MINNESOTA
OFFICE OF
ADMINISTRATIVE
HEARINGS

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October 11, 2024

VIA EFILING ONLY
Ian Lewenstein
Rulemaking Manger
Department of Corrections
1450 Energy Park Dr
Saint Paul, MN 55108
ian.lewenstein@state.mn.us

Re: ***In the Matter of the Adopted Exempt Permanent Rules Relating to Restrictive Procedures and Searches in Juvenile Detention Facilities***
OAH 22-9051-39958; Revisor *R-4862*

Dear Mr. Lewenstein:

Enclosed herewith and served upon you please find the **ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.386 AND MINN. R. 1400.2400** in the above-entitled matter.

Pursuant to Minn. R. 1400.2400, subp. 4a, the Department may resubmit the rule and accompanying materials to the Administrative Law Judge for review. The Department may also request, pursuant to Minn. R. 1400.2400, subp. 5, that the Chief Administrative Law Judge reconsider the disapproval of the rules **within five working days of receiving the Judge's decision**.

If you have any questions, please contact William Moore at (651) 361-7893, at william.t.moore@state.mn.us or via fax at (651) 539-0310.

Sincerely,

Nichole Helmueller
Legal Assistant

Enclosures

cc: Ryan Inman
Legislative Coordinating Commission
Representative Ginny Klevorn
Senator Kari Dziedzic

OAH 22-9051-39958
Revisor R-4862

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Adopted Exempt Permanent Rules Relating to Restrictive Procedures and Searches in Juvenile Detention Facilities	**ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.386 AND MINN. R. 1400.2400**

This matter came before Administrative Law Judge Christa L. Moseng upon the application of the Minnesota Department of Corrections (Department) for a legal review under Minn. Stat. § 14.386 (2024).

On October 7, 2024, the Department filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. § 14.386 and Minn. R. 1400.2400 (2023).

Based upon a review of the written submissions by the Department, and for the reasons set out in the Memorandum which follows below,

IT IS HEREBY DETERMINED THAT:

According to 2023 Minn. Laws Ch. 52, Art. 11, § 34, the Department has the statutory authority to adopt these proposed rules using the exempt rulemaking process.

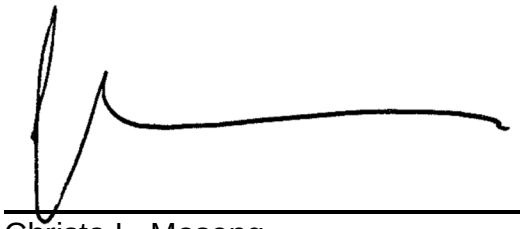
IT IS HEREBY ORDERED THAT:

1. The following rule part is not approved: Part 2960.0240, subp. 3.

2. All other rules or parts thereof are **APPROVED.**

3. The repeal of Minn. R. 2960.0020, subp. 30; and 2960.0710, subp. 8, is **APPROVED**.

Dated: October 11, 2024



Christa L. Moseng
Administrative Law Judge

MEMORANDUM

2023 Minn. Laws Ch. 52, Art. 11, § 34 (Authorizing Law) provides that the Commissioner of Corrections (Commissioner) must amend Minnesota Rules, chapter 2960, to enforce the requirements under Minnesota Statutes, section 241.0215, including but not limited to: training, facility audits, strip searches, disciplinary room time, time-outs, and seclusion. The law further provides that the Commissioner may amend the rules to make technical changes and ensure consistency with Minnesota Statutes, section 241.0215.

Minn. Stat. § 241.0215 applies to juvenile facilities licensed by the Commissioner under Minn. Stat. § 241.021, subd. 2. The statute restricts strip searches and methods of discipline for juveniles in those facilities. Because Minn. R. 2960.0010 – .3340 are jointly administered by the Departments of Corrections and Human Services, the Authorizing Law excepts from joint administration a rule amendment applicable only to the Department of Corrections and provides that "[a] rule that is amending jointly administered rule parts must be related to requirements on strip searches, disciplinary room time, time-outs, and seclusion and be necessary for consistency with this section."

The Commissioner is required to use the exempt rulemaking process under Minn. Stat. § 14.386. But, unlike rules typically adopted under Minn. Stat. § 14.386, which expire after two years, a rule adopted under the Authorizing Law "is permanent."[1] Although the same standards apply to this rule as other exempt rules, the permanency of the rules increases the stakes for this review of the proposed rules' legality.

Rules adopted under Minn. Stat. § 14.386 are subject to the requirements in Minn. R. 1400.2400 and Minn. R. 1400.2100, items A and D to G (2023). Accordingly a rule must be disapproved if it:

> A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);
>
> [. . .]
>
> D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;
>
> E. is unconstitutional or illegal;
>
> F. improperly delegates the agency's powers to another agency, person, or group;

[1] 2023 Minn. Laws Ch. 52, Art. 11, § 34(b).

G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law

The Department's Summary Explanation thoroughly and adequately explains the proposed amendments and their basis in the law.[2] The Department's submission has been proposed consistent with the Authorizing Law and is substantively consistent with the requirements of the Authorizing Law and Minn. Stat. § 241.0215 (2024). With one exception, the Department's submission satisfies the requirements of Minn. Stat. § 14.386 and Minn. R. 1400.2400. Accordingly, except as provided below, there is no basis to disapprove the proposed rules.

