MARK BORN
STATE REPRESENTATIVE • 39TH ASSEMBLY DISTRICT

Testimony on Senate Bill 409

Senate Committee on Judiciary and Public Safety

December 16, 2015

Members of the Senate Committee on Judiciary and Public Safety,

Thank you for allowing me to speak in favor of Senate Bill 409, relating to residency requirements for sexually violent persons on supervised release under Wisconsin's Chapter 980 program.

One morning in late May, my office received a flurry of calls from constituents in an area of my district where a violent sex offender notification meeting had taken place the prior evening. At that meeting, members of the Leroy community learned two violent sex offenders were going to be placed on supervised release together in a house in their township. This house, which is located in a very rural area of Dodge County near the Horicon Marsh, is many miles away from the nearest full-time law enforcement department and more importantly, less than 200 feet from an adjacent house where twin 11-year olds lived with their widowed father.

Though the Department of Health Services (DHS) has a difficult task in placing these offenders once they are granted supervised release, this placement was simply unacceptable. In late July and early August, two separate judges in Dodge County agreed, and ordered both offenders in the house in Leroy back to the Sand Ridge Secure Treatment Center until a more suitable residence could be found.

After the judges' orders and several weeks of research, it was readily apparent that the guidelines DHS uses when searching for suitable residences for these individuals are insufficient and need to be changed. SB 409 was crafted after discussions with members of the community, law enforcement, and administrators of the state's Chapter 980 program with the goal of keeping a situation like this from happening again elsewhere in the state.

Under SB 409:

- DHS must consult with the local law enforcement agency that has jurisdiction over a prospective residential option for an offender on supervised release;
- DHS must review a written report from local law enforcement on the offender's victims, and ensure residential placements are meeting guidelines as they relate to victims;
- No sexually violent person may live with 1,500 feet of a school, daycare, youth center, place of worship, or public park;

(over)

Capitol Office: Room 312 North • P.O. Box 8952 • Madison, WI 53708-8952
(608) 266-2540 • Toll-Free: (888) 534-0039 • Fax: (608) 282-3639 • Rep.Born@legis.wi.gov

- No sexually violent person may reside adjacent to a property where a child resides, if the offender committed a sexually violent offence against a child; and
- No sexually violent person may reside within 1,500 feet of a nursing home or assisted living facility, if they committed a sexually violent offence against an elderly or disabled person.

Thank you for your consideration. I will now take any questions.

Protecting
Justice for all
Since 1977

Wisconsin State Public Defender

17 S. Fairchild St. - 5th Floor
PO Box 7923 Madison, WI 53707-7923
Office Number: 608-266-0087 / Fax Number: 608-267-0584
www.wisspd.org

Kelli S. Thompson
State Public Defender

Michael Tobin
Deputy State
Public Defender

Written Testimony on Senate Bill 409
Senate Committee on Judiciary and Public Safety
Wednesday, December 16, 2015

Thank you for the opportunity to testify and express concerns with Senate Bill (SB) 409. As you may know, the State Public Defender (SPD) is authorized to provide representation in Chapter 980 original commitment proceedings as well as in proceedings for supervised release or discharge from commitment.

I'd like to describe briefly how the SPD provides this representation. Because of the difficulty, need for expertise, and ongoing nature of a Ch. 980 commitment, most (though not all) petitions are handled by the Department of Justice rather than local prosecutors. For the same reasons, the SPD formed a Ch. 980 practice group to provide consistent and coordinated statewide representation. That unit is headed by Attorney Robert Peterson.

Chapter 980 was established about 20 years ago to provide post-incarceration treatment for sexually violent persons. Since that time, the practice, statute, case law and science behind commitment for treatment in these cases has changed significantly.

The Wisconsin Legislature in 2013 unanimously passed what became Act 84. The product of a Legislative Council study committee, Act 84 prioritized supervised release from commitment as the primary mechanism for the transition of patients back to the community. Until that point, it was easier for patients to achieve outright discharge from commitment, which does not include continued care in the community. By contrast, supervised release provides ongoing treatment, strict supervision, and conditions of release. Act 84 not only improved the statutory process in these cases, but it also increased the chances for success on release and increased public protection by using the release tools accompanying supervised release. The SPD supported the changes in Act 84.

