Report From Agency

ORDER OF THE DEPARTMENT OF HEALTH SERVICES TO ADOPT PERMANENT RULES

The Wisconsin Department of Health Services proposes an order **to repeal** DHS 95.03 (11), 95.06 (3) and 95.08 (3); and to **amend** DHS 95.06 (1) (title) and (1) (a), 95.08 (1) and 95.10 (1) (intro.) and (1) (c) of the Wisconsin Administrative Code, relating to custody and control of ch. 980, Stats., patients.

RULE SUMMARY

Statute interpreted
Sections 46.055, 46.058 (2m), Stats.

Statutory authority
The Department has been granted explicit statutory authority by the Legislature in ss. 46.058 (2m), 51.61 (9), 980.065 (2), 980.067, 227.11 (2) (a), Stats., to promulgate the proposed rules.

Explanation of agency authority
Pursuant to ss. 46.055, 46.058 (2m), and 980.065 (2), Stats., the Legislature directed the Department to promulgate rules governing the operation of secure mental health facilities for the detention and care of persons under ch. 980, Stats., including promulgation of rules governing the custody and discipline of persons placed in the facilities. The proposed rules are necessary to effectuate the purposes of the statutes listed in the "statute interpreted" section, and also necessary to comply with s. 227.11 (2) (a), Stats.

Related statutes or rules
None.

Plain language analysis
Under the current s. DHS 95.06 (1), use of force in secure facilities must be governed by policies and procedures that establish a "Force Option Continuum." This model dictates the use of a systematic, less adaptable progression of force based on the level of threat facing staff to guide them in the use of force during a disturbance or emergency. The progression of force stages under this model include staff presence, dialogue, empty-hand control, incapacitating devices, and lethal force.

This model has been replaced with "Intervention Options", rendering the current rule out-of-date and at odds with existing training practices. The Intervention Options model was adopted in the Principles of Subject Control Manual (hereinafter "Manual") in 2012. The Manual is based on the Department of Corrections' version of the Defense and Arrest Tactics Manual—which was approved by the WI Department of Justice and is currently used for every sworn law enforcement officer in the state. The Manual has been approved by the department and is supported by directors at both the Wisconsin Resource Center and Sand Ridge Secure Treatment

Center as the standard training program designed to provide instruction on defensive tactics and use of force, consistent with federal and state guidelines.

Intervention Options emphasizes a dynamic, more adaptable approach to confronting threats, giving staff more discretion on selecting which alternative of force to use based on the specific level of threat. The model is intended to eliminate confusion about how to respond to threats that may not originate or evolve along a linear path, resulting in diminished risk of harm and liability to staff, as well as improved threat response and management. The Intervention Options model uses the term "control alternatives" to include measures to overcome passive resistance, active resistance or their threats from facility detainees. The model uses the term "protective alternatives" to include measures to overcome continued resistance, assaultive behavior or their threats. Removing explicit reference to "empty hand control" and "incapacitation devices" (such as electronics, chemical agents, batons and impact munitions) will not remove the use of either option. Instead, both types of force are encompassed within the more broad Intervention Options categories of control alternatives and protective alternatives.

The Department also proposes to change the circumstances under which escorted leaves may occur. Under the current rule, superintendents of secure mental health facilities have discretion to grant escorted leaves to patients under limited circumstances. Requests for escorted leaves may be granted for off-site appointments and death-bed visit of relatives, to secure medically necessary health services, and to engage in pre-placement activities pursuant to an approved supervised release plan. *Out-of-state* escorted leaves are not currently prohibited under ch. DHS 95. However, these present logistical obstacles, require additional resources, and pose risks that secure mental health facilities face difficulty in meeting. To mitigate these challenges, the department proposes to only permit escorted leaves within the state.

Summary of, and comparison with, existing or proposed federal regulations
All searches were conducted in May 2018.

