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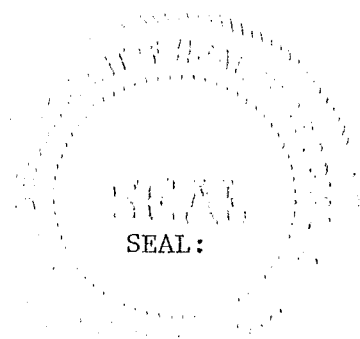
STATE OF WISCONSIN)
) SS
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Donald E. Percy, Secretary of the Department of Health and Social Services and custodian of the official records of said department, do hereby certify that the annexed rules relating to conduct of youth in correctional institutions for youth were duly approved and adopted by this department on September 28, 1982.

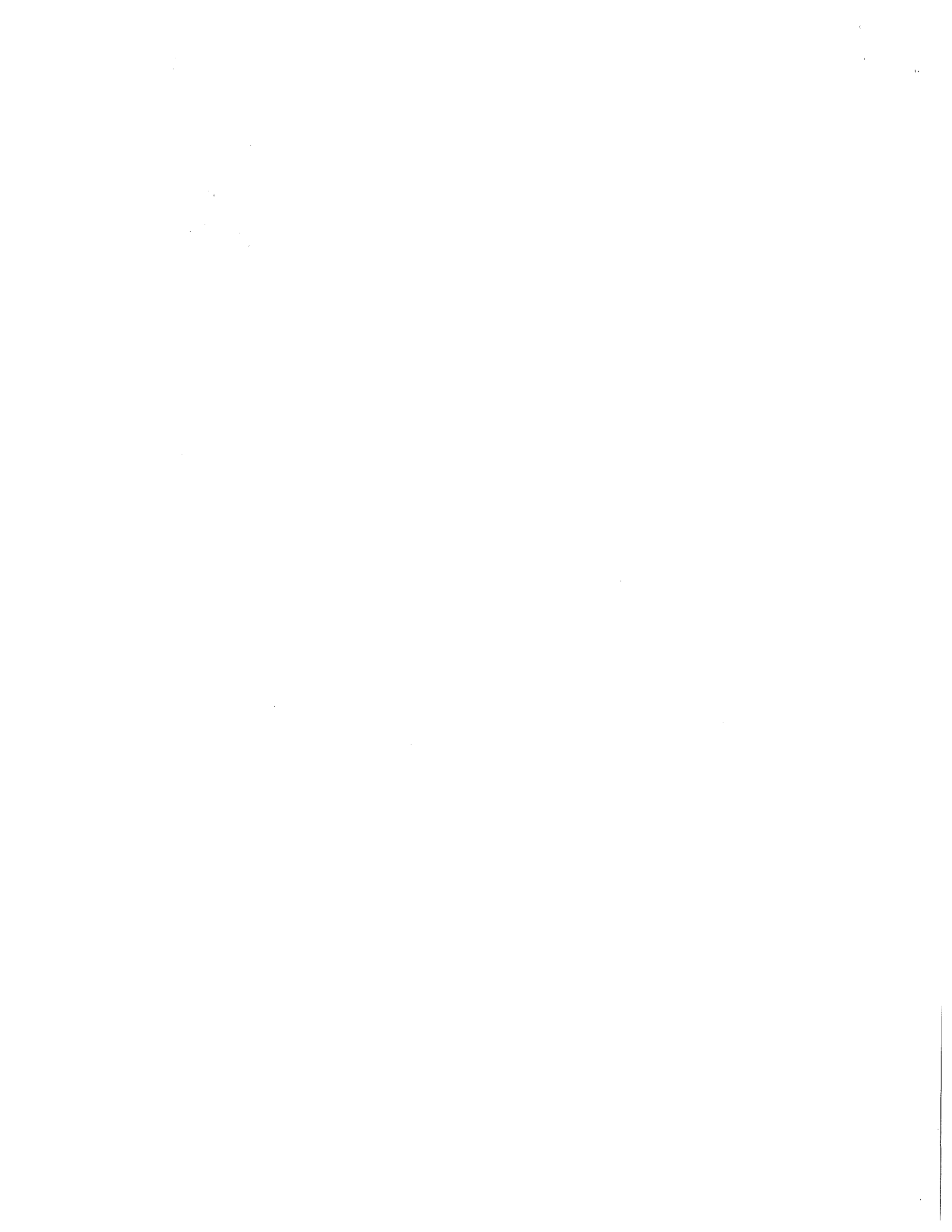
I further certify that said copy has been compared by me with the original on file in this department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 28th day of September, A.D. 1982.



Donald E. Percy, Secretary
Department of Health and Social Services

12-1-82



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ORDER OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
ADOPTING RULES

To create HSS 333, relating to conduct of youth in correctional institutions for youth.

Analysis Prepared by the Department of Health and Social Services

This chapter identifies the conduct for which youth in correctional institutions may be disciplined, the considerations to be taken into account in imposing discipline, and a variety of ways by which misconduct is dealt with. While HSS 333 gives staff considerable flexibility in charging and punishing decisions, the rules structure the exercise of that discretion in an effort to promote uniformity and fairness in the treatment of youth.

Pursuant to the authority vested in the Department of Health and Social Services by s. 227.014(2), Stats., the Department hereby adopts rules interpreting s. 46.03 (1) and (6), and ch. 48, Stats., as follows:

SECTION 1. Chapter HSS 333 of the Wisconsin Administrative Code is created to read:

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF CORRECTIONS

ADMINISTRATIVE RULES

CHAPTER HSS 333

Conduct of Youth in Correctional Institutions

September 1982 a

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CHAPTER HSS 333

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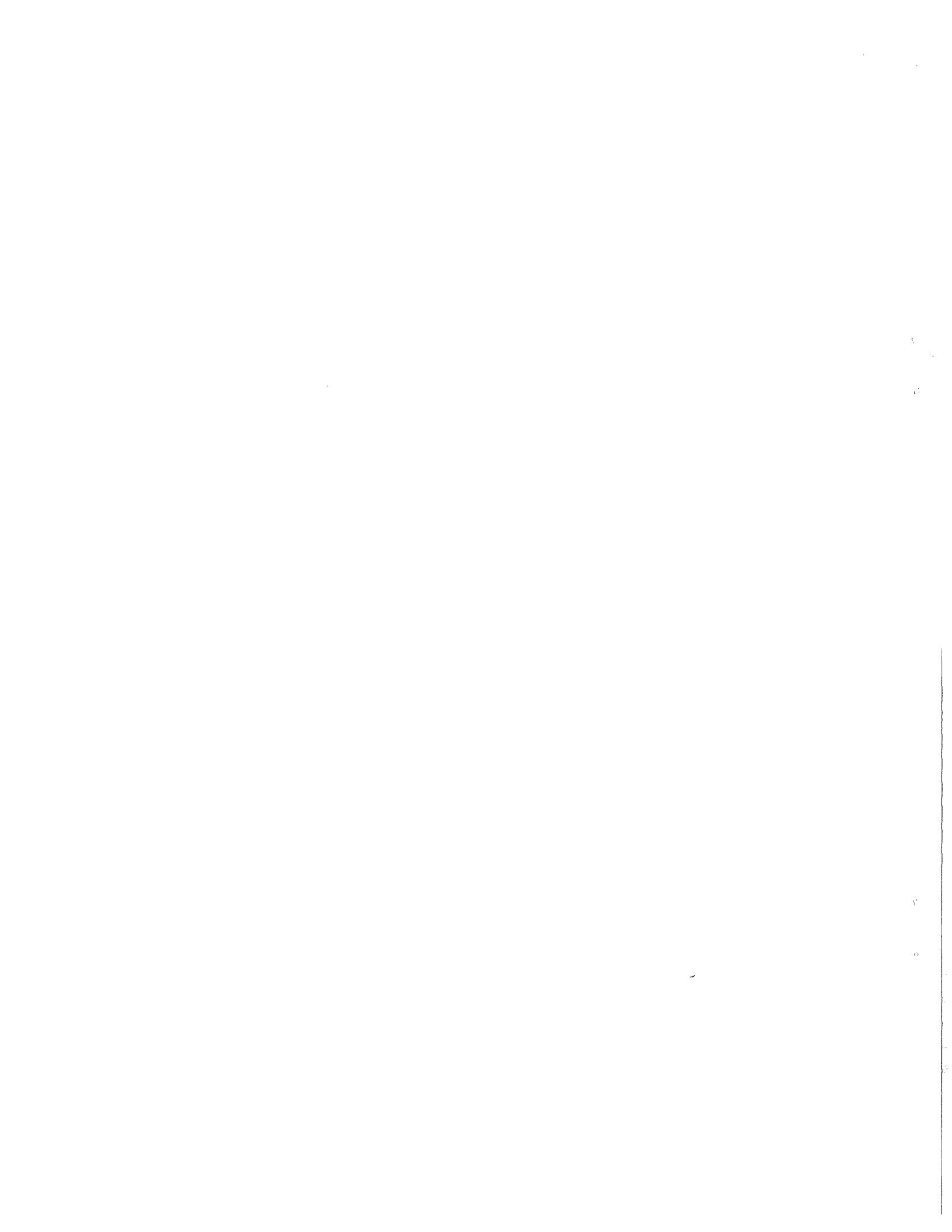
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SUBCHAPTER I - GENERAL PROVISIONS

Introductory Note

All rules of conduct for youth in correctional institutions are found in ch. HSS 333. Although s. HSS 333.55 delegates authority to institutions to formulate supplemental policies and procedures in specific areas, those specific policies and procedures are not themselves rules. The rules violated when they are violated are ss. HSS 333.23, 333.26, 333.38, 333.43, and 333.47.

HSS 333 is consistent with the intention expressed in the Children's Code "[to] provide judicial and other procedures through which children ... are assured fair hearings and their constitutional and other legal rights are recognized and enforced, while protecting the public safety" (s. 48.01(1)(a)), Stats. It also conforms closely to the American Correctional Association's Manual of Standards for Juvenile Training Schools and Services (1979) (hereinafter ACA Juvenile Standards), standards 9355-9378.

In Wisconsin correctional institutions for youth there is a need for some formality in the disciplinary process in order to ensure that goals set out in s. HSS 333.01(4) are met. The ACA Juvenile Standards recommend the use of precise written regulations to ensure that youth will know what behavior is expected of them and the punishments they can expect for failure to comply. This chapter distinguishes infractions by the degree of seriousness of the offense.

Traditionally, correctional officials have seen their role as a parental one in which they acted in the best interests of the youth under their supervision and responded to offenses on an individual basis with the sanctions that appeared appropriate. Chapter HSS 333 does not diminish the traditional role of staff in the disciplinary system. It permits considerable flexibility in charging and punishing decisions. It promotes counseling as the initial option for staff to consider when faced with a youth who has violated a provision of these rules. It is not intended to diminish the primary treatment and rehabilitation goals of youth corrections. But it structures the exercise of discretion in an attempt to promote uniformity and fairness in the treatment of all youth. It structures the exercise of discretion at various decision-making stages in the disciplinary process, including the decision to make a written report, the decision to classify an alleged violation as to degree of seriousness, and the disposition.

Codifying conduct rules in clear and specific language serves important objectives. These are the clear statement of what conduct is prohibited, the elimination of unnecessary discretion, increased equality of treatment, increased fairness, and raising the probability that youth will follow the rules.

A key element of fairness is that people must know the rules which they are expected to follow. Rules which are unnecessarily ambiguous or overly broad are unfair, and so are rules which are unwritten and therefore not known to everyone. Youth who are aware of the rules and what they mean are more likely to obey than those who are uncertain about them. When rules are vague, overbroad or unwritten, the interpretation and enforcement of them may vary greatly from one staff member to another. Thus, having specific written rules increases fairness and equality of treatment.

Clarity also saves time and money. When there is unnecessary ambiguity, there is also unnecessary disagreement which takes staff time and, ultimately, the time of lawyers and courts. Clarity in the rules can prevent the expenditure of time and money in settling such disagreements.

The English language is not so precise that ambiguity can be done away with entirely. Nor is that necessarily desirable, since flexibility is an important tool in the effective administration of the correctional system. Without flexibility, there is undue reliance on formalism and rules will be enforced in a mechanical way.

Discretion is thus very important in corrections. Formal discipline is not always the best way to induce future compliance with rules; special circumstances may dictate harshness or leniency because different individuals respond differently to a particular type of discipline. These rules are not intended to disparage the quality of decisionmaking under the past system which allowed broader discretion. In fact, they reflect what has been learned by experience and use this knowledge to provide guidelines for the future exercise of discretion.

As for the rationale for the rules of conduct, it is impossible for any community, including a youth institution, to exist without order. No society or individual can exist without limits, which are usually in the form of rules. This chapter provides the necessary structure and expectations that permit the community to function. Without such norms and expectations, people cannot interact constructively with each other.

Youth cannot participate in school, programs or work unless they are safe. Thus, a safe setting is essential to the treatment goals of the institutions.

Rehabilitation also requires teaching youth who have demonstrated their inability to live within rules to live with others, within rules. Rules of discipline are some of those rules which prepare youth to function within the rules set by the community. If youth violate them, counseling and punishment are usually helpful in causing them to think carefully about their future acts.

People will not live by norms, however, unless those norms are enforced fairly and in a way that develops and maintains respect for the system. The system will get respect if it deserves it. To deserve it, it must be fair. The staff -- by the example it sets and by the way it enforces rules--fairly or unfairly--greatly influences the treatment process.

HSS 333.01 PURPOSES OF INSTITUTIONAL CONDUCT RULES.

- (1) This chapter describes youth rights, privileges and responsibilities together with conduct expectations and disciplinary sanctions for misconduct.

- (2) The purposes of the conduct rules are to help youth in the custody of the department for correctional purposes become productive, well-adjusted, law-abiding citizens in our institutions and in our communities while guaranteeing safety to the general public, correctional staff and other youth.
- (3) "Discipline" includes only the sanctions described in this chapter.
- (4) The goals which are relevant for accomplishment of the purposes of the rules are these:
 - (a) Rehabilitation of youth through their learning to live with others, within rules;
 - (b) Awareness by each youth of what he or she is responsible for, what conduct is expected of him or her, and what punishment may be imposed for misconduct;
 - (c) Deterrence of youth misconduct;
 - (d) A safe setting in which youth are protected from being harmed by staff or one another;
 - (e) The orderly operation of the correctional institution so that youth can participate in constructive programs;

- (f) Response by staff to misconduct of youth by imposition of appropriate disciplinary measures for willful violation of applicable rules;
- (g) Accuracy, fairness and regularity in fact-finding, with a participatory role for youth who are accused of misconduct and face sanctions;
- (h) Treatment by staff of each youth as an individual, with protection of the right of every youth to a hearing before severe limitations are placed on the youth's personal freedom;
- (i) A structuring of the exercise of discretion by staff in dealing with youth; and
- (j) Prevention of cruel and unusual punishment within the correctional institution.

HSS 333.02 APPLICABILITY.

This chapter applies to the department of health and social services and to all youth under its legal custody in correctional institutions. It interprets s. 46.03(1), and (6), Stats., and ch. 48, Stats.

HSS 333.03 DEFINITIONS. As used in this chapter:

- (1) "Administrator" means the administrator of the division of corrections, department of health and social services, or designee.

- (2) "Authorized" means permitted:
 - (a) According to the department's administrative rules;

 - (b) According to posted specific policies and procedures;

 - (c) According to the latest order of a staff member;

 - (d) According to established institution customs; or

 - (e) With permission from the appropriate staff member.

- (3) "Bodily harm" means injury or physical pain, illness or any impairment of physical condition.

- (4) "Close room confinement" means confinement to the youth's room with a minimum of one hour per day out of the room.

- (5) "Communicate" means:
 - (a) To express verbally;

- (b) To express in writing, or
 - (c) To express by means of gesture or other action.
- (6) "Consent" means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.
- (7) "Contraband" means:
- (a) Any item that a youth may not knowingly possess under ss. HSS 333.34 to 333.39;
 - (b) Any item which is not state property and is on the institution grounds but not in the possession of any person;
 - (c) Stolen property;
 - (d) Any item which a youth may possess but which comes into his or her possession through unauthorized channels or which is not on the youth's property list and is required to be;
 - (e) Items of a type which are not allowed, according to posted policies and procedures;
 - (f) Allowable items in excess of the quantity allowed, according to posted policies and procedures; or

- (g) Items which do not belong to the youth, except state property issued to the youth for his or her use, such as sheets and uniforms.

- (8) "Cottage confinement" means confinement to a youth's room with a minimum of 10 hours time out of the room each day and general participation in the activities of the cottage program, including school and recreation in the cottage.

- (9) "Device" includes, but is not limited to, stills, chemical laboratory equipment, hollow needles, small spoons, roach clips and marijuana or hashish pipes.

- (10) "Disrespect" means behavior directed at another which is open and observable, and includes but is not limited to:
 - (a) Using derogatory or profane writing;

 - (b) Using derogatory or profane remarks or gestures;

 - (c) Name-calling;

 - (d) Spitting

 - (e) Yelling; and

 - (f) Acting in other ways to publicly express contempt for authority.

- (11) "Disruptive conduct" means conduct within the sight or hearing of others which is unusually loud, offensive or vulgar, and may include arguments, yelling, loud noises, horseplay, loud talking, or other behavior, which may impair the normal functioning of the institution or which may annoy another.

- (12) "Disturbance" means serious disruption to institutional order caused by a group of 2 or more youth which creates a serious danger of harm to persons or property.

- (13) "Evidence" means any statement or object which could be presented at a disciplinary hearing or in a court of law, whether or not it is admissible.

- (14) "Fight" means any situation where two or more people are trying to injure each other by any physical means, to include hitting, biting, kicking, scratching, throwing or swinging objects, or using weapons.

- (15) "Gambling" includes betting money or anything of value on the outcome of all or any part of any game of skill or chance, or on an athletic contest or on the outcome of any event.

- (16) "Harass" means to persistently annoy or irritate, and not respond to requests to discontinue such behavior.

(17) "Inappropriate sexual conduct" means:

(a) Sexual intercourse with another person;

(b) Sexual contact, as defined under s. HSS 333.03(34), with another person;

(c) Requesting, hiring or telling another person to have sexual intercourse or sexual contact, as defined under s. HSS 333.03(34) and (35);

(d) Exposing his or her intimate parts to another person for the purpose of sexual arousal or gratification, or for exhibitionistic purposes; or

(e) Touching the intimate parts of an animal, for the purpose of sexual arousal or gratification.

