1999 DRAFTING REQUEST

Bill

Received: **11/17/1999**

Received By: **olsenje**

Wanted: **As time permits**

Identical to LRB:

For: **Health and Family Services**

By/Representing: **John Kiesow**

This file may be shown to any legislator: **NO**

Drafter: **olsenje**

May Contact:

Alt. Drafters:

Subject: **Criminal Law - miscellaneous**
Mental Health - detent/commit

Extra Copies: **MGD**
DAK
JTK
RJM

Pre Topic:

No specific pre topic given

Topic:

Treatment rights of sexually violent persons

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/P1	olsenje 12/20/1999	chanaman 12/20/1999	martykr 12/21/1999	_______ _______	lrb_docadmin 12/21/1999		State
/P2	olsenje 01/17/2000	chanaman 01/18/2000	hhagen 01/18/2000	_______ _______			State
/1	olsenje 01/19/2000	wjackson 01/19/2000	jfrantze 01/19/2000	_______ _______	lrb_docadmin 01/19/2000	lrb_docadmin 02/16/2000	State

FE
N/A
2/16/00

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FE Sent For:

<END>

LRB-3970

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FE Sent For: cmtt / 1/19   [handwritten: nh 1/18   nh/rr 1/18   [illegible] 1/19   [illegible]/km 1/19]

<END>

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/?	olsenje	cmH 12/20 /P1	km 12/21	jf 12/21 km			

FE Sent For:

<END>

- Rights of ch. 980 detainees

• Treatment objective – if treatment rationale allows differential trtmt, OK from eq. protection standpoint.

– Take out of ~~ch. 980~~ 51.61;

essentially: start off w/zero rights
let them earn rights
~~but~~ lose rights if violation
May earn them back

– [Severability?]

– Initial app. → ~~OR~~ transition provision: assessment of existing committees
(do this)

– Grievance: limited to facility
"What process is due?"
Exhaustion of remedies b4 ct.

– least restrictive language – check

– Right to refuse trtment: Refusal could result in lower level of rights
– a consequence of refusal

– Exempt from rules

APPROPRIATE SVP PATIENT RIGHTS

Current Patient Rights under s.51.61, Stats.

- The current patient rights laws were created to protect vulnerable individuals.
- Patients are given as many rights as possible.
- Most rights cannot be limited or denied for any reason, but a few rights can be limited or denied for treatment or security reasons.
- The current patient rights paradigm looks like this:

All Rights → Abuse of Right → Right Limitation → Review → Reinstatement

Impact of Current SVP Patient Rights

- The data show that 75% of SVP patients abuse their rights.
- Over 1/3 do so repeatedly, creating many new victims in the process.
- Almost 1/2 (43%) of the incidents were illegal or, without staff intervention, would have resulted in crimes being committed.
- Full rights for SVPs leads to more community, staff and peer victims.
- This creates new victims and is counter-therapeutic to the patients' treatment.

A New approach to SVP Patient Rights

- The new paradigm would look like this:

Limited rights → Treatment / trust → Incremental increase → Full rights → Release

- They should start out with very limited opportunities to victimize.
- Rights should increase incrementally as they progress in treatment.
- Violations would result in the return to a more restrictive rights level.

<u>Purpose</u>: To provide a safe and secure environment that fosters and supports effective treatment of SVPs while preventing further victimization of the community, staff and peers.

Definition of Resident	A resident is any person detained or committed pursuant to Ch. 980, statutes, who is residing in a state-operated facility.
Civil Rights	Residents have the right to vote in state and national elections. Residents have the right to vote in local elections if the resident was a resident of the county in which the facility is located prior to their 980 commitment. Residents have the right to make a will. They may marry with approval of facility director after a therapist approved by the facility director has completed pre-marital counseling with the couple. Marital counseling may be provided by the facility or the resident may request to have and pay for an outside counselor. Residents may enter into other contracts with treatment team approval.
Right to be Informed of rights	Must be informed of rights, upon admission or commitment, or as soon thereafter as practical if they are unable to understand their rights upon admission. Written copies shall be available in residents' living units and library, and available to guardians and immediate family. Must be informed in a language resident can understand.
Treatment	Residents have the right to adequate and appropriate offense related treatment that is individualized to their needs. Residents who refuse treatment or deny their offenses will be placed on a corresponding treatment status and management level as determined by treatment team.* Every aspect of a resident's behavior may be considered as possible treatment targets and proper subjects for treatment planning and interventions.
Participate in Treatment	Residents will be encouraged to participate in development of their treatment plan. Resident's input will be documented in resident's treatment records. The final decision on all treatment issues rests with the treatment team.
Second Opinions	Residents may request a review of their treatment team's decision. This review is to be provided by the clinical director or designee. Resident may request outside second evaluation by an evaluator approved by the clinical director and at the resident's expense.
Mail	Residents have the right to correspond with individuals or businesses on their individual approved correspondence lists. Mail (other than legal mail, as defined herein) can be opened and read by staff. The degree of mail monitoring should correspond to a resident's management level. * All outgoing mail will be stamped as coming from an SVP facility. An address, in the case of incoming mail, or a return address, in the case of outgoing mail, must have the resident's admission name and correct facility address. Residents may send and receive correspondence to government agencies, officials, private physicians and licensed psychologists independent of their approved correspondence list but this mail is still subject to the approval of the facility and the monitoring provisions of this section.
Legal Mail	Legal mail (defined as mail to and from courts, attorneys, and grievance personnel only) must be shaken out in front of

	staff. Staff may open legal mail with documented "cause".
Packages, other Mail	Residents have the right to receive packages and publications after such items are opened and inspected by staff. Mail from businesses and magazines can be reviewed or read by staff for appropriateness. Items which pose a security risk or are counter-therapeutic to the individual will be returned, destroyed, or held as evidence for future annual review or re-exam hearings and the resident will receive notice as to the disposition of the item, and be documented in the resident's treatment record.
Visitors	Residents have the right to receive visits from individuals on their individual approved visitors lists. Visits can be limited or monitored by staff, the degree of restriction or monitoring will correspond to the resident's management level. * Visitors must undergo appropriate security checks and procedures prior to being allowed to visit with the resident. Visitors may be denied visits for specified periods as a result of non-compliance with visiting procedures or security breaches, as determined by the facility director or designee, and with appropriate notification in writing.
Phone Calls	Residents have the right to make and receive pre-approved telephone contacts. Residents will have approved callers lists. Approval will be contingent upon facility investigation/verification of the identity and relationship of the requested caller/receiver of resident calls. Calls can be limited and monitored by operational policy for security, management or therapeutic reasons by the treatment team. Outgoing calls may identify the facility/program of origin, and both incoming and outgoing calls may be recorded for monitoring at a later time.
Possessions	Residents have a right to specified/approved personal possessions and property. The facility director or designee decides on the approval and limits on property/possessions. Possessions may be limited or restricted for operational security or management reasons, or restricted individually in accordance with the resident's management level.
Restraints	Residents will be restrained during transport outside the facility, except in the case of medical transport when medically contraindicated as determined by a physician, or as required by policy by the emergency medical transportation provider. Restraints may be used during internal facility movement, as individually determined by the facility director, designee or clinical director or in accordance with the resident's management level, or in the case of emergencies or lock-downs.
Protective Isolation	"Protective Isolation" is when a resident is isolated from his peers for treatment, security or management reasons to contain a resident's aggressiveness, to diminish a risk he poses or to protect him from peers. Residents may be kept in protective isolation when necessary and for a length of time determined by the facility director or designee relying on input from the treatment team. Temporary protective isolation may be ordered by the facility, clinical or security director pending investigations into rule violations, relying on input from the treatment team. If protective isolation is necessary for treatment reasons, that part of the treatment plan must be reviewed and approved by the clinical director in the beginning and at each regular treatment planning and review interval/session.
Seclusion	A licensed psychologist or a medical doctor can order emergency seclusion. Seclusion or restraint for the purpose of treatment must be reviewed and approved by a physician, psychiatrist or licensed psychologist.

