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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...  
PUBLIC HEARING - COMMITTEE RECORDS

2001-02

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Corrections and Courts (AC-CC)

**COMMITTEE NOTICES ...**

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

**INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL**

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  - (**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)
  - (**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

\* Contents organized for archiving by: Mike Barman (LRB) (May/2012)

**Assembly**

**Record of Committee Proceedings**

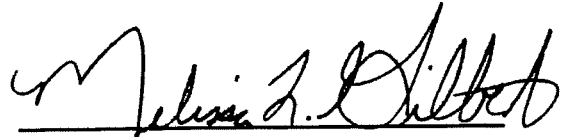
**Committee on Corrections and the Courts**

**Clearinghouse Rule 01-089**

Relating to the rights of patients to make telephone calls.  
Submitted by the Department of Health and Family Services.

November 1, 2001 Referred to Committee on Corrections and the Courts.

December 3, 2001 **NO ACTION TAKEN**

A handwritten signature in black ink, appearing to read "Melissa S. Gilbert", written over a horizontal line.

Committee Clerk





## Scott Walker

Wauwatosa's Representative in the Wisconsin State Assembly

TO: Members of the Assembly Committee on Corrections and the Courts  
FROM: Rep. Scott Walker, Chair  
DATE: Nov. 1, 2001  
RE: Clearinghouse Rule 01-089

The following clearinghouse rule has been referred to the Assembly Committee on Corrections and the Courts:

**CR 01-089** An order to amend HFS 94.20 (3), relating to the rights of patients to make telephone calls.

The committee's jurisdiction over CR 01-089 ends on Monday, Dec. 3, 2001. If you wish to receive a copy of this rule or if you wish to submit comments or request a hearing, please contact Missy in my office at 266-9180.

Thank you.



DATE: November 1, 2001

TO: Melissa Gilbert

Committee on Corrections and the Courts

FROM: John Scocos, Assembly Chief Clerk

RE: Clearinghouse Rules Referral

The following Clearinghouse Rule has been referred to your committee.

### **CLEARINGHOUSE RULE 01-089**

AN ORDER to amend HFS 94.20 (3), relating to the rights of patients to make telephone calls.

Submitted by **Department of Health and Family Services.**

Report received from Agency on **October 23, 2001.**

To committee on **Corrections and the Courts.**

Referred on **Thursday, November 1, 2001.**

Last day for action - **Monday, December 3, 2001.**

Under section 227.19 (4) of the Wisconsin Statutes, your committee has 30 days to take action or get an extension. The day **after** the official referral date is day one of your review period. Therefore, the 30th day should fall four weeks and two days after the referral date. For example, for Clearinghouse Rules referred on a Monday, a Wednesday would be your 30th day. For Clearinghouse Rules referred on a Tuesday, a Thursday would be your 30th day. For Clearinghouse Rules referred on a Wednesday, a Friday would be your 30th day. For Clearinghouse Rules referred on a Thursday or Friday, your 30th day would fall on a weekend. Therefore, your time would expire on the next working day (Monday) as provided for in s. 990.001 of the Wisconsin Statutes. Also, if the 30th day falls on a legal holiday, time would expire on the next working day.

Section 227.19 **requires** you to notify each member of your committee that you have received this Clearinghouse Rule. Although some committee chairs do so, you are not required to send a copy of the text of the rule to each member at this time. Your notice could state that members should contact you if they wish to receive a hard copy of the rule. **(Please note that the text of Clearinghouse Rules beginning with the prefix "01" is now available online in the Clearinghouse Rules infobase in FOLIO.)** Please put a copy of your official notification memo in the rule jacket.

Three copies of the Clearinghouse Rule and its accompanying documents are contained in the jacket. If you wish to have your Legislative Council attorney review the Clearinghouse Rule, send him/her a copy. I only need one copy remaining in the jacket when you report it out of committee at the end of the review period.

The identical process is happening simultaneously in the Senate. Keep track of their action on the rule.

For assistance with the Clearinghouse Rule process, please consult Ken Stigler (6-2406) or your Legislative Council attorney. If you wish to learn more on this subject, read section 227.19 of the Wisconsin Statutes or part 2 of the *Administrative Rules Procedures Manual* written by the Revisor of Statutes Bureau and the Wisconsin Legislative Council staff.



PROPOSED ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
AMENDING RULES

CRule  
01-089  
folder

Analysis Prepared by the Department of Health and Family Services

To amend HFS 94.20 (3), relating to the rights of patients to make telephone calls.

