

DEPARTMENT OF HEALTH AND HUMAN SERVICES

CHILDREN'S SERVICES AGENCY

DIVISION OF CHILD WELFARE LICENSING

**PROHIBITION OF PRONE RESTRAINT; PROCEDURES INVOLVING OTHER
RESTRAINTS IN CHILD CARING INSTITUTIONS**

EMERGENCY RULES

Filed with the Secretary of State July 16, 2020

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

(By authority conferred on the director of the department of health and human services by sections 2, 5, 10, and 14 of 1973 PA 116, MCL 722.112, 722.115, 722.120, 722.124; Executive Reorganization Order No. 2015-1, MCL 400.227; and section 48 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.248.)

FINDING OF EMERGENCY

1973 PA 116, MCL 722.111 to 722.128, known as the child care organizations act, (Act) provides for the protection of children through the licensing and regulation of child care organizations and for the establishment of standards for child care in the form of administrative rules. The Department is empowered to exercise authority and promulgate rules to carry out the mandates of the Act, and to safeguard the public health. MCL 333.2226(d).

A child caring institution (CCI) is one type of child care organization covered in the Act. CCIs are defined in section 1(c) of the Act, MCL 722.111, as follows:

"Child caring institution" means a child care facility that is organized for the purpose of receiving minor children for care, maintenance, and supervision, usually on a 24-hour basis, in buildings maintained by the child caring institution for that purpose, and operates throughout the year. An educational program may be provided, but the educational program shall not be the primary purpose of the facility. Child caring institution includes a maternity home for the care of unmarried mothers who are minors and an agency group home, that is described as a small child caring institution, owned, leased, or rented by a licensed agency providing care for more than 4 but less than 13 minor children. Child caring institution also includes an institution for developmentally disabled or emotionally disturbed minor children. Child caring institution does not include a hospital, nursing home, or home for the aged licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260, a boarding school licensed under section 1335 of the revised school code, 1976 PA 451, MCL 380.1335, a hospital or facility operated

by the state or licensed under the mental health code, 1974 PA 258, MCL 330.1001 to 330.2106, or an adult foster care family home or an adult foster care small group home licensed under the adult foster care facility licensing act, 1979 PA 218, MCL 400.701 to 400.737, in which a child has been placed under section 5(6).

On May 1, 2020, a young man tragically died due to the improper use of a physical restraint at Lakeside for Children facility, a CCI licensed by the Department of Health and Human Services (Department). In response to this tragedy, the Department initiated a robust review of the current statutes, administrative rules, and policies regarding restraint in CCIs. The Department also consulted with national experts at the Annie E. Casey Foundation, Casey Family Programs and the Building Bridges Initiative (Casey) to review the current restraint framework.

Based on this review, the Department concluded that current administrative rule, Michigan Administrative Code R 400.4159, does not sufficiently protect against dangerous restraints. In addition, the current rule lacks reporting requirements the Department needs to track the use of restraints, monitor CCI performance, and provide oversight against dangerous practices. A rule providing for such tracking, monitoring, and oversight is necessary to prevent further harm or death due to improper use of restraints.

These rules will prohibit the use of a particularly dangerous form of restraint, limit the duration of restraints, limit the circumstances when restraints can be used, and require timely notification to the Department when any restraint is used to prevent immediate or imminent injury to the individual or to others. Following the normal rulemaking process under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, (APA) would result in ongoing use of this dangerous form of restraint while rules are promulgated, and would forego critical data collection and reporting that is needed to understand the extent of the problem and timely intervene to prevent danger.

In light of the foregoing, I find that emergency rules are necessary to safeguard the public health, welfare, and safety, because any delay will result in ongoing use of dangerous restraints without appropriate oversight. Under section 48(1) of the APA, 1969 PA 306, MCL 24.248(1), the Department may promulgate rules without following the notice and participation procedures required by sections 41 and 42 of the APA, MCL 24.241 and 24.242, under these circumstances. In addition, the Department finds these emergency rules are necessary to help prevent any harm that might occur to children in child caring institutions during the period of time to complete the notice and participation procedures in promulgating permanent rules.

Prohibition of Prone Restraint; Procedures Involving Other Restraints in Child Caring Institutions

Rule 1. (1) A child caring institution (CCI) must establish and follow written policies and procedures regarding restraint. These policies and procedures shall be available to all residents, their families, and referring agencies.