(18) "Intentionally" means that the youth had a purpose to do the thing or cause the result specified, or believed that his or her act, if successful, would cause the results specified.

(19) "Intimate parts" means penis, testicles, buttocks, vaginal area, and female breast, whether clothed or unclothed.

- (20) "Intoxicating substance" means anything which if taken into the body may alter or impair normal mental or physical functions, to include but not limited to: LSD, heroin, cocaine, marijuana, alcoholic drinks, paint thinner or glue. Tobacco is not included.
- (21) "Knowingly" means only that the youth believes that the specified fact exists.
- (22) "Least serious offense" means an offense classified as a least serious offense in ss. HSS 333.07 to 333.55 or other offenses that staff elect to treat as least serious offenses under the discretion provided in s. HSS 333.06(3). A "least serious offense" is also called a Class C offense.
- (23) "Major penalty" means a disposition that includes a program under ss. HSS 333.78 to 333.81 imposed as a penalty for a most serious offense.
- (24) "Moderately serious offense" means an offense classified as a moderately serious offense under ss. HSS 333.07 to 333.55 or other offenses that staff elect to treat as moderately serious offenses under the discretion provided in s. HSS 333.06(3). A "moderately serious offense" is also called a Class B offense.
- (25) "Modified cottage confinement" means confinement to the youth's room with a minimum of 7 hours per day out of the room.

- (26) "Most serious offense" means an offense classified as a major offense in ss. HSS 333.07 to 333.55 or other offenses that staff elect to treat as most serious offenses under the discretion provided in s. HSS 333.06(3). A "most serious offense" is also called a Class A offense.
- (27) "Modified room confinement" means confinement to the youth's room with a minimum of 4 hours per day out of the room.
- (28) "Negligently" means that in acting or failing to act, a youth failed to exercise the degree of care appropriate for the circumstances.
- (29) "Negotiable instrument" is a written statement, signed by the maker or drawer, which contains an unconditional promise to pay which is payable on demand or at a specified time and which is payable to the order of the bearer.
- (30) "Possession" means on one's person, in one's quarters, in one's locker, or under one's immediate physical control.
- (31) "Prehearing security" means detention of a youth following an alleged violation of this chapter and prior to a hearing on the matter.
- (32) "Recklessly" means that, in acting or failing to act, the youth created a situation of unreasonable risk that another or self might be injured; or that property may be damaged, destroyed or altered. The act or failure to act must demonstrate a conscious disregard for the physical

safety of self, another, or property and a willingness to take known chances of perpetrating an injury or damage.

(33) "Relevant evidence" means evidence that makes it appear more likely or less likely that a youth committed the offense of which he or she is accused.

(34) "Sexual contact" means:

(a) Touching by the intimate parts of one person to any part of another person; or

(b) Any touching of the intimate parts of another person.

(35) "Sexual intercourse" means any penetration, however slight, by the penis into the mouth, vagina, or anus of another person, or any penetration, by any part of the body or an object into the anus or vagina of another person.

(36) "Steals" means obtains or retains possession of or title to the property of another, with intent to deprive the owner of it permanently, and without consent of the owner.

(37) "Superintendent" means the superintendent of a juvenile correctional institution or designee.

(38) "Threaten" means:

(a) To communicate to another the intent to physically harm or harass that person or someone else;

(b) To communicate to another the intent to cause damage to or loss of that person's or another person's property; or

(c) To communicate to another the intent to make an accusation known to be false.

(39) "Without consent" means no consent in fact or that consent is given for any of the following reasons:

(a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on him or her, or on a person in his or her presence, or on a member of his or her immediate family; or

(b) Because the actor purported to be acting under legal authority; or

(c) Because the victim did not understand the nature of the thing to which he or she consented, either by reason of ignorance, or mistake of fact or of law other than criminal law, or by reason of youth, or by reason of defective mental condition whether permanent or temporary.

- (40) "Working day" means any day except Saturdays, Sundays, and legal holidays.
- (41) "Youth" means a person or persons under the age of 19 years placed under the legal custody and supervision of the department for correctional purposes by dispositional order of a court.

HSS 333.04 CONDUCT RULES BOOKLET.

- (1) This chapter and notes shall be published in booklet form and may also be issued or made available in any other appropriate form.
- (2) A copy of the booklet shall be given to every youth. Any time major changes are made, the booklet shall be amended.
- (3) An introductory summary of the rules, phrased in non-legalistic language, shall be provided along with the booklet and include cross-reference to actual rule sections as appropriate.

NOTE: Due process and fundamental fairness require that youth be given notice of the rules they are expected to follow. In addition, awareness and understanding of the rules and of the sanctions for breaking them should increase compliance with them.

SUBCHAPTER II - YOUTH RIGHTS, PRIVILEGES AND RESPONSIBILITIES

Introductory Note

This subchapter is key to implementing the balance of this particular rules chapter and has meaning for the whole packet of rules for youth in correctional institutions. Youth are placed in custody because they have violated the person or property of others to such an extent that a court determined their freedom of movement and decision-making must be restricted. During this period of supervised restriction, delinquent youth have a right to rehabilitative services and developmental care under Wisconsin Statutes.

Youth are placed in departmental custody with the expectation that they will be given and responsibly take advantage of the opportunity to learn and to demonstrate more constructive values and behaviors. The challenge to staff and youth alike is to establish and reward a pattern of behavior which allows progressive addition of privileges and responsibilities to each youth.

For a youth to "learn" responsible behavior, the residential staff member must be a special kind of "teacher". We are not talking here about classroom teaching ---as important as it is to other aspects of development. Instead, we are talking about a rehabilitative approach which uses a "learning concept" and about adult counselors who can provide meaningful "instruction" in personal and social skills.

Many youth come to correctional schools because they never learned or had sufficient chance to learn key personal and social skills. Lacking them, they learned "other behaviors" which included verbal and physical aggressiveness, destructiveness, and other anti-social acts such as robbing, assault and the like. Some not only abused other people, they abused themselves with alcohol or drugs. Still others were abused by parents or peers and their vulnerability led eventually to copying those same behaviors with others in an attempt to fight back.

Just as these youth "learned" anti-social behaviors outside their public school classroom, they now have a supervised opportunity to learn pro-social behaviors outside the institutional classrooms -- in the cottages and congregate areas. Their "teachers" have various titles -- among them counselors, social workers, and medical staff. Their job is to provide the positive, out-of-the-classroom instruction in personal and social skills to youth who learned negative skills in the streets. There is no one "right way" to do this kind of teaching; every youth is a special challenge.

Each youth comes to us with certain skill deficits or shortages. Some cannot carry on a conversation, make a lasting friendship, help another, cope with conflict, get used to authority, keep their bodies clean, make an apology, give a compliment, or show affection. Helping them to "learn" to do any or all of these things requires staff with special talents -- fairness with a dash of firmness now and then, competence and caring, patience and persistence, and the ability to cultivate in youth, whom others may have given up on, a positive self-concept and self-image.

This is best accomplished by establishing an appropriate expectation in and for each youth, an individualized development plan, needed treatment services and an institutionalized system for rewarding positive behaviors and, as needed, for disciplining negative ones.

By design, this subchapter occurs early in a rule which deals primarily with the disciplinary alternatives when other efforts fail or when youth choose not to make constructive use of their privileges and opportunities. Discipline or punishment are often not first choice actions; they provide little of lasting value beyond stopping misconduct for some period. As important as such stopping may be in a given situation, it is important that the temporary restriction this gives the youth and the temporary respite this gives the staff, be used by both to re-examine their effectiveness in learning and teaching roles.

HSS 333.05 RIGHTS, PRIVILEGES AND RESPONSIBILITIES OF YOUTH IN INSTITUTIONS.

While youth in departmental custody have been restricted in certain ways by the action of the committing court, they still have certain rights guaranteed by the Constitution and by the Wisconsin Children's Code. In addition, upon entering an institution, youth are granted certain baseline privileges as a demonstration of positive programmatic and personal development expectations. "Baseline" means those basic privileges accorded to youth in institutions but it does not apply to privileges of youth in security or the reception center. Misconduct as defined in the next subchapter can result in loss of privileges, and positive development can be rewarded with additional privileges beyond the baseline.

(1) YOUTH RIGHTS. Youth rights shall include, but not be limited to, the right to:

- (a) Be free from discrimination based on race, natural origin, color, creed, sex or physical handicaps;

- (b) Have equal access to programs and services for male and female residents in co-educational facilities;
- (c) Receive adequate and appropriate dental and medical care;
- (d) Be protected from abuse, neglect or exploitation;
- (e) Have privacy subject to the limitations necessary to maintain order and security;
- (f) Participate in religious services and religious counseling on a voluntary basis subject only to the limitations necessary to maintain order and security;
- (g) Be treated in the least restrictive status consistent with his or her needs for treatment and the protection of the public;
- (h) Be offered an educational program consistent with his or her needs;
- (i) Visit and communicate with family members within reasonable guidelines;
- (j) Have access to the courts;
- (k) Establish communication and have visits with an attorney;

- (l) Be afforded opportunities to participate in recreational activities;
 - (m) Be involved whenever possible in major decisions affecting his or her life, especially the planning process designed to return the youth to the community at the earliest, appropriate date; and
 - (n) Receive appropriate and reasonable adult guidance, support and supervision in order to be assisted in acting responsibly and to respect the rights of others.
- (2) BASELINE PRIVILEGES. The baseline privileges each youth shall be afforded conditionally upon entering the institution are:
- (a) Use of an institution-provided radio;
 - (b) Access to some on-grounds recreational activities and employment;
 - (c) Visits with approved family members and others;
 - (d) Phone calls to parents on an occasional basis;
 - (e) Wearing personal clothing from one's home rather than clothing issued by the institution;
 - (f) Purchasing items from the institution canteen;

- (g) Accepting approved gifts from family members and others;
 - (h) Having approved personal belongings from one's home in his or her room;
 - (i) Keeping personal care items in one's room or an approved place;
and
 - (j) Limited late night hours with a 10:00 p.m. bedtime.
- (3) BASELINE RESPONSIBILITIES. The baseline responsibilities of youth shall include but not be limited to:
- (a) Allowing others to have privacy;
 - (b) Respecting others' property;
 - (c) Not physically abusing, exploiting or harming other youth or staff;
 - (d) Accepting reasonable and appropriate adult guidance, support and supervision;
 - (e) Knowing the rules of the institution and asking questions of staff if unsure of the meaning of a rule;

- (f) Being supportive of other youths efforts to involve themselves in individual treatment plans and assist others in their efforts to keep institution rules;
 - (g) Respecting others' race, religious background and culture;
 - (h) Participating in major decision-making affecting his or her life;
 - (i) Carrying out his or her part of the individual treatment plan;
 - (j) Expressing concerns appropriately about cottage program and asking staff questions about others' progress in carrying out their responsibilities for his or her treatment plan;
 - (k) Using the grievance procedures to address problems which cannot be handled on an informal basis;
 - (l) Maintaining good personal hygiene and striving to maintain good health; and
 - (m) Getting involved in an appropriate education program.
- (4) POSITIVE REWARDS.
- (a) As a youth learns new skills which will enhance the youth's capacity to return to a community setting, the "teachers" - counselors, social workers, medical staff, support staff - need to

acknowledge and react positively to this behavior. A "teacher's" reaction may be a comment - "job well done." The reaction may also involve granting, at that time, a reward that the youth wants, or it may involve granting a reward after discussion by the staff and a group decision. The types of behavior that may lead to a reward are accepting one's responsibilities without or with little adult guidance. For some youth this may mean accepting the institution rules and for others it may mean doing well in a school program. Accordingly, the reward to the youth should be individualized to the degree practicable. For example, the youth who in the past had difficulty accepting the rules may receive more recreation time inside or outside the cottage. The youth who has made progress in the education setting may lead a class discussion in a favorite class or participate in an off-grounds field trip.

- (b) The key to a positive reward system in an institutional setting, as in any other setting, is acknowledging the youth's behavior and linking that behavior with a desired reward. As the youth shows consistent progress in being more responsible for his or her own behavior, the youth should be offered opportunities to test the new behaviors in a community setting. These rewards may include off-grounds employment or education, frequent off-grounds recreational trips, trial visits to an alternate care setting or furloughs to the home of a parent or relative.

(c) Examples of other positive rewards include:

1. Increased access to on-grounds and off-grounds recreational activities and equipment.
2. Increased opportunities for off-grounds cultural and educational activities.
3. Additional late night hours for recreational activities within the cottage.
4. Furloughs to the parental home or the home of a relative.
5. Increased freedom of movement on-grounds.
6. Expanded cottage kitchen usage for making snacks.
7. Increased privacy often through the use of honor rooms in honor cottages.
8. Access to off-grounds supervised employment.

SUBCHAPTER III - MISCONDUCT

Introductory Note

Given the stated goal of helping youth in departmental correctional custody "become productive, well-adjusted, law-abiding citizens in our institutions" and, eventually, in their home communities, while at the same time "guaranteeing safety to the general public, correctional staff and other youth," the normal expectation is that youth within correctional institutions will seize the opportunity for a new beginning. Accordingly, they enter the institution with the baseline privileges and responsibilities set forth in subch. II and a challenge to maximize them.

As in any community, including the one from which the youth was committed for failure to meet legal expectations of citizens, there are legal norms for individual behavior. It is crucial that youth in correctional institution "communities" understand the limits of their behavior as reflected by categories of misconduct leading to sanctions or punishment.

What follows is such a listing of conduct offenses, arranged by level of seriousness. This is not a primer on "how to go wrong" in the institution. It is a summary of the points at which the exercise of personal privilege by youth goes beyond acceptable or safe conduct. It is at these points and in these acts that institutional youth, like their peers outside, risk loss of privileges and the imposition of sanctions and punishments appropriate to the offense.

There are special conditions described in subch. IV which can affect determinations under this subchapter.

HSS 333.06 CLASSIFICATION OF OFFENSES.

- (1) CLASSIFICATIONS. Conduct offenses are classified in this subchapter in two ways, by general type and by degree of seriousness. Furthermore, some offenses are made lesser included offenses under others.

- (2) GENERAL TYPE. The general type categories of offenses are offenses against bodily security; institutional security; order; property; sanitation, safety and health; and institution policies and procedures; as well as contraband, movement and program offenses. These categories are merely headings under which misconduct offenses listed in this subchapter are grouped.

(3) SERIOUSNESS. The sanctions that may be imposed for an offense will ordinarily depend upon how serious the offense is. The seriousness categories of offenses are least serious, moderately serious and most serious. Each offense type in this subchapter is categorized least serious, moderately serious or most serious. The utility of this classification is that it provides authoritative guidance to staff in selecting or recommending a disposition and at the same time lets youth know what to expect for the misconduct. However, certain offenses can be more serious because of the circumstances or context in which they are committed than is indicated by their classification. Examples are disobeying orders, lying, leaving an assigned area, and counterfeiting and forgery. When circumstances or context make the particular offense a greater threat to safety, order or security, staff may, with the advance approval of supervisor, impose a disposition which is normally reserved for more serious types of offenses. Remedial measures shall be the recourse of first choice for least serious offenses.

(4) OFFENSES CLASSIFIED BY DEGREE OF SERIOUSNESS. The seriousness category for each type of conduct offense listed in this subchapter is indicated by a Class A, B or C designation. "Class A" means most serious offense; "Class B" means moderately serious offense; "Class C" means least serious offense.

(a) The following are classified as Class A (most serious) offenses:

1. HSS 333.07 Sexual assault - intercourse.

2. HSS 333.08 Sexual assault - contact.
3. HSS 333.09 Inappropriate sexual contact - intercourse.
4. HSS 333.11 Battery.
5. HSS 333.13 Inciting a disturbance.
6. HSS 333.14 Participation in a disturbance.
7. HSS 333.31 Arson.
8. HSS 333.32 Causing an explosion.
9. HSS 333.35 Possession or use of intoxicants.
10. HSS 333.36 Possession of drug paraphernalia.
11. HSS 333.37 Possession, manufacture or alteration of weapons.
12. HSS 333.42 Running away.
13. HSS 333.50 Misuse of prescription medication.

(b) The following are classified as Class B (moderately serious) offenses:

1. HSS 333.095 Inappropriate sexual conduct - other.

2. HSS 333.10 Fighting.
3. HSS 333.12 Threats.
4. HSS 333.15 Conspiracy.
5. HSS 333.16 Group resistance.
6. HSS 333.17 Disguising identity.
7. HSS 333.18 Disobeying orders.
8. HSS 333.20 Soliciting staff.
9. HSS 333.22 Disruptive conduct.
10. HSS 333.27 Gambling.
11. HSS 333.28 Counterfeiting and forgery.
12. HSS 333.29 Theft.
13. HSS 333.30 Damage or alteration of property.
14. HSS 333.33 Creating a hazard.
15. HSS 333.34 Unauthorized possession of money.

16. HSS 333.39 Unauthorized property - miscellaneous.
17. HSS 333.40 Unauthorized use of the mails.
18. HSS 333.41 Unauthorized transfer of property.
19. HSS 333.43 Unauthorized group and individual movement.
20. HSS 333.47 Violation of conditions on furlough, offgrounds
or trial visit.
21. HSS 333.51 Disfigurement.
22. HSS 333.52 Tardiness and absence.
23. HSS 333.53 Refusal to perform work or study assignments.
24. HSS 333.54 Treatment violations.

(c) The following are classified as Class C (least serious) offenses:

1. HSS 333.19 Disrespect.
2. HSS 333.21 Lying.
3. HSS 333.23 Talking when talking is forbidden or limited.
4. HSS 333.24 Unauthorized forms of communication.

5. HSS 333.25 Enterprises and fraud.
6. HSS 333.26 Violation of clothing policies.
7. HSS 333.38 Unauthorized possession or use of smoking materials.
8. HSS 333.44 Leaving assigned area.
9. HSS 333.45 Loitering.
10. HSS 333.46 Entry to another youth's room.
11. HSS 333.48 Room disorder.
12. HSS 333.49 Poor self-maintenance.

(5) LESSER INCLUDED OFFENSES. (a) When one offense is a lesser included offense of another and a youth is charged with the greater offense, the youth is deemed to be charged with the lesser included offense as well and may be found guilty of the lesser included offense.