The Department operates secure mental health facilities for the evaluation, treatment and detention of ch. 980, Stats., sexually violent patients. Departmental investigations have indicated that a portion of the ch. 980 inpatient population has routinely abused their s. HFS 94.20 telephone rights by making inappropriate calls to members of the public, by fraudulently placing numerous long distance calls that are billed to innocent third-parties or by operating fraudulent schemes. Since the Department has previously had no means of monitoring patient telephone use, the extent of this activity is unknown, but given the experience of investigations triggered by citizen complaints, it is clear that these sorts of activities are not infrequent among this population. In addition, experience with telephone monitoring in other secure institutions indicates that call monitoring can and does help staff detect contraband and other security-related issues and activities. These abuses are clearly contrary to the therapeutic activities conducted at the secure mental health facilities.

Until recently, the Department has been unable to stop these abuses because the Department's facilities lacked secure telephone systems. Previous DHFS efforts to obtain secure telephone systems from the telephone system's vendor used by the Department of Corrections were not successful because the call volume at DHFS's secure mental health facilities were viewed as insufficient to support the telephone system.

In late 2000, the Department of Corrections selected a new vendor for its secure telephone system. In May, 2001, the new vendor agreed to also install the system in DHFS's secure mental health facilities. On June 22, 2001, the Department issued these proposed permanent rules as emergency rules that became effective as of that date. The telephone systems allow the Department to establish and enforce calling lists for each inpatient and monitor inpatients' calls for counter-therapeutic activity. An inpatient's calling list is a finite number of telephone numbers associated with persons the inpatient is approved to contact by telephone. Use of calling lists alone, however, is insufficient to discourage and minimize inpatient attempts to subvert the system. The Department must monitor phone calls made by ch. 980 inpatients to discourage and minimize the occurrence of inpatients calling persons on their calling list who, in turn, subvert the secure system by forwarding the inpatient's call for the prohibited purposes and activities previously described. The Department must be able to monitor the phone calls of ch. 980 inpatients both to protect the public and promote therapeutic activities at the secure mental health facilities.

The Department is proposing these rules to protect the public's safety by minimizing the recurring fraudulent activity associated with telephone use. Pursuant to an earlier emergency rule promulgated by the Department, the Sand Ridge Secure Treatment Center and the Wisconsin Resource Center have been operating with the secure telephone system since late June and early July, 2001.

The Department's authority to amend these rules is found in s. 51.61 (9), Stats. The rules interpret s. 51.61 (1) (p), Stats.

SECTION 1. Section HFS 94.20 (3) is amended to read:



HFS 94.20 (3) (a) Except as provided in par. (b), Each inpatient shall be permitted to make a reasonable number of private, personal calls. The number and duration of the calls may be limited for legitimate management reasons, but the facility shall provide every patient the opportunity to make at least one private, personal call per day.

(b) This subsection does not prohibit a facility under s. 980.065, Stats., from recording patients' personal telephone calls or monitoring the resulting recordings.

The rules contained in this order shall take effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health and  
Family Services

Dated:

By: \_\_\_\_\_

Phyllis J. Dubé  
Secretary

SEAL:

### Fiscal Estimate — 2001 Session

- Original       Updated  
 Corrected       Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number HFS 94

**Subject**  
 Authorizing the establishment of a secure telephone system at Chapter 980 patient facilities

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation       Increase Existing Revenues  
 Decrease Existing Appropriation       Decrease Existing Revenues  
 Create New Appropriation

- Increase Costs — May be possible to absorb within agency's budget.  
 Yes       No  
 Decrease Costs

Local:  No Local Government Costs

- |  |   |
|--|---|
| 1. <input type="checkbox"/> Increase Costs<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 3. <input type="checkbox"/> Increase Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |
| 2. <input type="checkbox"/> Decrease Costs<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 4. <input type="checkbox"/> Decrease Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |

5. Types of Local Governmental Units Affected:
- Towns    Villages    Cities  
 Counties    Others \_\_\_\_\_  
 School Districts       WTCS Districts

**Fund Sources Affected**

- GPR    FED    PRO    PRS    SEG    SEG-S

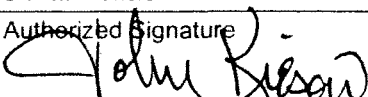
Affected Chapter 20 Appropriations

**Assumptions Used in Arriving at Fiscal Estimate**

The secure telephone system that will be implemented at the State's Chapter 980 institutions does not create any additional costs for State or Local governments. The immediate cost of installing and operating the system is paid by the vendor that provides the secure telephone system to the State. Ultimately, the costs associated with this telephone system will be borne by the patients who use the system, or by individuals who accept collect calls from these patients, through user fees collected by the vendor.