Lockdowns	Residents may be locked in their rooms during cross-shifts, during emergencies, or during security "shakedowns".
Rules of Conduct	The facility director may approve development and implementation of a standardized set of resident conduct rules or expectations, and corresponding consequences for violation of those expectations, and a set of procedures carried out by investigative, and treatment teams to administer/implement them. Residents have a right to receive notice of these rules and behavior expectations, possible consequences and processes/procedures to administer them.
Medication	Residents have a right to refuse psychotropic medications except in an emergency or when they are court-ordered. Due process for court ordered psychotropic medication parallels that under Sec. 51.61, Stats.
Labor	Residents have a right to refuse to perform labor that is of financial benefit to the facility. Residents may voluntarily engage in therapeutic labor if that labor financially benefits the facility and if it is compensated according to a plan approved by the Division. Residents may voluntarily engage in therapeutic labor without compensation when it does not financially benefit the facility. Uncompensated therapeutic labor cannot result in layoffs of staff hired by the facility to otherwise perform such labor. Payment to resident performing labor under this section shall not be applied to the costs of treatment without their informed, written consent. Residents can be required to clean their own rooms and perform light housekeeping tasks in common areas as long as all residents living in or using the area share the work.
Records Access	Residents may have access to their own treatment or medical records during treatment. The facility director may limit or deny such access for treatment, security or management reasons. Limits or restrictions on access may be applied according to treatment status or management level of the resident.* In the case of medical records, access will be determined according to the factors previously listed and in consultation with any contracted medical provider.
Confidentiality	Outgoing mail may be stamped as having come from an SVP facility. Resident's phone calls in or out may carry an identifying message that the call is to or from an SVP facility. Any potential or actual new victims of resident actions that the facility becomes aware of can be informed of the resident's Ch. 980 status. Any inquiry from a law enforcement agency about an unsolved violent offense, whether general or specific, may be provided any information, including the name of residents, nature of the facility and information disclosed during treatment as long as that information is relevant to assisting in the resolution of that offense, or providing closure for the victim or victim family members. Residents who have been taped during a facility wide emergency may be identified to law enforcement or emergency response personnel, and other information released as relevant to controlling or resolving the emergency, and tapes may be used in future emergency response training sessions for emergency response personnel.
Clothing	Residents have a right to wear their own clothing or be provided an allowance of adequate clothing if none are available, as approved by the facility director based on operational security or management reasons. The extent to which residents are allowed to wear personal clothing items may vary according to designated management levels.* Residents assigned to specific management level may be required to wear designated facility issued clothing or other visible identification items in order to designate and identify management and movement status.
Religion	Residents shall be allowed to participate in approved religious services offered within the facility and if a member of the

	clergy of the resident's religious denomination is available to the facility. No resident may be coerced into engaging in any religious activities.
Filming and Taping	Residents can be filmed or taped in common areas, including bathrooms. Residents can be taped during treatment sessions for treatment, security or management purposes. Residents have a right to be informed of the taping activity and it's purpose prior to taping them.
Privacy	Residents have a right to privacy however, privacy may be limited, depending on resident's management level. *
Drastic Treatment	Residents cannot be subject to drastic treatment measures (psychosurgery, etc.) without informed written consent.
Experimental Research	Residents have the right to be informed of experimental treatment that may reasonably be expected to improve their sexually violent mental disorder or condition, and that the facility/program is considering for possible implementation and research. Refusal of experimental treatment may result in a designated treatment status and management level when no sufficient body of empirical research exists to validate the effectiveness of a particular treatment over another proposed theoretical or experimental treatment. Residents have the right to refuse to be subject to experimental treatment and research that involves the use of pharmaceutical or other ingested substances, surgical procedures, aversive conditioning or other drastic/extreme behavior modification techniques without informed written consent. The facility will establish a research and ethics committee consisting of members with varying backgrounds, and at least one external, non-staff member, to ensure complete and adequate review of research activities conducted by the facility. The committee shall possess the professional competence necessary to review and recommend approval of specific research activities to the facility director or designee, and shall be able to ascertain the acceptability of proposals in terms of commitments to the facility, applicable law and standards of professional conduct, practice and community attitudes.
Resident Jobs	Residents will have opportunities provided by, and within the facility and programs, to provide labor to the facility, with their consent, and corresponding to designated management/ treatment levels and the resident's assigned level. * The facility will determine the number and types of jobs to make available to the residents and shall consider such things as facility staff supervision and fiscal resources. Pay rates must conform to the minimum wage requirements of state and federal law.
Resident Funds	Residents may be allowed to carry cash or credit cards or have outside bank accounts at certain designated management levels.* Mechanisms must be established by the facility for residents to perform approved purchases and other financial transactions using their facility account. All transactions must go through the facility's resident account management system. All incoming property purchases must be approved by the facility and go through the institution's resident accounts system.
Liability	Residents have a right to be informed of any financial liability they or their relatives may incur for costs of care and the right to receive information about the charges for care and treatment. Also incorporate 51.61(2)(w)(2 & 3).

Restitution	Residents may be required to make restitution payments as part of their treatment plan. Restitution may be required to past or current victims of their actions, including the facility if state property is damaged as a result of the resident's actions, and/or to facility staff in the case of resident to staff assault and if physical injury and medical costs occur.
Storage space	Residents shall have a reasonable amount of storage space for seasonal clothing and for property that is disapproved due to reductions in the resident's assigned management level. *
Grievance Process	Residents are required to attempt to settle complaints by first appropriately discussing issues with designated staff or in community meetings, or as required by the treatment team. If the issue is not resolved, a resident may file a grievance with the facility's clients rights specialists (CRS). The resident or affected staff may appeal the CRS's decision to the facility director who may elect to render a final decision on the complaint or request the DCTF Clients rights Office to investigate and make a recommendation to the director as to resolution.
Resident Input	The facility shall develop and inform residents of mechanisms for individual residents to provide positive suggestions and input to the effective attainment of the treatment goals of the facility.
Legal Access	Visits and telephone calls with attorneys and grievance personnel shall be private. The facility may require verification of the legal entity and shall make reasonable provisions and arrangements for private calls to and from legal representatives. Provisions for these calls will be subject to facility procedures and available facility resources to provide for/manage the private space, numbers and length of these calls, except that the facility shall make provisions for these calls when legal proceedings or activities require immediate action because of an imminent deadline, hearing or court proceeding. Residents will be required to pay legal access costs, including costs of copying legal documents, unless they do not have sufficient funds at the time and can show there is a bona fide, pressing need for the access or copies. The facility may choose to require the resident to repay any legal costs, including copying costs, when the resident can afford it.
Lawsuits	Residents must exhaust their administrative remedies prior to filing a lawsuit on a resident rights issue. 801.02 (8)
P & A	Protection and Advocacy law (Sec. 51.62, Stats.) does not apply to Ch. 980 residents.
Rules	The department shall adopt rules to define specific procedures to implement the resident grievance, level, conduct management and protective isolation processes and procedures.

* The management level assigned to the resident determines the resident's rights and any limitations or restrictions of those rights. A resident's management level is established through the treatment team process by considering a combination of treatment, security and management factors, resident needs, and any other relevant factors presented by the individual resident. Refusal of treatment or any required component of treatment may affect an individual's treatment status and that status may affect security-related needs. Both of those elements would be factored into an assigned management level for the resident.

Example/Sample SVP Management Level System

Level 1: Protective Isolation Status

All mail is read; limited no-contact visits, all visits monitored and or recorded; very limited number of time-limited calls, all calls dialed, all calls monitored, possessions very limited; not allowed access to treatment records; not allowed to have cash or outside bank accounts; limited recreational activities; etc.

Level 2: Entry Level Status

Random frequent monitoring of mail, visits, calls; basic personal possessions allowed; state clothing required on admission, can wear own clothing after initial assessment period; not allowed to have cash or outside bank accounts; regular recreation and activities access; etc.

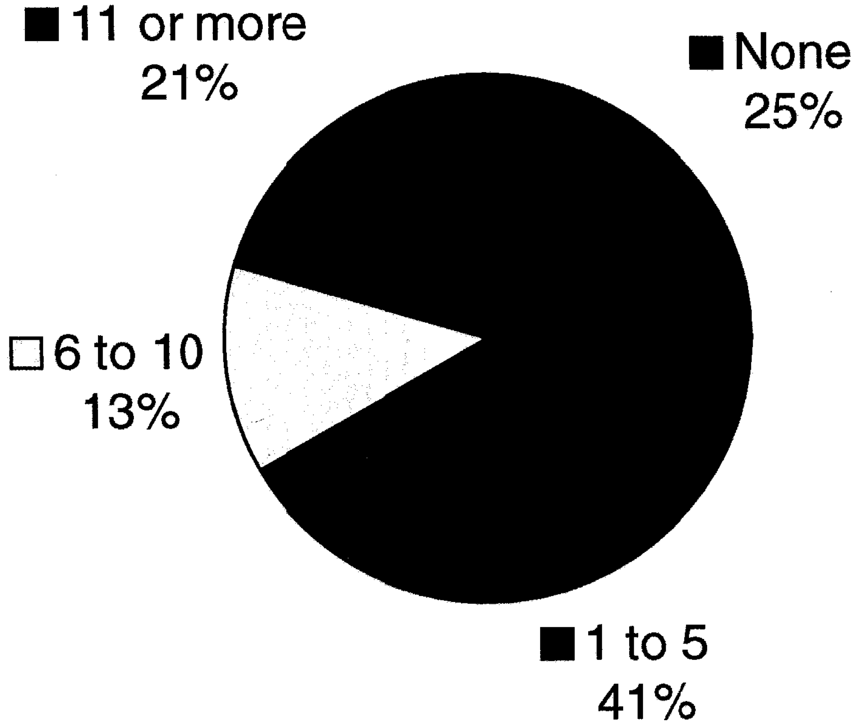
Level 3: Progressing Status

Random infrequent monitoring of mail, visits, calls; extra possessions allowed; can wear own clothing; limited access to treatment records allowed; not allowed to have cash or outside bank accounts; regular recreation and activities access; etc.