(b) A youth may not be found guilty of two offenses or punished for two offenses based on a single incident if one offense is a lesser included offense of the other.

(c) No offense may be considered a lesser included offense of another unless it is so listed in Table 333-A. Aiding and abetting, attempt and conspiracy are always lesser included offenses of the completed offense.

TABLE 333-A
LESSER INCLUDED OFFENSES

Greater Offense	Lesser Included Offense
333.58 Aiding and abetting	333.57 Attempt, or 333.15 Conspiracy.
333.11 Battery	333.10 Fighting.
333.07 Sexual Assault -- intercourse	333.08 Sexual assault -- contact, or 333.09 Inappropriate sexual conduct.
333.08 Sexual Assault -- contact	333.09 Inappropriate sexual conduct.
333.13 Inciting a disturbance	333.14 Participation in a disturbance, 333.16 Group resistance or 333.22 Disruptive conduct.
333.14 Participation in a disturbance	333.16 Group resistance, or 333.22 Disruptive conduct.
333.22 Disruptive conduct	333.23 Talking when talking is forbidden or limited, or 333.19 Disrespect.
333.29 Theft	333.41 Unauthorized transfer of property.
333.31 Arson	333.32 Causing an explosion or 333.33 Creating a hazard.
333.32 Causing an explosion	333.33 Creating a hazard.
333.34 Money	333.39 Contraband -- miscellaneous.
333.35 Intoxicants	333.39 Contraband -- miscellaneous.
333.36 Drug Paraphernalia	333.39 Contraband -- miscellaneous.
333.37 Manufacture and alteration of weapons	333.39 Contraband -- miscellaneous.

TABLE 333-A (continued)
LESSER INCLUDED OFFENSES

Greater Offense	Lesser Included Offense
333.38 Smoking materials	333.39 Contraband -- miscellaneous.
333.42 Running away	333.44 Leaving assigned area.
Any substance offense	333.57 Attempt, 333.58 Aiding and abetting, or 333.15 Conspiracy.

NOTE: The concept of a lesser included offense serves two functions. First, it puts each youth on notice that he or she, when charged in writing with one offense, is also charged and may be found guilty of either the offense charged or any lesser included offense. Second, it ensures that a youth is not punished twice for a single act which satisfies the elements of more than one offense where conviction for more than one offense would be unfair.

The basic test in labeling certain offenses as "lesser included" is fairness. Is it fair to say that a youth has notice that he or she is accused of the "lesser" offense, if the youth has been told only that he or she is accused of the "greater" offense? Is it fair to convict and punish for two closely related offenses, when a youth committed only one act?

Offenses against bodily security

HSS 333.07 SEXUAL ASSAULT - INTERCOURSE. (Class A)

A youth may not have sexual intercourse with another person if it is without that person's consent and the youth knows that it is without that person's consent.

HSS 333.08 SEXUAL ASSAULT - CONTACT. (Class A)

A youth may not intentionally have sexual contact with another person if it is without that person's consent and the youth knows that it is without that person's consent.

NOTE: Some examples of violations of this section are kissing, handholding, grabbing or touching a female's breast or someone's genitals, and rubbing one's genitals against the buttocks of another person (whether clothed or unclothed). If the other person consents to the contact, and it is authorized, this section is not violated, but both persons have violated HSS 333.13, unless the contact involves only kissing and handholding.

Sexual contact is a lesser included offense of sexual intercourse and inappropriate sexual conduct is a lesser included offense of this section. However, where a youth has violated this section in an attempt to rape the other person, a charge of attempted sexual assault intercourse would be appropriate.

HSS 333.09 INAPPROPRIATE SEXUAL CONDUCT - INTERCOURSE. (Class A)

A youth may not intentionally engage in sexual intercourse with another person.

NOTE: Traditionally, non-marital sexual activity has been a criminal offense but such activity is rarely prosecuted. The definition of such activity as a crime, however, is mainly for the purpose of formally expressing disapproval. In the setting of an institution for youth, the need to express disapproval of it is stronger. Homosexual conduct may be more prevalent and it is not always possible to prove lack of consent to sexual activity, especially in situations where it is likely that one youth is taking advantage of another. Thus, prohibiting consensual sexual intercourse helps to prevent sexual assault by youth.

HSS 333.095 INAPPROPRIATE SEXUAL CONDUCT - OTHER. (Class B)

A youth may not intentionally engage in sexual contact with another person, or in sexual conduct as defined in s. HSS 333.03(17)(c) to (e). Kissing and handholding are not by themselves violations of this section.

NOTE: Whereas s. HSS 333.09 prohibits consensual sexual intercourse, this section prohibits consensual sexual contact and other forms of inappropriate sexual conduct in order to protect youths from one another and to maintain order in the institution.

HSS 333.10 FIGHTING. (Class B)

A youth may not intentionally participate in a fight.

NOTE: A principal purpose of this section is to protect the safety and security of youth and staff. In addition, fights create a serious risk of disruption. Fights must be considered moderately serious offenses for these reasons. Although youth do have a limited privilege of self-defense, as a general rule they should learn to use non-violent means of settling disputes and they should depend on staff members rather than their own fists to defend them when attacked. Obviously it will often be difficult for staff members, the hearing officer or the supervisor to determine who started the fight and whether or not the other person exceeded the bounds of self-defense. Therefore, prohibiting such behavior entirely is the safest course.

It is intended that a youth should not be found guilty under both HSS 333.11 and this section for the same fight. This section should be applied to the youth who willingly joins a fight when someone attacks him or her.

HSS 333.11 BATTERY. (Class A)

A youth may not intentionally cause bodily harm to another by an act done with intent to cause bodily harm to that person or another.

NOTE: Aggressive behavior which does not result in bodily harm could be punished as attempted battery or as threats.

This section and s. HSS 333.10 overlap considerably. A youth should not be found guilty of violating both sections based on a single incident. If it is possible to determine the aggressor in a fight, this section rather than s. HSS 333.10 should be used.

HSS 333.12 THREATS. (Class B)

A youth may not intentionally make a threat that puts another person in a reasonable fear of harm to person or property.

NOTE: This section does not provide for the punishment of a youth for threatening to do something which he or she has a legal right to do, for example, to bring a lawsuit or to write a letter. Such a rule would have a chilling effect on the exercise of the protected rights of freedom of expression and access to the courts. In this section only certain types of threats are punishable. Extortion is not a necessary element to find guilt. If an otherwise allowable "threat" is communicated in certain ways, i.e., loudly and abusively, s. HSS 333.22 or 333.19 might be violated.

Offenses against institutional security

HSS 333.13 INCITING A DISTURBANCE. (Class A)

A youth may not intentionally encourage, direct, command, coerce, or signal one or more other persons to participate in a disturbance.

NOTE: This section should be used to charge "ringleaders" of a serious disturbance which involves violence. HSS 333.10 should be used against those youth who actively participate in but are not ringleaders of a disturbance. HSS 333.12 should be used against those youth who participate in non-violent forms of disruption such as a sit-down strike. Three offenses regarding disruptions are necessary to more accurately reflect the seriousness of youths' acts in the disruption.

HSS 333.14 PARTICIPATION IN A DISTURBANCE. (Class A)

A youth may not intentionally or recklessly participate in a disturbance, or may not intentionally or recklessly remain in a group which has been ordered to disperse if some members of the group are participating in a disturbance.

HSS 333.15 CONSPIRACY. (Class B)

- (1) Two or more youth may not plan or agree to do acts which are forbidden under this chapter.
- (2) The penalty for conspiracy may be the same as the penalty for the most serious of the planned offenses.

NOTE: A purpose of this section is to enable correctional staff to prevent group criminal or prohibited activities at an earlier stage than the stage of attempt. Group activities against the rules pose a greater risk than similar individual activities, and this justifies intervention at an earlier stage and punishment for acts which, if done by an individual, would not be against the rules.

Overt acts are not required because an institutional setting may be so volatile that it is unwise to wait for such acts. As in s. 939.31, Stats., the maximum penalty for conspiracy is the same as for the offense itself; a youth cannot be found guilty of both conspiracy and the planned offense because under s. HSS 333.06(4), conspiracy is a lesser included offense.

The reason that conspiracy has been made a lesser included offense is the similarity between conspiracy and attempt. Both kinds of offenses provide a sanction against activity which is preparatory to an actual offense. If the offense is completed, however, conspiracy should be included in the other offense just as attempt is.

HSS 333.16 GROUP RESISTANCE. (Class B)

- (1) A youth may not intentionally participate in any group action which is contrary to this chapter, to institution policies and procedures, or to a direct verbal order from a staff member, even if the group action does not create a serious danger of harm to persons or property.
- (2) A youth may not intentionally join in or solicit another to join in any group petition, gathering or statement, except that the following activities are not prohibited:

(a) Group complaints in the youth complaint procedure, ch. HSS 340,
Wis. Adm. Code.

(b) Group petitions to courts; or

(c) Authorized activity by authorized groups.

(3) Nothing under this section shall be construed to limit a youth's use of
the mails which is governed by ch. HSS 339, Wis. Adm. Code.

NOTE: This section differs from conspiracy in that here each individual
must actually disobey a rule, while under s. HSS 333.15, a youth may be punished
for merely planning an offense. Also, under s. HSS 333.15 a plan or agreement is
required, while under this section spontaneous group action can be punished.
Finally, punishment under this section can be added to punishment for the
particular section violated, while punishment for conspiracy cannot, because
conspiracy is a lesser included offense of the planned offense.

Subsection (2) states that the youth complaint review system is the
appropriate method for bringing group complaints. To permit complaints or
statements other than through this system could seriously disrupt an institution.
Experience has proven that it is important that there be as few opportunities as
possible for coercion of one youth by another. Unrestricted rights to petition
in groups generates intimidation and coercion as youth try to force others to
join them.

Other problems are also created by unrestricted group petitioning. It
disrupts orderly physical movement and security by requiring more freedom of
movement than is safe. It is also disruptive of programs and contributes to the
formation of gangs, which pose a serious threat to institutions. Like many
institution rules, this one is aimed at conduct which taken alone might not seem
serious to people without experience in corrections. In Wisconsin, the
experience has been that permitting such activity creates serious problems and
can contribute to the erosion of authority which leads to serious disturbances at
institutions.

HSS 333.17 DISGUIISING IDENTITY. (Class B)

A youth may not intentionally conceal, alter or disguise his or her usual appearance with the intent to prevent his or her identification.

NOTE: The purpose of this section is to help prevent more serious offenses, such as running away, and to promote identification of the youth in other cases.

Youth may legitimately change their appearance in many ways: change of clothing, use of glasses and sunglasses, change of hairstyle, growing or shaving facial hair. Where such a change is the basis for a charge under this section, proof of the intent to prevent identification becomes crucial. Commission of certain offenses, for example, attempted runaway, soon after such a change would be strong evidence of the intent to prevent identification. On the other hand, where a youth uses, for instance, a mask or a staff member's clothing, the intent to prevent identification can be inferred from the change of appearance itself.

Offenses against order

HSS 333.18 DISOBEYING ORDERS. (Class B)

- (1) A youth may not disobey any of the following:
 - (a) An oral or written order from any staff member or other authorized person, directed to the youth or to a group of which the youth is or was a member;
 - (b) A bulletin which applies to the youth and which was posted or distributed in compliance with division rules; or
 - (c) Any other order which applies to the youth and of which he or she has actual knowledge.

- (2) A youth may not intentionally commit an act which violates an order whenever the youth knows or should know that the order exists.

NOTE: Because of the close proximity of large numbers of youth in an institution, prompt obedience to orders is necessary for orderly operation. Obedience is also an important aspect of learning self-discipline.

Subsection (1)(a) covers a direct verbal order. Subsection (1)(b) covers "general" orders, that is, those which apply to all or to a group of youth, and which are properly posted. It is not necessary to show that the youth actually knew of the order; it is the youth's duty to read and remember posted or distributed orders. Subsection (1)(c) covers situations where a posted bulletin was improperly removed from the bulletin board, situations where an order was relayed indirectly by a youth, or any other situation where the youth knew of the order even though it was not directly given to him or her or was not properly posted.

A violation of this section should not be charged where the order violated was a posted bulletin and there is a more specific section which covers the same thing. For example, s. HSS 333.26 requires obedience to posted specific policies and procedures at each institution regarding clothing. If a youth violates the posted policies, he or she should be charged with violating s. HSS 333.26, not this section. However, if a staff member notices the improper clothing and tells the youth to change, but the youth does not change, then the youth can be charged with violating both sections. Under this section, the staff member giving the order need not say, "I am giving a direct order," although this is occasionally a desirable practice.

HSS 333.19 DISRESPECT. (Class C)

- (1) A youth may not show disrespect for any staff member, youth or any person performing his or her duty as an employee of the state of Wisconsin, whether the subject of disrespect is present or not.
- (2) A youth may not show disrespect for any member of the public while that person is present.

NOTE: Behavior of the type prohibited by this section can lead to a breakdown of authority or a serious disturbance. This section is not intended to prohibit all criticism of staff members or criticism expressed through the mail. Nor is it directed toward activity in therapy or counseling groups, where open expression is important to treatment. Rather, it is directed at conduct which is

potentially disruptive or which erodes authority. Resort should be made to s. HSS 333.22 to deal with more serious examples of this behavior including the verbal abuse of visitors in their presence.

HSS 333.20 SOLICITING STAFF. (Class B)

A youth may not intentionally do any of the following:

- (1) Offer or give anything of substantial value to a staff member or the family of a staff member, except in accordance with the sections on contraband. A youth may entrust some of his or her property to a designated staff member for the purpose of storage or forwarding it to a friend or relative of the youth;
- (2) Request or accept anything of substantial value from a staff member or the family of a staff member;
- (3) Buy anything from, or sell anything to, a staff member or the family of a staff member, except craft items for sale to the public in accordance with institutional procedures; or
- (4) Request a staff member or family of a staff member to purchase anything for him or her, except that the superintendent may allow this by special authorization if it fosters treatment goals or may designate a staff member to handle such requests.

NOTE: This section forbids all contacts between youth and staff which could lead to favoritism or bribery. Just as theft would be very difficult to control in an institution without a rule prohibiting all transfer of property, so bribery and favoritism would be difficult to control in the absence of a rule prohibiting exchanges between staff and youth. Also, the appearance of impropriety may be as destructive to youth or staff morale as would actual impropriety.

Subsection (1) prohibits the offering or giving of anything of substantial value to a staff member or family. The word substantial was chosen, rather than an absolute exclusion, to permit youth to give token gifts to staff, if they desire. This can be beneficial for treatment purposes, since staff members serve as role models to youth and youth may wish to convey a feeling of affection by offering a token gift. Such gifts should be reported by the staff member to his or her supervisor to prevent even the appearance of impropriety.

HSS 333.21 LYING. (Class C)

- (1) A youth may not knowingly makes a false or misleading written or oral statement to a staff member.

- (2) A youth may not knowingly file a false or misleading grievance under ch. HSS 340, Wis. Adm. Code, that affects the safety, security, or integrity of the institution or the correctional program the youth is in.

NOTE: The purposes of this section are to help maintain orderly and efficient operation of the institution and to encourage youth to tell the truth.

The proper exercise of discretion is important in charging youth under this section. For example, staff should not charge a youth with lying for telling a "fish story," but should charge a youth who falsely accuses another person of starting a fight or some other more serious offense.

HSS 333.22 DISRUPTIVE CONDUCT. (Class B)

A youth may not intentionally or recklessly engage in, cause or provoke disruptive conduct.

NOTE: Disruptive conduct in most circumstances can and should be handled by a warning rather than a charge of violating this section. See s. HSS 333.61(1). Examples of when this section may be used are when a youth talks about rule violations or criminal conduct in a manner that sanctions or encourages such behavior or rule violations, or when a youth disturbs others by unusually loud talking or unusually offensive language, as well as for non-verbal disruptions.

Section HSS 333.19 rather than this section should be used when the disruptive tendency of a youth's words or actions is due to their message or disrespect for a staff member.

HSS 333.23 TALKING WHEN TALKING IS FORBIDDEN OR LIMITED. (Class C)

Each institution shall post specific policies and procedures stating the times and places talking is forbidden or limited. A youth may not talk during those times or in those places, or in a manner contrary to established limits, unless:

- (1) The youth is replying to a question addressed to him or her by a staff member; or
- (2) Talking at that time and place is necessary for the physical health and safety of the youth or another person.

NOTE: This section is intended to help provide a reasonably quiet and orderly environment for the benefit of all youth and staff. Even talking in a normal tone of voice can be disturbing at certain times or places, for example, while others are sleeping or watching TV. Also, talking can prevent other youth from understanding instructions from staff which are being given to a group.

Recognizing that needs vary (for example, some rooms have solid doors; others do not), this section merely provides notice that policies on talking do exist and are posted, and that a violation of them is an offense under this section.

HSS 333.24 UNAUTHORIZED FORMS OF COMMUNICATION. (Class C)

Unless permission is given, a youth may not communicate with another person by an unauthorized means, such as by passing notes, or by use of sign language, signals, a telephone, or any other communication device or code. Speaking in a foreign language is not in itself a violation of this section.

NOTE: This is another example of a prohibition of action which in itself is not harmful; however, it is necessary as an aid in controlling more dangerous behavior. In this case, controlling secret means of communication helps prevent conspiracies and runaways. If a youth is deaf or mute, it is not intended that this section be applied to use of sign language by or to that youth.

HSS 333.25 ENTERPRISES AND FRAUD. (Class C)

(1) A youth may not engage in a business or enterprise, whether or not for profit, or sell anything except as specifically allowed under other sections or as authorized by the superintendent, except that:

(a) A youth who was owner or part owner of any lawful business or enterprise prior to sentencing may communicate with his or her manager or partner concerning the management of the enterprise or business; and

(b) A youth may author, write, or seek publication of works in accordance with this section and institutional policies and procedures.

(2) A youth may not offer to buy or order any item with the intent to not pay for it.

NOTE: The purpose of this section is three-fold: to prevent youth who set up businesses from taking advantage of any member of the public; to prevent any state liability upon contracts entered into by youth; and to prevent defrauding of the public by youth who order items and do not pay for them. It is possible an unsuspecting outsider would pay for something the youth could not supply, leading to the unsatisfactory alternatives of a victim who has lost money or state liability. Youth have opportunities to work in institutional assignments and to sell craft items through official channels.