SB 409 threatens the efficacy of Act 84 and the general release structure necessary for the ongoing constitutionality of Chapter 980. SB 409 would create a system whereby, over time, the ability to place a person who has successfully completed treatment becomes difficult to the point that release is practically unattainable. Recent court rulings in Minnesota and Missouri indicate that barriers of this nature undercut the constitutional structure of Ch. 980.

In Minnesota's case, *Karsjens v. Jesson,* 2015 WL 3755870 (D. Minn.), the court found that there is a fundamental liberty interest at stake in civil commitment cases, and therefore, the strict scrutiny standard applies. The burden is on the State to demonstrate that there is a compelling state interest and that the law is narrowly tailored to serve that interest.

The court noted that Minnesota's civil confinement program differs from those subject to previous challenges in that no one had been released, whereas in other programs the duration was anticipated to be "a few years or only *potentially* indefinite." *Karsjens* at ¶ 14. For example, the Court cited to *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997), which is arguably the seminal case on sexually violent person commitment statutes, and noted that "'commitment under the Act is only potentially indefinite' because

'[t]he maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year' and '[i]f Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement.'" *Karsjens* at ¶ 14.

The Minnesota court also pointed to the concurring opinion in *Hendricks*, noting that "'[i]f the object or purpose' of a civil commitment law is to provide treatment, 'but the treatment provisions were adopted as a sham or mere pretext,' such a scheme would indicate 'the forbidden purpose to punish.'" *Id.* at ¶ 15, quoting *Hendricks*, at 371 (Kennedy, J., concurring).

The court used this reasoning to invalidate Minnesota's statute as being facially unconstitutional and not narrowly tailored for six reasons: (1) It does not require periodic risk assessments and without such periodic risk assessments, individuals could be held "even after committed individuals no longer pose a danger to the public and [no longer] need further inpatient treatment and supervision for a sexual disorder;" (2) There exists no judicial bypass to the statutory scheme that allows committed individuals to challenge their continued commitment in a timely manner; (3) The discharge criteria are more onerous than the original commitment criteria; (4) The statute impermissibly places the burden upon the committed individual to prove that placement in a less restrictive setting is appropriate; (5) Although the statute contemplates less restrictive placements, no such facilities actually exist; and (6) The statute does not require the State to take action and petition for a reduction of custody when an individual no longer requires inpatient commitment. *Karsjens*, ¶¶ 19-24.

The court also found the statute to be unconstitutional as applied because it results in individuals "being confined to the Minnesota Sex Offender Program beyond such a time as they either meet the statutory reduction in custody criteria or no longer satisfy the constitutional threshold for continued commitment." *Id.*, ¶ 29. As support for that conclusion, the Court again observed that less-restrictive placement options were not available. "Insisting on confinement at the secure facilities impinges on the individual's liberty interest, particularly given the statutorily proscribed less restrictive options, and thus the statute is not narrowly tailored, resulting in a punitive effect and application contrary to the purpose of civil commitment." *Id.*, ¶ 34, *citing Hendricks*, 521 U.S. at 361-62.

SB 409 could trigger many of the same concerns voiced by the court in Minnesota. The court was concerned with the lack of less restrictive placements for individuals who no longer required the confinement of a secure inpatient setting. SB 409 could make the placement of individuals through supervised release, pursuant to Wis. Stat § 980.08, much more difficult, if not impracticable, particularly in urban areas. Wisconsin's statute, which to this point is often heralded as a model program, would then be subject to constitutional attack . Supervised release, which is looked at as a fourth phase in the treatment program, would become a "sham or mere pretext," turning the treatment statute into one designed to punish.

Missouri's case, *Van Orden v. Schafer*, 2015 WL 5315753 (E.D. Mo.), raised two constitutional challenges to the Missouri sex offender treatment program. The first claim, related to the adequacy of the offered treatment, was not found meritorious by the court, though it did note deficiency in the treatment program itself.

The second claim, which resulted in the court declaring Missouri's release program unconstitutional, focused on the ability to attain release from locked in-patient treatment. The court concluded that the statute is unconstitutional as applied for three reasons: (1) Evaluators conducting annual reviews have not consistently applied the correct legal standard, thereby permitting the continued confinement of

individuals beyond the time constitutionally permitted; (2) The last phase of treatment, community integration, is being improperly applied; and (3) Release procedures are not being implemented according to the statute or due process.