It is anticipated that the implementation of this system will reduce the number of incidents of telephone fraud and inappropriate telephone calls to the general public that originate from Chapter 980 patients.

**Long-Range Fiscal Implications**

Prepared By: Steven Watters	Telephone No. (608) 847-1720	Agency DHFS
Authorized Signature 	Telephone No.	Date (mm/dd/ccyy) 6-21-01

**PROPOSED ADMINISTRATIVE RULES – HFS 94  
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES  
PURSUANT TO S. 227.19 (3), STATS.**

**Need for Rules**

The Department operates secure mental health facilities for the treatment of ch. 980, Stats., sexually violent patients. Departmental investigations have indicated that a portion of the ch. 980 inpatient population has routinely abused their s. HFS 94.20 telephone rights by making inappropriate calls to members of the public, by fraudulently placing numerous long distance calls that are billed to innocent third-parties or by operating fraudulent schemes. Since the Department has previously had no means of monitoring patient telephone use, the extent of this activity is unknown, but given the experience of investigations triggered by citizen complaints, it is clear that these sorts of activities are not infrequent among this population. In addition, experience with telephone monitoring in other secure institutions indicates that call monitoring helps staff detect contraband and other security-related issues and activities. These abuses are clearly contrary to the therapeutic activities conducted at the secure mental health facilities.

Until recently, the Department has been unable to stop these abuses because the Department's facilities lacked secure telephone systems. Previous DHFS efforts to obtain secure telephone systems from the telephone system's vendor used by the Department of Corrections were not successful because the call volume at DHFS's secure mental health facilities were viewed as insufficient to support the telephone system.

In late 2000, the Department of Corrections selected a new vendor for its secure telephone system. In May 2001, the new vendor agreed to also install the system in DHFS's secure mental health facilities. On June 22, 2001, the Department issued these proposed permanent rules as emergency rules that became effective as of that date. The telephone systems allow the Department to establish and enforce calling lists for each inpatient and monitor inpatients' calls for counter-therapeutic activity. An inpatient's calling list is a finite number of telephone numbers associated with persons the inpatient is approved to contact by telephone. Use of calling lists alone, however, is insufficient to discourage and minimize inpatient attempts to subvert the system. The Department must monitor phone calls made by ch. 980 inpatients to discourage and minimize the occurrence of inpatients calling persons on their calling list who, in turn, subvert the secure system by forwarding the inpatient's call for the prohibited purposes and activities previously described. The Department must be able to monitor the phone calls of ch. 980 inpatients both to protect the public and promote therapeutic activities at the secure mental health facilities.

The Department is proposing these rules to protect the public's safety by minimizing the recurring fraudulent activity associated with telephone use. Pursuant to an earlier emergency rule promulgated by the Department, the Sand Ridge Secure Treatment Center and the Wisconsin Resource Center have been operating with the secure telephone system since late June and early July, 2001.

**Response to Clearinghouse Recommendations**

There were no comments from the Legislative Council's Rules Clearinghouse on this rulemaking order.

### **Public Hearings Summary**

The Department held one public hearing on the proposed rules amendment in Madison on September 12, 2001. No one appeared at or testified at the hearing. The Department received one written comment.

### **Final Regulatory Analysis**

The proposed permanent rule will not affect small businesses as "small business" is defined in s. 227.114(1)(a), Stats.

**Department of Health and Family Services  
Division of Care and Treatment Facilities  
Public Hearing and Written Comment Summary  
Chapter HFS 94.20 (3)**

One public hearing on the proposed permanent rules was held as follows:

Madison, WI on September 12, 2001

Staff in attendance:

James Yeadon, Hearing Officer, Supervisor, Client Rights Office, Division of Care and Treatment Facilities, DHFS

Steve Watters, Director, Sand Ridge Secure Treatment Center, Division of Care and Treatment Facilities, DHFS

Michael Dittman, Security Director, Sand Ridge Secure Treatment Center, Division of Care and Treatment Facilities, DHFS

Christi Bermejo, Client Rights Specialist, Client Rights Office, Division of Care and Treatment Facilities, DHFS

The Department kept the hearing record open for written comments until September 24, 2001.

Participation in the hearings is tabulated below. The indication of support and opposition reflects the positions indicated on the registrations or written statements filed by the hearing participants.

