Rights of Persons with Disabilities in Correctional Settings

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Correctional Settings and Monitoring

County Jails

There is a jail in every county in Wisconsin. Jails are local facilities funded and operated by county government and administered by each County Sheriff's Office. The primary function of county jails is for pre-trial detention of individuals charged with crimes and post-trial incarceration of individuals sentenced to terms of less than one year.

State Prisons

Felony sentences (sentences of more than one year) are typically served in state prisons. There are 13 prisons in the State of Wisconsin. They include maximum, medium and minimum security facilities. Prisons are state facilities, created and funded by the Legislature. Prisons are operated by the State of Wisconsin Department of Corrections **(DOC)**. Some inmates are also sent to prison facilities in other states.

Mental Health Forensic Units

There are two inpatient mental health forensic programs in the State of Wisconsin. They are located at the Mendota Mental Health Institute and at the Winnebago Mental Health Institute. These forensic programs are created by the State Legislature and operated by the State of Wisconsin Department of Health and Family Services **(DHFS)**.

Probation, Parole and Supervision

There are currently three situations under which a person convicted of a crime can be placed in the community under the control of the Wisconsin Department of Corrections - - probation, parole and supervision. People placed in one of these forms of monitoring can be subject to varying degrees of control by the Department of Corrections. Violations of the terms of any of these can result in return to prison or jail. An individual can be sent directly to the community instead of to a correctional setting through probation. An individual who is released from a correctional setting prior to the completion of the entire term of their sentence, may then serve the remainder of their sentence on parole, or may serve an additional period of time under supervision.

How do people end up in these facilities?

There are a number of routes through which people can end up in correctional facilities, but the common factor is that, at some point, they have been charged with a crime. What happens after the person is

charged with a crime has a lot do to with which facility a person ends up in, how long they may have to stay there, and what types of rights they have.

Pre-trial detention: When a person is arrested and charged with a crime, they are usually taken to jail. Some relatively minor offenses have a cash bond which, once paid, results in the detainee's immediate release, pending trial or other resolution of the case. However, in most cases the person will be held in jail until their first court appearance, usually within two or three days of arrest. At that first court appearance, the person will enter a plea and bail will be set. The court may give the person a signature bond - - meaning that they will be released from jail upon their written promise to appear at all future court dates and comply with other stated conditions. Sometimes a cash bail will be set and the person will be held in jail until they pay that amount, or the court lowers it to an amount they can afford. If a person is unable to pay the amount set by the court, or if the court declines to set bail, they may be held in jail until the completion of their trial.

Forensic mental health commitments: People charged with crimes can be sent by the criminal court to one of the mental health forensic units. A forensic mental health commitment can arise either out of questions regarding the person's competency to stand trial or because the person has been found to be "not guilty by reason of mental disease or defect." *(See Forensic Mental Health Commitments chapter, pg. 363.)*

Right to Treatment in Correctional Settings

There is some variation in the nature of the right to receive treatment depending on the facility involved. **Generally, the right to medical and psychiatric treatment is based on the constitutional right to be free from "cruel and unusual punishment."** State statutes give more specific and particularized rules for the provision of this treatment.

Medical Care

What treatment is "necessary"

Jails: The laws of Wisconsin require jails to provide medical attention for detainees or inmates who need it. There is room for much argument about what medical care is "needed", as opposed to desirable, and jails are not required to provide all medical care that might be advisable or requested. **The laws require that county jails provide individuals in their custody with "appropriate care or treatment."** Jails meet this standard in several different ways - - by employing medical staff within the jail, by contracting with medical providers to serve the population of the jail, or by transporting inmates who need medical services to outside medical providers. When jails rely upon the judgment of medical professionals as to what care is needed and how best to provide it, they will most likely be insulated from a lawsuit when an inmate suffers harm from lack of

Sec. 302.38, Wis. Stats.

or poor treatment (although medical malpractice actions against the medical professionals themselves may be possible). In some circumstances, inmates may be required to pay for the cost of medical treatment provided to them.

Prisons: Prisons are also required to provide necessary medical care. Prisons generally meet this requirement through physicians employed by the facility or who contract with the facility to provide services. When necessary, inmates may be transported to hospitals and treatment facilities outside of the prison. As with the jails, prisons need only provide "necessary" care and treatment, and there is room for debate about what care is "necessary." In some circumstances, inmates may be required to pay for the cost of medical treatment provided them.