This conclusion is applicable to the constitutional impact of SB 409 on Wisconsin's Ch. 980 program. As in Wisconsin, Missouri's treatment program has the ultimate goal to "treat and safely reintegrate committed individuals back into the community." *Van Orden*, p. 20. Despite this stated goal, no one "has been reintegrated into the community as the treatment manual envisions, and no procedures or placement options for community reintegration have been established." *Id.* at p. 20 (emphasis added). The Court contrasted this program with Wisconsin's program, which has "successfully treated and conditionally released approximately 150 residents into the community as of 2014." *Id.* at p. 16. The Court concluded that "while the treatment program [in Missouri] itself is not a sham, the release portion of the program is" thereby turning "civil confinement into punitive, lifetime detention of SORTS residents [individuals committed after serving sentences for sexual assaults], in violation of the Due Process Clause." *Id.* at p. 28.

Wisconsin's Chapter 980, soon after enactment, initially survived constitutional scrutiny in two cases, both decided by the Wisconsin Supreme Court on December 8, 1995. *State v. Carpenter,* 197 Wis.2d 252 (1995) involved constitutional challenges invoking the Ex Post Facto and Double Jeopardy clauses. *State v. Post*, 197 Wis.2d 279 (1995) upheld the constitutionality of Ch. 980 against attack on substantive due process and equal protection grounds. In both decisions the Court found that the state has a legitimate interest in providing "care and treatment to those with mental disorders that predispose them to sexual violence." *Post*, 197 Wis.2d at 302. The provisions of Ch. 980 that allow for less restrictive placements, through supervised release, led the Court "to conclude that the statute is aimed primarily at treating the sexually violent person, not punishing the individual." *Carpenter,* 197 Wis.2d at 267. The Court assumed, based upon the record, that "the State is prepared to provide specific treatment to those committed under ch. 980 and not simply warehouse them." *Id.* Further, the Court presumed that "the legislature will proceed in good faith and fund the treatment programs necessary for those committed under chapter 980." *Post* at 308. The Court upheld the statute as being reasonably related to the legitimate state interests and therefore constitutional.

In 2002, Justice Ann Walsh Bradley wrote a concurring opinion in *In re Commitment of Rachel*, 254 Wis.2d 215 (2002) observing that "[w]e continue to gain experience with the way that ch. 980 has played out in the real world" and that "the case law has become rife with examples of the State's inability to provide appropriate placements for those committed under ch. 980." *Rachel* at 251. These failures to place individuals concerned Justice Bradley because:

> "[w]hen an individual committed under ch. 980 cannot be appropriately placed, his treatment is severely hampered, if not undermined completely. The viability and feasibility of treatment is a necessary predicate to ch. 980's constitutionality. Should the promise of treatment be proven an illusion, this necessary predicate to the constitutionality of ch. 980 is removed." *Id.* at 252-253.

Such failures would be fatal to Ch. 980 as it "cannot continue to survive constitutional scrutiny if the predicates for its constitutionality prove to be false." *Id.* Supervised release is a key component of the treatment program and "[t]he State must take steps to ensure that proper placement and treatment actually happen." *Id.* (emphasis added). Without treatment, Ch. 980 becomes a "mechanism for retribution or general deterrence-functions properly those of criminal law, not civil commitment." *Id.* quoting *Kansas v. Crane*, 534 U.S. 407 (2002) (citing *Kansas v. Hendricks,* 521 U.S. 346, 372-373 (1997)(Kennedy, J., concurring)).

SB 409 could compromise the supervised release component of the treatment regime by making placements extremely difficult. Without meaningful treatment, the State lacks a legitimate interest in confining individuals under Ch. 980 and the statute begins to lose its constitutional underpinnings.

