

CR 89-173

RECEIVED

CERTIFICATE

APR 26 1990
10:10 am
Revisor of Statutes
Bureau

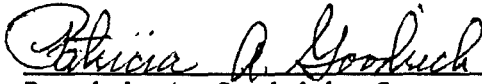
STATE OF WISCONSIN)
) SS
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

I, Patricia A. Goodrich, Secretary of the Department of Health and Social Services and custodian of the official records of the Department, do hereby certify that the annexed rules relating to the expected conduct of youth on state or county aftercare supervision and procedures for dealing with violations of the conditions and rules of aftercare supervision were duly approved and adopted by this Department on April 26, 1990.

I further certify that this copy has been compared by me with the original on file in the Department and that this copy is a true copy of the original, and of the whole of the 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 26th day of April, 1990.

SEAL:



Patricia A. Goodrich, Secretary
Department of Health and Social Services

6-1-90

ORDER OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
CREATING RULES

To create HSS 343, relating to the expected conduct of youth on state or county aftercare supervision and procedures for dealing with violations of that conduct.

Analysis Prepared by the Department of Health and Social Services

Until recently, the only administrative rules relating to youth in the legal custody of the Department on aftercare supervision who allegedly commit a violation of a rule or special condition of aftercare were contained in ch. HSS 31. That chapter governs revocation proceedings for adults but was made to apply also to youth until rules specifically relating to youth were promulgated. The rules contained in this order are specifically for youth on aftercare supervision. They will take the place of similar emergency rules that were published on September 25, 1989.

These rules establish detailed procedures to be followed when a youth on either state or county aftercare allegedly violates a rule or special condition of aftercare supervision. Upon release to aftercare supervision, a youth must be informed of all conduct rules that apply to him or her. When the Department or county agency employee who is supervising a youth on aftercare believes the youth has violated a rule or a condition of aftercare, he or she may choose from three courses of action--counseling, summary disposition or, for state aftercare only, the initiation of revocation proceedings, or, for county aftercare only, the filing of a petition in court for a change in placement. The rules require that a youth facing revocation proceedings be granted numerous due process protections because of the potential loss of liberty the youth faces.

Chapter HSS 31 required both a preliminary revocation hearing and a final revocation hearing. The preliminary hearing had to be held within 5 working days after the youth received notice of the preliminary hearing. However, the rules failed to set a specific time by which the final revocation hearing had to take place, only requiring that it be held within a reasonable period of time. A review of the Department's experience in implementing ch. HSS 31 immediately after that chapter went into effect in January 1982 revealed that the final hearing was frequently not scheduled for 7 to 8 weeks because all concerned parties had to be notified of and prepare for two separate hearings. With a youth being held in custody for such a long period of time prior to the final revocation decision, there was a potential for interference with the youth's progress towards rehabilitation.

In order to deal with the concern that a youth could be held in custody for a long period of time pending the outcome of two hearings, the Department in 1983 established an administrative procedure whereby a youth taken into custody did not have a preliminary hearing but the final revocation hearing was held within 30 days in accordance with the procedures of HSS 31.05. That hearing could be held within such a short period of time because all parties had only to receive notice of and prepare for one hearing. This lessened the potential for interference in the youth's rehabilitation by shortening the time the youth was in custody prior to the revocation decision.

Earlier this year, however, circuit court judges in two jurisdictions issued decisions which called into question the practice of the Department in having one hearing which is the final revocation hearing when a youth on aftercare is taken into custody. Both ch. HSS 31 and ch. 48, Stats., may be read as requiring a prompt hearing to determine the appropriateness of the decision to take a youth on aftercare into custody pending the final revocation hearing. Yet no constructive purpose appears to be served by conducting an administrative and a judicial hearing regarding the same legal issue.

These rules clarify on a permanent basis the procedures to be followed in all circumstances in which a youth on state aftercare is taken into custody pending a revocation hearing. The rules codify the current administrative procedures established by the Department in 1983. Without precise rules setting out the procedures applicable to youth who allegedly violate a rule or condition of aftercare, a youth may be held in custody for an unduly long period of time pending the two hearings required under ch. HSS 31 or ch. 48, Stats. Also, aftercare agents, the courts, and other concerned persons need clear guidance on taking a youth on aftercare into custody for an alleged conduct violation. In the absence of clear guidance through precise rules, a youth could either improperly be held in custody or not be taken into custody due to a lack of understanding regarding due process protections which must be accorded to youth on aftercare. Accordingly, the rules establish definite due process procedures to be followed throughout the state for both state aftercare and county aftercare. However, the procedures for revoking aftercare supervision apply only to state aftercare. Counties do not have the authority to revoke youth on county aftercare, nor does the Department. If a county agent and supervisor believe that the placement of a youth on county aftercare should be changed, they may initiate change of placement proceedings.

