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## WISCONSIN LEGISLATIVE COUNCIL

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### REVIEW OF EMERGENCY DETENTION AND ADMISSION OF MINORS UNDER CHAPTER 51

Legislative Council Conference Room  
Madison, Wisconsin

December 19, 2011  
10:00 a.m. – 4:15 p.m.

[The following is a summary of the December 19, 2011 meeting of the Special Committee on Review of Emergency Detention and Admission of Minors Under Chapter 51. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.state.wi.us/lc>.]

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#### **Call to Order and Roll Call; Approval of the Minutes of the December 6, 2010 Meeting**

Chair Lazich called the meeting to order. The roll was called and a quorum was determined to be present.

*Senator Hansen moved, seconded by Representative Pasch, to approve the minutes of the December 6, 2010 meeting of the Special Committee. The motion was approved by unanimous consent.*

COMMITTEE MEMBERS PRESENT: Sen. Mary Lazich, Chair; Rep. Sandy Pasch, Vice-Chair; Sen. Dave Hansen; Rep. Joan Ballweg; and Public Members Michael Bachhuber, Kristin Kerschensteiner, George Kerwin, Dr. Gina Koeppl, Brian Shoup, Galen Strebe, and Carianne Yerkes.

COMMITTEE MEMBERS EXCUSED: Public Members Dr. Jon Berlin, Ann Hraychuck, Michael Kiefer, Tally Moses, and Brenda Wesley.

COUNCIL STAFF PRESENT: Laura Rose, Deputy Director.

## **Introduction of New Committee Members**

Chair Lazich and Representative Ballweg, new members to the Special Committee, introduced themselves to the committee. The other members present also introduced themselves and discussed their background and interest in the issues before the committee.

## **Discussion of Committee Assignment and Review of Bill Drafts**

### **WLC: 0112/1, relating to requiring county community programs board appointees to include law enforcement personnel and hospital employees and increasing the size of county community programs boards**

Laura Rose, Legislative Council staff, explained WLC: 0112/1.

Chair Lazich commended that she supports adding the law enforcement and hospital representatives to the board, but did not think it was necessary to increase the size of the county community programs boards. Mr. Bachhuber expressed concern about possible conflicts of interest if providers served on these boards. Ms. Kerchensteiner said counties currently have the flexibility to add such members and also stated that she favored required consumer representation on the boards. Mr. Kerwin and Ms. Yerkes favored the addition of hospital and law enforcement members to the boards. Mr. Shoup noted the difference in Brown County between the human services board and the human services committee, which is comprised entirely of county board members and makes financial recommendations on programs.

*Mr. Bachhuber moved, seconded by Mr. Strebe, to amend the draft to phrase the membership requirements in "person first" language, and to add the requirement that a consumer be appointed to the board. The motion was approved by unanimous consent.*

*Mr. Bachhuber moved, seconded by Mr. Strebe, to recommend adoption of the draft, as amended. The motion was approved on a vote of Ayes, 11; Noes, 0; Absent, 5.*

### **WLC: 0073/1, relating to emergency detention, involuntary commitment, and privileged communications and information**

Ms. Rose described the first item in the draft. Current law allows a law enforcement officer or other specified persons to take a person into custody on an emergency detention basis if certain criteria are met. In addition, current law provides that this may occur if the county department of community programs approves the need for detention. The bill modifies both of those statutes to include a determination "...that detention is the least restrictive alternative because the individual is resistant to professional help or too high risk to be safely assisted on a voluntary basis." She noted that the purpose of this change is to ensure that emergency detention only be used in certain situations, and that individuals who voluntarily seek mental health treatment are not subjected to emergency detention.

Mr. Kerwin raised issues with this proposal that concern hospitals. He noted that if a hospital discharges a person who is under emergency detention, and transfers them to another, non-accredited facility, the hospital can be subject to significant penalties under the federal Emergency Medical

Treatment and Active Labor Act (EMTALA). Also, if a high-risk individual comes to a hospital for treatment, and the person is not emergency detained or the county department does not approve the need for the emergency detention as required under s. 51.15 (2), Stats., the individual may leave the facility before being stabilized. This would also subject a hospital to potential EMTALA liability.