The changes in SB 409 put Ch. 980 at risk of a future constitutional challenge without evidence-based information showing a risk reduction. Such restrictions are premised on the assumption that the proximity of a sex offender to certain areas increases the risk to reoffend. Research has shown such an assumption to be inaccurate. The Association for the Treatment of Sexual Abusers (ATSA), an international organization who is committed to studying "evidence based practice, public policy and community strategies that lead to the effective assessment, treatment and management of individuals who have sexually abused or are at risk to abuse," published a paper outlining the research on residency restrictions. *Sexual Offender Residence Restrictions*, August 2, 2014, http://www.atsa.com.
In that paper, ATSA cites to a study by Zandbergen, Levenson and Hart (2010), which found that "[t]hose who lived within 1,000, 1,500, or 2,000 feet of schools or daycare centers did not reoffend more frequently than those who lived further away." *Id.* page 2 (emphasis added). A 2007 Minnesota Department of Corrections study cited by ATSA similarly finds that "residence restrictions would not have prevented even one re-offense." Id. Out of the sexual assaults that "occurred within a mile of the offender's residence . . . none of the crimes took place in or near a school, daycare center, or park." Id. After citing the research, ATSA concludes that the organization "does not support the use of residence restriction laws as a sex offender management strategy" because "[s]exual abuse is most likely to occur within a pre-existing relationship between the sexual offender and the victim" and "there is no evidence that residential proximity to schools, playgrounds, day cares, parks, and recreational centers increases sexual reoffending." Id. page 4. Residency restrictions "often create more problems than they solve" by "creating obstacles to community reentry that may actually compromise, rather than promote, public safety." Id. pages 1, 2. To reduce the likelihood of recidivism the focus should be on "access to housing, employment opportunities, prosocial support persons, mental health treatment, and transportation." Id. page 3. SB 409 would act as a barrier to known effective support mechanisms thereby reducing the efficacy of treatment.

As to concerns with the language in SB 409, the SPD has several specific concerns primarily related to Section 8 of the bill which prohibits all placements within 1500 feet of any school premises, child care facility, public park, place of worship, or youth center.

The bill uses the definition of school premises found in s. 948.61(1)(c) which reads: "'School premises' means any school building, grounds, recreation area or athletic field or any other property owned, used or operated for school administration." This broad definition would apply restrictions beyond what a layperson may assume to be a "school" to include property such as vacant land owned by a school district for future expansion or athletic fields designated for use by a school but which are non-contiguous with commonly recognized school property.

A child care facility is designated under s. 48.65, 48.651, and 120.13(14). Section 48.65 states that "No person may for compensation provide care and supervision for 4 or more children under the age of 7 for less than 24 hours a day unless that person obtains a license to operate a child care center from the department." It exempts immediate family or guardians, but essentially, any person who charges to care for 4 or more children under 7 must obtain a license. Section 120.13 (14) covers facilities licensed by school boards to provide child care. This definition, while easy to check prior to placement given the list maintained by the Department of Children and Families upon licensing, presents unanswered questions

depending on the future applicability of restrictions on placements made after the effective date if SB 409 were to be signed into law as drafted.

SB 409 does not specifically define "public park." Chapter 27 provides broad and varying definitions for what constitutes a public park, depending on the type of municipality. Cities are treated differently than towns, for example. SB 409 also does not make clear whether state or federally designated lands or parks are included. Without a clear definition, "public park" could be very broadly interpreted, thus restricting placements even more than may have been the intent in the bill.

Similarly, place of worship is not defined in the bill and includes even less specificity elsewhere in statute than for a public park. Section 765.002(2) states that, "In this chapter "church under his or her ministry" includes any congregation, parish or place of worship at which any member of the clergy is located or assigned and also any administrative, missionary, welfare or educational agency, institution or organization affiliated with any religious denomination or society in this state." If applicable to SB 409, this definition would include a significant number of physical locations statewide.

The definition of youth center created in Section 5 of the bill allows for significant ambiguity. For instance, "regular basis" could create varied interpretation statewide.

The limitations on placement provided in Section 8 create a limit on placement that directly leads to an inability to find suitable placement. If placement becomes practically unobtainable, then a challenge to Chapter 980 may result in a conclusion that the treatment-to-release program has become a "sham or mere pretext" (as determined in the Minnesota and Missouri court decisions).

