



Scott Walker

Wauwatosa's Representative in the Wisconsin State Assembly

MEMO

TO: Members of the Assembly Committee on Corrections and the Courts

FROM: Rep. Scott Walker, Chair

DATE: April 25, 2000

RE: **Clearinghouse Rule 97-027**

On April 25, 2000, the following rule was referred to the Assembly Committee on Corrections and the Courts:

Clearinghouse Rule 97-027, relating to mental health treatment for inmates.

The deadline for committee action on this rule is May 25, 2000. If you wish to submit comments or request a hearing, please do so before this date. You may also obtain a copy of the rule by calling Missy in my office at 6-9180.

Thank you.

PROPOSED ORDER OF THE
DEPARTMENT OF CORRECTIONS
REPEALING AND RECREATING RULES

The Wisconsin department of corrections proposes an order to repeal and recreate DOC 314, relating to mental health treatment for inmates.

Statutory authority: ss. 51.61, 301.02, 301.03 (2), and 301.03 (6) and 227.11 (2), Stats.
Statutes interpreted: ss. 51.20 and 51.61 Stats.

Analysis by the Department of Corrections

The proposed rules repeal and recreate the current rules related to mental health treatment for inmates. The current rules have been effective for over 14 years and do not represent current law relative to involuntary administration of psychotropic medication.

Pursuant to statute, these rules provide for the involuntary commitment of an inmate to a state treatment facility following consideration of voluntary commitment. These rules require a physician or psychologist to inform the inmate about the inmate's treatment needs; the mental health services that are appropriate and available to the inmate, including appropriate voluntary treatment available in either a correctional institution or state treatment facility; and the inmate's rights under s. 51.61, Stats.

These rules provide for 2 situations in which an inmate may be treated involuntarily with psychotropic medication: (1) when an inmate is in a state treatment facility under an involuntary commitment for the treatment of mental illness and the court has found the inmate not competent to refuse psychotropic medication; and (2) when the court has found the inmate not competent to refuse psychotropic medication, and has committed the inmate as an outpatient to a correctional institution and the inmate refuses to take the medication voluntarily.

The rules provide for involuntary administration of psychotropic medication after the inmate has been counseled and has continued to refuse to take the psychotropic medication voluntarily.

The department is promulgating this rule under ss. 301.02, 301.03 (3), and 301.03 (6). The department is required to direct the correctional psychiatric service in all state correctional institutions under s. 301.03 (6). In order to accomplish this requirement, the department must interpret s. 51.20.

SECTION 1. DOC 314 is repealed and recreated to read:

CHAPTER DOC 314

INVOLUNTARY MENTAL HEALTH TREATMENT FOR INMATES

- DOC 314.01 Authority, applicability and purpose
- DOC 314.02 Definitions
- DOC 314.03 Involuntary Commitment
- DOC 314.04 Informing the Inmate
- DOC 314.05 Involuntary treatment
- DOC 314.06 Review of an inmate on psychotropic medication

DOC 314.01 AUTHORITY, APPLICABILITY AND PURPOSE. (1) This chapter is promulgated pursuant to the authority vested in the department by ss. 301.02, 301.03 (2), 301.03 (6) and 227.11 (2), Stats., and applies to the department and to all adult inmates in its legal custody in correctional institutions. This chapter interprets s. 51.20, Stats.

(2) The department has authority to provide specialized treatment for inmates and shall assess and direct inmates into treatment programs.

(3) The department may consider involuntary mental health treatment when the inmate otherwise cannot be treated adequately and when ordered by a court. Whenever feasible and appropriate, the department intends to use other forms of treatment for mental illness, including voluntary treatment in the correctional institution or state treatment facility or transfer to another more appropriate correctional institution. This chapter provides guidance to correctional institution staff concerning the times when it will become necessary to provide an inmate involuntary treatment.

DOC 314.02 DEFINITIONS. In this chapter:

(1) "Correctional institution" means a facility named in s. 302.01, Stats.

(2) "Department" means the department of corrections.

(3) "Nurse practitioner" means a person who meets the qualifications under s. 411.16, Stats.

(4) "Outpatient" means an inmate receiving treatment for a mental disorder in a correctional institution.

(5) "Physician" means a person licensed to practice medicine in Wisconsin under ch. 448, Stats.

(6) "Physician assistant" means a person licensed to practice as a physician assistant in Wisconsin under ch. 448, Stats.

(7) "Psychiatrist" means a person licensed to practice medicine in Wisconsin under ch. 448, Stats. and who is board certified to practice as a psychiatrist.