HSS 333.26 VIOLATION OF CLOTHING POLICIES. (Class C)

Each institution shall post specific policies and procedures describing the clothing to be issued to youth and how it shall be worn, and the circumstances when personal clothing and accessories may be worn and how they may be worn. A youth may not violate these specific policies and procedures.

NOTE: The purposes of rules on clothing are: (1) to prohibit use of clothing which could create identification problems; (2) to simplify laundry and storage; (3) to prohibit use of clothing which could be used as a weapon, e.g., excessively heavy belt buckles; (4) to prohibit the use of clothing which could be used to hide contraband, e.g., lined belts; (5) to prevent the wearing of indecent outfits; and (6) to prevent the wearing of garments which could pose a danger to the wearer or others in certain work situations, or to require protective clothing for similar reasons, e.g., a hairnet. See the ACA Juvenile Standards, standards 9349 and 9353.

If a youth violates a clothing policy, it should ordinarily only be considered a violation of this section, not of s. HSS 333.18. If the youth has refused to obey a direct order in addition to disobeying the posted policy, a charge of violating s. HSS 333.18 would be appropriate.

HSS 333.27 GAMBLING. (Class B)

A youth may not gamble.

NOTE: Gambling is forbidden for the following reasons: (1) it can result in some youth being cheated or taken advantage of; (2) it can lead to serious debts which in turn lead to violence, intimidation, and other problems; (3) even without cheating or large debts, it can create emotional upsets leading to violence or other discipline problems; and (4) some youth have a psychological dependence on gambling (similar to alcoholism) which has been associated with delinquent behavior in the past. The experience of staff is that even betting a pack of cigarettes on the outcome of a TV football game can lead to these serious problems.

HSS 333.28 COUNTERFEITING AND FORGERY. (Class B)

- (1) A youth may not intentionally make or alter:
- (a) Any document so it appears to have been made, signed, initialed, or stamped either by someone else, or at a different time, or with different provisions; or
 - (b) Any postage stamp or postal cancellation mark.
- (2) A youth may not knowingly use a forged, counterfeit, or altered document, postage stamp, or postal cancellation mark.

NOTE: In an institutional setting almost any writing is of potential legal significance, since letters are sometimes monitored, many memos are put into youths' files, and notes might be used as evidence in disciplinary proceedings. Also, the smooth and fair operation of the institution depends on the reliability of records such as canteen books, passes, orders, prescriptions and files. Hence, the scope of this section is broad. This section is not a lesser included offense of theft; if a forged document is successfully used to obtain someone else's property, the youth has violated both s. HSS 333.29 and this section.

Offenses against property

HSS 333.29 THEFT. (Class B)

A youth may not steal the property of another person or of the state of Wisconsin. The value of the stolen property shall be considered in assessing the severity of the offense.

HSS 333.30 DAMAGE OR ALTERATION OF PROPERTY. (Class B)

- (1) A youth may not intentionally damage, destroy, or alter any property of another person or of the state of Wisconsin.
- (2) A youth may not intentionally damage, destroy, or alter his or her own property without the permission of the counselor of the youth's living unit.
- (3) A youth may not, by reckless conduct, damage, destroy, or alter any property of another person, the state, or the youth's own property.

NOTE: Youth may only destroy their own property if they have permission to do so. This is because it is important to monitor such destruction in order to maintain current property lists. Otherwise it is impossible to keep track of property in institutions.

HSS 333.31 ARSON. (Class A)

A youth may not intentionally start a fire and thereby create a danger to the safety of persons or property, or both.

NOTE: Because of the danger that a fire or fire-caused explosion represents, arson is punishable even if no damage to property occurs. If damage does occur, a youth could be punished for violating both this section and s. HSS 333.30. In addition, starting a fire or creating a fire hazard is punishable even where not done intentionally (see s. HSS 333.33). Violation of this section is more serious than violation of s. HSS 333.33.

This section does not require proof of any damage. Lack of consent or intent to defraud need not be shown. In other words, youth may not set fire to their own property or anyone else's for any reason, except when directed to do so by a staff member. No distinction is made in this section between arson of a building or of other property.

An unwritten but fairly obvious exception to this section is that under almost all circumstances, lighting a cigarette, cigar or pipe is not a violation.

HSS 333.32 CAUSING AN EXPLOSION. (Class A)

A youth may not intentionally cause an explosion.

NOTE: Because of the dangerous potential of explosions, intentionally causing an explosion is punishable even if no damage occurs, and if damage does occur a youth could be punished for violating both this section and s. HSS 333.30. Also, negligently causing an explosion is punishable under s. HSS 333.33 if a hazard is thereby created.

HSS 333.33 CREATING A HAZARD. (Class B)

- (1) A youth may not intentionally, recklessly, or negligently create a hazard by fire, explosion, or otherwise.
- (2) A disposition of a charge under this section shall include a decision whether the youth's conduct was intentional, reckless, or negligent.

NOTE: This is the only section under which a youth can be punished for negligence or recklessness as well as an intentional action. Because of the high density living situation in an institution, carelessness can endanger large numbers of people and create a very serious risk. Therefore, the standard of care of reasonable people must be enforceable through the disciplinary process. Thus, carelessly tossing a match in a pile of dry leaves or smoking in an area where gasoline is stored can be punished as an offense if a fire or explosion results, even if the youth did not mean to cause it.

Intentionally created risks of fire and explosion are covered by ss. HSS 333.31 and 333.32. This section is a lesser included offense of both of those sections.

Contraband offenses

HSS 333.34 UNAUTHORIZED POSSESSION OF MONEY. (Class B)

- (1) Except as specifically authorized, a youth may not knowingly have in his or her possession any of the following:
 - (a) Coins or paper money;

- (b) A check;
 - (c) A money order;
 - (d) A savings bond; or
 - (e) Any other negotiable instrument.
- (2) Any of the above items, if received through the mail, a visit, or other means, shall be turned over to the proper authority and deposited in the youth's account or put in safekeeping.

NOTE: Circulation of money is not permitted within the institutions for the same reasons that transfer of property is not allowed. See the note to s. HSS 333.41. Money, unlike other types of personal property, is not readily identifiable, and it would be impossible to prevent the transfer of money if youth were allowed to keep it in the institution. Provision is made for youth funds in ch. HSS 339, Wis. Adm. Code.

Only knowing unauthorized possession of these items is an offense. If a youth turns in items received through the mail promptly, they will be deposited in his or her account or put in safekeeping, and the youth will not have committed an offense. This section conforms to standard 9384 of ACA Juvenile Standards.

HSS 333.35 POSSESSION OR USE OF INTOXICANTS. (Class A)

- (1) A youth may not knowingly possess or use any intoxicating substance, except that approved items such as glue which have a legitimate use may be used under the supervision of a staff member and in accordance with posted institution policies and procedures.
- (2) All intoxicating substances prohibited by this section shall be confiscated, whether or not any violation of this section occurs.

NOTE: Besides prohibiting an illegal activity, this section has the additional purpose of protecting youth and staff from intoxicated persons. People under the influence of intoxicants often act abnormally and may injure themselves or others. In an institution, intoxicants are particularly troublesome because acting without inhibition can be dangerous to others. Attempts to leave the institution and attacks on people are often committed while youth are under the influence of intoxicants. It is important to control such conduct by controlling the substances which create the risks. Many youth have substance abuse problems. It is hoped that the time youth spend in the institution may serve to help them recover from any dependence on mind-altering substances.

HSS 333.36 POSSESSION OF DRUG PARAPHERNALIA. (Class A)

- (1) A youth may not possess any device used in the manufacture of an intoxicating substance or any device used to take an intoxicating substance into the body, with intent to use the device for manufacture or use of an intoxicating substance.
- (2) Any item found which appears to violate this section may be confiscated. If the youth is not found guilty of violating this section and the item is not contraband, it shall be returned.

NOTE: It is easier to control the use of prohibited substances if the means for making or using the substances are unavailable. The types of "devices" defined in HSS 333.03 are examples of paraphernalia which youth may not possess.

A youth must intend to use the device for the manufacture or use of a intoxicating substance in order to be found guilty under subsection (1). Some paraphernalia may be possessed legitimately. For example, a diabetic may be permitted to possess a hypodermic needle.

HSS 333.37 POSSESSION, MANUFACTURE OR ALTERATION OF WEAPONS. (Class A)

- (1) A youth may not possess any item which can be used as a weapon with intent to use it as a weapon.

- (2) A youth may not make or alter any item with intent to make it suitable for use as a weapon.
- (3) A youth may not knowingly possess an item which is designed exclusively to be used as a weapon or to be used in the manufacture of a weapon.
- (4) Any item found which apparently violates this section may be confiscated. If the youth is found not guilty of violating this section and the item is not contraband, it shall be returned.

NOTE: Many items which a youth may legitimately possess can also be used as weapons. For this reason an intent to use the item as a weapon must be proven before youth can be found guilty under sub. (1). Intent can be inferred from the circumstances.

Subsection (1) deals with items which are still in their original form and which have both a legitimate use and use as a weapon. Examples are knives, other kitchen utensils, matches, cigarettes, tools, heavy objects, and art objects.

Subsection (2) deals with items which have been altered from their original form. Examples include a spoon or table knife which has been sharpened and a razor blade which has been taped or fitted to a handle, a broken pool cue with a ball of tightly wound tape on the end, and a bar of soap in a sock. If a youth makes or alters such an item, there is no need to show that he or she intended to use it as a weapon. It is only necessary to show that the youth intended to make the item suitable for use as a weapon. In most cases, this intent can be inferred from the mere fact of making the item.

Finally, sub. (3) deals with items which have no purpose other than to be used as weapons. Examples include guns, explosives, switchblade knives, and many of the homemade items which are also covered by sub. (2). Youth are not allowed to have such items under any circumstances; if found, they will be confiscated. If a youth knowingly has such an item in his or her possession, the youth is guilty of an offense.

Even if the youth is found "not guilty" under this section because there was insufficient proof of intent or because the item was not something that could be used only as a weapon, in many cases the youth will nonetheless be guilty of damage or alteration of property. (see s. HSS 333.30). For instance, altering a state-owned item in a way that makes it more suitable for use as a weapon, even without proof of intent to use the item as a weapon, would be punishable under those sections.

HSS 333.38 UNAUTHORIZED POSSESSION OR USE OF SMOKING MATERIALS. (Class C)

- (1) Each institution shall post specific policies and procedures specifying the kind and number of smoking materials youth may possess and the areas where smoking is allowed.
- (2) A youth may not knowingly violate the specific policies and procedures posted under sub. (1).

NOTE: The purpose of this section is the same as the purpose of ss. HSS 333.34 and 333.41: to aid in the prevention of various other offenses or abuses such as gambling; the sale of favors by youth who have access to supplies, equipment or information; the sale of sexual favors; and forced "selling," "giving" or "borrowing." Cigarettes are often used as a form of money in institutions, and transfer of cigarettes is difficult to detect because cigarettes are not individually identifiable. Therefore, their use as a medium of exchange can be curbed by prohibiting the hoarding of large quantities.

HSS 333.39 UNAUTHORIZED PROPERTY-MISCELLANEOUS. (Class B)

- (1) Each institution shall post a list of all types of personal property which youth are allowed to possess in accordance with departmental rules relating to personal property. All property which is not on the posted list is unauthorized.
- (2) A youth may not knowingly possess unauthorized property.

NOTE: The purpose of restricting the type and amount of property which youth may possess are: (1) to prevent trading and the more serious offenses associated with it, such as gambling and theft (see note to s. HSS 333.41); (2) to simplify storage; (3) to keep out items which are likely to be misused; and (4) to keep out extremely valuable items which may create jealousy among youth.

Items covered by this section and not covered by any of the more specific sections are items which are not, in themselves, dangerous. Therefore, even when a youth is guilty because he or she failed to register an item, had a prohibited

item, or had too many of one kind of item, the youth's property will not be confiscated. It will be disposed of or returned in an appropriate manner.

The types of allowable items vary from institution to institution, so no actual listing is given here.

HSS 333.40 UNAUTHORIZED USE OF THE MAILS. (Class B)

(1) A youth may not use the U.S. postal service to communicate with a person who has been declared a prohibited correspondent of that youth in accordance with ch. HSS 339, Wis. Adm. Code.

(2) A youth may not send through the mail any item which, according to ss. HSS 333.34 to 333.39 he or she is not allowed to possess, except that items in safekeeping and some items which have been seized may be sent out at the youth's expense.

NOTE: A youth may not be charged with a violation of both HSS 333.24 and this section for the same act. See s. HSS 339.02, Wis. Adm. Code, for authorized use of mail.

HSS 333.41 UNAUTHORIZED TRANSFER OF PROPERTY. (Class B)

A youth may not intentionally give, sell or lend property to another youth, receive, take, buy, or borrow property from another youth, or barter or exchange property with another youth, without authorization.

NOTE: This section covers only transfer between youth. The section is designed to help prevent a variety of offenses and undesirable activities such as theft, including forced "borrowing" and unfair "sales", gambling, the selling of favors by youth with access to supplies, equipment, and information, and the selling of sexual favors.

Most property items of significant value are easily recognizable (for instance, youth are not allowed to keep money in their possession), so if an item belonging to one youth is found in the possession of another, a violation of this section is easy to prove even though it may be impossible to prove that theft, gambling or some other offense took place.

Some would argue that since at least one of the two parties to an exchange of property would be guilty of an offense in each of the above examples, this additional section is not needed. However, the experience in Wisconsin has been that this section is necessary to prevent abuses of the types mentioned. It does not prohibit harmless or beneficial sharing, trading, or gift-giving if there is authorization.

This section also makes it easier for staff to help youth keep their own personal property safely in their possession. By allowing punishment for any impermissible transfer of property, it emphasizes that youth must have respect for the property of others. It is also intended to discourage such behavior as exchanging or giving away food at meals. Youth should be encouraged to eat the balanced meals which are served, and older and stronger youth must not be allowed to coerce smaller ones into giving up desserts or other desirable foods.

Conduct or incident reports should not be written for petty and harmless violations, such as exchanging single cigarettes, although a specific institution policy may prohibit this under s. HSS 333.38, when there is no evidence that the exchange is related to any abuse such as those mentioned earlier.

Movement offenses

HSS 333.42 RUNNING AWAY. (Class A)

(1) A youth may not do any of the following, without permission and with intent to be absent from custody without permission:

(a) Leave the confines of the institution proper;

(b) Leave the custody of a staff member while outside of the institution;

(c) Leave the authorized area to which he or she is assigned and not return promptly; or

(d) Fail to return to the institution from furlough, off-grounds, or trial visit at the time designated.

(2) A youth may not make or possess any materials with the intent to use them to run away.

NOTE: Running away is an extremely serious offense. This section describes the types of behavior which may constitute this offense. In the past, any deviation from an assigned route was sufficient to support a charge of running away. But if a youth is off grounds, on furlough, or on a trial visit, a mere physical deviation from his or her assigned location is not enough to prove running away. Intent to be absent from the institution without permission must also be proved. This recognizes that unexpected situations may arise when a youth is off grounds and unsupervised, and a certain amount of leeway must be available to them to deal with such situations. Of course, a youth who deviated from a prescribed route or left an area would probably be guilty of violating s. HSS 333.18 or 333.44. If no unexpected situation arose, however, then deviation from the schedule would create a strong inference of intent to commit the running away offense. Running away should not be charged unless it is clear that the intent to leave and not return was present.

HSS 333.43 UNAUTHORIZED GROUP AND INDIVIDUAL MOVEMENT. (Class B)

(1) Each institution shall make and post specific policies and procedures regulating the movement of youth.

(2) A youth may not violate any posted specific policy or procedure.

NOTE: This section and the other sections concerning movement offenses have common purposes. These are to help ensure order within the institution and to help staff account for the whereabouts of all youth at all times and thereby prevent unauthorized absences.

HSS 333.44 LEAVING ASSIGNED AREA. (Class C)

A youth may not intentionally leave a room or area where he or she is attending any scheduled activity such as a class, meal, religious service, group meeting, or other event, and may not leave the immediate area of work or school assignment, unless:

- (1) The youth gets permission to leave from a staff member supervising the activity; or
- (2) The youth has a valid pass to go somewhere else at that time.

HSS 333.45 LOITERING. (Class C)

Youth shall move without delay when going to and from all events, classes, meetings, meals, appointments, and their quarters.

NOTE: This section aids in the orderly running of the institution by requiring that youth move promptly from place to place in accordance with posted procedures. It also encourages punctuality and decreases opportunities for theft or other undesirable behavior.

HSS 333.46 ENTRY OF ANOTHER YOUTH'S ROOM. (Class C)

- (1) A youth may not enter the room of any other youth or permit another to enter his or her quarters unless such entry is:

- (a) Part of a work assignment under the supervision of a staff member;
- or

(b) Authorized by appropriate staff.

- (2) Reaching, leaning, or putting any object or part of the body into another youth's room shall be considered "entering."

NOTE: This section is intended to help prevent theft, assaults, and other offenses. It is also designed to teach youth to respect each others' privacy and property. It does not attempt to limit staff authorization for entry where both youth agree and it is otherwise appropriate.

HSS 333.47 VIOLATION OF CONDITIONS ON FURLOUGH, OFFGROUNDS OR TRIAL VISIT.

(Class B)

- (1) Each institution shall post written specific policies and procedures regarding the conditions imposed on furlough, offgrounds, and trial visit.
- (2) A youth may not violate the posted specific policies and procedures or the individual conditions of his or her furlough, offgrounds, or trial visit.
- (3) The institution is encouraged to solicit the views of appropriate community representatives prior to adoption of the specific policies and procedures under sub. (1).

Offenses against sanitation, safety, and health

HSS 333.48 ROOM DISORDER. (Class C)

Each institution or residence area shall adopt and post specific policies and procedures regulating the organization, neatness, and cleanliness of youths' quarters. A youth shall comply with the posted policies.

NOTE: In the close living conditions of an institution, a messy or dirty room may become a breeding ground for bacteria or a haven for pests such as insects or mice, and thus threatens the health and safety of everyone. When two or more youth share quarters, differences in habits of neatness can lead to arguments or to an unpleasant environment for one person. Finally, youth should be encouraged to develop the habit of neatness as part of their treatment.