Even if Ch. 980 could survive such a constitutional challenge, the practical effect of these limitations would be to drive releases from urban centers to rural areas. Based on the provisions of the bill, there is no suitable placement on the Isthmus in Madison, for instance. Currently, a significant number of sex offenders who are homeless register with Grace Episcopal Church as their residence. This bill would prohibit that practice. Not only is forcing urban placements into rural areas unfair to the rural area, it results in the decreased likelihood that the offender will continue successful treatment and community reintegration. It also makes it more difficult to provide effective supervision to ensure public safety.

SB 409 does not contain key provisions that could avoid some of these possible future scenarios. While there must be protections to protect public safety, the legal basis for Ch. 980 requires a meaningful opportunity for patients who do well in treatment to earn supervised release.

One potential change to SB 409 would be a preemption of local residency restrictions. The bill does not address local ordinances that are currently more restrictive than the bill, as well as those that may be enacted in the future. Some of the issues that drove the drafting of SB 409 related to local ordinances will continue, and in fact grow worse, without a preemption clause.

Under current law, as local ordinance restrictions have spread, nearly every time a placement is attempted outside of the county of origin, the alternative community then enacts its own local restrictions. Now that all municipalities in Milwaukee County restrict residency, it has become nearly impossible to find suitable placement. In the entire City of Milwaukee, there are fewer than 60 possible residential locations that meet the local restrictions. Just in the last two weeks, proceedings to place one Milwaukee and one Ashland county resident back in their community have resulted in attempts to find placement in Fond du Lac and Vilas counties respectively. Both of the proposed communities immediately enacted local residency restrictions in response to these attempted placements.

Massachusetts recently decided a case finding the local ordinances unconstitutional because they were at odds with the legislative intent of having passed statewide restrictions. Rather than litigate this issue post enactment in Wisconsin, an amendment to preempt local ordinances could be attached.

SB 409 also does not answer the question of what happens if a placement is made after the bill is enacted only to have a park, school or church open within 1500 feet of the placed individual. Is the individual required to move? Is it the responsibility of the Department of Health Services, Department of Corrections, the county, or the Court to notify and find alternate placement? Is revocation of supervision the remedy in this scenario? Without answering these questions in the statutory language, it could take years of costly litigation, incarceration, and relocation to answer them after enactment.
Finally, while the bill does not address the issue, the current law requirement of attempting to return a person placed on supervised release is becoming unworkable in the current environment and becomes mostly irrelevant if SB 409 were to pass. Section 980.08(4)(cm) requires, in part: "Unless the court has good cause to select another county, the court shall select the person's county of residence as determined by the department under s. 980.105." Language requiring that cause be shown, placed on the record or meeting some stated standard, would decrease the effect this bill would have on placing placing individuals from urban counties in more rural communities.

We understand why placing in statute the guidelines proposed in SB 409 may seem appropriate, but this proposal could put Chapter 980 at risk as a civil commitment statute and which provides for the supervised release of individuals who have been treated to the satisfaction of their therapists and a court of Wisconsin. The problem of local ordinances restricting residency is one that needs to be addressed for the statute to continue to be viable. Senate Bill 409 does not address the issues that currently exist in statute and, as written, would create challenges to the ongoing constitutionality of Chapter 980.

We have spoken with Representative Born about our suggested changes to SB 409. We are happy to work with the authors and this committee to make Senate Bill 409 a bill that enhances public safety while preserving the necessary components of legitimate supervised release.

City of Milwaukee

Department of Administration
Intergovernmental Relations Division

Tom Barrett
Mayor

Sharon Robinson
Director of Administration

Jennifer Gonda
Director of Intergovernmental Relations

2015-2016 Legislative Session - 12/16/2015 Senate Committee on Judiciary and Public Safety

Testimony for SB409/AB497, relating to: residency requirements for sexually violent persons on supervised release.

Thank you committee chairman Wanggaard and committee members for allowing the City of Milwaukee to testify on SB409/AB497. I am testifying for information only.

Before going into the bill I wanted to quickly provide the committee with some background about our experience to provide context that, I hope, illustrates what is also happening statewide.