(8) "Psychologist" means a person licensed to practice psychology in Wisconsin under ch. 455, Stats.

(9) "Psychotropic medication" means controlled medication that is used to influence psychological functioning, behavior or experience.

(10) "Registered nurse" means a person licensed to practice as a registered nurse in Wisconsin under ch. 441, Stats.

(11) "State treatment facility" has the meaning given in s. 51.01 (15), Stats.

DOC 314.03 INVOLUNTARY COMMITMENT. The department may file a petition for an inmate's involuntary commitment to a state treatment facility under s. 51.20, Stats., following consideration of voluntary treatment.

DOC 314.04 INFORMING THE INMATE. (1) Before filing a commitment petition under s. DOC 314.03 for an inmate's involuntary commitment for mental health care, a physician or psychologist shall inform the inmate about all of the following:

(a) The inmate's treatment needs.

(b) The mental health services that are appropriate and available to the inmate, including a description of the appropriate voluntary treatment available in either a correctional institution or state treatment facility.

(c) The inmate's rights under s. 51.61, Stats. Inpatients have all rights specified in s. 51.61, Stats.

(d) Outpatients have only the rights under s. 51.61, Stats., that are specified in s. 51.61 (1) (a), (d), (h), and (k), Stats.

(2) The correctional institution shall give the inmate an opportunity to consent to voluntary treatment, including voluntary placement in a state treatment facility or voluntary treatment with psychotropic medication.

(3) Correctional institution staff shall tell the inmate that the inmate retains the status as an inmate upon commitment under s. 51.20, Stats., and that the inmate is subject to the same rules as other inmates of the department, which include for outpatients the grievance procedure under ch. DOC 310 and for inpatients the grievance procedure required under s. 51.61 (5), Stats.

(4) Any information conveyed under subs. (1) to (3) shall be in a manner that is reasonably calculated to best enable the inmate to understand the information.

DOC 314.05 INVOLUNTARY TREATMENT. An inmate may be treated involuntarily with psychotropic medications only under the following circumstances:

(1) While the inmate is in a state treatment facility under an involuntary commitment under ch. 51 Stats., for the treatment of mental illness and the court has found the inmate not competent to refuse psychotropic medication under s. 51.61.

(2) If the inmate is committed under s. 51.20, Stats., as an outpatient in a correctional institution, the court has found the inmate not competent to refuse psychotropic medication, and the inmate refuses to take the medication voluntarily. All of the following steps shall be followed:

(a) Psychotropic medication shall be administered by a registered nurse, nurse practitioner, physician assistant, physician, or a designee.

(b) The registered nurse, nurse practitioner, physician assistant or physician shall give the inmate an opportunity to take the medication voluntarily.

(c) When an inmate has been adjudicated under ch. 880, Stats., to be incompetent to consent to treatment, the department of corrections shall obtain consent to voluntary treatment from the inmate's guardian.

(d) When the inmate refuses, the registered nurse, nurse practitioner, physician assistant or physician shall counsel the inmate and attempt to persuade the inmate to take the medication.

(e) If the inmate continues to refuse and there is a current physician order to involuntarily administer the psychotropic medication, the registered nurse, nurse practitioner, or physician assistant shall contact the physician who wrote the order to assess the situation. The physician shall decide the course of action to be taken. Possible actions may include all of the following:

1. Take no action for a period of time.

2. Transfer the inmate to a special unit within the correctional institution for treatment of mental illness.

3. Place the inmate in observation status pursuant to ch. DOC 311.
4. Recommend transfer of the inmate to an alternate correctional institution pursuant to ch. DOC 302.
5. Recommend transfer of the inmate to a state treatment facility, pursuant s. 51.20, Stats.
6. Direct that the medications be administered.

(f) If directed by the attending physician, the registered nurse, nurse practitioner, or physician assistant shall instruct the inmate to take the medication. If the inmate persists in refusing to take the medication, security staff will restrain the inmate while the registered nurse, nurse practitioner, physician assistant, or physician administers the psychotropic medication involuntarily.

314.06 REVIEW OF AN INMATE ON PSYCHOTROPIC MEDICATION. The department of corrections staff psychiatrist or psychologist shall review the need to request an extension of the court order 60 days prior to the end of the court order.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Corrections

Date: _____

By _____
Jon E. Litscher
Secretary

Seal:

**PROPOSED ADMINISTRATIVE RULES – DOC 314,
RELATING TO THE MENTAL HEALTH
TREATMENT OF INMATES
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3) STATS.**

Need for Rule

The proposed rule repeals and recreates the current rules related to mental health treatment for inmates. The current rules have been effective for over 14 years and do not represent current law relative to involuntary administration of psychotropic medication.