Registered: 0

Oral testimony: 0

Written testimony from people who attended and gave oral testimony: 0

Written comments from people who attended, but did not testify: 0

Written comments from people who did not attend a hearing: 1

Support the rules: 0

Support the rules with changes: 0

Oppose the rules: 1

Undecided: 0

**Proposed Amendment to HFS 94.20(3)  
Hearing Attendees or Commenters**

The following is a complete list of the people who attended a public hearing or submitted written comments on the proposed ch. HFS 95, permanent rules. Each person's name and affiliation is accompanied by an indication of the person's position on the proposed rules and whether or not the person testified or provided written comments. The number preceding a name indicates in the attached summary of hearing comments who made the specific comment.

Name and Address	Position	Action
1. Todd Winstrom Wisconsin Coalition for Advocacy 16 N. Carrol St., Suite 400 Madison, WI 53703	Opposed	Written comments only

**Summary of HFS 95 Public Hearing Testimony  
Including Written Comments and Departmental Responses**

<b>Rule Reference</b>	<b>Comment</b>	<b>Departmental Response</b>
General comments	<p>The proposed rule is an improper interpretation of statute, as it conflicts with § 51.61(2), Stats. The right to use the telephone can only be limited for cause per § 51.61(2). The proposed rule is a limit on communication rights of all patients, with no finding of individual cause. 1</p>	<p>The secure phone system meets the requirements of s. 51.61 (1) (p), Stats. The statute does not create an absolute right to make and receive phone calls. The proposed rule interprets the "reasonable access...within reasonable limits" language of the statute. Section 51.61 (2), Stats, addresses the ability to completely deny (eliminate) access to a telephone; not impose reasonable limits on telephone use. Thus, it does not need to comply with s. 51.61 (2), Stats. Given ch. 980 patients' track record of abusing their phone rights, as well as treatment and security concerns that uniquely apply to ch. 980, Stats., patients, the limitations imposed by the rule are reasonable and within the meaning of the statute.</p>
General comments	<p>The proposed rule changes a longstanding, well-established interpretation of the statute without reasonable justification and is inconsistent with Legislative intent. The current rule guarantees patients' <u>privacy</u> in telephone use, consistent with the legislative intent of § 51.61(p), Stats. 1</p>	<p>The statute does not mention "privacy" as part of the right to use the telephone. The "privacy" provision of the right is found in the s. HFS 94.20, rather than s. 51.61(1) (p), Stats. Thus the modification of the "privacy" provision is not inconsistent with the statute; it merely adds a reasonable interpretation of the existing rule. Furthermore, there is no prohibition against an agency changing its interpretation of a statute by amending an existing rule, regardless of whether the interpretation under the existing rule is "long-standing." An agency is, and must be, free to amend its own rules, particularly where, as here, it is called upon to apply the statute the rule interprets to a new set of facts. Ch. 980, Stats., did not exist at the time the Department adopted the current language of s. HFS 94.20 (3), and that language is not well adapted to deal with the new patient population of sex predators.</p> <p>Regarding legislative intent, if the legislature intended to grant patients a right to "private" phone calls, presumably it would have done so expressly, as it did with respect to other patients' rights. For instance, s. 51.61 (1), Stats., provides in part that a</p>

Rule Reference	Comment	Departmental Response
		<p>patient shall:</p> <p>"(m) Have a right to a humane psychological and physical environment within the hospital facilities. These facilities shall be designed to afford patients with comfort and safety, to promote dignity and ensure <u>privacy</u>."</p> <p>"(s) Have reasonable protection of <u>privacy</u> in such matters as toileting and bathing."</p> <p>The legislature also provided in s. 51.61 (1) (c), Stats., that facilities for the most part may not read patient mail, but did not suggest that facilities may not monitor the content of patient phone conversations.</p>
General comments	<p>When the legislature recently changed the law on mail for Ch. 980 patients, it allowed it to be read <u>only for cause</u> on an individual basis. This establishes legislative intent that patient privacy may be breached <u>only for cause</u> and on an <u>individual</u> basis. 1</p>	<p>The rights for mail and telephone are established in different parts of the statutes, and if anything, the wording of these rights supports the Department's position. Specifically, s. 51.61 (1) (c), Stats., makes clear that patients have a right to send and receive sealed mail (prior to the recent changes relative to Chapter 980 patients). However, s. 51.61 (1) (p), Stats., does not include any statement or provision relative to privacy in telephone usage. Also, when one looks at the substantial changes that the Legislature authorized for the rights of Chapter 980 patients, including changes relative to privacy of mail for Chapter 980 patients, there is a clear record that the Legislature supports the view that Chapter 980 patients' rights need to be different than the rights of other patients. This is all very consistent with the Department's actions on the telephone system.</p>
General comments	<p>The Department has not demonstrated compelling evidence that this dramatic change in rights is necessary. There has only been the claim that some minority of the Ch. 980 patients engage in some abuse of the telephone. These claims have been supported by anecdotal reports regarding particular incidents. This limited evidence is not sufficient to support a complete change in the rights</p>	<p>There is no requirement in ch 227, Stats., or elsewhere that requires an agency to cite "evidence" that a change in a rule is "necessary." The tests are whether the proposed change in the rule represents a proper interpretation of the statute and comports with legislative intent.</p> <p>If such evidence were to be required, it is readily available. A</p>