Level 4: Maintenance Status

Highest status attained in later stages/phases of treatment program – random occasional monitoring of mail, visits, calls; full possessions allowed; can wear own clothing; regular recreation and activities access; on-site work and vocational training and placements available; allowed to have cash or outside bank accounts with treatment team approval and monitoring; residents set own program and activity schedule, including recreation and leisure activities, with treatment team approval.

Number of Incident Reports per Patient in 1998



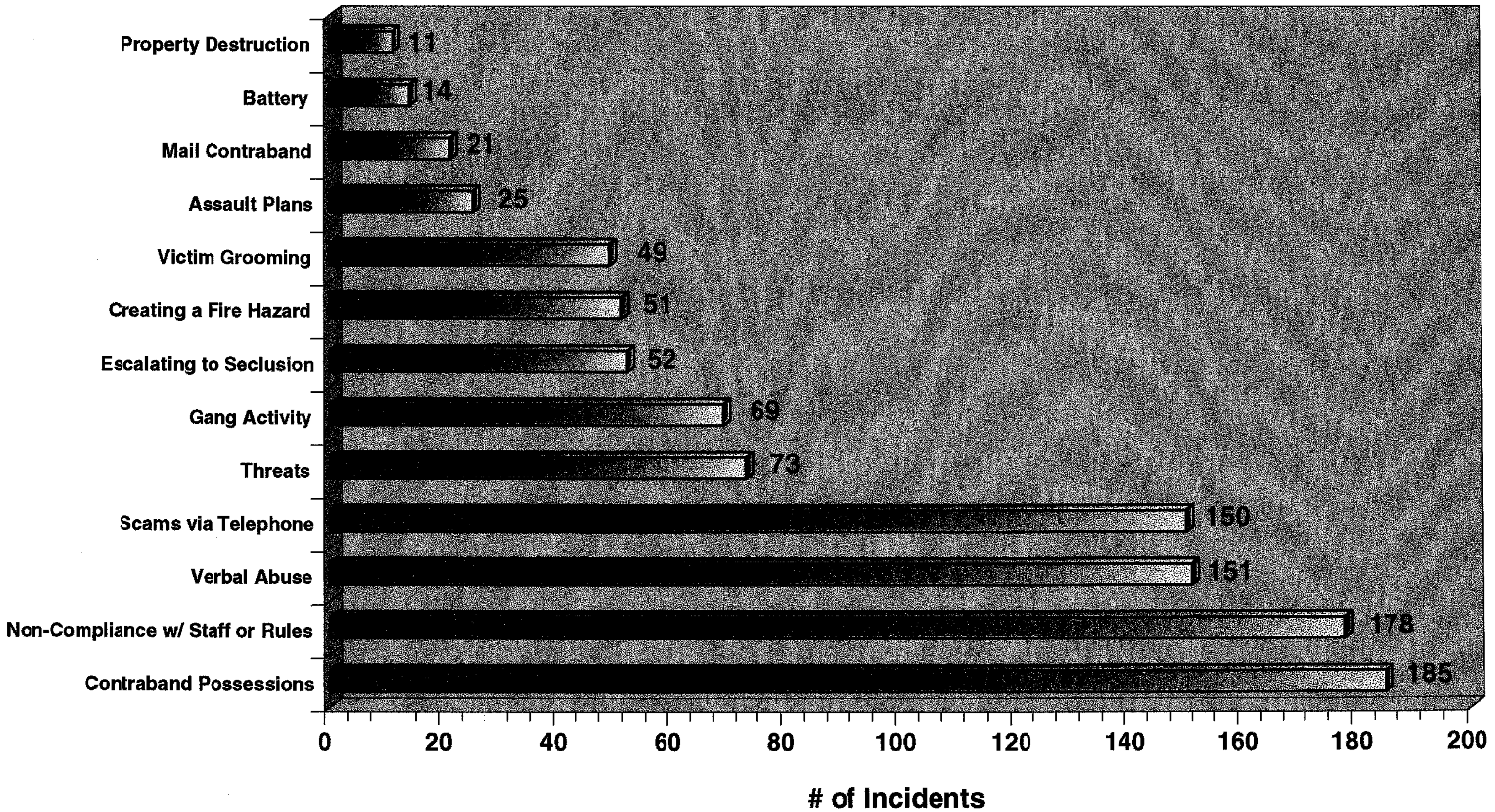


Chart by Types of Incidents in 1998
Property Destruction
11
Battery
14
Mail Contraband
21
Assault Plans
25
Victim Grooming
49
Creating a Fire Hazard
51
Escalating to Seclusion
52
Gang Activity
69
Threats
73
Scams via Telephone
150
Verbal Abuse
151
Non-Compliance w/ Staff or Rules
178
Contraband Possessions
185
0
20
40
60
80
100
120
140
160
180
200
# of Incidents

STATE OF WISCONSIN – **LEGISLATIVE REFERENCE BUREAU** – LEGAL SECTION
(608–266–3561)

Laura Flood 267-7921

Tim 266-5525

Dan Stier 6-1404

Committed person: right to min. trtmt
- adequate food, shelter, clothing, and trtmt
Youngberg; Kara B
DeShaney

(Sub. due process)

right to refuse treatment
- except: emergency?
legit. state interest
- less intensive = ↓ liberty interest

forced treatment must be medically appropriate

Can't punish refusal; but can restrict person in ways reasonably related to legit. gov't objectives & not tantamount to punishment.

eg, treatment; safety of others

Require exercise of prof. judgment
↓
Youngberg

Equal protection: more acute vis-a-vis right to refuse? (no competency finding)
↓
OK: incompetence presumed

Procedural due process
→ Creating token economy means creating lib/prop interest in privileges & ∴ implicate due process

Sub. due process

Given min. intrusiveness,
Riggins & Harper inapt?
Has "liberty int." (which I think exists under Vitek) been vindicated by ch. 980 procedures, & once committed right to refuse less intrusive therapies either extinguished or subject only to min. scrutiny (deferential)

rational relationship

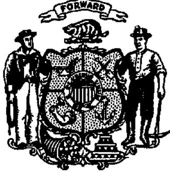
Sections Affected Post–Drafting–Check For 99–3970/P1

Monday, December 20, 1999 10:06 am

Current Wisconsin Statutes updated through 1999 Act 10

SECTION (Sub)(Par)	TREATMENT	AFFECTED BY
51.61(1)(g)2.	(aff. 1995 WisAct 292) r.cr. effec. 12–1–2001	.... WisAct 292 1995
51.61(1)(g)3.	(aff. 1995 WisAct 292) r.cr. effec. 12–1–2001	.... WisAct 292 1995

OK not affected



State of Wisconsin
1999 – 2000 LEGISLATURE

LRB–3970/P1
JEO:...:...

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

1 AN ACT ...; relating to: policies concerning treatment and conduct of sexually
2 violent persons.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version of the draft.

For further information see the ***state*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 51.30 (4) (b) 25. of the statutes is created to read:
4 51.30 **(4)** (b) 25. To a law enforcement agency, as defined in s. 165.83 (1) (b), for
5 the purpose of investigating a criminal offense. Records released under this
6 subdivision are limited to records concerning a person committed under s. 980.06
7 that are relevant to the investigation of the offense.
8 SECTION 2. 51.61 (1) (intro.) of the statutes is amended to read:

1 51.61 **(1)** (intro.) In this section, "patient" means any individual who is
2 receiving services for mental illness, developmental disabilities, alcoholism or drug
3 dependency, including any individual who is admitted to a treatment facility in
4 accordance with this chapter or ch. 48 or 55 or who is detained, committed or placed
5 under this chapter or ch. 48, 55, 971~~,~~ or 975 ~~or 980~~, or who is transferred to a
6 treatment facility under s. 51.35 (3) or 51.37 or who is receiving care or treatment
7 for those conditions through the department or a county department under s. 51.42
8 or 51.437 or in a private treatment facility. "Patient" does not include persons
9 committed under ch. 975 who are transferred to or residing in any state prison listed
10 under s. 302.01 or persons committed to institutional care under s. 980.06. In private
11 hospitals and in public general hospitals, "patient" includes any individual who is
12 admitted for the primary purpose of treatment of mental illness, developmental
13 disability, alcoholism or drug abuse but does not include an individual who receives
14 treatment in a hospital emergency room nor an individual who receives treatment
15 on an outpatient basis at those hospitals, unless the individual is otherwise covered
16 under this subsection. Except as provided in sub. (2), each patient shall:

History: 1975 c. 430; 1977 c. 428 ss. 96 to 109, 115; 1981 c. 20; 1981 c. 314 s. 144; 1983 a. 189 s. 329 (5); 1983 a. 293, 357, 538; 1985 a. 176; 1987 a. 366, 367, 403; 1989 a. 31; 1993 a. 184, 445, 479; 1995 a. 27 s. 9126 (19); 1995 a. 92, 268, 292; 1997 a. 292.

17 **SECTION 3.** 51.62 (3) (a) (intro.) of the statutes is amended to read:

18 51.62 **(3)** (a) (intro.) ~~The~~ Except as provided in sub. (3g), the protection and
19 advocacy agency may:

History: 1985 a. 29; 1987 a. 161 s. 13m; 1987 a. 399; 1989 a. 31; 1993 a. 27; 1995 a. 27, 169; 1997 a. 27, 35.