Responses to Clearinghouse Recommendations

All comments of the Legislative Council's Rules Clearinghouse Report were accepted.

Public Hearings

The department held three public hearings on the proposed rule. The public hearings were held in Eau Claire on July 23, 1997; in Waukesha on July 24, 1997; and in Madison on July 25, 1997.

One individual registered against the rule at hearing.

Modifications Made as a Result of Public Hearings

No modifications were made a result of public hearing testimony or letters. The following is a synopsis of appearances and/or letters.

Dianne Greenley, 16 N. Carroll St., Madison, WI

Representing Wisconsin Coalition for Advocacy.

Ms. Greenley opposed the rule for the following reasons that are dealt with in turn:

1. Ms. Greenley states that the proposal eliminates protections for the voluntary treatment of inmates, including approaches to be used before turning to involuntary treatment.

Response: No modification was made to the rule. 314.04 contains procedures requiring a physician or psychologist to inform the inmate about treatment needs, patient rights, opportunity to consent to voluntary treatment, etc. These procedures provide the safeguards Ms. Greenley is concerned about.

2. Ms. Greenley stated that psychotropic medication could be abused, especially if staff is unaware of voluntary treatment options.

Response: No modification was made to the rule. 314.03 provides that the Department may file a petition, as allowed under current law, for involuntary

commitment after consideration of voluntary commitment. This requirement guarantees that voluntary treatment be considered as the first option. 314.05(2)(b) further provides that the registered nurse, nurse practitioner, physician assistant or physician shall give the inmate an opportunity to take medication voluntarily. These provisions both provide instruction to staff and ensure voluntary treatment is considered.

3. Ms. Greenley stated that the rule does not explicitly state that commitment can take place only pursuant to the dangerousness standards in Sec. 51.20 Wis. Stats.

Response: No modification was made to the rule. The Department is obligated to comply with the requirements of both statutory and common law and that obligation need not be stated within administrative code.

Final Regulatory Flexibility Analysis

This proposed rule is not expected to impact on small businesses as defined in s. 227.114 (1.)

Attachment

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CLEARINGHOUSE RULE 97-027

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

The rule cites as its statutory authority s. 51.20 (19) (b), Stats. However, it appears that that provision of the statutes relates to duties of the Department of Health and Family Services. [See s. 46.011 (1), Stats.]. The authority of the Department of Corrections to promulgate this rule should be reviewed and better explained in the analysis.

2. Form, Style and Placement in Administrative Code

In s. DOC 314.01 (1), the notation "ss." preceding "51.20" in the last sentence should be changed to "s." The entire rule should be reviewed for this problem. In addition, in s. DOC 314.02 (5), and other places in the rule, when a reference is made to a chapter of the statutes, the chapter number should be preceded by the notation "ch." and not "s." This problem should be corrected throughout the rule.

4. Adequacy of References to Related Statutes, Rules and Forms

a. Both the analysis of the rule and the rule itself refer to various rights under s. 51.61, Stats. However, neither the statutory authority nor statutes interpreted provisions of the rule refer to this section of the statutes. It appears that they should.

b. Section DOC 314.02 (7) refers to a psychologist licensed under "s. 445, Stats." Chapter 445, Stats., relates to the licensure of funeral directors. It appears that the correct reference should be to ch. 455, Stats.

c. In s. DOC 314.04 (1) (intro.), a cross-reference to s. DOC 314.03 should be included after the word "petition."

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The word "The" in the last sentence of s. DOC 314.01 should be changed to "This."

b. It appears that the word "may" should be inserted before "considers" in s. DOC 314.01 (3) and the "s" should be deleted from "considers." Also, based upon the definitions provided in the rule, it appears that the term "mental health institution" should be changed to "state treatment facility." In addition, the word "institution" in the last sentence should be preceded by "correctional" to be consistent with the definitions provided in the rule. [However, see comment 5. f., below.] Finally, it may be more appropriate to modify the phrase "treat an inmate involuntarily" in the last sentence to read "provide an inmate involuntary treatment."

c. In s. DOC 314.04 (1) (intro.), it appears that the phrase "to mental health care" should either be modified to read "for mental health care" or "to a state treatment facility," depending upon the intent of the rule.

d. Because the use of the word "this" is vague in s. DOC 314.04 (1) (b), it would be more appropriate to replace the period after the first sentence with a comma and substitute the word "including" for the phrase "This shall include."

