

# WISCONSIN LEGISLATIVE COUNCIL STAFF

## ***RULES CLEARINGHOUSE***

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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, subds. 6. and 7. do not appear to logically follow subds. 1. to 5. Since subds. 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 subds. 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 subds. 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.