These rules generally identify responsibilities of state and county staff who do aftercare supervision; require that a youth on release to aftercare supervision be informed verbally and in writing of the conduct expected of him or her; list rules that apply to all youth being supervised and authorize a youth's agent to add to these rules; require a youth's agent, following investigation, to do one of three things when a youth is alleged to have violated a rule or special condition of aftercare--counsel the youth, impose a summary disposition or initiate revocation proceedings (state aftercare) or file a petition with the court to change the placement of a youth (county aftercare); describe how a decision is made to take a youth into custody pending the outcome of a revocation hearing or the decision on a petition to change the placement of the youth; provide for notice of a revocation hearing; permit a youth to waive the right to a revocation hearing and set forth the procedure for deciding whether to revoke aftercare when the right to a hearing is waived; and include procedures for the conduct of revocation hearings.

The Department's authority to create these rules is found in ss. 46.03(6)(a) and (b), 48.48(1) and 227.11(2), Stats. The rules interpret ss. 46.03(6)(a) and (b), 46.22(1)(c)8 d, 48.19 to 48.21, 48.357(5), 48.366 and 48.48(1), Stats.

SECTION 1. HSS 343 is created to read:

Chapter HSS 343

YOUTH AFTERCARE CONDUCT
AND REVOCATION

- HSS 343.01 Authority and Purpose
- HSS 343.02 Applicability
- HSS 343.03 Definitions
- HSS 343.04 Responsibilities of the Aftercare Provider
- HSS 343.05 Expected Conduct
- HSS 343.06 Finding of Violation
- HSS 343.07 Staff Response to Alleged Violation
- HSS 343.08 Violation Report
- HSS 343.09 Preparation for Revocation Hearing
- HSS 343.10 Procedure When Hearing Right is Waived
- HSS 343.11 Revocation Hearing
- HSS 343.12 Decision of the Hearings and Appeals Administrator
- HSS 343.13 Appeal to Court

HSS 343.01 AUTHORITY AND PURPOSE. This chapter is promulgated under the authority of ss. 46.03(6)(a) and (b), 48.19 to 48.21, 48.357(5), 48.48(1) and 227.11(2), Stats., to establish rules of conduct for youth who are on either state or county aftercare supervision and standards and procedures for dealing with violations of the expected conduct, including procedures to revoke a youth's aftercare status or to change the youth's placement pursuant to s. 48.357, Stats.

HSS 343.02 APPLICABILITY. This chapter applies to the department, to counties that operate an aftercare program and to all youth on aftercare supervision.

HSS 343.03 DEFINITIONS. In this chapter:

(1) "Administrator" means the administrator of the division of youth services, or that person's designee.

(2) "Aftercare" means the status of a youth who is supervised outside of an institution by the department or a county agency following release from an institution by action of the division or following placement on aftercare supervision by the department subsequent to an examination under s. 48.50, Stats., or by a court under s. 48.366(5)(b), Stats., until expiration of the youth's commitment term.

(3) "Agent" means a person designated by a supervisor to provide the aftercare supervision of a youth, that person's designee, or any employee of the

department or county agency authorized to make decisions regarding aftercare matters.

(4) "Alternate care placement" means the placement of a youth in a residential living arrangement other than the parental home.

(5) "County department" means a county agency that administers aftercare supervision.

(6) "County intake worker" means a person designated to provide intake services under ss. 48.067 and 48.20, Stats.

(7) "Day" means a calendar day.

(8) "Department" means the Wisconsin department of health and social services.

(9) "Division" means the department's division of youth services.

(10) "Hearing examiner" means an attorney employed by the Wisconsin department of administration to conduct revocation hearings under this chapter.

(11) "Hearings and appeals administrator" means the administrator of the division of hearings and appeals in the Wisconsin department of administration.

(12) "Institution" means a secure correctional facility for youth operated by the department.

Note: Department-operated secure correctional facilities for youth include the Lincoln Hills School near Merrill and the Ethan Allen School near Wales.

(13) "Legal custody" means a legal status of a youth which authorizes the department or a county department, when custody is transferred to the department or the county department, to exercise the rights and duties under s. 48.02(12), Stats.

(14) "Parent" means a biological parent, an adoptive parent or a legal guardian.

(15) "Secretary" means the secretary of the department, or that person's designee.

(16) "Superintendent" means the superintendent of an institution, or that person's designee.

(17) "Supervisor" means a department or county employe responsible for the administration of aftercare services, or that person's designee.

(18) "Youth" means a person whose legal custody or supervision has been transferred to the department or a county department under s. 48.34 or 48.366, Stats., regardless of the person's age.