Disapproved Amendment: Part 2960.0240, subp. 3

A statute or rule is impermissibly vague when people of common intelligence must guess at its meaning or when the words of the rule are not sufficiently specific to provide fair warning of the type of conduct which is prohibited.[3] A rule is not unconstitutionally vague where the words are commonly understood, are judicially defined, or have a settled meaning in law.[4]

The proposed rule amends Minn. R. 2960.0240, subps. 3 and 6, to detail requirements for trauma-informed searches, as required by Minn. Stat. § 241.0215, subd. 3. Specifically, the amendment to subpart 6 will require that a strip search or resident-assisted search must be conducted "by a staff member of the same identified gender as the resident." However, the amendment to subpart 3, which relates to a facility's staffing plan, would provide:

> D. The license holder must not assign staff in a manner that invades the privacy of residents or embarrasses or diminishes the dignity of residents by requiring staff of the opposite ~~sex~~ gender to perform the duties in subitems (1) to (4): (1) strip searches and resident-assisted searches;

Here, the Commissioner proposes to replace the word "sex" with the word "gender," which would be consistent with the term used in subpart 6. But in subpart 3 it is modified not by "same identified"[5] but by "opposite." Because the word "gender" would be modified with the word "opposite," this amendment is impermissibly vague.

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[2] Exhibit B2.

[3] *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980); *See Irongate Enterprises v. County of St. Louis*, 736 N.W.2d 326, 332 (Minn. 2007) (discussing vagueness as pertains to a statute).

[4] *Irongate,* 736 N.W.2d at 332.

[5] It is unclear what purpose "identified" serves here. Later rule amendments require data reporting "disaggregated by age, race, and gender." And, existing rule language proposed to be struck requires that "[t]he search of the resident must be done by a staff person of the same gender as the resident." The Department offers no explanation for the introduction of the qualifying adjective "identified" in subpart 6, of how "identified gender" is distinct from "gender," or, importantly, who is doing the identification. These vagaries are significant where the goal is to uphold a person's dignity during strip searches and resident-

Neither the rule chapter nor the statutory chapter governing facilities of the Department of Corrections[6] define gender. However, looking to legal or common understandings of the word "gender," it can not function as a drop-in replacement for the word "sex" in this context.

In its policy titled "Management and Placement of Incarcerated People Who Are Transgender, Gender Diverse, Intersex, or Nonbinary," the Department defines gender as "a set of socially-constructed roles, behaviors, activities, and attributes that society uses to classify an individual as, for example, feminine, masculine, both, or neither."[7] The Minnesota Human Rights Act[8] defines "gender identity" as "a person's inherent sense of being a man, woman, both, or neither."[9] The *American Heritage Dictionary of the English Language* offers multiple definitions of gender, one of which is "[o]ne's identity as female or male or as neither entirely female nor entirely male."[10]

To the extent that there is common understanding or settled meaning in law, gender does not exclusively contain elements in evident binary opposition. Because it is unclear what definition of "gender" the Commissioner intends, and because rule, law, and common understanding provide no clarity as to a given gender's "opposite," it is unclear what conduct the amended language would prohibit.

In addition to being impermissibly vague, were the proposed amendment to subpart 3 adopted, the Commissioner would likely find the amended rule inadequate. Prohibiting the assignment of "opposite gender" staff is not the same as prohibiting the assignment of "different gender" staff. The Commissioner plainly intends to ensure that searches are conducted by a staff member of the *same* gender as the resident because proposed subpart 6 would require it. The amendment to subpart 3 should agree with the requirement of subpart 6.

The Judge concludes that the proposed amendment to subpart 3 is defective because it renders the amended rule impermissibly vague. To cure this defect, the Judge recommends that the language of subpart 3, item D, be revised consistent with the same-gender provision in proposed subpart 6, as follows:[11]

> D. The license holder must not assign staff in a manner that invades the privacy of residents or embarrasses or diminishes the dignity of residents by requiring staff of ~~the opposite sex~~ a different gender to perform the duties in subitems (1) to (4): (1) strip searches and resident-assisted searches;[. . .]

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assisted searches. Because it is vague and appears superfluous, the Judge recommends removing the word "identified," but does not disapprove the amendment to subpart 6 on this basis.

[6] Minn. Stat. § 241.01–.95 (2024).

[7] Department Policy No. 202.045 (Apr. 1, 2024).

[8] Minn. Stat. §§ 363A.01–.50 (2024).

[9] Minn. Stat. § 363A.03, subd. 50.

[10] Gender, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2022).

[11] Better practice would be to reword item D in subpart 3 to be a positive rather than a negative requirement, which would allow a parallel use of "same;" but, in keeping with a principle to minimize changes to existing language, the Judge does not recommend it on this occasion.

Recommended Change: Part 2960.0740

This proposed rule part describes when and how "administrative separation" must be used. As drafted, it appears as though an extra "and" may make the circumstances requiring administrative separation unintentionally narrow:[12]

> Subpart 1. **When used.** Administrative separation must be used by staff when a resident:
>
> A. is engaging in behavior that requires law enforcement to determine whether criminal charges or delinquency proceedings should be brought;
>
> B. is participating in gang activity that would threaten the resident, other residents, or facility staff if the resident were not separated;
>
> C. according to the vulnerability assessment under part 2960.0070, subpart 5, item A, is vulnerable on the basis of actions or comments and the vulnerability creates a threat to the resident's safety; **and**
>
> D. on the basis of actions or comments, creates a threat to another resident's safety and requires a different environment better suited to the resident's needs until staff can create a modified treatment plan; or
>
> E. is being chronically disruptive and the disruption: [. . .].

As proposed, it appears administrative separation must be used when (1) items A, B, C ***and*** D are satisfied, or (2) item E is satisfied. If the Commissioner intends to require the conditions in A, B, C and D to all be present to satisfy the first part of the disjunction, no change is warranted. However, if the intent is to require administrative separation when items A, B, C, D, ***or*** E are satisfied, the "and" between items C and D should be removed.[13]

C. L. M.

[12] Underlining omitted for clarity because this entire provision is proposed new rule language, and emphasis added.

[13] Another possible intent is that items C and D should be combined into one item.