(2) Resident restraint must be performed in a manner that is safe, appropriate, and proportionate to the severity of the minor child's behavior, chronological and developmental age, size, gender,

physical condition, medical condition, psychiatric condition, and personal history, including any history of trauma, and done in a manner consistent with the resident's treatment plan.

(3) Mechanical restraints must not be used on pregnant youth, including youth who are in labor, delivery, and post-partum recovery, unless credible, reasonable grounds exist to believe the youth presents an immediate and serious threat of hurting self, staff, or others.

(4) The following restraints are prohibited for use on pregnant youth unless reasonable grounds exist to believe the youth presents an immediate and credible risk of escape that cannot be reasonably minimized through any other method:

- (a) Abdominal restraints.
- (b) Leg and ankle restraints.
- (c) Wrist restraints behind the back.
- (d) Four-point restraints.

Rule 2. The written policy must include all of the following:

(a) Procedures for a debriefing of the restraint among the staff involved and supervisors immediately following the end of the restraint that examines preventive strategies that could have been used to avoid the restraint.

(b) Procedures to debrief with the youth restrained that includes the examination from the youth's perspective of preventive strategies that could have been used to help support the youth to avoid behavior or that would have helped the youth de-escalate from behaviors that placed the youth or others at risk of injury.

(c) Procedures for recording restraints as an incident report. The incident report must include the reason for the restraint, the type of restraint used and its duration, names of all staff involved with the restraint and their roles and a description of all less restrictive interventions utilized prior to the initiation of the restraint.

(d) Procedures to submit the incident report regarding all restraints within 12 hours to the parent or legal guardian in writing and in writing to the Michigan Department of Health and Human Services within 24 hours, as well as the review and aggregation of incident reports regarding restraints at least biannually by the CCI's director or designee.

(e) Procedures for a comprehensive review of the incident within 24 hours following the use of a restraint. Such comprehensive review may need to occur multiple times over multiple days to support the youth involved or any youth that witnesses the restraint. Family members should be invited to participate in the review.

(f) Procedures for the provision of sufficient and adequate training for all staff members of the CCI who may use or order the use of restraint using the CCI's written procedures.

Rule 3. (1) The written policy must only permit the licensee to restrain a child after less restrictive techniques have been exhausted and the restraint is still necessary to either of the following:

- (a) To prevent serious injury to the child, self-injury, or injury to others.
- (b) As a precaution against escape where the youth may be at risk of injury to self or others.

(2) The written policy must prohibit, at a minimum, any of the following aversive punishment procedures:

- (a) The use of noxious substances.
- (b) The use of instruments causing temporary incapacitation.

- (c) Chemical restraint as that term is defined in section 2b of 1973 PA 116, MCL 722.112b.
- (d) Prone restraints or other restraint that may constrict a youth's breathing.
- (3) Restraint equipment and physical restraint techniques must not be used for punishment, discipline, or retaliation.
- (4) The use of a restraint chair is prohibited.

Rule 4. (1) Resident restraint must only be applied for the minimum time necessary to accomplish the purpose for its use as specifically permitted in Rule 1(2).

(2) The approval of the administrator or his or her designee must be obtained before any use of material or mechanical restraints. A staff member shall be present continuously while material or mechanical restraint equipment is being used on a resident, and the staff member shall remain in close enough proximity to the restraint to intervene immediately in case of emergency to protect the safety of the resident.

(3) A staff person shall document each use of material or mechanical restraint equipment in a written record and shall include all of the following information:

- (a) The name of the resident.
- (b) The name of the administrator or designee who authorized the use of the equipment, and the time of the authorization.
- (c) The time the restraint equipment was applied.
- (d) The name of the staff member who was responsible for the application.
- (e) A description of the specific behavior that necessitated its use.
- (f) The name of the staff person who was continuously with the resident.
- (g) The date and time of removal of the equipment and the name of the person removing the equipment.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES



Robert Gordon, Director

Date: July 15, 2020

Pursuant to Section 48(1) of 1969 PA 306, MCL 24.248(1), I hereby concur in the finding of the Department of Health and Human Services that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rules.



Gretchen Whitmer, Governor

Date: July 15, 2020