Rule Reference	Comment	Departmental Response
	<p>of all Ch. 980 patients, but rather only on an individual basis. 1</p>	<p>review of the incident reports from 1998 at the facility housing Ch. 980 patients indicated that 41 of the 115 patients in the sample abused their telephone privacy rights. This is 35.7% of the patients. This figure represents only those patients who were caught doing this. It is logical to assume that many more patients abused this right but were not caught doing so. The data indicates that there is a propensity for these types of patients to abuse this right. The Department believes that this is sufficient evidence to support a change in the privacy rights of telephone use by this population. Furthermore, without the capability to record and monitor calls, the facility would not have any capability to ensure that patients are contacting only approved parties via the telephone. The facility would thus lose the ability to enforce calling lists, since patients could have their calls forwarded by a third party.</p>
<p>General comments</p>	<p>The proposed rule does not afford reasonable access to a telephone. The increased costs of the new phone system are borne by the patients. The Department has passed on these costs to all patients, not just the ones who abuse the telephone, creating an unreasonable burden on them and thus a barrier to their access to the telephone. 1</p>	<p>There are some increased costs to the patients with the new secure telephone system. The Department has taken actions to attempt to reduce the costs to patients (the debit calling system, which has somewhat lower rates than the collect call system). The Department has also taken several steps to allow patients to use the telephone for other uses (such as the 800 telephone call process that has been implemented). The Department is using the lowest cost secure telephone system that was available. The costs do accrue to the patients or their outside contacts. This increased cost basically is produced because the system has a considerable amount of cost associated with it. Unfortunately, the system has been made necessary because of rampant abuse of the old system.</p> <p>The rule amendment doesn't say anything about who will pay for changes in the phone system. Therefore, the fact that patients may pay part of them is not a proper objection to the language of the rule amendment itself. If the Sand Ridge Secure Treatment Center or the Wisconsin Resource Center implement the rule in a way that unreasonably limits patient access to phones, that would violate the statute and a patient</p>

Rule Reference	Comment	Departmental Response
		<p>would have a cause of action for violation of patient rights.</p> <p>Requiring patients to pay for the system may or may not have that effect. That will have to be determined on the basis of grievances or lawsuits if and when they are filed. But, in any event, the plan to charge the patients for the new phone system does not mean that the rule amendment itself violates patients' rights to reasonable access to phones.</p>
General comments	<p>Persons outside the facility who desire to communicate by telephone with Ch. 980 patients will have their privacy rights compromised by the proposed rule. This may cause them to opt not to communicate with the patients, thus further limiting patients' access to telephone communications. 1</p>	<p>It is possible that the system may result in a reduction of some contacts with appropriate outside parties. Presumably, the frequency of these contacts may be reduced (for instance, from daily to weekly calls) or they may encourage more written communication with the patients. However, we believe that this system will virtually eliminate inappropriate telephone calls (scams, fraud, contact with victims, grooming of victims, etc.) by the Chapter 980 patients. Thus, in terms of assessing the overall impact on the treatment environment, the secure telephone system greatly enhances the overall quality of the environment and the treatment milieu.</p> <p>Furthermore, there is no legal basis for the claim that persons outside the facility have a right to private telephone conversations with ch 980 patients. As long as outside callers are notified that their conversations may be monitored, there is no violation of law.</p>
General comments	<p>The barriers imposed upon telephone use by costs and unnecessary impositions upon privacy will have a detrimental effect on patients' treatment. The results of these burdens on communication will be less communication from people supportive to the patients. When patients are ultimately released, they will have fewer existing relationships and community support. 1</p>	<p>Besides protecting the public, the limitation on phone abuse is intended to foster the treatment of the Ch. 980 patients. Unfettered access to the world via telephone in the past has allowed Ch. 980 patients to perpetrate phone scams, contact victims, groom new victims, etc. This was counter-therapeutic to them and undermined the rest of their treatment. When Ch. 980 patients have completed their treatment in a supportive milieu, they will be less likely to recidivate and more likely to build supportive relationships with others in the community.</p>