

## REFUSING MEDICATIONS AND TREATMENT - - CONSENT REQUIRED

### THE LAW

"**Subject** to the **rights** of patients provided under this chapter, the department, county departments under s. 51.42 or 51.437, and any **agency providing services** under an agreement with the department or those county departments have the right to use **customary** and **usual treatment techniques** and **procedures** in a **reasonable** and **appropriate** manner in the treatment of patients who are receiving services under the mental health system, for the purpose of ameliorating the conditions for which the patients were admitted to the system. The **written, informed consent** of any patient shall first be **obtained**, unless the person has been **found not competent** to refuse medication and treatment under s. 51.61 (1) (g) **or** the person is a **minor 14 years** or older who is receiving services for **alcoholism or drug abuse or a minor under 14** years of age who is receiving services for **mental illness, developmental disability, alcoholism, or drug abuse**. In the case of such a minor, the written, informed consent of the parent or guardian is required, except as provided under an order issued under s. 51.13 (1) (c) or 51.14 (3) (h) or (4) (g) or as provided in s. 51.138 or 51.47. Except as provided in s. 51.138, if the **minor** is **14** years of age or **older** and is receiving services for mental illness or developmental disability, the **written, informed consent** of the **minor and** the minor's parent or **guardian** is required except that a **refusal** of either a minor 14 years of age or older or the minor's parent or guardian to provide written, informed consent for admission or transfer to an approved inpatient treatment facility is reviewable under s. 51.13 (1) (c), (3), or (4), or 51.35(3)(b), and a refusal of either a minor 14 years of age or older or the minor's parent or guardian to provide written, informed consent for outpatient mental health treatment is reviewable under s. 51.14."

§ 51.61(6), Wis. Stats. [Emphasis added.]

"A patient may **refuse medications** and any **other treatment except** as provided under **s. 51.61(1)(g) and (h), Stats.**, and **this section**."

DHS 94.09(2), Wis. Admin. Code [Emphasis added.]

Each patient admitted or committed under this chapter shall...

"Have the following rights, under the following procedures, to **refuse medication and treatment**:

1. Have the right to **refuse all medication and treatment except as ordered by the court** under subd. 2, **or** in a situation in which the medication or treatment is **necessary to prevent serious physical harm** to the patient or to others. Medication and treatment during this period may be refused on religious grounds only as provided in par. (h).
2. At or after the hearing to determine probable cause for commitment but prior to the final

commitment order, other than for a subject individual who is alleged to meet the commitment standard under 51.20(1)(a)2.e, the court shall, upon the motion of any interested person, and may, upon its own motion, **hold a hearing** to determine whether there is probable cause to believe that **the individual is not competent to refuse medication or treatment** and whether the medication or treatment will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for or participate in subsequent legal proceedings. If the court determines that there is probable cause to believe the allegations under this subdivision, the **court shall issue an order permitting medication or treatment** to be administered to the individual regardless of his or her consent. The order shall apply to the period between the date of the issuance of the order and the date of the final order under s.51.20 (13), unless the court dismisses the petition for commitment or specifies a shorter period. The hearing under this subdivision shall meet the requirements of s.51.20(5), except for the right to a jury trial.

3. **Following a final commitment order**, other than for a subject individual who is determined to meet the commitment standard under 51.20(1)(a)2.e, have the right to exercise **informed consent** with regard to all medication and treatment **unless** the committing **court** or the court in the county in which the individual is located, within 10 days after the filing of the motion of any interested person and with notice of the motion to the individual's counsel, if any, the individual and the applicable counsel under s. 51.20 (4), **makes a determination**, following a hearing, that the **individual is not competent to refuse medication or treatment** or unless a situation exists in which medication or treatment is necessary to prevent serious physical harm to the individual or others. A report, if any, on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the subject individual needs medication or treatment and that the individual is not competent to refuse medication or treatment, based on an examination of the individual by a licensed physician. The hearing under this subdivision shall meet the requirements of s.51.20(5), except for the right to a jury trial. At the request of the subject individual, the individual's counsel or applicable counsel under s.51.20 (4), the hearing may be postponed, but in no case may the postponed hearing be held more than 20 days after a motion is filed.
- 3m. Following a final commitment order for a subject individual who is determined to meet the commitment standard under s. 51.20(1)(a)2.e., the court shall issue an order permitting medication or treatment to be administered to the individual regardless of his or her consent.
4. For purposes of determination under subd. 2 or 3, an individual is not competent to refuse medication or treatment **if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment** have been explained to the individual, one of the following are true:
  - a. The individual is incapable of expressing an understanding of the advantages and

disadvantages of accepting medication or treatment and the alternatives.