HSS 343.04 RESPONSIBILITIES OF THE AFTERCARE PROVIDER. The state or county aftercare provider shall make reasonable efforts to ensure that a youth on aftercare:

(1) Is free from discrimination based on race, national origin, color, creed, sex, age, sexual orientation, marital status, political affiliation, handicap, ethnicity, religion or ancestry;

(2) Is protected from abuse or neglect;

(3) Is placed in his or her parent's home when this is consistent with treatment needs and the protection of the public;

(4) Is involved in planning for his or her treatment;

(5) Has access to the courts;

(6) Has access to department or county agency and community programs and services consistent with the protection of the public;

(7) Has his or her educational, vocational, drug or alcohol abuse, mental health and other treatment needs advocated for by the aftercare provider and addressed;

(8) May visit, use the mail and communicate with family members and an attorney within reasonable guidelines regardless of placement; and

(9) May participate in authorized recreational, leisure-time and religious activities.

HSS 343.05 EXPECTED CONDUCT. (1) Every youth on aftercare shall be informed verbally and in writing of the rules and special conditions of aftercare. The following rules shall apply to a youth on aftercare:

(a) The youth shall avoid all conduct that violates a criminal law or municipal ordinance;

(b) The youth shall report any arrest or police contact to his or her agent within 72 hours;

(c) The youth shall cooperate with his or her agent and fully participate in his or her aftercare treatment plan;

(d) The youth shall be truthful with his or her agent at all times;

(e) The youth shall keep all appointments scheduled for him or her by an agent;

(f) The youth shall report to and inform his or her agent of his or her whereabouts and activities as directed;

(g) The youth shall obtain advance permission from his or her agent to quit a job or change jobs or to drop out of an educational or vocational program or

change educational or vocational programs, except that when this is not possible the youth shall notify the agent of the change within 72 hours after it takes place;

(h) If the youth resides with his or her parents, the youth shall notify the agent of the family's change of residence within 72 hours after it takes place;

(i) If the youth is in an alternate care placement, the youth shall obtain advance permission from his or her agent for a change of residence;

(j) The youth shall obtain advance permission from his or her agent to leave the state of Wisconsin;

(k) The youth may not purchase, own, carry or possess a firearm, knife or weapon, or ammunition, without the advance permission of the youth's agent. An agent may not grant a youth permission to possess a firearm if the youth is prohibited from possessing a firearm under s. 941.29, Stats., or federal law;

(l) The youth may not use or possess any drug listed in subch. II of ch. 161, Stats., any drug paraphernalia as defined in s. 161.571, Stats., or any prescription drug except as prescribed for the youth by a licensed physician.

(m) The youth shall submit to and cooperate with searches of the youth's person, living quarters and property and with tests ordered by a staff member consistent with the law, including but not limited to urinalysis, breathalyzer and blood tests; and

(n) The youth shall follow any additional specific rules that may be issued to the youth by the youth's agent. These may include but are not limited to rules concerning:

1. Companions;
2. Hours;
3. Possession or use of intoxicants;
4. Medical, mental health or dental attention;
5. Family responsibilities;
6. Support of self, including income earned and unearned and its sources;
7. Educational and vocational obligations;
8. Job attendance;
9. Counseling or therapy attendance;
10. Court obligations;
11. Reporting to the agent;
12. Conditions to be met when residing in an alternate care facility;
13. Purchasing, trading, selling or operating a motor vehicle; and
14. Borrowing money or making a purchase on credit.

(2) A youth shall follow all special conditions that may be placed on the youth's aftercare by order of the department, or by the court if the youth is under extended jurisdiction under s. 48.366, Stats., to achieve the goals and objectives of aftercare supervision.

(3) A youth shall sign a written copy of the aftercare rules and special conditions placed upon the youth's aftercare.

(4) A youth's agent may modify or supplement the youth's conduct rules at any time. Written notice shall be given to the youth as promptly as practical.

HSS 343.06 FINDING OF VIOLATION. A youth may be found to have violated a rule or special condition of aftercare under s. HSS 343.05 only if the youth committed the conduct prohibited by the rule or special condition of aftercare or if the youth was convicted of violating or was adjudicated delinquent for having violated a criminal law or municipal ordinance.

HSS 343.07 STAFF RESPONSE TO ALLEGED VIOLATION. (1) INVESTIGATION. An agent who has reason to believe that a youth on aftercare has violated a rule or special condition of aftercare shall investigate the matter. The investigation shall include a meeting with the youth to discuss the allegation of the violation within a reasonable period of time after the agent becomes aware of the alleged violation.