28 CFR Part 552, Subpart C governs the Use of Force and Application of Restraints on Inmates. Section 552.22, in particular, states:

> **28 CRF § 552.22 Principles governing the use of force and application of restraints.**
> **(a)** Staff ordinarily shall first attempt to gain the inmate's voluntary cooperation before using force.
> **(b)** Force may not be used to punish an inmate.
> **(c)** Staff shall use only that amount of force necessary to gain control of the inmate. Situations when an appropriate amount of force may be warranted include, but are not limited to:
> **(1)** Defense or protection of self or others;
> **(2)** Enforcement of institutional regulations; and
> **(3)** The prevention of a crime or apprehension of one who has committed a crime.
> **(d)** Where immediate use of restraints is indicated, staff may temporarily apply such restraints to an inmate to prevent that inmate from hurting self, staff, or others, and/or to prevent serious property damage. When the temporary application of restraints is determined necessary, and after staff have gained control of the inmate, the Warden or

designee is to be notified immediately for a decision on whether the use of restraints should continue.
(e) Staff may apply restraints (for example, handcuffs) to the inmate who continues to resist after staff achieve physical control of that inmate, and may apply restraints to any inmate who is placed under control by the Use of Force Team Technique. If an inmate in a forcible restraint situation refuses to move to another area on his own, staff may physically move that inmate by lifting and carrying the inmate to the appropriate destination.
(f) Restraints should remain on the inmate until self-control is regained.
(g) Except when the immediate use of restraints is required for control of the inmate, staff may apply restraints to, or continue the use of progressive restraints on, an inmate while in a cell in administrative detention or disciplinary segregation only with approval of the Warden or designee.
(h) Restraint equipment or devices (e.g., handcuffs) may not be used in any of the following ways:
(1) As a method of punishing an inmate.
(2) About an inmate's neck or face, or in any manner which restricts blood circulation or obstructs the inmate's airways.
(3) In a manner that causes unnecessary physical pain or extreme discomfort.
(4) To secure an inmate to a fixed object, such as a cell door or cell grill, except as provided in § 552.24.
(i) Medication may not be used as a restraint solely for security purposes.
(j) All incidents involving the use of force and the application of restraints (as specified in § 552.27) must be carefully documented.

The Department was unable to locate any federal regulations addressing patient/offender release.

Comparison with rules in adjacent states
All searches were conducted in May 2018.

<u>Illinois</u>
Illinois Admin. Code tit. 59 § 299.350 of the states:

Section 299.350 Security

a) Use of Force

1) Force shall be employed only as a last resort or when other means are unavailable or inadequate, and only to the degree reasonably necessary to achieve a permitted purpose. Department staff shall not employ deadly force.
2) Use of force shall be terminated as soon as force is no longer necessary.
3) Medical screening and/or care shall be conducted following any use of force that results in bodily injury.
4) Corporal punishment is prohibited.

b) Force may be used under the following circumstances:

1) To compel compliance with a lawful order given by an employee to ensure the safety and security of the facility.
2) To protect oneself or any other person from physical assaults, injury or death.
3) To prevent escapes from the facility or from the custody of employees in the community.
4) To protect State property or the property of others from unauthorized use, possession, damage or destruction.
5) To prevent or suppress a riot, revolt, mutiny or insurrection, or other serious disturbance.

The Department was unable to locate administrative rules governing patient/offender leaves.

Iowa

IAC Rules 201.38.1-4 address sex offender management and treatment. However these rules do not include provisions related to the use of force. IAC Rule 201.20.12 and Iowa's Department of Corrections policy IS-RL-04 discuss the availability of "Furloughs" for certain types of offenders, but exclude sex offenders in particular and in all cases prohibit out-of-state leaves.

Michigan

Michigan Admin. Code r. 791.706 states:

> **Use of force.**
> Rule 6. A facility shall establish and maintain written policy, procedure, and practice 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. Physical force shall not be used as punishment. A written report is prepared after force is used and is submitted to administrative staff for review.