- b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment. § 51.61(1)(g), Wis. Stats. [Emphasis added]

“(4) Except in an emergency when it is necessary to prevent serious physical harm to self or others, no medication may be given to any patient or treatment performed on any patient without the prior informed consent of the patient, unless the patient has been found not competent to refuse medication and treatment under s. 51.61(1)(g), Stats., and the court orders medication or treatment. In the case of a patient found incompetent under ch. 880, Stats., the informed consent of the guardian is required. In the case of a minor, the informed consent of the parent or guardian is required. Except as provided under an order issued under s.51.14(3)(h) or (4)(g), Stats., if a minor is 14 years of age or older, the informed consent of the minor and the minor’s parent or guardian is required. Informed consent for treatment from a patient’s parent or guardian may be temporarily obtained by telephone in accordance with s. DHS 94.03(2m).

(5) A **voluntary patient** may refuse **any treatment**, including medications, at any time and for any reason, **except in an emergency**, under the following conditions:

- (a) If the prescribed treatment is refused and **no alternative treatment services are available** within the treatment facility, it is not considered coercion if the facility indicates that the patient has a choice of either **participating** in the prescribed treatment or **being discharged** from the facility; and
- (b) The treatment facility shall **counsel the patient** and, when possible, **refer the patient to another treatment resource prior to discharge**.

DHS 94.09, Wis. Admin. Code [Emphasis added.]

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## DECISIONS

1. A parent filed a complaint based on her belief that her daughter was being over-medicated by a County doctor. The County did not appeal the Level III decision’s findings of rights violations for the lack of informed consent and for inadequate documentation. Nor did the County provide any reply to the grievant appeal to Level IV. Thus, “mootness” was the only issue decided at Level IV. The Level III decision found that the County failed to obtain proper written informed consent prior to administering any medication and adjusting the dosage. The County was using two separate forms for informing patients about their medications and obtaining consent. The forms were not properly used, but even if they had been properly used they would not have met the requirements of the County’s own policy. County policy required one form that should have been signed by the parent and the patient and placed in the

medical record. **If the county had followed its own policy it would have ensured that the patient and the parents had reviewed the information about each medication prescribed, and would have ensured that the county retained a signed copy of the consent.** A violation of the patient's right to informed consent was found. (Level IV decision in Case No. 12 SGE-0011 decided on 05/09/2013)

2. A parent filed a complaint based on her belief that her daughter was being over-medicated by a County doctor. "Mootness" was the only issue decided at Level IV. The Level III decision found that the county failed to obtain proper written informed consent prior to administering medication and prior altering the dosage of the medication. It was not until a full three months after the patient began receiving a medication that an unidentified staff made notations in the patient's County "Medication Acknowledgement and Consent Form." Under the heading "Medication," there was a list of three different medications. The form indicated that the consent was verbal. There was no client signature but a notation that indicated that the patient had verbally consented to the medication. There was no signature of the person who completed the form; there was no reference to the recommended dosage range or anticipated dosage range; and there were no references to the possible consequences of not receiving the medication or to the possible side effects of receiving the medication. **In sum, the form in question did not document any informed consent until three months after the initial prescription.** On its face the form showed that the consent was "verbal" and not "written" as required by statute. At the time the patient was 11 years old, and the County was therefore required to obtain written consent from the patient's parent or guardian; yet the form demonstrated that whatever level of consent was obtained was obtained solely from the patient. Moreover, SGE precedent required that an informed consent document should provide sufficient information for the patient, and in this case the parent or guardian, to make an informed decision regarding the services they were consenting to receive. In the case of medications, this should have included: (i) the recommended dosage; (ii) the anticipated dosage range; (iii) a discussion of the consequences of not receiving the medication; and (iv) a discussion of the possible side effects of taking the medication. Several violations of the patient's right to give informed consent prior to the administration of any medication were found. (Level IV decision in Case No. 12 SGE-0011 decided on 05/09/2013)
3. A patient experienced unwanted sexual side effects from a medication. The patient reported sexual side effects of eight weeks duration. The side effects went away after weaning from the medication. The patient's doctor reported that the patient's underlying symptom of anxiety may have been ameliorated by the medication. **The patient signed a document stating that he had reviewed and understood his patient rights, so the patient was presumably aware that he could discontinue the medication at any time.** The client stated that he agreed to take the medications, was experiencing progress in his treatment, and then was taken off of the medications when he expressed concerns about the side effects. No evidence indicated that the patient was forced to take the medication or that the medication was prescribed punitively or for any other inappropriate reason. Here, the medications

were used to treat the client's condition and he consented to take them, although he did not sign a consent form. There was no violation of the patient's right to refuse medication. (Level IV decision in 14-SGE-0001 decided on 12/22/2014)