Sec. 51.61(1)(f) & (m), Wis. Stats.

Forensic Units: Patients in forensic mental health units are also entitled to medical care. The Patients Rights statute requires "prompt and adequate treatment and a humane .... physical environment." Mendota Mental Health Institute and Winnebago Mental Health Institute provide some medical services on-site, through physicians who are employed by or contract with the facility. When needed, patients can also be transported to off-site medical facilities or hospitals. In some circumstances, patients may be required to pay for the cost of medical treatment provided them.

Probation, Parole and Supervision: People who have been released to the community under any of these programs are required to provide and pay for their own medical care through whatever private or public resources are available in the community.

Mental Health and Psychiatric Care

The provision of psychiatric care is covered by the same general rules as any other medical care. Jails and prisons are required to provide necessary psychiatric treatment.

Gaining access to mental health treatment

Jails: Jails meet the responsibility to provide mental health care in a variety of ways. Some larger county jails have mental health providers who have offices at the site. These services are generally provided under the auspices of county human services. Other jails rely upon county human services to provide mental health care on an as-needed basis. Sometimes, mental health staff in these counties come to the jail and provide services, while in other counties, a person must be transported to the mental health office. **There are a number of counties that have not found a workable solution for the provision of mental health treatment.** Some counties rely on a case-by-case approach, some do relatively little mental health treatment in their jails, and some rely on civil commitments as the primary means of obtaining psychiatric care for inmates. Regardless of the approach used, jails should have clear procedures for handling medications prescribed for an individual prior to being placed in jail. Most will confiscate all medications at the time the individual is first placed in custody.

It may take repeated advocacy efforts to receive consistent dispensing of medication or other mental health treatment in the jail setting.

Prisons: Prisons have mental health and psychiatric care provided by staff of the facility. It is important to note that the level of clinical staffing in the prisons has not increased to match the growth of population. This fact may affect the quality and accessibility of treatment.

Forensic Units: A forensic unit's primary purpose is to provide psychiatric care. These units have psychiatrists, social workers and other mental health professionals on staff.

Probation, Parole and Supervision: As with other medical care, people under these forms of supervision are required to seek their own mental health care at their own expense. Often conditions of release will require compliance with mental health treatment.

Involuntary Psychiatric Treatment

Right to refuse treatment

Sec. 51.37(5), Wis. Stats.

Jails: Jail inmates and detainees have the right to refuse treatment. This right can only be overcome through the civil commitment process. Civil commitment proceedings can be instituted against jail inmates and detainees either through the same approach and under the same standards as any other civil commitment, *(see Civil Commitment and Voluntary Treatment chapter, pg. 355)* or through special procedures applicable solely to prisoners.

Sec. 51.20(1)(ar), Wis. Stats
DOC 314, Wis. Admin. code

Prisons: Prisoners also have the right to refuse treatment, which may be overcome only through civil commitment procedures. Procedures for civil commitment for involuntary mental health treatment are similar for prisoners as for any other civil commitment, however a showing of dangerousness is not required. DOC does have administrative regulations which contain certain other requirements which must be met before a civil commitment proceeding can be instituted against a prisoner. One such regulation requires the clinical staff to attempt to convince the prisoner to accept voluntary treatment. The commitment petition must include a statement by DOC clinicians that appropriate treatment is either not available within the prison, or that treatment within the prison will not meet the person's needs. *(See Civil Commitment and Voluntary Treatment chapter, pg. 351.)*

Emergency transfers

Sec. 51.37(5), Wis. Stats.
DOC 314, Wis. Admin. Code

Prisons may also institute emergency transfers of prisoners to Mendota or Winnebago Mental Health Institute. These emergency transfers may result in the person being held at the institute for up to 72 hours, during which time a commitment for civil commitment may be filed. In certain emergency situations, while clinical staff is determining whether or not to initiate an emergency transfer or while the transfer is pending, prisoners may be subjected to involuntary medication.

Sec. 971.14(3)(dm), Wis. Stats.