e. Because the material after the first sentence in s. DOC 314.04 (1) (c) is substantive material identifying and interpreting patients' rights under the statutes, the material should be set off as a separate substantive provision of the rule.

f. In s. DOC 314.04 (2), the word "correctional" should be inserted before the word "institution" to be consistent with the definition provided in the rule. Similarly, the word "state" should be inserted before the term "treatment facility." However, if the rule is referring to something other than a correctional institution or state treatment facility, the rule should be clarified accordingly.

g. In s. DOC 314.04 (3), the term "Correctional" should be inserted at the beginning of the sentence before the word "Institution." [See comment 5. f., above.]

h. In s. DOC 314.05 (2) (a), the word "should" should be replaced by either the word "may" or "shall," depending upon the rule's intent and the statutory authority authorizing the administration of psychotropic medication. In addition, who may appoint a designee? All of the persons listed or just a physician? Does statutory authority exist for a "designee" to administer psychotropic medication? The rule should be clarified.

i. Because the designee is not listed in s. DOC 314.05 (2) (b), as it is in par. (a), can it properly be inferred that the designee does not have to give the inmate an opportunity to take the medication voluntarily?

j. In s. DOC 314.05 (2) (d), the phrase "If the inmate refuses," appears to be redundant because sub. (2) (intro.) is premised on the fact that the inmate is refusing to take the medication.

In addition, could par. (d) be combined with par. (b) since both paragraphs relate to attempting to get the inmate to take the medication voluntarily?

k. Who must get the consent from the guardian under s. DOC 314.05 (2) (c)?

l. Section DOC 314.05 (2) (e) appears to cover the situation in which no physician order exists to involuntarily administer the medication. However, the rule appears silent on the situation in which such an order exists. What happens in those cases? The rule should be clarified since it is intended to provide guidance to staff of correctional institutions. In addition, who is the "attending physician"? Is the "physician" referred to in pars. (a), (b) and (d), also the "attending physician"? This should be clarified.

Also, subs. 6. and 7. do not appear to logically follow subs. 1. to 5. Since subs. 1. to 5. appear to relate to the attending physician's options, it may be more appropriate to create a subd. 6. which provides as follows: "6. Direct that the medications be administered." Then, a par. (f) could be created which provides directions for staff once those directions have been given and possibly when a physician order already exists. The two concepts embodied in subs. 6. and 7. could be incorporated into that paragraph.

Finally, the following modifications should be made: In subd. 2., the word "correctional" should be inserted before the word "institution"; in subd. 3. the word "the" should be inserted after the word "Place"; and, in subs. 4. and 5., the phrase "of the inmate" should be inserted after the word "transfer."

m. In s. DOC 314.06, which psychiatrist or psychologist is being referred to? In addition, the rule provides no definition of "psychiatrist." It should.

FISCAL ESTIMATE
DOA-2048 N(R10/94)

- ORIGINAL
- CORRECTED
- UPDATED
- SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
Adm. Rule DOC 314

Amendment No. if Applicable

Subject
Relating to Mental Health Treatment for Inmates

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

- Increase Existing Appropriation
- Decrease Existing Appropriation
- Create New Appropriation
- Increase Existing Revenues
- Decrease Existing Revenues

Decrease Costs

Local: No local government costs

- 1. Increase Costs
 - Permissive
 - Mandatory
- 2. Decrease Costs
 - Permissive
 - Mandatory

- 3. Increase Revenues
 - Permissive
 - Mandatory
- 4. Decrease Revenues
 - Permissive
 - Mandatory

5. Types of Local Governmental Units Affected:
- Towns
 - Villages
 - Cities
 - Counties
 - Others _____
 - School Districts
 - WTCS Districts

Fund Sources Affected

- GPR
- FED
- PRO
- PRS
- SEG
- SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The repeal and recreation of Adm. Rule DOC 314 reflects the update in current law relative to involuntary administration of psychotropic medication to inmates.

The Department considers involuntary administration of medication only when the inmate has been informed of 1) available and appropriate treatment, 2) patient/inmate rights and 3) grievance procedures. If the inmate refuses medication the Courts must rule the inmate is mentally ill, dangerous to others or self, and not competent to refuse medications before the Department will deliver medication without inmate consent.

This Administrative Rule should not have a Departmental fiscal effect separate from the statutory effect.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)
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Authorized Signature/Telephone No.
Robert Margolies
Robert Margolies/266-2931

Date
2-25-97