(2) ACTION. If the agent following the investigation under sub. (1) concludes that the youth committed the violation, he or she shall take one of the following actions:

(a) Counseling. 1. Procedure. An agent may review the rules and special conditions of the youth's aftercare with the youth, inform the youth that he or she has determined that the conduct is in violation of a rule or special condition of aftercare and discuss remedial behavior with the youth. Counseling is the appropriate course of action when one or more of the following conditions exists:

- a. The youth is unfamiliar with the rule or special condition;
- b. The youth has not violated the same or a closely related rule or special condition recently;
- c. The youth is unlikely to repeat the behavior if warned and counseled;
- d. The youth's ability to function is impaired due to a mental illness or developmental disability; or
- e. The staff member believes that for some other reason summary disposition or revocation is not advisable.

2. Record. A brief written record describing the youth's violation and the counseling given to the youth by the agent shall be maintained in the youth's supervision file. A violation report under s. HSS 343.08 is not required.

(b) Summary disposition. 1. Procedure. An agent may inform the youth that he or she believes the youth's conduct is in violation of a rule or special condition of aftercare. After reviewing the rules and special conditions of the youth's aftercare with the youth, the agent may do one or more of the following:

- a. Modify or supplement the rules for the youth's aftercare;
- b. Reprimand the youth;

c. Require remedial behavior; or

d. Increase the restrictiveness of the youth's supervision.

2. Report. When the agent imposes a summary disposition on a youth, the agent shall prepare a violation report in accordance with s. HSS 343.08.

3. Agent and supervisor disagreement. When an agent and a supervisor disagree on whether there has been a violation or on whether to impose a summary disposition, the supervisor shall make the decision.

4. Appeal. A youth may appeal a summary disposition to a supervisor verbally or in writing at any time during its imposition. The supervisor shall issue a verbal or written decision within 7 days after receipt of the appeal. A youth may appeal the supervisor's decision to the administrator orally or in writing at any time during imposition of the summary disposition. The administrator shall issue a verbal or written decision within 10 days after receipt of the appeal. The summary disposition is not stayed pending a decision on an appeal. The administrator's decision on an appeal shall be noted in the youth's supervision file.

(c) Initiation of revocation proceedings for a youth on state aftercare.

1. Recommendation of agent. A youth's agent may recommend that aftercare revocation proceedings be initiated. If the agent does make that recommendation, the agent shall discuss the matter in detail with his or her supervisor. The discussion shall include the facts relating to the youth's alleged violation of a

rule or special condition and the youth's past conduct. The seriousness of the youth's past conduct and alleged violation shall be taken into account. The reasons that counseling and a summary disposition are inappropriate shall be discussed.

2. Decisions. The supervisor initially shall decide whether to initiate revocation proceedings based upon the alleged violation and the youth's past conduct. If the decision is to proceed with revocation, the supervisor shall decide if the youth should be taken into custody under s. 48.19, Stats. If the decision is to take the youth into custody, the supervisor shall decide whether the youth should remain in custody pending the outcome of the proceedings. A youth shall not remain in custody pending the outcome of the revocation proceedings unless the supervisor reasonably believes that the youth meets one of the following criteria:

- a. The youth is believed to be dangerous;
- b. The youth presents a substantial risk of fleeing;
- c. The youth presents a substantial risk of engaging in criminal behavior prior to the revocation hearing; or
- d. The youth presents a substantial risk of repeatedly engaging in an activity which violates a rule or condition of aftercare supervision.

3. Agent and supervisor disagreement. When an agent and a supervisor disagree on whether to initiate aftercare revocation proceedings or on whether to

have a youth taken into custody, the agent may appeal the supervisor's decision to the administrator.

4. Youth under extended jurisdiction. a. When a decision is made under subd. 2 to initiate revocation proceedings for a youth under extended jurisdiction under s. 48.366, Stats., the department shall file a petition with the committing court pursuant to s. 48.366(5), Stats., requesting revocation of the youth's aftercare supervision.

b. The aftercare revocation procedures of s. HSS 343.09 do not apply to a youth under extended jurisdiction.

5. Agent's report. The agent shall prepare a violation report under s. HSS 343.08 prior to the revocation hearing which includes the reasons supporting revocation.