Representative Pasch noted that if individuals can be diverted from hospitals and from emergency detention, the EMTALA issue would not arise.

Chair Lazich invited Matthew Stanford of the Wisconsin Hospital Association to join the discussion. Mr. Kerwin distributed a flow chart of how EMTALA operates, and Mr. Stanford described the flow chart and the incident that occurred recently in Wisconsin with a mentally ill individual that led to an EMTALA violation.

After additional discussion, Chair Lazich established a working group to meet prior to the next meeting to develop draft language to address the EMTALA issue as it relates to emergency detention. Committee members who volunteered for the working group are Dr. Berlin, Mr. Shoup, Ms. Kerchensteiner, Mr. Kerwin, Mr. Strebe, and Ms. Yerkes. In addition, Lee Jones, Milwaukee County Corporation Counsel, and Liz Aldred, Walworth County Human Services Department, asked to be on the working group. Ms. Rose said that she would poll the working group members to find a mutually agreeable time to meet in January.

The committee adjourned for lunch from 12:00 p.m. to 1:00 p.m.

After lunch, the committee resumed discussion of WLC: 0073/1. Ms. Rose explained the second item in the draft. Current law provides standards for emergency detention and involuntary commitment. The third standard of dangerousness allows for commitment if there is a substantial probability of physical impairment or injury to himself or herself due to impaired judgment. The bill modifies this language to also include a substantial probability of physical impairment or injury to others. Ms. Kerchensteiner noted that “or others” should be added to page 4, line 5 of the draft and page 8, line 11 of the draft. After discussion, the committee approved the wording of this provision on a voice vote.

Ms. Rose then described the third item in the draft. The provision modifies the fourth standard of dangerousness for emergency detention to delete references to “drug dependency” to be consistent with the current fourth standard of dangerousness for purposes of involuntary commitment. Mr. Shoup noted a potential issue with this language in Brown County, which has invested in creating a specific facility for individuals with drug dependency issues. There was consensus to retain this language change, and Mr. Shoup requested that the minutes indicate that the county human services department could still designate this special facility as an emergency detention facility.

Ms. Rose described the fourth item in the draft. Under current law, emergency detention may occur in a hospital approved by the Department of Health Services (DHS) as a detention facility or under contract with the county department, an approved public treatment facility, a center for the developmentally disabled, a state treatment facility, or an approved private treatment facility if the facility agrees to detain the individual. The bill modifies this to include only an approved treatment facility, if the facility agrees to detain the individual, or a state treatment facility. There was some discussion about whether the term “state treatment facility” would still include the state centers for the developmentally disabled. Ms. Rose said that she would review the statutory definitions and also contact DHS to determine what facilities they consider to be included in the term “state treatment facility,” and the committee agreed to defer discussion of this item until the information is obtained.

Ms. Rose described item five in the draft. Current law provides somewhat different procedures for emergency detention in counties with a population of 500,000 or more and those with a population of less than 500,000. The bill increases the population threshold to 750,000.

*Mr. Strebe moved, seconded by Mr. Bachhuber, to retain this language in the draft. The motion was approved on a voice vote.*

Ms. Rose described item six in the draft. Current law in counties with a population of 500,000 or more requires that the treatment director of the facility in which the person is detained, or his or her designee, must determine within 24 hours whether the person is to be detained. If the individual is detained, the treatment director or designee may supplement in writing the statement filed by the law enforcement officer or other person undertaking the emergency detention. The bill modifies this statute to provide an exception to the requirement to make a determination within 24 hours if the treatment director or designee finds that he or she is unable to make this determination because the detained individual is comatose or otherwise physically or mentally incapable of being evaluated. The committee discussed the origins of the treatment director supplement (TDS) requirement in Milwaukee County.

Ms. Kerchensteiner said that she had met this past year in Milwaukee with Lee Jones of Milwaukee County, and members of the State Public Defender staff to discuss this issue. They developed alternative language to the language in WLC: 0073/1. The language in current s. 51.15 (4) (b) would be retained, but a new paragraph (c) would be inserted that would read as follows:

51.15 (4) (c) When calculating the 24 hours under par. (b) in which a treatment director determines whether an individual shall be detained, any period delaying that determination that is directly attributable to evaluation or stabilizing treatment of non-psychiatric medical conditions of the individual shall be excluded from the calculation.