20 **SECTION 4.** 51.62 (3g) of the statutes is created to read:

21 51.62 **(3g)** SEXUALLY VIOLENT PERSONS EXCLUDED. The protection and advocacy
22 agency may not engage in any of the activities specified in sub. (3) (a) with respect
23 to a person who has been committed to institutional care under s. 980.06.

****NOTE: In accordance with language in the information provided with the drafting request, this subsection provides that the protection and advocacy agency under s. 51.62 doesn't have any authority with respect to ch. 980 patients. Given the broad definition of "individual with mental illness" in 42 USC 10802 (4), this subsection may conflict with (and thus may be preempted by) the federal law requirements concerning the protection and advocacy system. Compare *Oklahoma Disability Law Center v. Dillon Family and Youth Services*, 879 F. Supp. 1110 (N.D. Okla. 1995) (a case dealing with state law restrictions on access to records concerning mentally ill individuals).

1 **SECTION 5.** 227.01 (13) (sp) of the statutes is created to read:

2 227.01 **(13)** (sp) Establishes policies under s. 980.066 (2) relating to treatment
3 for and conduct of persons who have been committed under s. 980.06 or establishes
4 a grievance system under s. 980.066 (6).

****NOTE: This paragraph exempts the treatment and conduct policies and the grievance system from rule-making requirements.

5 **SECTION 6.** 801.02 (8) of the statutes is created to read:

6 801.02 **(8)** No person committed under s. 980.06 may commence a civil action
7 or special proceeding, including a petition for a writ of certiorari, with respect to a
8 policy established under s. 980.066 (2) or an action taken to implement those policies
9 until the person has exhausted all available administrative remedies provided by the
10 grievance system established under s. 980.066 (6).

****NOTE: This subsection requires exhaustion of administrative remedies before a suit may be filed concerning the treatment and conduct policies.

11 **SECTION 7.** 905.04 (4) (j) of the statutes is created to read:

12 905.04 **(4)** (j) *Investigation of crimes; sexually violent persons.* There is no
13 privilege under this section as to a communication made by or information
14 concerning a person committed under s. 980.06 if the communication or information
15 is relevant to the investigation of a criminal offense by a law enforcement agency, as
16 defined in s. 165.83 (1) (b), and is contained in a record released under s. 51.30 (4)
17 (b) 25.

18 **SECTION 8.** 980.066 of the statutes is created to read:

1 **980.066 Policies concerning treatment and conduct of persons**
2 **committed to institutional care.** **(1)** DEFINITION. In this section, "institution
3 privileges" include liberty to move around a facility or a unit within a facility,
4 visitation privileges, access to and use of personal property, including clothing,
5 money, bank accounts and televisions, radios and other entertainment devices,
6 access to reading material, receipt and sending of mail, receipt and making of
7 telephone calls, and time to engage in exercise or other recreation or leisure
8 activities.

****NOTE: Should this definition include something about the extent of a committed person's personal privacy?

9 **(2)** POLICIES RELATING TO TREATMENT AND CONDUCT. Subject to sub. (3), the
10 department shall establish and implement policies relating to treatment for and
11 conduct of persons who have been committed under s. 980.06. The policies may
12 provide for distinct management levels that are based on a person's treatment needs,
13 participation in treatment and conduct, on the security needs of the facility at which
14 a person is placed and on other relevant factors, as determined by the department.
15 The management levels may differ from each other as to the responsibilities required
16 of, and the institution privileges allowed to, a person assigned to the management
17 level. The policies may also provide for all of the following:
18 (a) That a person may be assigned to a management level that allows additional
19 institution privileges if the person complies with the policies relating to conduct and
20 participates in and completes prescribed treatment or any part or phase of prescribed
21 treatment.
22 (b) That a person may be assigned to a management level that limits or denies
23 institution privileges if the person violates any policy relating to conduct or fails or

1 refuses to participate in or complete prescribed treatment or any part or phase of
2 prescribed treatment.

3 (c) The use of physical restraint and isolation for purposes relating to a person's
4 treatment or to prevent a person from physically harming others or protect a person
5 from being physically harmed by others.

****NOTE: Paragraph (c) is based on some of the language found in s. 51.61 (1) (i) 1., stats.

6 **(3)** RIGHTS OF COMMITTED PERSONS. The policies relating to treatment that are
7 established and implemented under sub. (2) shall provide the following rights to a
8 person committed under s. 980.06:

9 (a) The right not to be subjected, without the person's informed written consent,
10 to drastic treatment procedures, such as psychosurgery or electroconvulsive therapy.

****NOTE: Like s. 51.61 (1) (k), stats., paragraph (a) refers to electroconvulsive therapy. Okay?

11 (b) The right not to be subjected, without the person's informed written consent,
12 to experimental treatment or research that involves the use of any drug, ingested
13 substance, surgical procedure, aversive conditioning or other drastic or extreme
14 behavior modification techniques.

****NOTE: Paragraph (b) follows language contained in the information provided with the drafting request. Could denial or loss of institution privileges be considered "aversive" conditioning?

15 (c) The right to be informed of any experimental treatment or research that will
16 be used, or that is being considered for use, to treat the person.

17 (d) The right to refuse psychotropic medication except in an emergency
18 situation or as ordered under sub. (5).

****NOTE: Paragraph (d) is based on language contained in the information provided with the drafting request and is similar to some of the language in s. 51.61 (1) (i) 1., stats. I assume that you intended not to follow the language of s. 51.61 (1) (g) 1., stats. (medication or treatment may be refused except "in a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others").

1 (4) COMPETENCY GENERALLY. (a) No person is deemed incompetent to manage his
2 or her affairs, to contract, to hold professional, occupational or motor vehicle
3 operator's licenses, to marry or to obtain a divorce, to vote, to make a will or to
4 exercise any other civil right solely by reason of his or her commitment under s.
5 980.06.

6 (b) Notwithstanding par. (a), the policies relating to treatment that are
7 established and implemented under sub. (2) may limit the exercise of a civil right by
8 a person who has been committed under s. 980.06 or may require the person to obtain
9 the department's approval before exercise of a civil right, if the limitation or the
10 requirement for the department's approval is reasonably related to the person's
11 treatment needs, to the security of the facility or unit in which the person has been
12 placed or to the safety of others.

****NOTE: Paragraph (a) is based on s. 51.59 (1), stats. Given that the treatment and conduct policies being considered will in some cases impose limits on the exercise of some of these rights, it is probably appropriate that the draft make it clear that, while a ch. 980 commitment doesn't carry a finding of incompetency, persons committed under ch. 980 may have these rights limited for the specified purposes. Okay?

13 (5) COMPETENCY TO REFUSE PSYCHOTROPIC MEDICATION. (a) If a person committed
14 under s. 980.06 is not subject to a court order determining the person to be not
15 competent to refuse psychotropic medication for the defendant's mental condition
16 and if the facility at which the person has been placed determines that the defendant
17 should be subject to such a court order, the department may file with the court, with
18 notice to the person and, if applicable, the person's attorney, a motion for a hearing
19 under the standard specified in s. 51.61 (1) (g) 4., on whether the person is not
20 competent to refuse psychotropic medication. A report on which the motion is based
21 shall accompany the motion and notice of motion and shall include a statement
22 signed by a licensed physician that asserts that the defendant needs psychotropic

1 medication and that the person is not competent to refuse psychotropic medication,
2 based on an examination of the person by a licensed physician.

3 (b) Within 10 days after a motion is filed under par. (a), the court, without a jury,
4 shall determine the person's competency to refuse psychotropic medication. At the
5 request of the person or the person's counsel, the hearing may be postponed, but in
6 no case may the postponed hearing be held more than 20 days after a motion is filed
7 under this subsection. If the person and the person's counsel waive the opportunity
8 to present other evidence on the issue, the court shall determine the person's competency
9 to refuse psychotropic medication on the basis of the report accompanying the
10 motion. In the absence of these waivers, the court shall hold an evidentiary hearing
11 on the issue. Upon consent of all parties and approval by the court for good cause
12 shown, testimony may be received into the record of the hearing by telephone or live
13 audiovisual means.

14 (c) If, at a hearing under par. (b), the department proves by evidence that is
15 clear and convincing that the person is not competent to refuse psychotropic
16 medication under the standard specified in s. 51.61 (1) (g) 4., the court shall make
17 a determination and issue as part of the commitment order under s. 980.06 an order
18 that the defendant is not competent to refuse psychotropic medication and that
19 whoever administers the medication to the defendant shall observe appropriate
20 medical standards.

****NOTE: Subsection (5) is based on 975.06 (7), stats. In accordance with language in the information provided with the drafting request, it is limited to refusal to take psychotropic medication. Is that your intent?

21 **(6)** GRIEVANCE SYSTEM. The department shall establish a system by which a
22 person committed under s. 980.06 may make a grievance concerning a policy
23 established under sub. (2) or an action taken toward the person under those policies.

1 The grievance system shall have written policies and procedures regarding the uses
2 and operation of the grievance system and may provide for an informal process for
3 resolving grievances, a formal process for resolving grievances in cases in which the
4 informal process fails to resolve grievances, and a process to appeal to the director
5 of the unit or facility a decision made as part of any formal process for resolving
6 grievances.