6. Taking a youth into custody. a. When a supervisor decides under subd. 2 that the youth should be taken into custody under s. 48.19, Stats., the supervisor shall arrange for the youth to be taken into custody by the agent, institution staff, other individual authorized by the department or by law enforcement authorities in accordance with subpar. b or c. A youth shall be taken into custody by law enforcement authorities unless the youth comes voluntarily, the youth is suffering from illness or injury, or the youth is in immediate danger from his or her surroundings and removal from the surroundings is necessary.

b. The person taking the youth into custody under s. 48.19, Stats., may immediately release the youth to the legal custody of the department under s. 48.20(2)(a), Stats. Alternatively, the person taking the youth into custody under s. 48.19, Stats., may deliver the youth to a county intake worker, in which case the county intake worker shall determine whether the youth should be held in physical custody under s. 48.205, Stats., should be released to the legal custody of the department under s. 48.20(7)(c)1, Stats., or should be released from physical custody to another authorized entity under s. 48.20(7)(c)1, Stats. When a youth is released to the legal custody of the department, the department shall decide whether to return the youth to the institution pending revocation proceedings.

c. If the youth is held in physical custody under s. 48.205, Stats., a custody hearing shall be held in accordance with s. 48.21, Stats. If the youth is released to the legal custody of the department under s. 48.20, Stats., either by the person who took the youth into custody under s. 48.19, Stats., or by the intake worker, no custody hearing under s. 48.21, Stats., is required.

d. The decision to take a youth into custody shall be put into writing by the supervisor, stating one or more of the criteria for custody under s. 48.19, Stats., and the facts upon which the decisions to initiate revocation and take the youth into custody are based. The written decision shall be issued no later than 7 days after the date the youth is taken into custody and a copy shall be sent to the youth. The written decision shall inform the youth that he or she can appeal the supervisor's custody decision to the administrator orally or in writing at anytime prior to the revocation hearing. The administrator shall respond in writing to the

youth within 7 days after receipt of the youth's appeal. The custody decision of the supervisor remains in effect pending decision on the appeal.

(d) Filing of a petition for change in placement for a youth on county aftercare. 1. Recommendation of county aftercare agent. A youth's county aftercare agent may recommend that a youth's placement be changed. If the agent makes that recommendation, the agent shall discuss the matter in detail with his or her supervisor. The discussion shall include the facts relating to the youth's alleged violation of a rule or special condition and the youth's past conduct. The seriousness of the youth's past conduct and alleged violation shall be taken into account. The reasons that counseling and a summary disposition are inappropriate shall be discussed.

2. Decisions. The county aftercare agent and that person's supervisor shall decide whether change in placement proceedings under s. 48.357, Stats., should be initiated and whether the youth should be taken into custody under s. 48.19, Stats.

3. Agent and supervisor disagreement. When a county aftercare agent and that person's supervisor disagree on whether to initiate change in placement proceedings or on whether to have a youth taken into custody, they shall follow the procedures of the county department.

4. Agent's report. The county aftercare agent shall prepare a violation report under s. HSS 343.08 prior to the change in placement hearing under s. 48.357, Stats., which includes the reasons supporting the change in placement.

5. Youth under extended jurisdiction. a. The change in placement procedures of s. 48.357, Stats., do not apply to a youth on county aftercare under extended jurisdiction under s. 48.366, Stats.

b. The county department shall file a petition to revoke the youth's aftercare with the court pursuant to s. 48.366(5), Stats.

6. Taking a youth into custody. a. When a supervisor decides under subd. 2 that a youth should be taken into custody pending a hearing under s. 48.357 or 48.366, Stats., the supervisor shall arrange for law enforcement authorities to take the youth into physical custody under s. 48.19, Stats.

b. When a youth is delivered to a county intake worker under s. 48.19, Stats., the county intake worker shall determine whether the youth should be held in physical custody under s. 48.205, Stats., or should be released from physical custody to an authorized person under s. 48.20(7)(c)1., Stats.

c. If the youth is held in physical custody under s. 48.205, Stats., a hearing shall be held in accordance with s. 48.21, Stats. If the youth is released to the legal custody of a person authorized by the department under s. 48.20(7)(c)1., Stats., no custody hearing under s. 48.21, Stats., is required.

HSS 343.08 VIOLATION REPORT. (1) A violation report shall be prepared by the agent when the response to a violation is a summary disposition or the initiation of revocation or change in placement proceedings. The violation report shall be in writing and include the following:

(a) A description of the alleged misconduct including any conflicting versions of the nature and circumstances of the alleged violation;

(b) The alleged victim's statement or a statement of the impact on the alleged victim;

(c) The youth's statement;

(d) A description of any alleged violations of the law, guilty plea, confession, prosecutor's recommended disposition or conviction for the conduct underlying the alleged aftercare violation, if known;

(e) A list of all rules and special conditions the youth allegedly violated;

(f) A description of the agent's investigation and statement of the agent's conclusions;

(g) Information about the custody status of the youth; and

(h) A recommendation of revocation or change in placement, and reasons for the recommendation, or a description of the specific summary disposition imposed under s. HSS 343.07(2)(b).

(2) The violation report shall be maintained in the youth's supervision file.

(3) A copy of a violation report prepared by an agent shall be submitted to the agent's supervisor who shall review it.