*Mr. Bachhuber moved, seconded by Representative Pasch, to approve the language presented by Ms. Kerchensteiner. The motion carried on a voice vote.*

Ms. Rose then described item seven in the draft. For a person who is detained, current law requires that a hearing be held within 72 hours, excluding Saturdays, Sundays, and legal holidays. Current law allows this to be extended at the request of the detained individual or his or her counsel, but in no case may postponement exceed seven days from the date of detention. The bill provides two additional circumstances in which a postponement may be granted. Under the first circumstance, if the individual is in a facility and the director of the facility or designee determines that the individual cannot be safely moved, and if the individual or his or her attorney objects to holding the hearing at that facility (which is permitted under current law), the court may postpone the hearing. In the second circumstance, if the individual is comatose or, in the opinion of the director of the facility or designee, otherwise physically or mentally incapable of being evaluated or participating in the hearing, the court may postpone the hearing. In either of these circumstances, the postponement may not exceed seven days from the date of detention.

Mr. Bachhuber expressed concern with the draft's provision that the facility director could make a unilateral determination that the person cannot be moved. Ms. Kerchensteiner expressed concern with extensions to the 72-hour time period being overutilized. Mr. Shoup added that in the second circumstance in the draft, the detainee's attorney may want to challenge the determination of medical

inability to participate. After additional discussion, Chair Lazich established a working group to meet prior to the next meeting to develop draft language to address the concerns of members with the draft's language. Dr. Berlin, Ms. Kerchensteiner, Mr. Bachhuber, Mr. Strebe, and Adam Plotkin of the State Public Defender's Office volunteered to be on the working group.

Ms. Rose described item eight in the draft. Current law provides that involuntary commitment under the fourth and fifth standards of dangerousness apply only to persons who are mentally ill. However, while the introductory language to the standards states that the fifth standard applies only to the mentally ill, it fails to state that the fourth standard applies only to the mentally ill. The bill corrects that provision. After discussion, the committee gave unanimous consent to approve this provision, but requested that the introductory paragraph agree with the change made to item three.

Ms. Rose described item nine in the draft. Generally, current law provides that the first order of involuntary commitment is for up to six months, and all subsequent consecutive orders of commitment are for up to one year. However, current law provides that commitments that are based on the fourth standard of dangerousness may not continue longer than 45 days in any 365-day period. The bill eliminates that provision with respect to persons committed under the fourth standard of dangerousness. After discussion, Mr. Strebe moved, seconded by Representative Pasch, to approve item nine as drafted. The motion carried on a voice vote.

Ms. Rose described item 10 in the draft. Current law provides that an involuntary commitment of an inmate in a state prison or county jail or house of correction ends on the inmate's date of release on parole or extended supervision. The bill repeals this provision. Upon the committee's request, Ms. Rose said that she would find out from DHS how an inmate's Medical Assistance (MA) benefits resume once the person is released from confinement. Mr. Strebe offered to look into whether there has been a change in the law relating to extension of an inmate's commitment.

Ms. Rose described item 11 in the draft. Current law provides that a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental, or emotional condition, among the patient and various specified health care providers, including physicians, psychologists, social workers, marriage and family therapists, and professional counselors. Current law also provides that there is no privilege for communications and information relevant to an issue in proceedings to hospitalize the patient for mental illness or various other types of proceedings. The bill modifies this exception to the privilege statute to substitute "commitment" for "hospitalization" and to refer to "probable cause or final proceedings" to commit the patient for mental illness under s. 51.20. Ms. Kerchensteiner said the current law provision has a chilling effect on treatment by allowing the admission, in a certain court proceedings, of anything a person with mental illness says to a treatment provider.

*After further discussion, Mr. Strebe moved, seconded by Mr. Bachhuber, to approve item 11 as drafted. The motion carried on a voice vote.*

### **Other Business**

There was no further business before the committee.

### **Plans for Future Meetings**

The next meeting of the Special Committee will be held at the call of the chair.

### **Adjournment**

The meeting was adjourned at 4:15 p.m.

LR:wu:jal