****NOTE: Subsection (6) uses some of the language found in s. 51.61 (5) (a) and (b), stats.

7 (7) NOTICE OF POLICIES AND GRIEVANCE SYSTEM. A person committed under s.
8 980.06 shall, upon admission to the facility at which he or she is placed, be informed
9 orally and in writing of the policies established under sub. (2) and the grievance
10 system established under sub. (6). Copies of the policies relating to conduct shall be
11 posted conspicuously in areas of the facility to which persons committed under s.
12 980.06 regularly have access.

13 (8) APPLICABILITY. A person committed to institutional care under s. 980.06 is
14 subject to the policies established under sub. (2) and is not subject to s. 51.61, 1997
15 stats., regardless of whether the commitment order was issued before, on or after the
16 effective date of this subsection .... [revisor inserts date].

17 **SECTION 9. Nonstatutory provisions.**

18 (1) DETERMINATION OF MANAGEMENT LEVEL FOR PERSONS COMMITTED UNDER
19 CHAPTER 980. If the policies established under section 980.066 (2) of the statutes, as
20 created by this act, relating to treatment for and conduct of persons committed to
21 institutional care under ch. 980 of the statutes create distinct management levels for
22 those persons, the department of health and family services shall, no later than the
23 first day of the 4th month beginning after the date on which the policies take effect,

1 conduct an assessment of each person in its custody who has been placed in
2 institutional care pursuant to a commitment order issued under section 980.06 of the
3 statutes, regardless of the date on which the order was issued, to determine the
4 management level at which the person is to be placed.

5 **(END)**

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3970/P1dn
JEO:...:...

Cm Kt

This is a preliminary draft for your review. Please note the following when reviewing the draft:

1. There are a number of four star notes (****NOTE) in the draft that briefly explain specific provisions in the draft or raise issues or ask questions about specific provisions in the draft. Some of the notes refer to "the information provided with the drafting request"; by that reference I mean the six page document that you provided to me and that lists the major topics to be covered by the policies (such as use of restraints, forced psychotropic medication, receipt of mail and packages) and provides some details about how the topics might be addressed in the policies.

2. For the most part this draft contains very general grants of authority to DHFS. I went back and forth quite a bit on the level of detail in the draft, but ultimately opted to make only a few specific statements, all of which serve to limit or impose a minimum standard on the policies to be established. See proposed s. 980.066 (3), (4) and (7). I included these specific statements both because they relate to possible legal issues raised by the draft (see item # 5, below) and because the information provided with the drafting request also contained more specific limits or standards on these topics.

Note that the language in the draft could be made either more general or more specific. For instance, the draft could simply require DHFS to establish policies relating to treatment and conduct and say little more than that. One drawback to this approach is that DHFS will be unable to point to a more specific legislative grant of authority to adopt a particular policy in the event the policy is challenged. On the other hand, the draft could create a sort of counterpart to s. 51.61, stats., in ch. 980 that contains a similar level of detail. One drawback to more specificity is that the statute may establish a higher standard than might otherwise be required under the constitution. Thus, while reviewing this draft you should consider whether there are details that should be deleted or added to proposed s. 980.066.

3. The information provided with the drafting request indicated that the policies may allow the facility director to limit a person's access to his or her own treatment and medical records. Current law already provides authority for limiting access to treatment records; see s. 51.30 (4) (d) 1., stats. Are these limitations expansive enough for your purposes, or should the statute give more authority to facility directors with respect to treatment records of persons committed under ch. 980? Also, this draft does not affect s. 146.83 (1), stats., because the patient health care records covered by that section do not include records subject to s. 51.30, stats. See s. 146.81 (4), stats. Okay?

4. The draft creates a new subdivision (proposed s. 51.30 (4) (b) 25.) allowing release of treatment records without informed consent to a law enforcement agency investigating a criminal offense. The language does not specifically refer to "unsolved" crimes (because that might not cover crimes in which a codefendant has been charged or convicted) or to allowing release to provide "closure" for the victim or the victim's family (because that seems to be covered by the reference to investigation of the crime, given that "closure" implies that the crime is still under investigation). Also, because proposed s. 51.30 (4) (b) 25. could involve information otherwise privileged under s. 905.04, stats., and because that privilege would control (see s. 51.30 (6), stats.), the draft also creates a new exception in s. 905.04 (4), stats. Okay?

5. As we discussed briefly at our initial meeting, this draft may raise some constitutional law issues, so before completing the draft I took time to do some research into those issues. The law is still relatively unsettled on some of the issues, so it is impossible to say how they might play out. However, it seems unlikely that proposed s. 980.066 would be found unconstitutional on its face, and that most challenges will be to how the statute is being applied or implemented. Here's a synopsis of the issues:

a) The equal protection guarantee is implicated by providing that a person committed under ch. 980 is not subject to s. 51.61, stats., but to different (and maybe fewer) rights as determined by DHFS policies. If the difference between s. 51.61, stats., and DHFS policies involves a fundamental right, a court will likely require the difference to be necessary to further a compelling state interest; but if the difference does not involve a fundamental right, there need only be some rational relationship between the difference and a legitimate governmental purpose.

Chapter 980 has already been found to serve the state's compelling interest in protecting the public from "distinctively dangerous" sexually violent persons. *State v. Post*, 197 Wis. 2d 279, 321 (1995). This finding should mean that a facial challenge to proposed s. 980.066 would not succeed. In addition, it means that any differences concerning fundamental rights should survive scrutiny as long as they are relevant to and further that compelling interest, while other differences will survive if they are rationally related to that compelling interest or some other legitimate state interest (such as treating the mentally disordered). Needless to say, whether an equal protection challenge succeeds will ultimately depend on the specific differences and the reasons for them.

b) It seems clear that, as a general rule, a person has a right to refuse unwanted treatment. While the protections afforded by this right and how it can be overcome are not all that well settled, the right may be made to yield to the government's interests. When it must do so depends on the treatment involved and on the government's interests, which in turn may depend on the setting in which the treatment is being imposed (for instance, in a mental health institution versus a prison).

In the case of a person committed under ch. 980, it appears that the right to refuse treatment such as psychotherapy, behavior therapy or other therapies that do not involve some sort of bodily intrusion can be overridden by various state police power interests, such as protecting institution staff and others in the institution and, more generally, providing care and treatment to those with mental disorders that predispose

them to sexual violence. *Cf. Post*, 197 Wis. 2d at 302. More intrusive treatments may require more compelling state interests and more justification of medical appropriateness, but I think that the draft minimizes the constitutional issues that might arise with these treatments because proposed s. 980.066 (3) requires consent for the more drastic treatments or, with respect to psychotropic medication, an emergency or a court order.

c) As you know, creating a "levels" or "tier" system will mean that a person who is given a particular status and with it certain rights and privileges will be due some minimal procedural protections before his or her status can be reduced or his or her rights and privileges restricted or denied. This draft requires that DHFS establish a grievance system but provides no specifics as to the workings of the system. Thus, procedural due process challenges will turn entirely on the grievance system ultimately established.

d) At our meeting we briefly discussed the issue of the "least restrictive alternative" requirement. As you know, 1999 Wisconsin Act 9 eliminated the statutory "least restrictive alternative" requirement for persons committed to institutional care. Also, the Kansas law upheld by the U.S. Supreme Court has no explicit "least restrictive alternative" requirement. *Kansas v. Hendricks*, __ U.S. __, 117 S. Ct. 2072, 2094–95 (1997) (Breyer, J., dissenting) (suggesting that lack of requirement shows legislative intent to punish for purposes of *ex post facto* analysis).

However, as between types of treatment, it appears that a person may be entitled to have treatment alternatives not involving bodily invasion imposed before those that do involve bodily invasion (including psychotropic medication), as the latter probably implicate the right to bodily integrity. I think that the draft is consistent with this entitlement because of the provisions of proposed s. 980.066 (3) that require consent for drastic treatments and a court order or an emergency for forced psychotropic medication.

e) Finally, there are two other issues that may arise, depending on the actual content and operation of the policies created under proposed s. 980.066. First, because a person committed under ch. 980 can't be punished, deprivations of privileges will have to be justified as being at least rationally related to some other legitimate governmental purpose, such as the person's own treatment needs, institutional security or the safety of others. Also, because a person involuntarily committed for treatment has a right to certain basic human necessities, such as adequate food, shelter, clothing, sanitation and medical care, deprivations of privileges generally cannot have the effect of denying those basic necessities (though courts have upheld denial of these necessities in some cases where the denial was minimal or limited in time and scope and justified by some other legitimate interest).

Please let me know if you have any questions or changes.

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3970/P1dn
JEO:cmh:km

December 21, 1999

This is a preliminary draft for your review. Please note the following when reviewing the draft:

1. There are a number of four star notes (****NOTE) in the draft that briefly explain specific provisions in the draft or raise issues or ask questions about specific provisions in the draft. Some of the notes refer to "the information provided with the drafting request"; by that reference I mean the six–page document that you provided to me and that lists the major topics to be covered by the policies (such as use of restraints, forced psychotropic medication, receipt of mail and packages) and provides some details about how the topics might be addressed in the policies.