The program organization of living quarters is also important so that staff can observe youths when necessary and so that fire hazards can be prevented.

HSS 333.49 POOR SELF-MAINTENANCE. (Class C)

- (1) A youth may not so neglect personal cleanliness or grooming that it becomes a hazard to the health of the youth or to the health of others, when the youth knows of the condition and has an opportunity to correct it but fails to do so.
- (2) A youth may not knowingly fail without permission to shower at least once a week or more frequently if required by the institution.
- (3) Youth performing work assignments which may reasonably be considered hazardous may be required to maintain suitably cut hair or to wear protective head gear or nets. A youth shall maintain suitably cut hair or wear the required protective gear.

NOTE: The purpose of this section is to protect the health and safety of all youth and staff. Cleanliness can help prevent pests or infections which can easily spread from person to person. This section does not, however, impose standards of taste upon youth. For example, any hair style is acceptable as long as the hair is washed and combed often enough to prevent diseases or pests, and as long as on-the-job policies concerning hair are followed.

This section conforms to standard 9351 of the ACA Juvenile Standards, which states: "There are no restrictions on the right of juveniles to determine the length and style of their hair, except in individual cases where such restrictions are necessary for reasons of health and safety." The discussion accompanying this standard lists as reasonable restrictions the wearing of caps when working around machinery and the removal of hair when ordered by medical authorities if other treatments for hair infections or lice prove ineffective.

HSS 333.50 MISUSE OF PRESCRIPTION MEDICATION. (Class A)

A youth may not knowingly do any of the following:

- (1) Take more of a prescription medication than was prescribed;
- (2) Take a prescription medication more often than was prescribed;
- (3) Take a prescription medication which was not prescribed for him or her;
- (4) Possess or take any prescription medication except at the time and place he or she is supposed to take it, or in other than the prescribed way;
- (5) Give his or her own prescribed medication to another; or
- (6) Fail to take prescribed medication.

NOTE: The use of prescription medications must be carefully monitored because many of the medications have mind-altering qualities and can be abused just as much as alcohol or such controlled substances as heroin, cocaine or

marijuana. Youth should not be found guilty of violating both this section and s. HSS 333.35 on a single occasion unless more than one type of drug was involved. The staff member who reports the incident or the hearing officer should decide which of the sections is more appropriate.

HSS 333.51 DISFIGUREMENT. (Class B)

A youth may not intentionally cut, pierce, remove, mutilate, discolor, or tattoo any part of his or body or the body of another.

NOTE: The purpose of this section is to protect the safety and health of youth. Tattooing, ear piercing, and other forms of self-mutilation can lead to serious infections. In addition, some forms of disfigurement could lead to identification problems.

The wearing of pierced earrings is allowed. Youth may get their ears pierced but only by medical staff and only if prior parental approval is obtained.

This section is intended to cover only injury to oneself or to another person with that person's consent. Injury to another person without his or her consent is covered by s. HSS 333.11.

Program Offense

HSS 333.52 TARDINESS AND ABSENCE. (Class B)

Youth shall attend and be on time for all work assignments, classes, meetings, meals, appointments and other events for which they are scheduled.

A youth may not intentionally violate this section, unless he or she has specific permission to be absent from or late for the event.

NOTE: The purpose of this section is to promote the smooth operation of all programs of work, study, and recreation. More importantly, it should be used to encourage youth to develop the desirable habits of arriving on time for and regularly attending required activities.

Attendance at religious services is not mandated by this section. See Institute of Judicial Administration of the American Bar Association, Standards Relating to Corrections Administration, standard 8.6.

HSS 333.53 REFUSAL TO PERFORM WORK OR STUDY ASSIGNMENTS. (Class B)

A youth may not intentionally refuse to attend work or school or to perform his or her work or school assignment.

NOTE: Regular attendance at classes and performance of assignments are essential for developing good study habits which youth will need upon release and return to their community schools. Although positive incentives are used by the staff to develop these habits, it may sometimes be necessary to use the disciplinary system to ensure compliance.

This section also requires youth to perform their work assignments. Even when a youth is assigned to work which is not vital to the institution's operation, it is important that he or she perform the assignment. ACA Juvenile Standards, standard 9429, notes that juveniles benefit from work which is vocational in nature by learning not only job-related skills but also the more general skills of working with others and following instructions.

This section is designed to instill the habits of dependability and responsibility which are important in getting and keeping jobs outside of the institution.

The section is not intended to require that youth work on Sunday, unless the work is essential, such as in food service.

HSS 333.54 TREATMENT VIOLATIONS. (Class B)

A youth may not intentionally do either of the following:

- (1) Fail to abide by the terms of his or ^{her} specific treatment program, after attempts at counseling, or fail to cooperate with staff members responsible for his or her supervision; or
- (2) Interfere with the treatment of another youth by giving advice contrary to the stated goals of the youth's treatment program or coerce, intimidate, or harass or encourage another youth to act contrary to his or her best interests as determined by his or her treatment program.

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NOTE: Treatment expectations for youth should be reasonable, and positive methods to motivate youth are preferable. However, there are times when discipline is necessary for a youth who fails to cooperate.

Subsection (2) prohibits a youth from interfering with the treatment program of another youth by behavior which exerts a negative influence over the other youth. Telling or advising another youth not to cooperate with staff, making fun of someone for doing well in school or a work assignment, causing another youth to be afraid of retaliation if he or she cooperates with staff, and continuous "picking on" or "setting up" certain youth are all ways in which this kind of negative influence may be exerted. Counseling should, of course, be the first response of staff to such a situation. A youth should not be disciplined unless there is evidence that the youth's behavior is actually affecting someone else's treatment, and that there is no other way to deal with the negative behavior.

HSS 333.55 VIOLATIONS OF INSTITUTION POLICIES AND PROCEDURES.

(1) Each institution may make specific policies and procedures consistent with the legislative purposes of ch. 48, Stats., and the objectives of youth corrections under s. HSS 333.01 relating to:

(a) Talking (s.HSS 333.23);

(b) Clothing (s.HSS 333.26);

(c) Smoking (s.HSS 333.38);

(d) Movement within the institution (s.HSS 333.43); and

(e) Conditions on leave (s.HSS 333.47).

(2) The institution shall solicit the views of youth prior to the adoption of a specific policy or procedure. If circumstances require immediate enactment of a policy or procedure, an interim policy or procedure may be adopted until youth input can be solicited and considered.

(3) Discipline may be imposed for violation of an institution policy or procedure only if the policy or procedure was in fact posted on an official bulletin board at the time of the violation, or if the youth had actual knowledge of the contents of the bulletin and that it was still in force, or if the youth had received a copy of the bulletin.

(a) Each institution shall maintain at least one bulletin board for bulletins of general applicability. Bulletin boards shall be located so that every youth has an opportunity to read all bulletins which apply to him or her.

(b) Bulletins which are no longer in force shall be removed from the bulletin board.

(c) A notebook of all current bulletins shall be maintained and be available for youth in areas to which they have regular access.

NOTE: On certain subjects institutions are authorized to have institution-specific policies and procedures because conditions vary from institution to institution and from place to place within institutions. Youth are subject to institution-specific policies and procedures just as they are subject to this chapter, and may be admonished or disciplined for violating these policies and procedures. Of course a youth is not really culpable unless he or she is aware of the order or should have been aware of it because it was posted at the time of the offense and he or she had had an opportunity to read it. Staff should attempt to identify youth who are unable to read, and orally communicate institution policies and procedures to them.

SUBCHAPTER IV - SPECIAL CONDITIONS

Introductory Note

Special conditions related to the youth's culpability may apply when decisions are made by staff to charge a youth with violation of a rule or to impose a punishment for rules violation, or when a hearing examiner passes judgement on the youth's defense to an accusation made against him or her. These conditions are set out in this subchapter.

HSS 333.56 STATE OF MIND AND MENTAL CAPACITY.

- (1) As used in this chapter, the state of mind of the youth, such as "intentionally," "knowingly," "recklessly," "negligently," or "with intent to," shall be an element of each offense.
- (2) In implementing this chapter, staff shall take into account any chronic disability including, but not limited to, mental retardation, which significantly limits the capacity of the youth involved to fully gauge the seriousness of his or her offense, and shall select a remedial or corrective course of action which will be most meaningfully effective with the youth given his or her condition.

NOTE: It is basic in criminal law that all serious crimes require proof of a culpable state of mind. Morisette v. U.S., 342 U.S. 246(1952). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil ..." Morisette at 251. It is important to carry over this basic concept from the criminal law into the disciplinary rules used in institutions.

Strict liability rules are often perceived as being unfair, for the very reasons discussed in Morisette, above: the concepts of free will and of culpability are deeply ingrained in our culture. Any child who pleads, "But I didn't do it on purpose!" has already learned this lesson. Youth will lack respect for the disciplinary system if they see it a unfair, and this lack of respect will slow down their adjustment and treatment.

Many disciplinary offenses are also crimes, yet the decision in nearly all cases is to handle the situation internally rather than turning a youth over to the local juvenile authorities. But a finding of guilt through the disciplinary process may still result in a serious punishment. Therefore, it seems only fair to supply as many as possible of the safeguards available in a criminal prosecution in these cases. Chapter HSS 333 provides procedural safeguards and requires the substantive safeguard of proof of culpability.

"Culpability" here means one of four things: that a person did an act intentionally; that a person failed to act despite knowledge of a situation and the opportunity to act; that a person acted with great carelessness; or that the person acted without appropriate care.

These four concepts are represented in (1) by the words "intentionally," "knowingly," "recklessly" and "negligently." Every section from s. HSS 333.07 to s. HSS 333.55 contains one of these four words, or the phrase "with intent to," which describes the same culpability as "intentionally."

Under the division's old policies and procedures, there was no explicit state of mind requirement. Nevertheless, both youth and staff assumed that a youth who did something accidentally was not guilty. This unstated policy has now been made explicit, by including one of the words from this section in every section listing an offense.

A case can be made for not expressly including the state of mind requirement in the rules. State of mind is difficult to prove and accused youth will frequently claim that their actions were accidental or should be excused for another reason. But where the hearing officer feels that the accused youth was not culpable, he or she should dismiss the charge. In the majority of cases the need to prove the youth's state of mind is satisfied because the hearing officer can infer it from the act and the surrounding circumstances. For example, if two youths have a heated argument and one of them takes a knife and stabs the other, a permissible inference is that the first youth intended to cause bodily injury to the second. In such a situation, there is little doubt that a finding of guilt on a charge of battery is proper.

HSS 333.57 ATTEMPTED OFFENSES.

(1) A youth is guilty of attempt to commit an offense under this chapter if the following are both true:

(a) The youth intended to do something which would have been an offense; and

- (b) The youth did any act which showed that he or she intended to commit an offense at that time.

- (2) The records shall clearly differentiate between attempts and completed offenses.

- (3) The penalty for an attempt shall normally be less than the penalty for the completed offense.

- (4) A youth may be charged with both a substantive offense and with attempt to commit that offense, based on the same incident, but may be found guilty of only one.

HSS 333.58 AIDING AND ABETTING OR KNOWING OF OFFENSES.

- (1) If a youth intentionally does any of the following things, he or she is guilty of aiding and abetting the commission of an offense:
 - (a) Tells, encourages, hires or coerces another youth to commit a rule violation;

 - (b) Assists another youth, prior to a rule violation, in planning or preparing for it, with intent that the offense be committed;

 - (c) Assists another youth during commission of an offense, whether or not this was planned in advance; or

- (d) Destroys evidence of an offense committed by another person or otherwise helps to prevent discovery of a violation or of who committed it.
- (2) The records shall clearly differentiate between aiding and abetting and the completed offense.
- (3) A youth may be charged with both a substantive offense and aiding and abetting that offense, based on the same incident, but he or she may be found guilty of only one.
- (4) A youth may be charged and found guilty of aiding and abetting even if no one is charged or found guilty of committing the offense. The person who committed the offense may be identified when the youth is charged.
- (5) The penalty for aiding and abetting shall normally be the same as for the substantive offense.
- (6) The penalty given to a youth who aids and abets need not be based in any way on the penalty, if any, given to the youth who actually committed the offense.
- (7) If a youth knows of a plan to commit a Class A or Class B offense or of the commission of a Class A or Class B offense, failure to report the plan or commission is an offense.

NOTE: The definition of aiding and abetting used in this section is a combination of the crime of solicitation (sub. (1)(a)--compare s. 939.30, Stats.) and aiding and abetting (sub. (1)(b)-(d)--compare s. 939.05(2)(b), Stats.). No co-conspirator liability has been included in this section because in those few cases where a co-conspirator is liable as such but not aiding and abetting, his or her relationship to the offense committed is such that the conspiracy section of these rules should be relied on.

Separating conspiracy and aiding and abetting is also designed to avoid unnecessary confusion. See s. HSS 333.15.

Subsections (4) and (6) are necessary because of the history of aiding and abetting. Traditionally, a person could not be tried as an accessory unless the principal had already been found guilty, and the accessory's sentence could not exceed the sentence of the principal. Neither of these is true under modern criminal law, and neither of these is true under the disciplinary rules. This is so because it is in the nature of some offenses that it is possible to identify two or more people as accessories, though it is impossible to know who did the completed act. Subsection (4) points out that, when possible, the principal should be identified. This gives the accused accessory a fair opportunity to defend himself or herself.

Subsection (5) provides that the maximum sentence for aiding and abetting can be but will not normally be the same as that provided for the offense itself. Obviously, however, in many cases the aider or abettor will not be as culpable as the actual perpetrator of the offense. In such cases, the hearing officer should use his or her discretion to select an appropriate lower sentence.

HSS 333.59 DEFENSES.

The following, if established by clear and convincing evidence to the satisfaction of the hearing examiner, are complete defenses to alleged violations under ss. HSS 333.07 to 333.55.

- (1) MENTAL INCAPACITY. At the time of the conduct, the youth, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his or her conduct to the rules.

- (2) INVOLUNTARY INTOXICATION. At the time of the conduct, the youth, as a result of involuntary intoxication, lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his or her conduct to the rules. This section does not afford a defense if the intoxicant was taken voluntarily, unless the intoxicant is prescription medication taken in accordance with the prescribing physician's instructions.
- (3) MISTAKE. The youth honestly erred, and such error negates the existence of a state of mind essential to the offense.
- (4) SELF-DEFENSE. A youth may use the minimum amount of force necessary to prevent death or bodily injury to himself or herself or in defending a third person. A youth may not continue to exercise the right of self-defense after an order to stop. In determining whether the minimum force was used in exercising the right of self-defense, staff should consider:
- (a) Whether a weapon was used by the aggressor;
 - (b) The size of the youth in relation to the size of the other youth involved in the fight;
 - (c) The opportunity of the youth who claims self-defense to flee or to obtain assistance from a staff member; and
 - (d) Whether staff members were nearby.

- (5) ORDERS. A youth may disobey a conduct rule if he or she is expressly authorized to disobey it by a staff member. See s. HSS 333.18(2).

NOTE: Sections 939.42 to 939.49, Stats., list the "defenses" which may be used in a criminal case. In addition, s. 971.15, Stats., states the defense of mental disease or defect. These sections formed the basis for the defenses listed under s. HSS 333.59, but alteration was necessary to meet the special needs of the situation in juvenile institutions.

Section 939.42(2), Stats. provides that voluntary intoxication which "negates the existence of a state of mind essential to the crime" prevents a person from being convicted of the crime. No defense parallel to s. 939.42(2), Stats., for voluntary intoxication has been included in this section. The reason is that in the juvenile institutions, where all possession and use of intoxicants is forbidden, no defense based on voluntary intoxication is appropriate except in the case of prescription medication that is not abused. Voluntary intoxication is so serious an offense for youth that public policy requires that it not be used to excuse any other offense. If intoxication does in fact negate a state of mind, culpability sufficient for a finding of guilt lies in the fact of intoxication as a practical manner.

Drafting an appropriate self-defense subsection is difficult because of the importance of preventing fighting in institutions. Fights can lead to serious disruptions. But, on the other hand, it seems only fair to permit youth to prevent others from harming them. So, sub. (4) permits a youth to use minimum force in self-defense to prevent injury to himself or herself. Any privilege is lost if fighting continues after an order to stop. Finally, the definition provides guidance to staff in determining whether minimum force was used.

SUBCHAPTER V - DISPOSITION OF OFFENSES

Introductory Note

Just as there are categories of seriousness associated with different offenses, so there are a variety of rehabilitative, corrective and disciplinary responses (called "dispositions" in this section) which staff can draw on to deal with the misconduct of a youth.

This subchapter sets forth the range of dispositions which may or, in some cases, must be utilized. Staff should keep in mind the need to factor in applicable portions of the "special conditions" described in subch. IV.

State juvenile correctional institutions are called "schools" to indicate that youth in the correctional custody of the department warrant special rehabilitative effort; that such effort and any discipline attending it should be designed to remediate; and that staff working with youth are engaged in constructive teaching to be joined with discipline where essential.

The way staff dispose of an offense should stimulate the youth to devalue misconduct as a behavior choice in the future and to find constructive value in retention of privileges and in responsible conduct.

The dispositional options which follow range from remediation-oriented actions to more discipline-oriented actions. To be effective, they must be used creatively and tailored where possible to help youth see the wisdom of more positive and constructive behavior. Where punishment is imposed, it must be coupled with a remediation effort. The youth's degree of constructive commitment to and participation in the remedial effort should be seen as a reason to lessen the duration of any disciplinary period.

In broader society, misconduct or rule violation is judged and dealt with in a variety of ways ranging from warning and counseling to judicial proceedings leading to conviction. Within juvenile correctional institutions, the judgment and action can vest with a staff member alone or in consultation with his or her supervisor or, in more serious situations, with a formal hearing examiner or panel proceedings. There are important due process protections afforded the youth charged with more serious offenses. The rules which follow describe the range of dispositional alternatives.

HSS 333.60 STAFF ACTIONS IN RESPONSE TO OFFENSES.