Forensic Units: Patients in forensic units may be subjected to involuntary medications in certain circumstances.[1] *(See Forensic Mental Health Commitments chapter, pg. 364.)*

Probation, Parole and Supervision: Probation and Parole officers have great power over the people they supervise. They may require their supervisees to refrain from engaging in many activities, and to engage in other activities. Supervisees can be required to attend and cooperate with mental health treatment. If the supervisee fails to abide by these requirements, their probation, parole or supervision status may be revoked, possibly resulting in incarceration. It is also permissible to require supervisees to take psychiatric medications as a condition of their supervision, and to revoke that status based on failure to comply with the requirement.[2] However, courts have held that the imposition of this requirement must be subjected to a variety of due process procedural safeguards - - including independent medical evaluation and a neutral decision maker.

Discrimination Against Persons with Disabilities in Correctional Settings

The Americans with Disabilities Act

42 USC. § 12131 et seq.

The Americans with Disabilities Act **(ADA)** applies to state prisons, jails and forensic units as well. This federal law prohibits "public entities" from discriminating against "a qualified individual with a disability" on account of that person's disability. Such persons may not be excluded from or denied the benefits of participation in services, programs or activities of a public entity by reason of their disability. *(For a description of who meets the "qualified individual with a disability" standard, see ADA: Title 1 - Employment chapter, pg. 306.)*

The United States Supreme Court has ruled that the ADA applies to inmates in state prisons.[3] The Court ruled that a state prison is a "public entity" within the meaning of the ADA and is therefore covered by the provisions of that law. In its discussion of the prisons, the Court lists such things as recreational activities, medical services, and vocational programs as examples of the types of programs, activities and services which benefit inmates. Under this reasoning, inmates cannot be banned from these or other similar programs because of their disabilities.

Although the Supreme Court specifically addressed only prisons, the language of the ADA covers other governmental entities as well, and state operated forensic units, the state probation and parole system, and county jails would appear to fall within the coverage of the ADA. That being so, the denial of access to the benefits offered by any program or service or activity within these systems or settings would appear to be prohibited by the ADA.

Advocacy Options and Strategies

Jails

In most cases the first advocacy step is to attempt to advocate with the staff making the particular decision to which the inmate objects. It is important to remember that Sheriff's Departments are hierarchical organizations, using ranks such as Deputy, Sergeant, Lieutenant, or Captain. Jails usually have one person designated as the Jail Administrator, who actually runs the facility and reports to the Sheriff. Moving up the ranks as needed may be an effective advocacy strategy. **Medical decisions will most likely be made by medical professionals and the Sheriff's Office will usually defer to the professional judgment of medical personnel.** The mental health staff of the county Department of Human Services (also called Department of Community Programs or Unified Services Board) may be a useful resource for mental health issues, especially if they provide services to the jail. The jail's grievance system is also available as a means for advocacy. It is important to remember that the County Sheriff is an elected official, and normally cannot afford to ignore voting constituents and their concerns. An additional focus for advocacy is the elected County Board, which is responsible for funding the Sheriff's Department.

Complaints to state jail inspectors where conditions violate standards
DOC 350, Wis. Admin. Code

If advocacy within the Sheriff's Office is unsuccessful, there is another option outside the county system. The State DOC employs a number of persons as Jail Inspectors. **Jail Inspectors have the authority to investigate conditions within the jail and order changes where conditions violate standards.** Jail Inspectors are assigned throughout the state on a regional basis and work within the Office of Detention Facilities. Telephone numbers for the Jail Inspector assigned to a particular region may be obtained by calling 414-227-5199.

Prisons

Prisons are organized, like jails, in a hierarchal manner. The first step for advocacy will most often be with the individual decision maker. If that is unsuccessful, moving up the ladder within the hierarchy may be appropriate. Each prison is administered by a Superintendent or Warden. Superintendents report to the Division of Adult Institutions, located in Madison, and ultimately to the Secretary of the Department of Corrections. Additional resources for advocacy outside of this chain of command exist through facility medical staff, social workers and clinical staff. A grievance process is also available within the facility. Prisons are required to have an ADA compliance officer to deal with complaints and accommodations relating to a person's disability.

State Institute Forensic Units

Sec. 51.61, Wis. Stats.