2. For the most part this draft contains very general grants of authority to DHFS. I went back and forth quite a bit on the level of detail in the draft, but ultimately opted to make only a few specific statements, all of which serve to limit or impose a minimum standard on the policies to be established. See proposed s. 980.066 (3), (4) and (7). I included these specific statements both because they relate to possible legal issues raised by the draft (see item # 5, below) and because the information provided with the drafting request also contained more specific limits or standards on these topics.

Note that the language in the draft could be made either more general or more specific. For instance, the draft could simply require DHFS to establish policies relating to treatment and conduct and say little more than that. One drawback to this approach is that DHFS will be unable to point to a more specific legislative grant of authority to adopt a particular policy in the event the policy is challenged. On the other hand, the draft could create a sort of counterpart to s. 51.61, stats., in ch. 980 that contains a similar level of detail. One drawback to more specificity is that the statute may establish a higher standard than might otherwise be required under the constitution. Thus, while reviewing this draft you should consider whether there are details that should be deleted or added to proposed s. 980.066.

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a) The equal protection guarantee is implicated by providing that a person committed under ch. 980 is not subject to s. 51.61, stats., but to different (and maybe fewer) rights as determined by DHFS policies. If the difference between s. 51.61, stats., and DHFS policies involves a fundamental right, a court will likely require the difference to be necessary to further a compelling state interest; but if the difference does not involve a fundamental right, there need only be some rational relationship between the difference and a legitimate governmental purpose.

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b) It seems clear that, as a general rule, a person has a right to refuse unwanted treatment. While the protections afforded by this right and how it can be overcome are not all that well settled, the right may be made to yield to the government's interests. When it must do so depends on the treatment involved and on the government's interests, which in turn may depend on the setting in which the treatment is being imposed (for instance, in a mental health institution versus a prison).

In the case of a person committed under ch. 980, it appears that the right to refuse treatment such as psychotherapy, behavior therapy or other therapies that do not involve some sort of bodily intrusion can be overridden by various state police power interests, such as protecting institution staff and others in the institution and, more generally, providing care and treatment to those with mental disorders that predispose

them to sexual violence. *Cf. Post*, 197 Wis. 2d at 302. More intrusive treatments may require more compelling state interests and more justification of medical appropriateness, but I think that the draft minimizes the constitutional issues that might arise with these treatments because proposed s. 980.066 (3) requires consent for the more drastic treatments or, with respect to psychotropic medication, an emergency or a court order.

c) As you know, creating a "levels" or "tier" system will mean that a person who is given a particular status and with it certain rights and privileges will be due some minimal procedural protections before his or her status can be reduced or his or her rights and privileges restricted or denied. This draft requires that DHFS establish a grievance system but provides no specifics as to the workings of the system. Thus, procedural due process challenges will turn entirely on the grievance system ultimately established.

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However, as between types of treatment, it appears that a person may be entitled to have treatment alternatives not involving bodily invasion imposed before those that do involve bodily invasion (including psychotropic medication), as the latter probably implicate the right to bodily integrity. I think that the draft is consistent with this entitlement because of the provisions of proposed s. 980.066 (3) that require consent for drastic treatments and a court order or an emergency for forced psychotropic medication.

e) Finally, there are two other issues that may arise, depending on the actual content and operation of the policies created under proposed s. 980.066. First, because a person committed under ch. 980 can't be punished, deprivations of privileges will have to be justified as being at least rationally related to some other legitimate governmental purpose, such as the person's own treatment needs, institutional security or the safety of others. Also, because a person involuntarily committed for treatment has a right to certain basic human necessities, such as adequate food, shelter, clothing, sanitation and medical care, deprivations of privileges generally cannot have the effect of denying those basic necessities (though courts have upheld denial of these necessities in some cases where the denial was minimal or limited in time and scope and justified by some other legitimate interest).

Please let me know if you have any questions or changes.

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State of Wisconsin
1999 – 2000 LEGISLATURE

LRB–3970/P1
JEO:cmh:km

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

1 AN ACT ***to amend*** 51.61 (1) (intro.) and 51.62 (3) (a) (intro.); and ***to create*** 51.30
2 (4) (b) 25., 51.62 (3g), 227.01 (13) (sp), 801.02 (8), 905.04 (4) (j) and 980.066 of
3 the statutes; **relating to:** policies concerning treatment and conduct of
4 sexually violent persons.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version of the draft.

For further information see the ***state*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

5 SECTION 1. 51.30 (4) (b) 25. of the statutes is created to read:

6 51.30 **(4)** (b) 25. To a law enforcement agency, as defined in s. 165.83 (1) (b), for
7 the purpose of investigating a criminal offense. Records released under this
8 subdivision are limited to records concerning a person committed under s. 980.06
9 that are relevant to the investigation of the offense.

SECTION 2. 51.61 (1) (intro.) of the statutes is amended to read:

51.61 **(1)** (intro.) In this section, "patient" means any individual who is receiving services for mental illness, developmental disabilities, alcoholism or drug dependency, including any individual who is admitted to a treatment facility in accordance with this chapter or ch. 48 or 55 or who is detained, committed or placed under this chapter or ch. 48, 55, 971~~,~~ or 975 ~~or 980~~, or who is transferred to a treatment facility under s. 51.35 (3) or 51.37 or who is receiving care or treatment for those conditions through the department or a county department under s. 51.42 or 51.437 or in a private treatment facility. "Patient" does not include persons committed under ch. 975 who are transferred to or residing in any state prison listed under s. 302.01 or persons committed to institutional care under s. 980.06. In private hospitals and in public general hospitals, "patient" includes any individual who is admitted for the primary purpose of treatment of mental illness, developmental disability, alcoholism or drug abuse but does not include an individual who receives treatment in a hospital emergency room nor an individual who receives treatment on an outpatient basis at those hospitals, unless the individual is otherwise covered under this subsection. Except as provided in sub. (2), each patient shall:

SECTION 3. 51.62 (3) (a) (intro.) of the statutes is amended to read:

51.62 **(3)** (a) (intro.) ~~The~~ Except as provided in sub. (3g), the protection and advocacy agency may:

SECTION 4. 51.62 (3g) of the statutes is created to read:

51.62 **(3g)** SEXUALLY VIOLENT PERSONS EXCLUDED. The protection and advocacy agency may not engage in any of the activities specified in sub. (3) (a) with respect to a person who has been committed to institutional care under s. 980.06.

****NOTE: In accordance with language in the information provided with the drafting request, this subsection provides that the protection and advocacy agency under s. 51.62 doesn't have any authority with respect to ch. 980 patients. Given the broad definition of "individual with mental illness" in 42 USC 10802 (4), this subsection may conflict with (and thus may be preempted by) the federal law requirements concerning the protection and advocacy system. Compare *Oklahoma Disability Law Center v. Dillon Family and Youth Services*, 879 F. Supp. 1110 (N.D. Okla. 1995) (a case dealing with state law restrictions on access to records concerning mentally ill individuals).

1 **SECTION 5.** 227.01 (13) (sp) of the statutes is created to read:

2 227.01 **(13)** (sp) Establishes policies under s. 980.066 (2) relating to treatment
3 for and conduct of persons who have been committed under s. 980.06 or establishes
4 a grievance system under s. 980.066 (6).

****NOTE: This paragraph exempts the treatment and conduct policies and the grievance system from rule–making requirements.

5 **SECTION 6.** 801.02 (8) of the statutes is created to read:

6 801.02 **(8)** No person committed under s. 980.06 may commence a civil action
7 or special proceeding, including a petition for a writ of certiorari, with respect to a
8 policy established under s. 980.066 (2) or an action taken to implement those policies
9 until the person has exhausted all available administrative remedies provided by the
10 grievance system established under s. 980.066 (6).

****NOTE: This subsection requires exhaustion of administrative remedies before a suit may be filed concerning the treatment and conduct policies.

11 **SECTION 7.** 905.04 (4) (j) of the statutes is created to read:

12 905.04 **(4)** (j) *Investigation of crimes; sexually violent persons.* There is no
13 privilege under this section as to a communication made by or information
14 concerning a person committed under s. 980.06 if the communication or information
15 is relevant to the investigation of a criminal offense by a law enforcement agency, as
16 defined in s. 165.83 (1) (b), and is contained in a record released under s. 51.30 (4)
17 (b) 25.

18 **SECTION 8.** 980.066 of the statutes is created to read:

1 **980.066 Policies concerning treatment and conduct of persons**
2 **committed to institutional care. (1)** DEFINITION. In this section, "institution
3 privileges" include liberty to move around a facility or a unit within a facility,
4 visitation privileges, access to and use of personal property, including clothing,
5 money, bank accounts and televisions, radios and other entertainment devices,
6 access to reading material, receipt and sending of mail, receipt and making of
7 telephone calls, and time to engage in exercise or other recreation or leisure
8 activities.