The offenses described in ss. HSS 333.07 to 333.55 may be dealt with by staff in the following ways:

- (1) For least serious (Class C) offenses, no written report or recording of the incident is required. The youth involved may be simply counselled and warned against repetition. If other Class C offenses are committed by the same youth within a relatively brief period, in spite of such counselling and warning, they may be collectively considered a Class B offense and handled as described in (2).
- (2) For moderately serious (Class B) offenses, the staff member shall record the incident and determine the summary or other disciplinary disposition, except as otherwise permitted under s. HSS 333.61(1). Summary or other disciplinary dispositions, including remedial dispositions, are described in ss. HSS 333.63 to 333.64. Certain disciplinary dispositions for Class B offenses are subject to supervisory review and approval under s. HSS 333.64.
- (3) For the most serious (Class A) offenses, the staff member shall prepare a conduct report and may immediately confine the youth for all or part of a specified period pending a formal due process or other hearing as described in ss. HSS 333.67 to 333.74.
- (4) Staff shall consider any special conditions under subch. IV which may apply, along with the age, maturity and past conduct record of a youth

in determining the type of remedial and disciplinary action best suited to the particular offense.

HSS 333.61 CONDITIONS UNDER WHICH YOUTH WHO VIOLATE RULES ARE NOT DISCIPLINED.

(1) Staff members are not required to charge a youth for all observed Class B violations of these rules. Under any of the following conditions, the staff member may merely inform the youth that his or her behavior is against the rules and discuss remedial behavior and give a warning:

- (a) The youth is unfamiliar with the rule;
- (b) The youth has not violated the same or a closely related rule recently, whether or not a conduct report was made;
- (c) The youth is unlikely to repeat the offense if warned and counseled;
- (d) Although the youth technically violated a rule, the purpose of this chapter would not be served by disciplining a youth in the particular situation;
- (e) The youth is emotionally disturbed and the youth's ability to function is impaired; or

(2) No record of dispositions in accordance with sub. (1) is required.

NOTE: This section recognizes that it is not desirable or necessary to handle all observed Class B rule violations through the disciplinary process, and it provides guidelines for the exercise of discretion by correctional staff. This helps to promote fairness, uniformity, and increases understanding of the disciplinary rules and the enforcement policy among both youth and staff. HSS 333.61 is especially important in youth corrections. This is so because counseling and talking about problems may be the most effective way to motivate a youth towards positive behavior in many cases.

Although this rule limits the staff member's discretion (for example, a staff member may not informally handle a most serious offense such as sexual assault) there is still considerable scope for the staff member's judgment, for example, in deciding whether a youth is likely to commit the offense again. Staff experience can provide guidance in making this judgment better than a detailed rule could. Also, even if the staff member may handle a rule violation informally, this rule does not require the staff member to do so when in his or her judgment discipline is needed.

HSS 333.62 INCIDENT RECORDING AND CONDUCT REPORTS.

- (1) Except for conditions under ss. HSS 333.60(1) and 333.61, any staff member or other authorized person who observes or discovers an offense shall make any investigation necessary to assure himself or herself that an offense occurred, and if he or she believes a Class A offense has occurred, shall write a conduct report, or if it is a Class B offense, shall record it in the designated manner. If more than one staff member knows of the same violation, only one of them should write a conduct report or record the incident.
- (2) In a conduct report, the staff member shall describe the facts in detail and what other staff members told him or her, and list all sections which were allegedly violated, even if they overlap. Any physical evidence shall be mentioned in the report.

- (3) There should be only one report or record for each act or transaction that is alleged to be an offense under this chapter. If one act or transaction is more than one offense, only one report or record is necessary.

NOTE: If a staff member has decided, using the guidelines under s. HSS 333.60(1) and 333.61, that counseling or warning a youth is not the best response to a particular infraction, the next step is to record the incident or write a conduct report. A conduct report is the first step for a Class A offense hearing. Recording the incident means that summary disposition under s. HSS 333.63 or disposition requiring supervisor review and decision under s. HSS 333.64 will be used. A conduct report means a major offense hearing must be held unless waived by the youth or unless the charge is modified by the superintendent under s. HSS 333.65.

If the staff member did not personally observe the infraction, sub. (1) requires that he or she investigate any allegation to be sure it is believable before recording the incident or writing a conduct report. An informal investigation by the reporting staff member can save time by weeding out unsupported complaints, and can also provide additional evidence, if any is found. Also, it is fairer to the youth to spare him or her from discipline when the staff member cannot uncover sufficient evidence.

There is no "statute of limitations" for recording the incident or writing a report. Rather, the guiding factor, when there is time between the alleged offense and the record or report, should be whether the youth can defend himself or herself and not be unfairly precluded from doing so due to the passage of time.

HSS 333.63 SUMMARY DISCIPLINARY DISPOSITIONS.

- (1) Youth may be disciplined summarily for Class C or Class B offenses in accordance with this section. When a youth is disciplined under this section, an appropriate record shall be made. The staff member:
 - (a) Shall inform the youth of the nature of the alleged Class B infraction and the contemplated disposition;

- (b) Shall ask the youth to express his or her version of the underlying facts and opinion of the contemplated disposition; and
 - (c) Shall make a finding that the youth violated a rule and shall communicate this to the youth.
- (2) (a) If the staff member imposing discipline is a member of the cottage staff, any punishment under sub. (3) may be immediately imposed.
- (b) If the staff member is not a member of the cottage staff, only room confinement or a reprimand may be immediately imposed. Any disposition which interferes with the cottage program requires approval of cottage staff. If cottage staff agree, the punishment may be immediately imposed. If the cottage staff does not agree, the involved staff members shall negotiate an appropriate punishment.
- (3) Punishments imposed under this section shall be limited to one or more of the following:
- (a) Oral or written reprimand;
 - (b) Room confinement for no longer than five hours. Room confinement may not be served during mandatory program periods;
 - (c) Loss of a specific privilege for no longer than one week or for one occurrence of a special event;

- (d) Remedial disposition, to include but not limited to:
 - 1. Extra duty related to the misconduct;
 - 2. Apology for the misconduct;
 - 3. Monetary restitution; or
 - 4. Offsetting positive behavior; and
 - (e) Being out of room for no longer than five hours.
- (4) (a) The staff member's supervisor shall review the finding and punishment imposed. The supervisor shall review the appropriate record and may affirm or reverse the ruling of the line staff, may increase the penalty in accordance with s. HSS 333.64, or may write a conduct report. The supervisor may make any adjustments in the punishment imposed or in the imposition of future punishments to reflect the reversal of a staff decision.
- (b) The youth has no right to be present at the supervisor's review.
 - (c) Imposition of a penalty is not suspended while the matter is under review.
 - (d) A youth may appeal a decision by the supervisor to the superintendent or designee.

(5) The record of an offense dealt with by summary disposition shall be approved by the superintendent before being entered in any of the youth's offender-based records.

(6) Within a reasonable time following disposition, a staff member shall talk to the youth and counsel the youth about the incident that triggered the punishment.

NOTE: Summary disposition is allowed only where the punishment is one of those listed under sub. (3). The punishments allowed are relatively minor and more severe punishments would require supervisor review and decision under s. HSS 333.64 or a due process hearing under s. HSS 333.69. The basic elements of due process--notice, opportunity to be heard, and reasons for the decision--are preserved under sub. (1). This is desirable as a means of insuring that a youth has the right to express himself or herself and, more importantly, so the youth knows why the action was taken.

Summary punishment has the benefit of having the punishment follow the violation in a relatively short period of time. Experience in youth corrections has proven that this is very important if the disciplinary action is to have relevance to the youngster. A youth experiences the discomfort of punishment at a time when the violation is clear in his or her memory.

To limit the possibility of abuse by a staff member or an error in judgement as to the appropriate action, the decision is reviewed by the staff member's supervisor under sub. (4). The supervisor may adjust the punishment imposed or adjust future punishments if the review is after the fact. This supervisor review is designed to promote fairness for the youth as well as serving as a supervisory tool to insure that inexperienced staff have their decisions reviewed.

Subsection (2)(a) states that any member of the cottage staff may impose any of the punishments under sub. (3). However, staff who are not cottage-based may only impose room confinement without approval by cottage staff. Any other punishment under sub. (3) may only be recommended to the cottage staff as provided by sub. (2)(b). The primary reason for this limitation on non-cottage based staff is that the cottage staff must be concerned with the overall progress of the youth and must live with the consequences of a disciplinary decision. Cottage staff are, therefore, in a better position to know what would be an appropriate punishment in areas other than room confinement.

A punishment other than room confinement may interfere with other activities the cottage staff feels are necessary for the youth's progress. While room confinement can be scheduled so as not to interfere with other activities, the other punishments may not have that flexibility. For example, if a teacher wants to keep a youth after school, it may interfere with another activity scheduled by

the cottage staff. In such a case, the teacher would not be aware of the problem. The cottage staff and non-cottage staff should, however, negotiate a punishment that serves all the objectives of that youth's program. The most desirable solution to a disciplinary violation is to individualize the punishment for the particular youth considering all the circumstances.

Limiting all discipline to only cottage staff could have the negative effect of having youth view cottage staff only as disciplinarians. Such a view would inhibit cottage staff's ability to function in counselor, friend and teacher roles.

Examples of conduct for which summary punishment may be imposed and various types of sanctions may be applied follow:

A youth playing pool in the cottage recreation room may become disruptive by throwing pool balls or attempting to break a pool cue. The conduct may not be directed at another individual, but directed at objects out of frustration with the game. Accordingly, the conduct would not be assault or battery and, if nothing were broken, it would not be destruction of property. Summary punishment may be appropriate for this kind of conduct. A cottage staff member may take the youth's pool playing privilege away for a period of time. The staff member may consider only reprimanding the youth and directing him or her to pick up the pool balls. The severity of the summary punishment will depend upon the staff member's knowledge of the youth and perception as to the best way to prevent this kind of conduct from occurring again. Summary punishment provides the flexibility necessary for staff to individualize the punishment, relate it to the conduct and impose it quickly.

An example of an appropriate recommendation of summary punishment by other than cottage staff might be if a youth's school teacher finds that the youth is habitually not finishing his or her schoolwork. Under subs. (2)(b) and (3) the teacher may impose room confinement with the expectation that the youth spend this time doing schoolwork. If the teacher finds that part of the reason the youth was not finishing schoolwork is because the youth was spending too much time watching television, the teacher may also ask the cottage staff to withdraw television privileges in whole or in part. If the cottage staff agrees, this punishment could be immediately imposed.

If a youth was not habitually behind in his or her work, but had one particular project that was not finished, for example, a book report, the teacher could ask the cottage staff to withdraw television privileges until the youth finished the report. Another alternative might be that the teacher would recommend to the cottage staff that the youth be required to stay after school to work on the book report with the teacher. Again, the punishment imposed would depend upon the individual needs of the youth.

Summary punishment may also be used to require that the youth stay in his or her room, subject to the limitations of sub. (3). For example, each youth in a cottage may have an assigned task, such as participating in cleaning the cottage. A youth who refuses to perform his or her share of cottage work may be given room confinement up to 5 hours until the youth voluntarily agrees to perform the assigned task. Another example where this might be applicable is where two youth are habitually arguing and both are confined to their rooms for a maximum of 5 hours to decide if they are ready to stop arguing.

Work may not be imposed as a punishment, but remedial duty related to misconduct may be imposed under sub. (3)(d). An example of the appropriate use of this kind of punishment is where a youth breaks an ink bottle and a staff member directs the youth to clean it up.

Time out of the room may be imposed under sub. (3)(e). Staff may consider this an appropriate punishment where a youth is withdrawing into his or her room for extended periods.

As the above examples demonstrate, summary punishment can be an effective way of motivating a youth by swiftly applying appropriate measures to deal with undesirable conduct. The infringements on a youth's liberty allowed by this section are relatively minor and, hence, do not require a formal due process procedure. A highly formal procedure would mitigate the desirable effects of relating the punishment to the misconduct as swiftly as possible. These punishments are similar to those a parent might impose for misconduct.

Subsection (5) requires staff to counsel youth who have been disciplined under this section. In many cases the counseling is more important than the discipline itself. This section requires that counseling be done within a reasonable time so that it has relevance to the youth. An appropriate use of the counselor role might be to tell a youth to go to his or her room for up to 5 hours as corrective action for excessive and habitual attention-getting horseplay or to get the youth willing to talk about why he or she feels this need and what might be more socially acceptable alternatives.

This section is in substantial accord with ACA Juvenile Standards, standard 9361.

HSS 333.64 DISCIPLINARY DISPOSITIONS REQUIRING SUPERVISOR REVIEW AND DECISION.

More restrictive forms of discipline for Class B offenses than those authorized in s. HSS 333.63 require additional review as follows:

- (1) A recommendation for disposition by a staff member imposing discipline under this section shall be reviewed by the staff member's supervisor who shall approve or disapprove the decision prior to imposition of the penalty. Pending a supervisor's decision under this section, a staff member may impose a summary disciplinary disposition under s. HSS 333.63 and the youth shall receive credit subsequently for any room confinement or loss of privilege imposed under that section.

(2) Punishments imposed under this section shall be limited to one or more of the following:

(a) Room confinement for more than 5 but less than 10 hours;

(b) Loss of a specific privilege for more than one week but less than 2 weeks or the loss of 2 occurrences of a special event; and

(c) Loss of the privilege of an offgrounds activity for not longer than 30 days.

(3) When a youth is disciplined under this section, an appropriate record shall be made and the staff member shall:

(a) Inform the youth of the nature of the alleged infraction and the contemplated disposition;

(b) Ask the youth to express his or her version of the underlying facts and opinion of the contemplated disposition; and

(c) Inform the youth that the staff member's supervisor will discuss the matter with the youth within a reasonable time at the youth's request and will make a final decision as to whether a rule was violated and the appropriate disposition.

(4) (a) Upon receiving notice from a staff member that a recommendation has been made under sub. (4), the supervisor shall review the

recommendation and shall contact the youth to discuss the incident if the youth requests the meeting. The supervisor may follow the procedure of sub. (3)(a) and (b).

(b) The supervisor may take action he or she considers appropriate under sub. (2) or s. HSS 333.63(3), may dismiss the charge, or may write a conduct report.

(c) Appeals under this section may be made to the superintendent or designee.

(5) (a) Section s. HSS 333.63(2) applies for the powers of various staff members under this section.

(b) If the staff member making a recommendation under this section is not a member of the youth's cottage staff, the staff member's immediate supervisor and the youth's cottage staff supervisor shall perform the duties under sub. (4). If they cannot agree on an appropriate disposition, the superintendent shall make a final decision following discussion with the supervisors.

(6) Within a reasonable time following disposition, a staff member shall talk to the youth and counsel him or her about the incident that triggered the disposition.

NOTE: Supervisor review and decision as to an appropriate disposition is required whenever a staff member recommends a punishment under sub. (2). Dispositions allowed under this section require a supervisor's decision because they are a more severe restriction on a youth's liberty than those under s. HSS 333.63 and necessitate a higher degree of scrutiny for overall impact upon the youth. Since room confinement and privilege loss may be for longer periods, there are program implications that may need to be considered. Although the dispositions under this section are not severe enough to warrant a major review of the youth's institution program, nonetheless they should not be ignored. Where a supervisor does see a problem, he or she may modify the disposition originally recommended. Discipline under this section, although it requires supervisor review and decision, is still a type of summary disposition with the accompanying benefits of such a disposition.

HSS 333.65 REVIEW OF CONDUCT REPORTS BY THE SUPERINTENDENT.

- (1) Each working day, the superintendent or designee shall review all conduct reports written since the previous working day.
- (2) Conduct reports shall be reviewed for technical adequacy and appropriateness of the charges.
 - (a) The superintendent may dismiss a conduct report if he or she believes that it should not have been written.
 - (b) The superintendent shall eliminate any section number if the statement of facts cannot support a finding of guilty of violating that section.
 - (c) The superintendent may add any section number if the statement of facts can support a finding of guilty of violating that section and the addition is appropriate.

- (d) If no section numbers remain, a conduct report shall be destroyed.
 - (e) The superintendent may refer a conduct report for further investigation.
- (3) The superintendent shall divide all remaining conduct reports into Class A and Class B offenses.
- (a) Class B offenses shall be disposed of in accordance with s. HSS 333.63 or 333.64.
 - (b) Class A offenses and conduct reports charging both most serious and moderately serious offenses shall be disposed of in accordance with ss. HSS 333.67 to 333.74.
- (4) Following the review described in this section, the superintendent shall sign all reports he or she has approved. A record of the violation may be included in the youth's files only if the superintendent or designee has approved the current report and the punishment.

NOTE: A conduct report is the initial step in the formal disciplinary process under ss. HSS 333.67 through 333.74. Other reports do not require such a review. A conduct report can be written by any correctional staff member or other authorized person. The next step is review by the superintendent. The superintendent usually designates the residential care director to conduct the review. The purpose of the review is to improve the consistency of the reports so that the rules are used in the same way in all reports, and to check the appropriateness of the charges in light of the narrative description section of each report. The review is not a substitute for continuing supervision and training of staff members to make sure they all use the same rules in the same

way; however, it can serve as a tool in the supervision of staff members while at the same time making sure that a youth is not forced to go through a hearing based on an inappropriate charge, or conversely is not let off because the violation charged was under the wrong section.

HSS 333.66 PREHEARING SECURITY.

- (1) A youth may be placed in prehearing security by a shift supervisor, an assistant superintendent or a superintendent only in any of the following circumstances:
 - (a) Following an alleged Class A offense and pending a disciplinary hearing;
 - (b) Prior to a review under ch. HSS 334, Wis. Adm. Code; or
 - (c) At the youth's request and if the superintendent agrees. A youth who voluntarily requests security under this section shall be placed in an appropriate program under ch. HSS 331, Wis. Adm. Code.

- (2) A youth may be placed in prehearing security and kept there only if the decisionmaker is satisfied that it is more likely than not that one or more of the following is true:
 - (a) If the youth remained in the general population, there would be a substantial physical or psychological danger to the youth or another;

- (b) If the youth remained in the general population, the youth would seek to intimidate a witness in a pending investigation or disciplinary action;
 - (c) If the youth remained in the general population, he or she would encourage other youth by example, expressly, or by the youth's presence, to defy staff authority and thereby erode staff's ability to control a particular situation;
 - (d) If the youth remained in the general population, he or she would create a substantial danger to property;
 - (e) If the youth remained in the general population, a substantial danger would be created that the youth would try to run away from the institution; or
 - (f) If the youth remained in the general population, a disciplinary investigation would thereby be inhibited.
- (3) When a youth is placed in prehearing security, the person who makes the placement shall state the reasons on the appropriate form and shall include the facts upon which the decision is based. The youth shall be given a copy of the form.
- (4) (a) Within 24 hours of the youth's placement in prehearing security, the superintendent or designee shall determine whether the youth still needs to be in security pending a hearing.