4. A patient experienced unwanted sexual side effects from a medication. The patient alleged that there were sexual side effects of eight weeks duration. The side effects went away after weaning from the medication. The record did not contain a signed medication consent form and the provider admitted that no written consent form was obtained. Applicable statute and administrative code provide that no medication may be given to any patient without the prior consent of the patient unless there is a court order or an emergency situation. **It was the position of the Client Rights Office that all inpatient and outpatient providers were required to obtain written informed consent prior to distributing psychotropic medications.** On the other hand, the record did contain evidence that the doctor did discuss the proposed medications with the patient and the patient agreed to take them. Thus a technical violation of the client's right to participate in his treatment through written informed consent for psychotropic medication was found. (Level IV decision in 14-SGE-0001 decided on 12/22/2014)
5. A patient was receiving services at a Community Based Residential Facility under a **commitment order and an involuntary medication order. The patient claimed that the facility should respect her right to refuse medication and treatment.** The patient alleged that one medication was having negative effects on her life and that she had been at the provider for too long and needed to return home. It was **not a violation of the client's rights to give her medication over her attempted refusal because the court order to medicate was valid.** The provider **did not violate the patient's right to refuse treatment by placing her in the least restrictive environment and providing treatment ordered by a court.** Further, the patient exercised her right to participate in her own treatment by complaining about the medication, which eventually led to her being taken off of it. (Level IV decision in Case No. 15-SGE-0001 on 10/17/2016)
6. A patient grieved that he was wrongly denied Targeted Case Management (TCM), was wrongly discharged from Comprehensive Community Services and was misled about his ability to return to TCM. The undisputed evidence showed that the grievant was misinformed in court about his ability to return to TCM by the services Director. The patient refused to work with any of the three staff that were assigned to work with him and refused to work with two entire agencies. If the discharge was involuntary, which was not the finding in the case, the code requires that the documentation be specific, objective and adequately explain the reasons for any decisions made regarding the patient. Here, the alleged decision to voluntarily discharge the patient found adequate support in the record, although the records relied on were not as detailed or as organized as best practice would dictate. **Further, although the Director of the program indicated in court that the grievant could return to TCM as a matter of right, when in fact no such right existed, it was not a violation of the patient's right to adequate services to**

**refuse to allow him to return to TCM. However, it is not best practices to promise such things, especially in a courtroom setting.** (Level IV decision in Case No. 15-SGE-0007 on 12/9/2016)

7. If prescribed treatment is refused and no alternative treatment services are available within the facility, the provider can give the patient the choice of either participating in the prescribed treatment or being discharged from the facility. **If discharged, the provider should give the patient referrals to another treatment source prior to discharge where ever possible. In the case at hand, when the patient indicated that he no longer wished to receive services from the provider he was discharged with referrals for services.** The grievant refused specific services, but the specific services that the grievant refused included all services that the provider offered. Thus there was no violation of the patient's rights when he was discharged with referrals. (Level IV decision in Case No. 15-SGE-0007 on 12/9/2016)
8. A grievant claimed that a strip search conducted upon her admission was improperly performed by staff at an inpatient at a psychiatric hospital. The patient also complained that staff did not warn her that a strip search was required and that she was not informed that she could refuse the strip search as well as treatment. The grievant claimed that she never would have signed a statement agreeing to voluntary admission if she had known that the strip search would be required. **Patients must voluntarily agree to treatment at a time when they are competent and able to understand the terms of the consent In order for consent to be valid. The search should was not technically part of the patient's treatment as treatment is defined in applicable statutes. The patient has a right to refuse treatment. However, since a strip search is policy, not a treatment, the right to refuse treatment does not extend to strip searches.** (Level III decision in Case No. 15-SGE-0008 on 6/16/2016)
9. A patient was voluntarily admitted to the behavioral health unit after considerable indecision. The patient grieved that she was not allowed to refuse a body search upon admission. Patients have the right to refuse all medication and treatment. However, an inpatient's right to refuse treatment and leave the facility immediately is weighed against safety concerns prior to release. Since the patient could not leave the facility instantly, a search was necessary. Decisions regarding the patient's treatment must be rationally based on legitimate treatment, management or security interests. **Here, a search for weapons or contraband upon admission to an inpatient unit was rationally related to protecting the safety of the patient, other patients and staff.** (Level III decision in Case No. 16-SGE-08 on 5/26/2017)