****NOTE: Should this definition include something about the extent of a committed person's personal privacy?

9 **(2)** POLICIES RELATING TO TREATMENT AND CONDUCT. Subject to sub. (3), the
10 department shall establish and implement policies relating to treatment for and
11 conduct of persons who have been committed under s. 980.06. The policies may
12 provide for distinct management levels that are based on a person's treatment needs,
13 participation in treatment and conduct, on the security needs of the facility at which
14 a person is placed and on other relevant factors, as determined by the department.
15 The management levels may differ from each other as to the responsibilities required
16 of, and the institution privileges allowed to, a person assigned to the management
17 level. The policies may also provide for all of the following:
18 (a) That a person may be assigned to a management level that allows additional
19 institution privileges if the person complies with the policies relating to conduct and
20 participates in and completes prescribed treatment or any part or phase of prescribed
21 treatment.
22 (b) That a person may be assigned to a management level that limits or denies
23 institution privileges if the person violates any policy relating to conduct or fails or

1 refuses to participate in or complete prescribed treatment or any part or phase of
2 prescribed treatment.

3 (c) The use of physical restraint and isolation for purposes relating to a person's
4 treatment or to prevent a person from physically harming others or protect a person
5 from being physically harmed by others.

****NOTE: Paragraph (c) is based on some of the language found in s. 51.61 (1) (i) 1., stats.

6 **(3)** RIGHTS OF COMMITTED PERSONS. The policies relating to treatment that are
7 established and implemented under sub. (2) shall provide the following rights to a
8 person committed under s. 980.06:

9 (a) The right not to be subjected, without the person's informed written consent,
10 to drastic treatment procedures, such as psychosurgery or electroconvulsive therapy.

****NOTE: Like s. 51.61 (1) (k), stats., paragraph (a) refers to electroconvulsive therapy. Okay?

11 (b) The right not to be subjected, without the person's informed written consent,
12 to experimental treatment or research that involves the use of any drug, ingested
13 substance, surgical procedure, aversive conditioning or other drastic or extreme
14 behavior modification techniques.

****NOTE: Paragraph (b) follows language contained in the information provided with the drafting request. Could denial or loss of institution privileges be considered "aversive" conditioning?

15 (c) The right to be informed of any experimental treatment or research that will
16 be used, or that is being considered for use, to treat the person.

17 (d) The right to refuse psychotropic medication except in an emergency
18 situation or as ordered under sub. (5).

****NOTE: Paragraph (d) is based on language contained in the information provided with the drafting request and is similar to some of the language in s. 51.61 (1) (i) 1., stats. I assume that you intended not to follow the language of s. 51.61 (1) (g) 1., stats. (medication or treatment may be refused except "in a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others").

1 (4) COMPETENCY GENERALLY. (a) No person is deemed incompetent to manage
2 his or her affairs, to contract, to hold professional, occupational or motor vehicle
3 operator's licenses, to marry or to obtain a divorce, to vote, to make a will or to
4 exercise any other civil right solely by reason of his or her commitment under s.
5 980.06.

6 (b) Notwithstanding par. (a), the policies relating to treatment that are
7 established and implemented under sub. (2) may limit the exercise of a civil right by
8 a person who has been committed under s. 980.06 or may require the person to obtain
9 the department's approval before exercise of a civil right, if the limitation or the
10 requirement for the department's approval is reasonably related to the person's
11 treatment needs, to the security of the facility or unit in which the person has been
12 placed or to the safety of others.

****NOTE: Paragraph (a) is based on s. 51.59 (1), stats. Given that the treatment and conduct policies being considered will in some cases impose limits on the exercise of some of these rights, it is probably appropriate that the draft make it clear that, while a ch. 980 commitment doesn't carry a finding of incompetency, persons committed under ch. 980 may have these rights limited for the specified purposes. Okay?

13 (5) COMPETENCY TO REFUSE PSYCHOTROPIC MEDICATION. (a) If a person committed
14 under s. 980.06 is not subject to a court order determining the person to be not
15 competent to refuse psychotropic medication for the defendant's mental condition
16 and if the facility at which the person has been placed determines that the defendant
17 should be subject to such a court order, the department may file with the court, with
18 notice to the person and, if applicable, the person's attorney, a motion for a hearing
19 under the standard specified in s. 51.61 (1) (g) 4., on whether the person is not
20 competent to refuse psychotropic medication. A report on which the motion is based
21 shall accompany the motion and notice of motion and shall include a statement
22 signed by a licensed physician that asserts that the defendant needs psychotropic

1 medication and that the person is not competent to refuse psychotropic medication,
2 based on an examination of the person by a licensed physician.

3 (b) Within 10 days after a motion is filed under par. (a), the court, without a jury,
4 shall determine the person's competency to refuse psychotropic medication. At the
5 request of the person or the person's counsel, the hearing may be postponed, but in
6 no case may the postponed hearing be held more than 20 days after a motion is filed
7 under this subsection. If the person and the person's counsel waive the opportunity
8 to present other evidence on the issue, the court shall determine the person's
9 competency to refuse psychotropic medication on the basis of the report
10 accompanying the motion. In the absence of these waivers, the court shall hold an
11 evidentiary hearing on the issue. Upon consent of all parties and approval by the
12 court for good cause shown, testimony may be received into the record of the hearing
13 by telephone or live audiovisual means.

14 (c) If, at a hearing under par. (b), the department proves by evidence that is
15 clear and convincing that the person is not competent to refuse psychotropic
16 medication under the standard specified in s. 51.61 (1) (g) 4., the court shall make
17 a determination and issue as part of the commitment order under s. 980.06 an order
18 that the defendant is not competent to refuse psychotropic medication and that
19 whoever administers the medication to the defendant shall observe appropriate
20 medical standards.

****NOTE: Subsection (5) is based on 975.06 (7), stats. In accordance with language in the information provided with the drafting request, it is limited to refusal to take psychotropic medication. Is that your intent?

21 **(6)** GRIEVANCE SYSTEM. The department shall establish a system by which a
22 person committed under s. 980.06 may make a grievance concerning a policy
23 established under sub. (2) or an action taken toward the person under those policies.

1 The grievance system shall have written policies and procedures regarding the uses
2 and operation of the grievance system and may provide for an informal process for
3 resolving grievances, a formal process for resolving grievances in cases in which the
4 informal process fails to resolve grievances, and a process to appeal to the director
5 of the unit or facility a decision made as part of any formal process for resolving
6 grievances.

****NOTE: Subsection (6) uses some of the language found in s. 51.61 (5) (a) and (b), stats.

7 **(7)** NOTICE OF POLICIES AND GRIEVANCE SYSTEM. A person committed under s.
8 980.06 shall, upon admission to the facility at which he or she is placed, be informed
9 orally and in writing of the policies established under sub. (2) and the grievance
10 system established under sub. (6). Copies of the policies relating to conduct shall be
11 posted conspicuously in areas of the facility to which persons committed under s.
12 980.06 regularly have access.

13 **(8)** APPLICABILITY. A person committed to institutional care under s. 980.06 is
14 subject to the policies established under sub. (2) and is not subject to s. 51.61, 1997
15 stats., regardless of whether the commitment order was issued before, on or after the
16 effective date of this subsection .... [revisor inserts date].

17 SECTION **9. Nonstatutory provisions.**

18 (1) DETERMINATION OF MANAGEMENT LEVEL FOR PERSONS COMMITTED UNDER
19 CHAPTER 980. If the policies established under section 980.066 (2) of the statutes, as
20 created by this act, relating to treatment for and conduct of persons committed to
21 institutional care under chapter 980 of the statutes create distinct management
22 levels for those persons, the department of health and family services shall, no later
23 than the first day of the 4th month beginning after the date on which the policies take

1 effect, conduct an assessment of each person in its custody who has been placed in
2 institutional care pursuant to a commitment order issued under section 980.06 of the
3 statutes, regardless of the date on which the order was issued, to determine the
4 management level at which the person is to be placed.

5 **(END)**

Olsen, Jefren

From: Flood, Laura
Sent: Monday, December 27, 1999 4:29 PM
To: Kiesow, John; Olsen, Jefren
Cc: Stier, Daniel
Subject: Re: Ch. 980 revisions

I've done my inital review and have the following comments:

1. As i read it, detainees under 980.04 have no rights at all under 51.61 since they are removed from being patients under that section. did you mean to inlcude them in the new draft provisions? Just wanted to check. Makes no difference to us if they are excluded entirely from any statutory rights provisions, but does that mean we can apply any denial or restriction that is not unconstitutional? this lack of specificity for them may actually speed up the unending delays in current committment proceedings just so that they can get some privilages!

2. Page 4-personal privacy question. Yes a reference is needed for personal privacy. We may need to even limit that for urine drops, video moniroing and surveillance or group bathrooms etc.

3. Page 5.- Yes you can leave the electroconvulsive therapy stuff in there. Under)b. though perhaps we should clarify that professionally recognized and commonly accepted standards and practices for sex offender treatment exclude that type of TX from being considered experimental treatment, or is that understood through some other medical or legal definitions established through case law?

4. Page 5- Note section. I don't think I gave this much thought so nothing was intentional. It could folow 51.61 (1)(g)1 and be no problem at all for us.