- (b) In reviewing the placement decision, the superintendent shall solicit and include consideration of the youth's response to the reasons given for the decision to place the youth in pre-hearing security.

- (c) If, upon review, it is determined that prehearing security is not appropriate, the youth shall be released immediately.

- (5) No youth may remain in prehearing security for longer than three working days unless the youth requests a delay in holding a disciplinary hearing under this chapter.

- (6) Conditions in prehearing security should, insofar as feasible, be no more restrictive than the possible disposition for the offense. A youth's own room may be used for prehearing security.

NOTE: The main purpose of authorizing prehearing security is to allow temporary detention of a youth until it is possible to complete an investigation, cool down a volatile situation, or hold a disciplinary hearing. The aim is to avoid punitive segregation without a prior hearing, while ensuring that a youth can be separated from the general population when there is good reason to do so. The policy is to keep a youth in prehearing security as long as necessary and then either release the youth or put the youth in a secure program based on a disciplinary hearing which conforms to the provisions of this chapter.

Subsection (2) identifies the situations in which prehearing security may be appropriate. It must be emphasized that there are dangers in correctional institutions that may not exist outside them. For example, a youth who encourages others to defy authority may create an immediate and real danger. If security cannot be relied on to isolate such an individual, it is likely that measures would have to be taken against the group, though the group is not culpable. Likewise, a youth who is intimidating a witness should be restricted, rather than the victim of the intimidation. During evening recreation, when staff are few, unless the authority exists to temporarily isolate a youth who is trying to create a disturbance, it will be necessary to cut short recreation for everyone to prevent trouble.

Some youth need to be temporarily isolated for their own protection. For example, a youth may be endangered by virtue of having cooperated in an investigation. The threat may be such that the only effective way to protect him or her is through security.

Finally, a youth's presence in the general population may greatly inhibit an investigation because the youth may destroy evidence not yet discovered by authorities. Temporary isolation until the evidence is found is required.

This section substantially complies with the review procedures in ACA Juvenile Standards, standard 9368.

HSS 333.67 NOTICE OF HEARING PROCEDURE FOR CLASS A OFFENSES.

When a youth is alleged to have committed a Class A offense and the superintendent has reviewed the conduct report pursuant to s. HSS 333.65, the following procedure shall be followed:

- (1) A copy of the approved conduct report shall be given to the youth within 24 hours of its approval;
- (2) The youth shall be informed orally and in writing of the rules which he or she is alleged to have violated;
- (3) The youth shall be informed orally and in writing of the potential penalties which may be imposed; and
- (4) The youth shall be informed orally and in writing that he or she has a right to due process hearing and that he or she may waive this right in writing. The youth shall be informed that if a due process hearing is chosen, the youth may present oral, written, documentary, and physical evidence, and evidence from voluntary eye witnesses in accordance with

this subchapter; that he or she has a right to the assistance of a staff advocate in accordance with this subchapter; that the hearing officer may permit direct questions or require the youth or his or her advocate to submit questions to the hearing officer to be asked of the witness; that repetitive, disrespectful, and irrelevant questions may be forbidden; and that the youth may appeal the finding and disposition of the hearing officer to the superintendent.

- (5) The youth shall be informed that he or she may waive the right to a due process hearing and the rights specified in sub. (4). The youth shall be informed that a waiver is not an admission of guilt and that if the right to a due process hearing is waived, the conduct report shall be disposed of as follows:

- (a) The youth shall appear before a hearing officer under s. HSS 333.73 not less than one day nor more than 10 working days from the date the approved conduct report is given to the youth;
- (b) The youth may present his or her version of the facts;
- (c) The staff member who made the conduct report need not be present;
- (d) The hearing officer may question the youth and otherwise investigate the case and shall decide the guilt or innocence of the youth and the punishment to be imposed; and

- (e) The youth may appeal the finding and punishment to the superintendent.
- (6) If the youth elects to waive the right to a due process hearing, he or she shall do so in writing. This statement shall be returned to the superintendent's office. A youth may waive the right to hearing at any time.
- (7) If a youth waives the right to a due process hearing, a disciplinary hearing shall be held in accordance with s. HSS 333.68.

NOTE: Sections HSS 333.67 and 333.69 to 333.74 prescribe a hearing procedure for Class A offenses which complies with the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974). With respect to notice, the subject of this section, the court said:

"We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee." Wolff at 564.

To ensure that any waiver is a knowing, intelligent one, the youth must be informed of his or her right to a due process hearing and what that entails.

HSS 333.68 HEARING PROCEDURE WHEN DUE PROCESS IS WAIVED.

- (1) When a youth is alleged to have committed a Class A offense and the superintendent or his or her designee has reviewed the conduct report under s. HSS 333.65, and the youth has waived the right to a full due process hearing under s. HSS 333.67(4), (5) and (6), the following procedure shall be followed:

- (a) A copy of the approved conduct report shall be given to the accused youth no later than 24 hours preceding the hearing date. The conduct report shall include the offense or offenses charged, the facts upon which the charges are based, the sources of information, the date of the hearing, and shall order the youth to appear at the hearing.
 - (b) The hearing shall be held not less than one day nor more than 10 working days from the date the approved conduct report is given to the youth.
 - (c) The youth can request more time for preparation or can waive any time limits. More time should be granted and the waiver normally accepted.
- (2) At the hearing, a hearing officer shall review the conduct report and discuss it with the youth. The youth shall be provided with an opportunity to respond to the report and make a statement about the alleged violation. The hearing officer may question the youth. The youth has no right to a staff advocate, to confront witnesses or to have witnesses testify on his or her behalf.
- (3) The hearing officer shall decide the guilt or innocence of the youth on each charge, decide the punishment, and announce these decisions to the youth. Penalties may be imposed under s. HSS 333.76.

- (4) A finding of guilt shall be based on the preponderance of the evidence, and the institution shall establish this.
- (5) The hearing officer shall write the findings for each charge and their reasons and the disposition and the reasons for it on the conduct report and return it to the residential care office.
- (6) A hearing officer with direct personal involvement in preparing the conduct report shall not hold a hearing on that conduct report.
- (7) A youth may appeal the disposition within 14 days to the superintendent under s. HSS 333.69(4) and it shall be decided within 3 working days of receipt of the appeal.

NOTE: The protections present in the waived hearing procedure are: notice of the charges, opportunity for the youth to explain or deny the charges, a decision based on the evidence and on a preponderance of the evidence, an impartial hearing officer, and no records kept if the youth is found not guilty. On the last point, see s. HSS 333.75.

HSS 333.69 PROCEDURE FOR DUE PROCESS HEARING.

- (1) The due process hearing shall be held in accordance with the notice required by s. HSS 333.67. At a due process hearing, the conduct report shall be read aloud and all witnesses for or against the accused, including the accused and the staff member or other authorized person who wrote the conduct report, shall have a chance to speak. The hearing officer may require physical evidence to be offered. The hearing officer may permit direct questions or require the youth or the

youth's advocate to submit questions to the hearing officer to be asked of a witness. The hearing officer may forbid repetitive, disrespectful or irrelevant questions.

- (2) After the hearing the hearing officer shall deliberate, considering only the evidence which was presented and the youth's record. The institution must establish guilt. The hearing officer may find the youth guilty or not guilty. The hearing officer must find a person guilty by a preponderance of the evidence. The hearing officer shall then recall the accused and his or her advocate, if any, and announce the decision. The accused and his or her advocate, if any, shall each receive a written copy of the decision, the finding on each charge, the reasons and the disposition.
- (3) The due process hearing shall be held not sooner than one day and not later than 10 working days after service of notice that the youth is charged with a violation. This period can be enlarged or diminished if the superintendent approves and the youth agrees.
- (4) Any time within 14 days after receipt of a decision, a youth who is found guilty may appeal the decision of guilt or the punishment to the superintendent.
- (5) The superintendent shall review all records and forms pertaining to the appeal within 3 working days following the request.

- (6) After review, the superintendent may:
- (a) Affirm the hearing officer's decision of guilt and the punishment;
 - (b) Affirm the hearing officer's decision but reduce the punishment;
or
 - (c) Reverse the hearing officer's decision. In this case, all records of the decision shall be removed from all files relating to the youth. Records may be kept for statistical purposes only. The identity of individual youth shall not be part of the record.
- (7) If the punishment is reduced or eliminated by appeal, the superintendent shall order the change immediately.
- (8) A youth may waive in writing the time limits set by this section.

NOTE: Sections HSS 333.67, 333.69 to 333.74 and 333.77 prescribe a hearing procedure for Class A offenses which complies with the requirements of Wolff v. McDonnell 418 U.S. 539 (1974). Those requirements are:

- (a) Advance written notice of charges must be given to the youth not less than 24 hours before the youth's appearance before the hearing officer.
- (b) There must be a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).
- (c) The youth should be allowed to call witnesses and present documentary evidence in his or her defense if permitting him or her to do so will not jeopardize institutional safety or correctional goals.
- (d) The youth has no constitutional right to confrontation and cross-examination in correctional disciplinary proceedings.

- (e) Youth have no right to retained or appointed counsel in such proceedings, although counsel substitutes may be provided in certain cases.
- (f) Impartiality of the hearing officer.

The above requirements are satisfied under this chapter as follows:

- (a) Advance written notice: s. HSS 333.67.
- (b) Written decision based on the evidence: s. HSS 333.69.
- (c) Opportunity to call witnesses and present evidence, except where it jeopardizes institutional safety or correctional goals: ss. HSS 333.69 and HSS 333.72. Section HSS 333.72 requires advance screening of requested witnesses and gives guidelines for the screening process.
- (d) Confrontation and cross-examination, in the officials' discretion: HSS 333.69. Sub. (1) limits the hearing officer's discretion somewhat more than Wolff requires it to be limited; under this section, cross-examination can only be stopped if the questions are "repetitive, disrespectful or irrelevant."
- (e) Counsel substitutes in certain cases: s. HSS 333.70.
- (f) The hearing officer is a supervisory person with necessary independence to insure impartiality.

On the subject of requiring a written statement by the hearing officer (sub. (2)), the court said:

"We also hold that there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action. Morrissey, 408 U.S. at 489, 92 S. Ct. at 2604. Without written records, the youth will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission." 418 U.S. at 565.

Subsection (1) does not greatly limit the hearing officer's discretion to prohibit cross-examination and confrontation, as it appears to do, because of the fact that the witness need not be called at all. The hearing officer may rely on hearsay testimony if there is no reason to believe it is unreliable.

Subsections (4) to (6) provide for an appeal. Appeal is not required by Wolff v. McDonnell; in fact, an opportunity for appeal is not even an element of required due process in a criminal proceeding. Griffin v. Illinois, 351 U.S. 12 (1956).

HSS 333.70 DUE PROCESS HEARING: ADVOCATES.

- (1) At each institution, the superintendent shall designate staff members to serve as advocates. Preference shall be given to staff members who volunteer. Generally, any staff member may be selected by the youth, subject to the staff member's consent and availability.

- (2) Before the hearing, the advocate's purpose is to help the accused to understand the charges against him or her and to help in the preparation and presentation of any defense he or she has, including gathering evidence and testimony and preparing the accused's own statement. The advocate may speak on behalf of the accused at a disciplinary hearing or may help the accused prepare to speak for himself or herself. After the hearing, the advocate should discuss the case with the youth, insure that the youth understands what happened, and answer any questions the youth has.

NOTE: The idea of help from fellow youth has not been followed; the only advocates allowed to accompany a youth to a hearing are officially-designated staff advocates. However, the advocate does more than merely read to the illiterate or do legwork for those in confinement. If a youth refuses to participate in a hearing, an advocate may be appointed and the proceeding held while the youth stands mute. In any case, the advocate's most important tasks may be performed after the hearing, when the youth may be angry or upset. It is important to explain what has happened and answer any questions the youth may have.

HSS 333.71 DUE PROCESS HEARING: PLACE.

The due process hearing shall take place at the institution where the alleged conduct occurred, at a juvenile detention center, or at the institution to which a youth has been transferred. Efforts should be made to avoid an intimidating setting.

NOTE: Generally, it is desirable to provide hearings where the violation occurred. When it is impossible, fairness requires that the youth have the same protections (witnesses, evidence) where the hearing is held as he or she would have at the institution where the violation is alleged to have occurred.

HSS 333.72 DUE PROCESS HEARING: WITNESSES.

- (1) Requests for witnesses may be made by the accused to the advocate who shall deliver them to the hearing officer. Except for good cause, a youth may present no more than three witnesses. If a youth has chosen not to have an advocate, the request shall be sent directly to the superintendent's office. Such requests must be made within two days of the service of notice as provided in s. HSS 333.67.
- (2) After all witness requests have been received, a hearing officer shall review them and do any investigation necessary to determine whether the witnesses should be called.
- (3) Witnesses requested by the accused should be required to attend the disciplinary hearing unless:
 - (a) There is a significant risk of bodily or psychological harm to the witness if he or she testifies.
 - (b) The youth's witness does not want to testify;
 - (c) The testimony is irrelevant to the question of guilt, innocence, or disposition;

- (d) The testimony is merely cumulative of other evidence and would unduly prolong the hearing; or
 - (e) If a youth's witness must be transported to a detention center to testify, the advocate may be required to interview the witness and report on the testimony to the hearing officer in lieu of a personal appearance by the witness.
- (4) If a youth's witness will be unavailable due to hospitalization, transfer, release, or is in another facility and unable to attend, or if a staff member witness will be unavailable due to illness, no longer being employed at that location, vacation or being on a different shift, and there is no other reason to exclude the witness's testimony, then the hearing officer shall attempt to get a signed statement from the witness to be used at the disciplinary hearing.
- (5) If a witness's testimony would be relevant and useful to the hearing officer but the witness, if other than a staff member, does not wish to testify, or if testifying would pose a significant risk of bodily harm to the witness, the hearing officer shall attempt to get a signed statement to be used at the disciplinary hearing.
- (6) (a) If it is not possible to get a signed statement in accordance with subs. (4) and (5), the hearing examiner may consider other evidence of what the witness would say if present.
- (b) Evidence may be taken directly over the telephone.

(7) (a) After determining which witnesses will be called for the accused, the hearing officer shall notify the youth of the decision in writing and schedule a time for a hearing when all of the following people can be present:

1. Hearing officer;
2. Advocate, if any;
3. Staff member who wrote the conduct report;
4. Other witnesses against the accused, if any;
5. Accused; and
6. Witnesses for the accused, if any.

(b) In the case of youth witnesses and the accused, an attempt should be made to avoid conflict with off ground activities, but these persons may be required to attend the hearing even if it conflicts with other activities.

(8) Witnesses who are not youth or staff may not be required to attend the hearings nor may they be contacted by advocates. Rather, the hearing officer shall designate a staff member to interview any such witness and report to the hearing officer.

- (9) The hearing officer or other designated staff member shall prepare notice of the hearing and give it to the accused, the advocate, if any, the committee and all witnesses, and the staff member who wrote the conduct report.

NOTE: The youth facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his or her defense when permitting the youth to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing, but the unrestricted right to call witnesses from the institution population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. Institution officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses if doing so may create a risk of reprisal or undermine authority, as well as to limit access to other documentary evidence. Although not prescribed here, it would be useful for the hearing officer to state his or her reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.

Subsection (8) forbids interviewing members of the public and requesting their presence at hearings. Such people are usually employers and school officials. There is no authority to compel their involvement in hearings. More importantly, requesting their involvement or permitting adversary interviewing seriously jeopardizes programs by making people unwilling to cooperate. It also creates the possibility that there will be harassment of such people.

HSS 333.73 DUE PROCESS HEARING: HEARING OFFICER OR ADJUSTMENT COMMITTEE.

- (1) (a) The superintendent may designate two or three hearing officers to serve on an adjustment committee which makes the decisions of a single hearing officer under this chapter.
- (b) If more than one hearing officer is holding the hearing, the following voting procedure shall be followed:
1. A decision by a committee of 3 is when 2 or more members of the committee are in agreement.

2. A decision by a committee of 2 is when there is unanimity.
If a unanimous decision cannot be reached, the matter shall be referred to the superintendent.

- (2) No person who has direct personal involvement in an incident which is the subject of a hearing may serve as hearing officer or on the committee for that hearing. Committee members should find out the subject matter of hearings in advance in order to allow replacement of a hearing officer if necessary and avoid the necessity of postponing a hearing.

NOTE: Wolff v. McDonnell requires that adjustment committee members be impartial in the sense that they should not have personally observed or been a part of the incident which is the basis of disciplinary charges. However, the court specifically held that a committee member can be impartial even if he or she is a staff member of the institution.

HSS 333.74 DUE PROCESS HEARING: EVIDENCE.

- (1) During a disciplinary hearing, the hearing officer may consider any relevant evidence, whether or not it would be admissible in a court of law.
- (2) A hearing officer may refuse to hear or admit relevant evidence for any of the following reasons:
 - (a) The evidence is not reliable as, for example, opinions which are not supported by factual observation, hearsay (statements made outside of the hearing), or statements by a witness who has a reputation for unreliability.

- (b) The evidence, even if true, would be of marginal relevance as, for example, evidence of prior acts by the accused or by a witness, to show that he or she is repeating pattern.
 - (c) The evidence is merely cumulative of evidence already received at the hearing and is no more reliable than the already admitted evidence as, for example, testimony of other inmates corroborating the accused's story, when corroboration has already occurred.
- (3) If a witness is unavailable to testify, a written statement, a transcript of an oral statement, an authorized telephone call, or a tape-recorded statement may be considered. "Unavailable" means death, transfer, release, hospitalization, runaway, or confinement to another institution in the case of a youth; death, illness, vacation, employment elsewhere, or assignment to a different shift in the case of a staff member.
- (4) If a witness refuses to testify in person and if the hearing officer finds that testifying would pose a significant risk of bodily harm or psychological danger to the witness or another, the officer may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity. If such a statement is considered, the contents of the statement shall be revealed to the accused, though the statement may be edited to avoid revealing the identity of the witness. The hearing examiner may question the witnesses, if they are otherwise available. Two anonymous statements by

different persons may be used to corroborate each other. A statement can be corroborated in either of the following ways:

- (a) By other evidence which substantially corroborates the facts alleged in the statement, such as an eyewitness account by a staff member or circumstantial evidence;
 - (b) By evidence of a very similar violation by the same person; or
 - (c) By a polygraph examination which indicates truth.
- (5) After a finding of guilt by the hearing officer, confidential informant material shall be forwarded to the residential care office for retention in restricted security records.
- (6) The original conduct report and all due process documents shall be placed in the youth's case files.