HSS 343.09 PREPARATION FOR REVOCATION HEARING. (1) NOTICE. In preparation for a revocation hearing for a youth on state aftercare, the department shall personally serve the youth with written notice of the hearing. If a youth is held in physical custody under s. 48.205, Stats., or has been returned to the institution under s. HSS 343.07(2)(c)6, service shall be within 7 days after the youth was taken into custody under s. 48.19, Stats. If the youth is not in physical custody under s. 48.205, Stats., and is not at the institution, service shall be made at least 14 days prior to the scheduled revocation hearing. The notice shall also be sent to the hearing examiner's office and either the appropriate public defender's office or the youth's attorney. The notice shall include:

(a) A statement of the alleged violation;

(b) A statement of the rule or special condition the youth allegedly violated;

(c) A statement that a revocation hearing has been scheduled under this section and an explanation of the youth's general rights at that hearing which shall include all of the following:

1. The right to be present;

2. The right to deny the allegation and speak on his or her own behalf;

3. The right to present evidence;

4. The right to present witnesses and the right to question witnesses in accordance with s. HSS 343.11(2)(a) and (b);

5. The right to be represented by an attorney; and

6. The right to receive a written decision stating the reasons for the decision based upon the evidence and testimony presented;

(d) A statement of the evidence to be considered at the hearing which may include but not be limited to:

1. Documents;

2. Physical and chemical evidence;

3. Results of a breathalyzer test;

4. Incriminating statements by the youth;

5. All police reports regarding the allegation;

6. All warrants issued relating to the allegation; and

7. Relevant photographs;

(e) A statement that the youth has the right to waive the revocation hearing in accordance with sub. (3), in which case the secretary will decide whether to revoke his or her aftercare;

(f) A statement that whatever relevant information or evidence is in the possession of the department is available for inspection unless the hearing examiner under s. HSS 343.11(2)(b) determines that the information or sources of information may be kept confidential; and

(g) The date, time and place of the hearing.

(2) REISSUANCE OF NOTICE. When the notice of a revocation hearing is found to be improper and the impropriety by itself results in the dismissal of the revocation proceedings, the department may issue a proper notice for the revocation hearing.

(3) WAIVER. (a) A youth served with notice under sub. (1) may waive the right to an attorney or to a revocation hearing, or both the right to an attorney and the right to a revocation hearing, if the youth waives the right or rights knowingly and voluntarily and in writing.

(b) An agent may not accept a waiver from a youth who is less than 15 years old at the time of the waiver unless the youth's attorney approves of the waiver. An agent may not accept a waiver from a youth of any age who the agent reasonably believes may lack the mental capacity to waive his or her rights. A youth 15 years

of age or older shall be permitted to consult an attorney before the youth waives any rights.

(c) A waiver to be valid shall be signed in the presence of a witness who is an adult. The witness may not be an employe of the department unless this is impractical.

(4) REVIEW OF EVIDENCE. At least 2 days prior to a hearing, the youth and the youth's attorney, if any, may review all evidence to be submitted by the department at the hearing, except evidence that the hearing examiner determines is nondisclosable such as the identity of confidential informants.

(5) INFORMATION PACKET. At least 5 days prior to a hearing, the youth and the youth's attorney, if any, shall be sent copies of the following documents:

(a) The court order placing the youth in the legal custody of the department;

(b) The aftercare rules and special conditions signed by the youth;

(c) The violation report;

(d) The case history review summary;

(e) A statement from any unavailable witness and a statement explaining why the witness is unavailable;

(f) The division's Request for Administrative Action form; and

(g) The division's Aftercare Revocation Notice, Rights, Acknowledgement and Waiver form.

(6) HARMLESS ERROR. When a procedural requirement under this chapter is not met by department staff, the error shall be harmless and disregarded if it does not substantially affect the rights of the youth. Rights are substantially affected when a variance from a requirement prejudices a fair revocation proceeding for the youth.

(7) CONCURRENT PROSECUTION. All revocation proceedings under this chapter may proceed regardless of any concurrent prosecution of a youth for the conduct underlying the alleged aftercare violation. Dismissal or an acquittal in a court proceeding for a youth's conduct underlying an alleged violation does not preclude revocation of that youth's aftercare for the same conduct.

(8) DECISION TO TERMINATE REVOCATION PROCEEDINGS. At any time during the revocation proceedings, the agent and supervisor may consider whether to terminate the revocation proceedings in order to implement an alternative course of action. The supervisor shall decide whether to terminate the proceedings. The agent may appeal the supervisor's decision to the administrator.

HSS 343.10 PROCEDURE WHEN HEARING RIGHT IS WAIVED. (1) SUPERVISOR'S RECOMMENDATION. When a youth on state aftercare under s. HSS 343.09(3) waives his

or her right to a revocation hearing, the supervisor may recommend that the secretary revoke the youth's aftercare.

