

The Governor approved this Statement of Scope on August 3, 2017

STATEMENT OF SCOPE
DEPARTMENT OF HEALTH SERVICES

Rule No.: DHS 95

Relating to: Control and Custody of Chapter 980, Wis. Stats., Patients

Rule Type: Permanent

Type of Statement of Scope:

Original

1. Finding/nature of emergency (Emergency Rule only):

Not Applicable

2. Detailed description of the objective of the proposed rule:

The Department of Health Services (“Department”) proposes to remove references to outdated terminology and practices in ch. DHS 95 and update and modify current language to adopt best practices in the custody and control of patients in secure state facilities, under Ch. 980, Stats.. Language modification will focus particularly on updating Use of Force techniques and referencing current definitions and terminologies identified in the Wisconsin Principles of Subject Control (POSC) manual.

In addition, the Department proposes to revise Escorted Patient Leaves policies to prohibit out-of-state escorted travel. These leaves present logistical challenges and potential liability for staff whose jurisdictional authority could be jeopardized in the event of an escape or attempted escape.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Under s. DHS 95.06(1), use of force in secure facilities must be governed by policies and procedures that establish a “Force Option Continuum,” described as:

[A] systematic progression of force based on the perceived level of threat to guide staff in the use of force in a disturbance or emergency, to prevent escapes or to pursue and capture escapees. This progression includes staff presence, dialogue, empty-hand control, incapacitating devices, and lethal force. The policies and procedures are 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.

However, the most-current POSC manual¹ no longer identifies a “Force Option Continuum” as a best-practice. Instead, the manual focuses on a model of “Intervention Options,” including the use of presence,

dialogue, control alternatives, protective alternatives, and lethal force. This approach allows facility staff to use interventions based on the level of threat, rather than requiring a “systematic progression” of options. The Department intends to adopt the “Intervention Options” model in ch. DHS 95 to ensure that staff working with patients receive the most current training and make use of the most current standards for providing adequate and safe treatment settings, safe custody and care of patients, and greater safety and security of staff and the public. The Department also proposes to revise any related documentation and training provisions.

¹The POSC 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. Staff members from WRC, SRSTC, and all other DOC institutions, are required to follow the guidelines of the program and maintain annual re-certifications. The POSC manual is regularly updated by the DOC Use of Force Committee, as well as agency POSC instructors.

In addition, under DHS 95.10, facility directors currently 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 by DHS 95. However, they often involve logistical complexities, additional resources, and liability concerns that secure facilities face great difficulty in meeting. The Department therefore proposes to amend DHS 95.10 to only permit approval of escorted leaves occurring within the state boundaries.

The Department may also propose to modify or update other related provisions within DHS 95 to promote best practices in custody and control techniques and training at Sand Ridge Secure Treatment Center (SRSTC) and Wisconsin Resource Center (WRC).

One alternative to the proposed rulemaking is for the Department to not revise the current DHS 95 language and attempt to incorporate best practices in the custody and control of patients when feasible. However, this alternative is not desirable, nor likely to promote the greatest staff and patient safety. The current rule does not reflect best practices in custody and control, and would restrict facilities to utilizing the now-outdated Force Option Continuum practices.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Pursuant to ss. 46.055, 46.058 (2m) and 51.61 (9), Stats., the Department is authorized to use necessary and appropriate force for stated reasons on patients committed to and detained at any facility, center or unit under Ch. 980, Stats..

Under s. 980.065(2), Stats.: The department shall operate a secure mental health unit or facility provided by the department of corrections under this subsection and shall promulgate rules governing the custody and discipline of persons placed by the department in the secure mental health unit or facility provided by the department of corrections under this subsection.

Under s. 980.067, Stats.:- The superintendent of the facility at which a person is placed under s. 980.065 may allow the person to leave the grounds of the facility under escort. The department of health services shall promulgate rules for the administration of this section.

Section 227.11(2)(a), Stats., reads: Rule-making authority is expressly conferred on an agency as follows:
(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold in the statutory provision.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :

The Department estimates that approximately 150 hours of staff time will be needed to develop the proposed rule changes, including the time required for research and analysis, establishing an Advisory Committee, conducting public hearings, soliciting input from stakeholders and the public, drafting rulemaking documents, and communicating with stakeholders and affected persons and groups.

6. List with description of all entities that may be affected by the proposed rule :

Proposed changes would impact all staff, administration, and ch. 980, Stats., patients, plus other service providers at the SRSTC and the WRC, both established under s. 980.065 (2), Stats.. Other groups that may be affected include family members of Ch. 980, Stats., patients.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :

There appears to be no existing or proposed federal regulations that address the activities to be regulated by this proposed rule.

8. Anticipated economic impact of implementing the rule :

The proposed rule is anticipated to have little to no economic impact if promulgated.

Contact Person:

Mike Derr
608-267-7704
Michael.Derr@dhs.wisconsin.gov