Policy directive 04.05.110 from the Michigan Department of Corrections, which addresses Use of Force, is exempt from public disclosure.

The Department was unable to locate administrative rules governing patient/offender leaves. However, policy direction 04.04.140 from the Michigan Department of Corrections, addresses "Funeral and Sick Bed Visits." These visits are restricted to in-state destinations.

Minnesota

Minnesota Rules ch. 2965 addresses Adult Sex Offender Treatment. However, these rules do not discuss the use of force, or patient/offender leaves. Part 2920.5700 § E. states: "physical force shall be used only in instances of justifiable self-protection, protection of others, and prevention of property damage, and only to the degree necessary to control the situation. The action taken shall be documented and placed on file."

Summary of factual data and analytical methodologies
The Department did not rely on factual data or analytical methodologies in preparing the proposed rule. Revisions are intended to conform to outdated provisions to existing practices and to improve risk management.

Analysis and supporting documents used to determine effect on small business
None. The proposed rules do not impact small businesses.

Effect on small business
None.

Statement on quality of agency data
The Department did not rely on data in developing the proposed rule. Revisions are intended to conform to outdated provisions to existing practices and to improve risk management.

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Place where comments are to be submitted and deadline for submission
Comments on the proposed rules may be submitted by accessing the department's rules site, at https://www.dhs.wisconsin.gov/rules/permanent.htm. Once a public hearing has been scheduled, additional commenting will be enabled through the Wisconsin State Legislature's site, at http://docs.legis.wisconsin.gov/code. The notice of pubic hearing and the deadline for submitting comments will be published both to the department's rules site, and in the Administrative Register.

RULE TEXT

SECTION 1. DHS 95.03 (11) is repealed.

SECTION 2. DHS 95.06 (1) (title) and (1) (a) are amended to read:

> DHS 95.06 **(1)** ~~FORCE OPTION CONTINUUM.~~ INTERVENTION OPTIONS.
> (a) *Policies and procedures.* The director shall adopt written policies and procedures that establish ~~a systematic progression of force~~ an intervention options model of force based on the perceived level of threat to guide staff in the use of force during a disturbance or emergency, to prevent escapes or to pursue and capture escapees. ~~This progression includes~~ These intervention options shall include staff presence, dialogue, ~~empty-hand control, incapacitating devices,~~ control alternatives, protective alternatives and lethal force. The policies and procedures shall be designed to help ensure that force is only used when necessary and that only the amount of force that is necessary under the circumstances is used.

SECTION 3. DHS 95.06 (3) is repealed.

SECTION 4. DHS 95.08 (1) is amended to read:

DHS 95.08 **Training. (1)** The director shall adopt written policies and procedures to ensure that facility staff who may be called upon to use force under S. DHS 95.06 are properly trained and regularly updated on the ~~systematic progression~~ intervention options model of force policies and procedures adopted under s. DHS 95.06 (1) (a).

SECTION 5. DHS 95.08 (3) is repealed.

SECTION 6. DHS 95.10 (1) (intro.) and (c) are amended to read:

DHS 95.10 **(1)** Pursuant to s. 980.067, Stats., the director of the secure mental health facility established under s. 46.055, Stats., the Wisconsin resource center established under s. 46.056, Stats., or any secure mental health unit or facility provided by the department of corrections under s. 980.065 (2), Stats., may, at his or her discretion, allow a patient detained or committed under ch. 980, Stats., to leave the grounds of a facility ~~under staff escort~~ and be escorted by staff to a location within the state of Wisconsin for a purpose consistent with the therapeutic interests of the patient and the security interests of the facility and the community, including any of the following:

DHS 95.10 **(1)** (c) To engage in pre-placement or pre-discharge activities when the patient has a proposed or approved supervised release plan under s. 980.08 ~~(5)~~, Stats., or a discharge plan.

SECTION 7.

DHS 95.10 (1) (Note) is repealed.

SECTION 8.

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.