5. Page 6.- I assume under section (b) we can require that the resdient get our approval before exercising their right to vote, and that we could restrict them to participating in local elections by absentee ballot in their county of residence as determined by the committing court(which will be required to be specified on the court order) and not allow themm to vote in local city/county(Mauston/juneau) elections due to TX and security concerns.

6. Page 6 - the answer to your question under the note is Yes-that's fine.

It looks very good to me. I prefer that we not go with any broader language since that only raises more questions about specifics. I would like to check with the others copied here after the holiday to collect any issues they ahve identified before haveing a final draft.

Thanks so much for your devoted time over the holiday season to get this done. I appreciate it very much.

>>> Olsen, Jefren 12/21/99 10:39AM >>>

John, Laura and Dan:

Attached are a draft and drafter's note dealing with the changes in ch. 980 patient rights. I apologize for the long delay in getting the draft to you, but I got pulled into several unexpected rush projects, one of which took the lion's share of two weeks. Also, I spent more time than I had initially thought I'd need doing background legal research on some of the issues raised in the draft.

Once you have had a chance to review the draft and have questions or changes, let me know. I will be here throughout the holidays, though I will be out of the office Jan. 5, 6 and 7.

Jefren Olsen

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Olsen, Jefren

From: Olsen, Jefren
Sent: Tuesday, December 28, 1999 11:48 AM
To: Kiesow, John; Flood, Laura
Cc: Stier, Daniel
Subject: Ch. 980 revisions

I misread note 980.04, not 980.06. Include 980.04 persons explicitly!

Laura, John and Dan:

Just a few brief comments and answers in response to Laura's email from yesterday (12/27):

1) The draft completely excludes persons committed under ch. 980 from coverage under s. 51.61, stats. Thus, persons committed under ch. 980 will have only those rights and privileges specified under proposed s. 980.066 (as created in the draft) and under the policies adopted under that proposed statute (and, of course, the constitution). As I mentioned in the drafter's note, the draft could leave out all mention of specific rights (such as those on page 5, lines 6 to 18, of the draft) and simply say that DHFS must adopt policies (or rules) specifying the rights and privileges of persons committed under ch. 980.

2) On further reflection, the personal privacy right language would perhaps be better placed in the list of civil rights on page 6 (proposed s. 980.066 (4) (a)), instead of in the definition of "institution privileges". Do any of you have thoughts on where it would best be placed?

3) The statute could go into more detail about what is currently accepted practice in the treatment of sex offenders, though as those practices change the statute could become outdated and may tie your hands in providing treatment. At the same time, it may make sense to make a general statement in certain places in the draft that the treatment must be appropriate to the condition on which the commitment is based (though with the more invasive treatments (psychotropics, ECT, psychosurgery) the courts have already required the treatment to be medically appropriate). Also, upon reviewing the language on page 5, lines 9 to 14, it seems to me that the two paragraphs (a) and (b) could be combined as one paragraph.

4) Following s. 51.61 (1) (g) 1., stats., more closely (or word for word) would give a person committed under ch. 980 "the right to refuse *all* medication *and treatment* except as ordered by the court ... or in a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others." Do you want to give the right to refuse *all* treatment?

5) Laura is correct in saying that proposed s. 980.066 (4) (b), on page 6, lines 6 to 12, would allow restrictions on the right to vote, if those restrictions have some treatment or security rationale.

6) No response from me needed.

Thanks for your comments, Laura. I will hold off on redrafting until Dan (and anyone else you wish) gets a chance to comment, so that we can limit the number of redrafts. In the meantime, if you have any other questions, comments or instructions, let me know.

Jefren Olsen

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Olsen, Jefren

From: Flood, Laura
Sent: Friday, January 07, 2000 4:24 PM
To: Olsen, Jefren
Cc: Kiesow, John; Lewis, Kevin; Stier, Daniel; Alt, Thomas; Meister, Debra
Subject: 980 rights draft

draftrts.doc

Attached is a brief summary of our collected feedback on the draft. We would like another chance to meet with you as soon as possible and prior to further drafting. We could come to you office if more convenient. I will have Deb Meister contact you for scheduling . Thanks again for you work on this.

NB: p. 2, p. 11

980 Patient Rights-DHFS Feedback

1. Detainees under 980.04 need to be afforded equivalent rights to those committed under 980.06. Include those being held under 980.04 in these new provisions. In addition it needs to be clarified throughout the draft that these new provisions apply only to those persons detained or committed to institutional care (excludes persons committed but placed on supervised release).

2. Answer to question posed by the drafter in paragraph #3, page 1: Current law that allows the director to limit access to treatment records is sufficient to meet our needs. (51.30(4) (d)). We concur that 146.83(1) need not be addressed by the draft due to the exclusion of 51.30 records from that section.

3. Answer to question #4 posed by the drafter page 2: yes, that approach to release of records to law enforcement is okay. The creation of the exception in 904.04(4) is appropriate.

4. Drafters point #5) c) links the levels or tier system of privileges with the grievance process. We would like to discuss issues related to this concept further when we meet with you.

5. Page 2, sections 3 and 4 - 51.62(3)(a) (intro.) and (3g) should be deleted. We agree that it conflicts with current federal requirements and state legislation about the authority of P& A agency. Persons detained and committed under 980 are subjects for P&A agency attention and activities.

6. Page 4, section 8 - 980.066: Create additional provisions as follows to address privacy concerns.

   980.066(3)(e) The right to privacy in toileting and bathing. The facility or unit may impose reasonable security measures to ensure that individuals are protected from harm from others or to self during toileting or bathing.

   980.066(3)(f) The right not to be video or audio-taped in their own rooms or during toileting or bathing. The facility or unit may conduct video or audio monitoring of patients in shared toileting or bathing areas to protect them from any danger of harm from others or self.

Comment 2 from Atty. Tom

7. Page 4 980.066(2), line 13: change to "on the **management** and security needs of the facility...."

8. Page 5, section, 980.066(2)(c): This language may allow use of locked room isolation for facility emergencies, but not for night or cross shift lock on an entire high management unit, nor would it allow as policy the use of restraints for transporting residents to/from the facility. This draft should contain specific provisions that parallel

51.61 (1) (I) "Patients who are committed under 980 may be restrained for security reasons during transport to or from the facility." And 51.61 (1) (I) (2) similar to the language for Mendota patients for night lock and cross shift and emergency lock down.

8. Page 5, Section 8 - 980.066 (3) (a &b): These two items a and b can be combined into one. Delete the term "**aversive conditioning**" from line 13 of this section.

9. Page 5, Section 8 - 980.066(3)(d) and note. You are correct. We did not intend to follow 51.61(1)(g)1. Language. The proposed language achieves our purpose.

10. Page 6, Section 8,line 2&3 - 980.066(4)(a): Need additional provision clarifying that residency for voting purposes is the county designated by the court under 980.105.
11. Page 6, Section 8 - 980.066(4)(b): Yes, this section is appropriate.

12. Add to 980.066 (1) Religious worship as an additional right that is subject to some limitations based on security or management reasons.

13. Page 7, section 8 – 980.066 (6): change "**make**" to "**file**" a grievance.

14. Page Section 9, line 23: Given the size of the population (211) at present **6 months** would provide a more reasonable timeframe for making the level determination.

Olsen, Jefren

From: Alt, Thomas
Sent: Friday, January 07, 2000 4:49 PM
To: Flood, Laura; Olsen, Jefren
Cc: Kiesow, John; Lewis, Kevin; Stier, Daniel; Meister, Debra
Subject: Re: 980 rights draft

Just finished reading Laura's notes and noticed one other change that needs to be made. Her point 6, under 980.066(3)(f) the third line beginning with "patients in shared toileting or bathing areas to protect..." the words in bold should be removed so that video and audio monitoring is allowed in all shared areas such as classrooms, hallways, cafeteria, etc.

This can also be discussed further when the meeting is set up.

>>> Laura Flood 01/07/00 04:24PM >>>
Attached is a brief summary of our collected feedback on the draft. We would like another chance to meet with you as soon as possible and prior to further drafting. We could come to you office if more convenient. I will have Deb Meister contact you for scheduling . Thanks again for you work on this.

J. Kiesow; K. Lewis; T. Alt; L. Flood; D. Stier
1/12 mtg @ DHFS

1) Cover 980.04 detainees

2) Clarify "institutional care"; NB p. 2 / 1.11 ok

3) Voting
- 6.10 ⇒ challenge voting locally? (How # restored?)
- - 980.105 as presumption
Other ev. of intent can overcome?
Eg: crime, ~~Mad.~~ Racine
family now in Madison...

Where likely to reside

4) Grievance vs. "discipline"/Sanction (loss (apparently) of privileges
→ It is not the case that any action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause. (Sandin v. Connor)

→ must be ~~[illegible]~~ restraint which imposes "atypical & significant hardship on the inmate in relation to ordinary incidents of prison life" or that "exceeds sentence [commitment?] in such an unexpected manner as to give rise to protection by Due Process Clause of its own force" (citing Vitek v. Jones & Washington v. Harper).

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(5) Privacy in Private bathing/toileting areas, subject to reasonable etc. — See email

(6) Transition .... Delay effective date for 6 months ....