(2) RECORD. When a supervisor recommends revocation under sub. (1), the supervisor shall forward the youth's waiver and the violation report, which includes written reasons in support of revocation, to the secretary within 14 days after acceptance of the waiver unless the secretary grants an extension for cause.

(3) SECRETARY'S DECISION. The secretary shall review the documents under sub. (2) and on the basis of that review shall decide whether to revoke the youth's aftercare. The secretary shall issue the decision in writing, stating the reasons for it based upon the documents. The decision shall be forwarded to the youth, the youth's attorney, if any, the agent and, if the youth is in custody at an institution or if the decision is to revoke, the institution, within 14 days after the secretary receives the documents.

HSS 343.11 REVOCATION HEARING. (1) TIME. (a) General. A revocation hearing for a youth on state aftercare shall be held within 30 days after the date the youth is taken into custody under s. 48.19, Stats., in Wisconsin for the alleged violation unless the hearing is postponed under sub. (2)(f) or the special circumstances under par. (b) apply.

(b) Special circumstances. If one of the following circumstances applies, the revocation hearing shall be held within 45 days after the date of the supervisor's decision under s. HSS 343.07(2)(c)2 to initiate revocation proceedings, unless the hearing is postponed under sub. (2)(f):

1. The youth has signed a written statement in which the youth admits to having committed the alleged violation;

2. There has been a finding of probable cause by a court on a felony charge or there has been a court order in a delinquency proceeding under s. 48.21(4), Stats., continuing the youth in physical custody under s. 48.205, Stats.;

3. There has been an adjudication of delinquency or conviction by a court for the same conduct that is alleged to be a violation of aftercare supervision; or

4. The youth is not being held in physical custody under s. 48.205, Stats., or in an institution pending the revocation proceedings.

(2) PROCEDURE. (a) General. A revocation hearing shall be closed to the public and conducted before a hearing examiner. At the hearing, the hearing examiner shall read a statement of the alleged violation to those in attendance. The department shall present the case for revocation and respond to questions by the hearing examiner and the youth or the youth's attorney, if any. The youth or his or her attorney shall then present the youth's case. In the course of the hearing, the youth and all witnesses for and against the youth shall have an opportunity to speak and shall be permitted to respond to questions by the youth or youth's attorney, if any, the department and the hearing examiner. Any physical or other evidence allowed under par. (c) to show that the youth did or did not commit the alleged violation or violations, affirmative defenses, mitigating or aggravating factors and suggestions regarding appropriate dispositions may be presented to and shall be considered by the hearing examiner.

(b) Witnesses and sources of information. 1. Except as provided in this paragraph, the hearing examiner shall require that sources of information be identified and that subpoenaed witnesses appear and testify at the revocation hearing.

2. Anyone seeking permission to withhold the name of a source of information or the name of a witness when there is a significant risk of physical or psychological harm to the witness or another person, or requesting that the testimony of a named or unnamed witness be taken outside the presence of the youth, shall contact the hearing examiner.

3. If the hearing examiner finds that there is a significant risk of physical or psychological harm to a witness or another person, the hearing examiner may permit nondisclosure of the name of a source of information or the name of a witness. The hearing examiner may question a witness outside the presence of the youth if the hearing examiner finds that there would be a risk of significant physical or psychological harm if the witness testified in person at the hearing or that the presence of the youth would unduly inhibit the testimony.

4. A hearing examiner shall request the department, the youth and the youth's attorney, if any, to submit relevant questions to the hearing examiner to be asked of any witness questioned outside of their presence. The hearing examiner may forbid any repetitive, disrespectful or irrelevant question or statement. When a hearing examiner questions a witness outside the presence of the department or the youth or the youth's attorney, if any, a general summary of the testimony shall be provided to the department, the youth and the youth's attorney, if any, and each

shall have the opportunity to rebut the testimony through further questioning of the witness by the hearing examiner or by submission of other evidence.

5. The hearing examiner may consider any information, statements, evidence or testimony received from a witness outside the presence of the department or youth or the youth's attorney, if any, if it is relevant. The hearing examiner shall disclose the receipt of any ex parte communication and the questioning of a witness outside the presence of the department or the youth or the youth's attorney, if any, under this paragraph and provide each party a summary of that testimony from the record prepared under sub. (3).

(c) Evidence. A hearing examiner shall consider any relevant testimony and evidence whether or not it would be admissible in a court of law. Hearsay evidence is admissible.

(d) Burden of proof. The department is required to prove by a preponderance of the evidence that the youth violated one or more of the rules or special conditions of his or her aftercare.