NOTES: This section makes clear that the rules of evidence are not strictly followed in a disciplinary proceeding. Neither the staff nor the youth have the training necessary to use the rules of evidence, which in any case were developed haphazardly and may not be the best way of insuring the reliability of the fact-finding process. Thus, a more flexible approach is used. The main guidelines are that the hearing officer should allow only reliable evidence and evidence which is of more than marginal relevance.

Relevant evidence is any statement or object which makes it appear more or less likely that the accused youth is guilty of the offense charged. For example, when a youth is accused of threatening another, testimony that the accused and the other person had a loud argument the day before is relevant. It indicates a possible motive for a threat and makes it appear more likely that the threat occurred. Testimony by a staff member that the accused has lied to him or her on previous occasions is relevant if the testimony of the accused varies from the conduct report; it indicates that the youth may be lying this time, too.

Hearsay should be carefully scrutinized since it is often reliable: the statement is taken out of context and the demeanor of the witness cannot be observed. However, there is no need to find a neatly labeled exception; if a particular piece of hearsay seems useful, it can be admitted.

HSS 333.75 RECORDKEEPING.

- (1) Records of disciplinary infractions may be included in a youth's permanent record only under the following conditions:
 - (a) The youth was found guilty by summary or other disciplinary disposition procedure, as provided in ss. HSS 333.63 and 333.64;
or
 - (b) The youth was found guilty by a hearing officer.
- (2) Following a successful appeal, all records of the infraction shall be removed from the youth's records.
- (3) Records of alleged disciplinary infractions which have been dismissed or in which the youth was found not guilty shall not be maintained in any offender-based record, nor considered in making program or release decisions. They may be retained in records for statistical or administrative purposes only, but without personal identifiers.

HSS 333.76 DISPOSITIONAL ALTERNATIVES FOR CLASS A OFFENSES.

- (1) The hearing officer shall decide the following:
 - (a) If the youth did not commit the conduct, the hearing officer shall dismiss the case.
 - (b) If the conduct, as proven, is not sufficient to warrant a major penalty, the hearing officer may make disposition under s. HSS 333.63 or 333.64.
- (2) If the hearing officer finds that the youth committed a Class A offense, the following shall be considered:
 - (a) Presence of extenuating or mitigating circumstances.
 - (b) If the youth does not constitute a substantial risk of physical harm to himself, others, or property, s. HSS 333.80 shall not be a disposition.
 - (c) If the youth does not constitute a substantial runaway risk or risk of passive-resistant conduct, s. HSS 333.78 shall not be a disposition.
 - (d) If the youth did not commit recent extremely dangerous conduct and if the youth is not presently extremely dangerous, the disposition shall be other than s. HSS 333.81.

- (3) If a program under ss. HSS 333.78 to 333.81 is not appropriate, the hearing officer shall make disposition under s. HSS 333.63 or 333.64 or dismiss the case, after consideration of the youth's past history, the nature of the offense, extenuating or mitigating circumstances, and any time spent in prehearing security.

- (4) If a program under ss. HSS 333.78 to 333.81 is appropriate, the hearing officer may order that the youth be placed in the secured discipline program for up to 3 days and referred to a disciplinary review committee under s. HSS 333.77. The youth shall receive credit for time spent in prehearing security.

NOTE: This section sets out the considerations which are actually used in deciding, within a range, how severe a youth's punishment should be. It does not contain any formula for deciding the punishment. The actual length of time spent in a secured program is determined by the disciplinary review committee under s. HSS 333.77.

The purpose of this section is to focus the hearing officer's attention on the factors to be considered, and to remind him or her not to consider other factors such as personal feelings of like or dislike for the youth involved.

HSS 333.77 REVIEW OF YOUTH IN A SECURED DISCIPLINE PROGRAM.

- (1) A disposition by the hearing officer that a youth be placed in a secured discipline program shall be reviewed within 3 days by a disciplinary review committee and weekly thereafter for a period not to exceed 10 weeks unless an extension of that period is granted by the bureau director or designee. An extension may not exceed 10 weeks and may not be renewed, except that the extension may be renewed every 10 weeks if the youth remains in the secured discipline program under s.HSS 333.81.

- (2) A disciplinary review committee shall determine whether the youth should remain in secured discipline.

- (3) The criteria for the decision under sub. (2) shall be those under ss. HSS 331.09, Wis. Adm. Code. In addition, the decision-maker must make a finding of whether any of the following conditions exist:
 - (a) Whether the youth is a substantial escape risk;

 - (b) Whether the youth continues to exhibit passive-resistant conduct;

 - (c) Whether the youth poses a substantial risk to self, another, or property;

 - (d) Whether the youth poses a substantial risk of present danger to self, another, or property, and psychological evaluation indicates the youth is extremely dangerous; and

 - (e) Whether the youth is unable to function in another setting.

- (4) If a disciplinary review committee decides that the youth does not fit any of the conditions of sub. (3)(a) to (e), the youth shall be returned to the general population. If a disciplinary review committee finds:
 - (a) That the conditions of subs. (3)(a) or (b) exist, the youth may be placed in secured discipline under s. HSS 333.78;

- (b) That the conditions of sub. (3)(c) exist, the youth may be placed in secured discipline under s. HSS 333.80;
 - (c) That the conditions of sub. (3)(e) exist, the youth may be placed in secured discipline under s. HSS 333.79; or
 - (d) That the conditions of sub. (3)(d) exist, the youth may be placed in secured discipline under s. HSS 333.81.
- (5) The procedure for the disciplinary review committee review under this section shall be the procedure under s. HSS 331.12, Wis. Adm. Code, except that notice of the review shall be given at least 2 hours in advance.
- (6) All decisions under this section are subject to review by the superintendent.

NOTE: The purpose of review by the disciplinary review committee under this section is to insure that the "whole" youth is looked at, not just the instant offense. The decision is made by a disciplinary review committee for the institution. A disciplinary decision that places a youth in a secure cottage obviously disrupts that youth's prior program. Consequently, the youth's program needs must be evaluated and a program developed to meet those needs. The disciplinary review committee's involvement is a recognition of the fact that major disciplinary decisions affect programs. Therefore, they become programming decisions which are properly reviewable by the institution program decision-making body.

HSS 333.78 MAJOR PENALTY PROGRAM FOR YOUTH WITH RUNAWAY OR PASSIVE RESISTANCE PATTERN.

(1) PURPOSES.

The purposes of this program are:

- (a) To provide physical security for youth who have planned, attempted to, or actually escaped;
- (b) To provide a setting for those youths who have engaged in passive-resistant conduct which is unduly disruptive; and
- (c) To provide counseling and clinical services to discourage behavior described in pars. (a) and (b).

(2) PROGRAM PLACEMENT CRITERIA.

- (a) No youth shall be placed in this program involuntarily unless he or she has committed a Class A offense and has had a hearing under s. HSS 333.69 or 333.68, or as a result of the planning process under s. HSS 331.08, Wis. Adm. Code;
- (b) A youth may be confined in this program in close room confinement, modified room confinement, or modified cottage confinement for periods not to exceed the following:

1. First Class A offense - 3 days.
2. Second Class A offense within 60-day period - 4 days; and
3. Third and subsequent Class A offenses within 60-day periods - 6 days.

(c) If a youth remains in the program longer than the maximum time period under par. (b), he or she shall be in cottage confinement status.

(d) The cottage shall have outside perimeter security. This may include window and door security as well as a fenced-in outside area.

(3) SERVICES AND PRIVILEGES.

Except for youth in close, modified room, and modified cottage confinement, the following apply:

- (a) Meals shall be served in a communal setting;
- (b) Youth shall not be locked in rooms except during sleeping hours;
- (c) Youth shall not be required to wear coveralls;

- (d) During the first week in this program, youth may be required to wear special clothing constructed to permit searches and prevent the hiding of contraband;
- (e) After one week, youth are permitted to wear regular clothing, providing that the perimeter of the institution is fenced;
- (f) After one week, youth shall be allowed use of all their personal possessions which can feasibly be provided, consistent with security.
- (g) Youth shall be permitted recreation consistent with s. HSS 333.82 as a minimum. More recreation time is encouraged.
- (h) The education program shall be contained within the cottage and be consistent with ch. HSS 339, Wis. Adm. Code. Youth with exceptional educational needs shall receive the special education required by law.

NOTE: The cottage routine in this program is not significantly different from the routine in the non-secure cottages. The youth in this program are not dangerous to other youth or themselves. However, security is necessary to prevent runaways. The level of security necessary to prevent youth from running away includes outside perimeter security. This program does not require the high degree of security necessary to prevent youth from harming each other since they are not dangerous.

HSS 333.79 MAJOR PENALTY PROGRAM FOR YOUTH IN NEED OF SHORT-TERM SECURE DISCIPLINE.

(1) PURPOSES.

The disciplinary purpose of this program is to provide prompt, short-term punishment as a response to a youth who commits a Class A offense but does not continue to evidence:

- (a) Risk of escape;
- (b) Passive-resistant behavior; or
- (c) Violent or assaultive behavior.

(2) PROGRAM PLACEMENT CRITERIA.

- (a) No youth shall be placed in this program involuntarily unless he or she has violated a major rule and has had a major hearing under s. HSS 333.69 or a hearing under s. HSS 333.68.
- (b) A youth placed in this program may be confined in close room confinement, modified room confinement, or modified cottage confinement for periods not to exceed the following:
 - 1. First Class A offense - 3 days;
 - 2. Second Class A offense within 60-day period - 4 days;

3. Third and subsequent Class A offenses within 60-day period -
6 days.

(c) If a youth remains in the program longer than the maximum time period under par. (b), he or she shall be in cottage confinement status.

(d) The cottage shall have inside and outside security.

(3) SERVICES AND PRIVILEGES.

The provisions of s. HSS 333.82 apply to all youth in this program.

Section HSS 333.78(3)(a) to (h) also applies except for youth in close, modified room, and modified cottage confinement.

NOTE: The routine in this program, as with the program under s. HSS 333.78, is not significantly different from the routine in the non-secure cottages. The purpose of this program, as stated in sub. (1), is to provide prompt, short-term punishment for youth who are not escape risks, passive-resistant, violent, or extremely dangerous. This differentiates the program from ss. HSS 333.78, 333.80 and 333.81. Youth appropriate for placement under s. HSS 333.80 may, however, be placed in this program in cottage confinement status.

HSS 333.80 MAJOR PENALTY PROGRAM FOR VIOLENT YOUTH.

(1) PURPOSES.

The purposes of this program are the following:

(a) To provide prompt, short-term punishment for a major offense;

(b) To protect youth, staff, and property from a youth who constitutes a present danger to self, others, or property by providing a highly secure program in a highly secure facility designed to prevent life-endangering situations; and

(c) To provide assessment and treatment of the conditions which cause the youth to act in a violent manner.

(2) PROGRAM PLACEMENT CRITERIA.

(a) No youth shall be placed in this program unless he or she has committed a Class A offense and has had a hearing under s.HSS 333.69 or 333.68.

(b) A youth may be placed in the following confinement status not to exceed the following time periods:

1. First Class A offense - close room confinement for 3 days; modified room confinement for 7 days; modified cottage confinement for 30 days.
2. Second Class A offense within a 60-day period - close room confinement for 4 days; modified room confinement for 9 days; modified cottage confinement for 40 days.
3. Third and subsequent Class A offenses within a 60-day period - close room confinement for 6 days; modified room

confinement for 12 days; modified cottage confinement for 50 days.

- (c) If a youth remains in the program longer than the maximums under sub. (b), he or she shall be in cottage confinement status.

(3) SERVICES AND PRIVILEGES.

The provisions of s. HSS 333.82 apply for the services and privileges available to a youth in this program.

HSS 333.81 MAJOR PENALTY PROGRAM FOR EXTREMELY DANGEROUS YOUTH.

(1) PURPOSES.

The purposes of this program are the following:

- (a) To protect youth, staff and property from a youth who constitutes a present extreme danger to self, others, or property following recent extremely violent conduct; and
- (b) To provide a psychological assessment and treatment of the conditions which cause the youth to act in a violent manner.

(2) PROGRAM PLACEMENT CRITERIA.

- (a) No youth shall be placed in this program unless he or she has committed a major offense, has engaged in recent extremely violent conduct indicating dangerousness, has had a psychological evaluation prior to hearing, and has had a hearing under s. HSS 333.69 or 333.68 during which the hearing officer considered the psychological evaluation in making the findings and disposition, or as a result of the planning process under ss. HSS 331.08 and 331.11, Wis. Adm. Code.
- (b) A youth may be placed in close room confinement, modified room confinement, or modified cottage confinement for an indeterminate period of time.
- (c) A psychologist shall interview and evaluate every youth in this program on a daily basis.
- (d) At any given time at an institution no more than a total of 5 youth may be in this program or in administrative confinement under ch. 334, Wis. Adm. Code, unless an additional placement is approved by the director of the division's bureau of juvenile services with appeal rights by the juvenile offender review program (JORP) director to the division administrator.

(3) SERVICES AND PRIVILEGES.

The provisions of s. HSS 333.82 apply for the services and privileges available to a youth in this program.

NOTE: This section differs from s. HSS 333.80, violent offender program, because this program is for only the most dangerous of the violent offenders.

This program differs from youth administrative confinement under ch. HSS 334 in that this program may only be used if there has been a prior violation of the disciplinary rules. Administrative confinement does not require a rule violation, although it is used to confine dangerous youth.

HSS 333.82 BASIC SERVICES AND PRIVILEGES FOR YOUTH IN A SECURED DISCIPLINE PROGRAM.

(1) MINIMUM SERVICES AND PRIVILEGES.

The following are the minimum services and privileges a youth in a secured program or confinement may receive or have access to unless temporarily suspended under sub. (2) because the youth is out of control:

- (a) Underwear, socks, outer clothing;
- (b) Blankets, sheets, mattress, bed;
- (c) Toothbrush, toothpaste, comb or pick;
- (d) Washcloth, towel, soap, shower;

- (e) Full meals at regularly scheduled times;
- (f) Magazines, school books, writing materials;
- (g) One hour daily of vigorous exercise or recreation, to take place outside of room;
- (h) Reasonable social worker contact, and discussion if desired by the youth;
- (i) Daily counselor contact and discussion;
- (j) One-half hour work of cleaning room;
- (k) Daily (except Saturday, Sunday and holidays) crisis intervention worker or other appropriate staff contacts and discussion (close and modified room confinement only);
- (l) Daily (except Saturday, Sunday, and holidays) teacher contact and discussion. The youth shall be offered at least three hours of structured educational work a day. Students with exceptional educational needs shall be offered instruction in accordance with law;
- (m) Health care; and
- (n) Chaplain services and religious articles.

(2) CONTROL STATUS.

- (a) A youth may be placed in control status and one or more of the items in sub. (1) may be removed temporarily if the youth is physically out of control and is abusing one of the items under sub. (1) in a manner that creates a dangerous situation or a serious disruption. The item removed must relate to the cause of the dangerous situation or serious disruption and may be removed for only so long as the situation continues.
- (b) Only shift supervisors or above may impose control status;
- (c) The maximum period of time a youth may remain in control status is 48 hours for a single act, but no more than a total of three days after which there shall be a clinical service evaluation for transfer to a mental health facility.

NOTE: This section lists the minimum conditions under which a youth may live while in the secured programs. Staff may improve on these conditions, consistent with the progress of the youth. Examples of when sub. (2) may be utilized are to take away reading materials if a youth is tearing them up or to take away bedding if a youth is clogging a toilet with his or her bedding.

HSS 333.83 REFERRAL FOR PROSECUTION.

- (1) The superintendent of each institution shall develop, in conjunction with local authorities, a policy stating which offenses should be referred for prosecution. The policy shall cover the following points:
 - (a) Which statutory crimes should be considered for prosecution;

- (b) The amount of evidence needed before prosecution should be considered;
 - (c) Circumstances in which, even though a violation of a criminal statute can be proved, there should not be prosecution; and
 - (d) Which disciplinary offenses include a crime which may be referred for prosecution.
- (2) When one of the offenses mentioned in sub. (1)(d) above is alleged in a report, the superintendent shall review the report in light of the policy to determine if the case should be referred.
- (a) If necessary, the superintendent shall order an investigation to determine if sufficient evidence exists for referral.
 - (b) The local authorities shall decide whether to bring charges against a youth.
- (3) Whether or not the review described in sub. (2) results in prosecution being started, the incident may be handled as a disciplinary offense.

NOTE: A number of rules cover conduct which is sometimes a criminal offense. However, many petty matters would probably not be prosecuted by the district attorney even if brought to his or her attention - for example, gambling. Also, in most cases, even outbreaks of violence are handled through disciplinary procedures rather than by prosecution. This section requires the superintendent to work with the district attorney in developing a policy on prosecution of crimes committed within the institution. The frustration and waste of time involved in referring cases which are dropped can be avoided, as well as the possibility of failing to refer a case which ought to be prosecuted.

Subsection (3) provides that the disciplinary procedure can go forward even if the case will also be prosecuted. This option is often needed for control because criminal procedure takes a long time. Also it may be needed in order to provide protection for the youth, for potential victims, or for the security of the institution. There is no double jeopardy in having both a disciplinary hearing and a criminal trial on the same matter. See Baxter v. Palmigiano, 425 U.S. 308 (1976).

The Institute of Judicial Administration of the American Bar Association, Standards Relating to Corrections Administration, standard 8.3, takes the position that when a youth in a correctional facility is accused of committing an offense which is a felony, he or she should be proceeded against in the same way that a nonadjudicated youth would be. The ABA recommends that the decision to proceed should be left to officials not connected with the facility; this section complies with that recommendation.

This section also conforms to standard 8341 of the ACA's Manual of Standards for Juvenile Detention Facilities and Services (1979) which recommends that law enforcement authorities handle major law violations.

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