



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.