Patients in forensic units receive the protections of the Patients Rights statute. Advocacy with involved staff–patient care technicians, social workers, other clinicians, psychiatrists and unit managers is an

Client rights specialists

appropriate place to start. These facilities also have a grievance procedure. Each facility employs Client Rights Specialists, who are involved in the first stage of the grievance process. Forensic patients have essentially the same set of rights as any civilly committed patient with the exception of the right to the least restrictive environment. Client Rights Specialists are permitted to seek informal resolution to problems, and are capable of being a resource. The Department of Health and Family Services also maintains a Client Rights Office **(CRO)** in Madison, which gets involved in later stages of the grievance process. The CRO may be a useful resource as well. Mendota Mental Health Institute and Winnebago Mental Health Institute are each under the control of an Institution Director. The Institution Director is responsible to the Administrator of the Division of Care and Treatment Facilities within the Department of Health and Family Services.

Probation, Parole and Supervision

The first step for advocacy is with the individual Probation Officer, Parole Officer or Field Supervisor. Each of these people works under a Regional Supervisor. Probation, Parole and Supervision staff are under the authority of the Division of Community Corrections, located in Madison, and are ultimately responsible to the Secretary of the Department of Corrections. Claims that a particular rule or condition of supervision is unreasonable may be reviewed by a court. There is also a grievance system available for these programs.

Contacting your state representative

At any of the institutions, if all other advocacy efforts fail, it may be useful to turn to your State Senator or Representative. Through legislative oversight of the Department of Corrections and the budgeting process, state legislators have a degree of control over the DOC. Therefore, it cannot afford to ignore their concerns.

Notice of Claim

Claims against the state

No action based on state law may be brought against the State of Wisconsin, state officer or state agency unless the plaintiff has first filed a notice of claim with the state Attorney General. A notice of claim is a written sworn statement which must include the "time, date, location and circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent." Prisoners may not commence a lawsuit until 120 days afer the submission of the notice of claim, unless the Attorney General denies the claim earlier (except when the action is to seek an injunction to prevent a substantial risk to the prisoner's health).

Although there are certain exceptions to the state rule, it is prudent to file a notice of claim in every case, instead of risking error.

Sec. 893.82, Wis. Stats.

The notice of claim must be filed with the Attorney General by certified mail within 120 days of the event causing the injury or damage, except

for claims involving medical malpractice, which must be filed within 180 days. There is the possibility of an extension of these timelines when the plaintiff did not and could not have known of the underlying cause of action.

Claims against the county
Sec. 893.80, Wis. Stats.

There are similar notice provisions required before an action based on state law can be brought against the county itself or jail personnel. A written statement containing the address of the claimant and itemization of the relief sought must be presented to the appropriate county clerk within 120 days of the event giving rise to the claim, 180 days if the claim involves malpractice.

The county has 120 days to consider the claim. They may, during that period, issue a notice disallowing the claim. If the county does not issue a notice by the end of the 120 day period, the claim will be treated as disallowed as of the 120th day. In either case, the claimant has only six months from the date of the disallowance to file a court action.

Exhaustion of Remedies

Sec. 801.02 (7), Wis. Stats.

If other advocacy efforts are unsuccessful, litigation is a possibility. There are limits on the ability to litigate over matters related to correctional facilities. Under state law, prisoners who wish to bring an action against a prison or jail regarding conditions of confinement are required to exhaust all administrative remedies by pursuing their complaint through the facility's grievance system, before bringing a lawsuit.

The Prisoner Litigation Reform Act

42 USC § 1997e

The Prisoner Litigation Reform Act **(PLRA)** is a federal law which makes it more difficult for persons who are detained or incarcerated in prisons, jails, or other correctional facilities to sue for rights guaranteed by the U.S. Constitution or by other Federal law (such as the ADA). The PLRA defines "prisoners" very broadly, to include people who have only been accused and not yet convicted of criminal offenses, or of terms and conditions of probation, parole or pretrial release. Prisoners may not, generally, bring a lawsuit based on the U.S. Constitution or on Federal law until they have "exhausted administrative remedies"- - that is, they have followed the institution's own internal grievance system to its final level. Along with other limits on lawsuits by prisoners, the PLRA bars claims for mental or emotional injury suffered in custody unless it can be shown that there was also a physical injury.

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1. Enis v. Department of Health and Social Services, 962 F. Supp. 1192 (W.D. WI 1996)
2. Felce v. Fiedler, 974 F.2d 111484 (7th Cir. 1992)
3. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952 (1998)