(e) Alibi defense. An alibi defense offered on the youth's behalf shall be considered by the hearing examiner if the hearing examiner and the department receive notice of it a reasonable time before the revocation hearing.

(f) Postponement and continuance. The hearing examiner may postpone a hearing only when the youth or youth's attorney, if any, requests or agrees to a

delay of a specified number of days or for other good cause as determined by the hearing examiner.

(3) RECORD. The hearing examiner shall keep a verbatim record of the testimony and evidence presented at an aftercare revocation hearing.

(4) DECISION. (a) After a hearing, the hearing examiner shall consider the relevant testimony and evidence presented at the hearing. The decision may not be based solely on unreliable hearsay. The hearing examiner shall decide:

1. Whether the youth behaved in the manner described in the notice under s. HSS 343.09(1);

2. If the youth behaved in that manner, whether the behavior constitutes a violation of the rules or special conditions of his or her aftercare; and

3. If the youth committed a violation, whether revocation should result.

(b) Revocation may not be the result unless the hearing examiner, on the basis of the offense for which the youth was placed in the department's legal custody and the youth's conduct since then, makes one or more of the following determinations:

1. Revocation is necessary to protect the public from further violations of the law by the youth;

2. The youth is in need of correctional treatment which can most effectively be provided at an institution; or

3. It would depreciate the seriousness of the violation if the youth's aftercare were not revoked.

(c) The hearing examiner's decision with a statement of reasons to support it shall be committed to writing and the written decision shall be mailed to the youth, the youth's attorney, if any, and the department not later than 14 days after the hearing. The hearing examiner may have an extension of 7 days to write up and mail the decision if there is cause for the extension and the examiner notifies the youth, the youth's attorney, if any, and the department of the reasons for the extension.

(5) EFFECTIVE DATE OF DECISION AND APPEAL. The hearing examiner's decision shall take effect and be final 14 days after the date it is issued unless the youth, the youth's attorney, if any, or the department files a written appeal together with any relevant materials with the hearings and appeals administrator, with copies to the other parties, within that time. An extension of time for filing may be granted by the hearings and appeals administrator for cause.

(6) SYNOPSIS. When an appeal is filed, a written or recorded synopsis of the testimony at the hearing shall be prepared by the hearing examiner and forwarded to the hearings and appeals administrator prior to the hearings and appeals administrator's review under s. HSS 343.12(1).

HSS 343.12 DECISION OF THE HEARINGS AND APPEALS ADMINISTRATOR. (1) The hearings and appeals administrator shall review the hearing examiner's decision, the synopsis of the testimony and all materials submitted for and against the appeal and shall decide based only upon those materials to affirm, reverse or modify the hearing examiner's decision or remand the case to the hearing examiner for further fact-finding.

(2) The written decision of the hearings and appeals administrator shall be mailed to the youth, the youth's attorney, if any, the supervisor and the alternate care provider, if any, within 14 days after receipt of all appropriate materials unless the hearings and appeals administrator extends the time period for cause.

(3) The written decision of the hearings and appeals administrator shall be final and shall take effect immediately.

HSS 343.13 APPEAL TO COURT. An appeal of a revocation decision by a hearing examiner may also be made to the circuit court which ordered the youth to be placed with the department. An appeal to the hearings and appeals administrator is not required prior to filing an appeal with the court.

The rules contained in this order shall take effect on the first day of the month following their publication in the Wisconsin Administrative Register as provided in s. 227.22(2), Stats.

WISCONSIN DEPARTMENT OF HEALTH
AND SOCIAL SERVICES

Dated: April 26, 1990

By: Patricia A. Goodrich
Patricia A. Goodrich, Secretary

Seal:



State of Wisconsin

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
1 West Wilson Street, Madison, Wisconsin 53702

Tommy G. Thompson
Governor

Patricia A. Goodrich
Secretary

Mailing Address:
Post Office Box 7850
Madison, WI 53707

April 26, 1990

RECEIVED

APR 26 1990

Revisor of Statutes
Bureau

Mr. Bruce E. Munson
Revisor of Statutes
7th Floor - 30 on the Square
Madison, WI 53702

Dear Mr. Munson:

As provided in s. 227.20, Stats., there is hereby submitted a certified copy of HSS 343, administrative rules relating to expected conduct of youth on state or county aftercare supervision and procedures for dealing with violations of the conditions and rules of aftercare supervision.

These rules are also being submitted to the Secretary of State as required by s. 227.20, Stats.

These rules concern youth who are under correctional supervision in communities by agents of the Department and agents of county departments that administer aftercare supervision. They do not directly affect small businesses as defined in s. 227.114(1)(a), Stats.

Sincerely,

Patricia A. Goodrich
Secretary

Enclosure