" (definition). The definition was modified to include the phrase "who is 10 years of age or older" after the word "juvenile." This modification makes the definition consistent with the definition of "juvenile" found in the statutes. (Section 938.02(10m) limits the term "juvenile" to persons who are over 10 years of age.) The definition was also clarified by inserting the words "which is" after the word "act."
2. DOC 349.03(14m) "Secure custody status" (definition). The definition was modified by substituting the phrase "which ends when" for the word "until."
3. DOC 349.21(2)(b) The word "and" was substituted for the word "or" between the words "sight" and "sound." This modification makes the rule language consistent with the language in the federal Juvenile Justice and Delinquency Prevention Act. This error was brought to the Department's attention by law enforcement outside of the Public Hearing period.
4. DOC 349.21(3) and (4). The word "only" was inserted after the word "may" to assure that the authorization was limited to the situations described.
5. DOC 349.21(5) intro. The phrase "at irregular intervals" was inserted in the second sentence after the word "be." The same phrase was deleted from subsections (a) and (b). The Department made this modification to clarify that observations are to be made at irregular intervals within the specified time period.

Final Regulatory Flexibility Analysis

This proposed rule is not expected to impact on small businesses as defined in s. 227.114(1), Stats.

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PUBLIC HEARING REPORT:

A public hearing was held in Waukesha, Wisconsin on February 15, 1999.

Kathryn R. Anderson, Office of Legal Counsel, and Marty Ordinans, Director of Office of Detention Facilities, were present and conducted the public hearing.

The hearing record was left open until February 22, 1999, for receipt of written comments.

Registered	4
Testified	1
Written Comments	0
Support the Rule	4
Opposed the Rule	0

The list of persons who appeared or registered for or against the proposed rule at the public hearing is as follows:

Registered and Testified in favor of the proposed rule:

Gary J. Mikulec, Police Chief, Whitefish Bay, 5300 N. Marlborough Dr., Whitefish Bay, WI 53217

Registered in favor of the proposed rule:

Gary Large, Lieutenant, 224 E. Jefferson St., Burlington, WI 53105
Michael Madsen, Sergeant, 224 E. Jefferson St., Burlington, WI 53105
Dave Banaszynski, Sergeant, 3936 N. Murray Ave., Shorewood, WI 53211

The Department of Corrections did not make any modifications to the proposed rule as a result of the testimony received at the Public Hearing.

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946

Richard Sweet
Assistant Director
(608) 266-2982



David J. Stute, Director
Legislative Council Staff
(608) 266-1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701-2536
FAX: (608) 266-3830

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 98-193

AN ORDER to renumber DOC 349.04 (1); to renumber and amend DOC 349.01, 349.04 (2) and 349.16 (1) (c); and to create DOC 349.01 (2) and (3), 349.03 (1m), (4m) and (10m), 349.16 (1) (c) and 349.21 (title) and (2), relating to holding juveniles in municipal lockup facilities.

Submitted by **DEPARTMENT OF CORRECTIONS**

12-04-98 RECEIVED BY LEGISLATIVE COUNCIL.
01-07-99 REPORT SENT TO AGENCY.

RS:AS:jal;wu

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 STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946

Richard Sweet
Assistant Director
(608) 266-2982



David J. Stute, Director
Legislative Council Staff
(608) 266-1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701-2536
FAX: (608) 266-3830

CLEARINGHOUSE RULE 98-193

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. The finding of an emergency should be replaced with an analysis of the permanent rule. Also, a new effective date for the permanent rule should be provided.

b. In s. DOC 349.01 (3), the phrase "These rules are" should be replaced by the phrase "This chapter is."

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

a. In item 2. of the emergency statement, the phrase "secure custody status" should be enclosed in quotation marks.

b. In s. DOC 349.03 (4m), "delinquent" should be defined as an adjective or "delinquent act" should be defined. "Delinquent" is not used as a noun in the rule.

c. In s. DOC 349.21 (2), the paragraphs do not logically follow the introductory material. It would be clearer to rewrite par. (a) as "Except as provided in this section, the lockup facility meets the provisions of this chapter and has been approved by the department as a suitable place for holding juveniles in custody." Pars. (c) and (e) could become pars. (b) and (c) and be rewritten in the past tense to require the policy and procedures to have been developed before any juvenile is held in a lockup.

Pars. (b) and (d) could be renumbered subs. (3) and (4) because those are conditions that must be met once a juvenile is taken into custody instead of before any juvenile is held in the facility. Finally in the introduction, the phrase "all of" should follow the word "if."

d. In s. DOC 349.21 (2) (d) 2., the sentence should clarify what a juvenile must be at risk of to require observations at 15-minute intervals. Also, the conditions listed following "such as" do not qualify as "at risk." Perhaps a phrase such as "due to a condition" could be inserted before "such as."

e. In s. DOC 349.21 (2), it may be helpful to the reader to include the statutory requirements that a juvenile may only be held in a lockup while he or she is awaiting a custody hearing under s. 938.21 (1) (a), Stats., and that a juvenile may be held for investigative purposes only.