Around 2007, the City of Milwaukee saw an increasing trend of surrounding municipalities in Milwaukee County passing sex offender residency restriction ordinances. At that time, the City of Milwaukee also considered a similar ordinance. The Department of Corrections (DOC) testified at our local common council committee hearing against our ordinance. During their testimony, it was communicated that DOC was intending to develop a statewide solution to sex offender placement with the Legislature. As a result of their testimony, the City did not take action on an ordinance to restrict the residency of sex offenders.

However, by 2014, nearly 15 of the 19 municipalities in Milwaukee County had passed some type of sex offender residency restriction, and unfortunately, no statewide solution existed. As more and more cities in the County developed ordinances restricting sex offender residency, the City of Milwaukee recognized a growing pattern of sex offenders who were not from the City of Milwaukee being placed within our borders.

For several months, both the Council President and the Mayor reached out to state officials to seek a collaborative statewide solution to the complexity of sex offender residency. We received correspondence from DOC Secretary Ed Wall that our concerns were a local issue. And as a result, the City of Milwaukee had no other choice but to implement the only tool available to ameliorate the situation. Therefore in 2014, we passed our own sex offender residency restriction ordinance which was based on the language of other ordinances already in place in Milwaukee County.

We continue to support a statewide solution that is fair and equitable, where Department of Corrections and Department of Health Services are held accountable to apply their placement procedures the same across the State of Wisconsin. Specific to SB 409/AB497, we wanted to communicate a few areas of the bill we feel could use more clarification and it includes:

1. The definition of "adjacent;"
2. Addressing the situation when a child moves to/from near where a sex offender is placed;
3. Addressing a grandfathered clause related to placement issues;

For more information, please contact:
Paulina de Haan, Legislative Fiscal Manager
(414) 286-3336 or paulina.dehaan@milwaukee.gov

4. Considering a required timeline of notification to local law enforcement by DOC and/or DHS of a prospective residential option; and
5. Considering elderly and vulnerable persons who live alone rather than a nursing home.

I want to thank the committee again for taking on this complicated, but very important topic. While this bill only addresses the smallest population of sex offenders, we are encouraged and hope the state will continue to consider more comprehensive policies that support statewide uniformity in the placement of sex offenders in our communities.

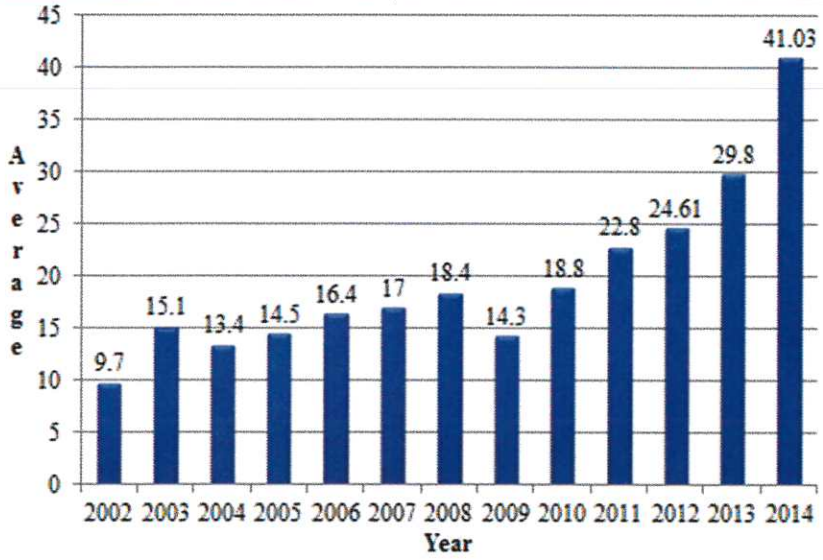
We want to be partners with the State in working toward an effective long term solution that clearly holds the safety of our children and vulnerable populations to the highest degree, while acknowledging the evidence that the key to preventing further victimization is stable housing, effective supervision, and necessary treatment for this offender population.

Thank you for your time. Please do not hesitate to contact me if you need more information or further clarification about our policies related to sex offender residency.

For more information, please contact:
Paulina de Haan, Legislative Fiscal Manager
(414) 286-3336 or paulina.dehaan@milwaukee.gov

Sand Ridge
secure treatment center

HISTORICAL GROWTH RATE—SR



Sand Ridge
secure treatment center

HISTORICAL RATE OF DISCHARGES