



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 24-040

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.]

2. Form, Style and Placement in Administrative Code

a. In the caption for the proposed rule, a relating clause should be inserted following the enumeration of treated provisions in order to identify the subject matter of the proposed rule. Consider, for example, “, relating to youth conduct in type 1 secured correctional facilities.”. [s. 1.01 (1) (a), Manual.]

b. In the treatment clause for SECTION 5 of the proposed rule, the sequential list of affected rule subsections could be shown as “DOC 373.03 (13) and (17) to (22)”.

c. In SECTION 11 of the proposed rule, amending s. DOC 373.05, the title for the rule section should be shown in the text.

d. In the treatment clause for SECTION 12 of the proposed rule, the sequential list of affected rule subsections could be shown as “(title) and (1) to (6)”.

e. SECTION 34 of the proposed rule, amending ss. DOC 373.58, 373.59 (1) and (2), and 373.60, should be divided into three treatment SECTIONS. Consecutively numbered rule sections may be included in a single treatment SECTION only if each rule section is affected in its entirety. Section DOC 373.59 is not treated in its entirety. [s. 1.03 (2) (b) 1., Manual.]

f. In the treatment clause for SECTION 39 of the proposed rule, the designation “(intro.)” should be inserted following “(1)”. The designation should also be inserted in the rule caption’s enumeration of treated provisions.

g. In SECTION 47 of the proposed rule, creating s. DOC 373.68 (14), the abbreviation “s.” should be revised to “ch.”, unless a cross-reference to a specific provision within ch. DOC 379 is intended.

h. In the treatment clause for SECTION 48 of the proposed rule, the sequential list of affected rule sections could be shown as “DOC 373.69 to 373.78”.

i. A number of instances within the existing text of ch. DOC 373 refer to the agency adopting policies and procedures for regulating youth behavior in DOC Type 1 facilities (i.e., Lincoln Hills). The existing text also includes rules of conduct that prohibit youth from violating a facility's rules or policies. The proposed rule amends other aspects of some of these provisions, but retains the references to "policies". Any policy that has the force of law – meaning that the legal rights of a youth may be affected – is by definition a rule, and should be promulgated through the administrative rulemaking process. Depending on the contents of a facility's policy, it could raise questions on whether a policy has been properly promulgated. Consider whether rules and regulations currently contained only in agency policies should also be promulgated as administrative rules. Alternatively, consider elaborating in the rule summary to explain the reasoning for why the referenced policies are not promulgated as rules, such as whether a policy does not have the force of law or is exempt from rulemaking, or whether ch. DOC 373, as promulgated, adequately puts a youth on notice of the prohibited conduct.

3. Conflict With or Duplication of Existing Rules

SECTION 21 of the proposed rule amends the conduct rule of "Inappropriate sexual conduct", but broadly prohibits any contact with another person unless it is appropriate and permissible under facility policy. SECTION 25 creates the conduct rule of "Violating boundaries", and prohibits the intentional touching of any part of another person with a body part or object without consent. There seems to be significant overlap between these two conduct rules, but any conflict or duplication cannot be fully assessed as the particular differences in prohibited behavior depend on what is contained in a policy outside of the administrative rules.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the rule summary's listing of related statutes or rules, the agency refers to "Wisconsin Administrative Code Chapter 301". However, there is no ch. DOC 301. Is this intended to refer to ch. 301, Stats.?

b. SECTION 3 of the proposed rule creates a new definition of "disturbance" to mean that a "group disturbance" occurred, an "incident" occurred, or a youth has taken a hostage. Neither existing ch. DOC 373 nor the proposed amended rule create a definition for "incident". The rule should create a definition or include a reference to the definition given in s. DOC 376.03 (16).

c. SECTION 17 of the proposed rule amends the conduct rule of "Participating in a Disturbance" in s. DOC 373.22 (1), which is described as intentionally or recklessly participating in a disturbance, "including disruptive behavior, throwing items, or language that includes hate or conflict". This language is different from the definition of "disturbance" that the proposed rule creates in s. DOC 373.03 (9), which means either a group disturbance, an incident, or taking a hostage. The department should address the difference between the definition and the language in s. DOC 373.22 (1) that includes disruptive behavior, throwing items, or using language of conflict or hate as constituting a disturbance.

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

a. SECTION 15 of the proposed rule creates the conduct rule of "Bullying", and defines it as unwanted aggressive behavior that involves a real or perceived power imbalance through "verbal behavior, physical, or social behavior or both...". The word "physical" should be revised to the phrase "physical behavior", to make the terms consistent. The sentence also includes three

types of behavior but refers to “or both”. This should be revised to read either “or a combination”, or as “or both physical behavior and social behavior”, depending on the intended meaning of the sentence.

b. In SECTION 17 of the proposed rule, amending s. DOC 373.22 (1), the comma between “including” and “disruptive” should be deleted.

c. In SECTION 25 of the proposed rule, s. DOC 373.35 creates the conduct rule of “Unauthorized forms of communication”, which applies when a youth “communicates with persons whom the department has prohibited contact”. The provisions should read “with persons with whom” the department has prohibited contact.