

CR 81-136

CERTIFICATE

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STATE OF WISCONSIN)
)
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Donald E. Percy, Secretary of the Department of Health and Social Services and custodian of the official records of said department, do hereby certify that the annexed rules relating to observation status for youth in correctional institutions were duly approved and adopted by this department on August 24, 1982.

I further certify that said copy has been compared by me with the original on file in this department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 24th day of August, A.D. 1982.



Donald E. Percy, Secretary
Department of Health and Social Services

SEAL:

12-1-82

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ORDER OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
ADOPTING RULES

To create HSS 335, relating to observation status for youth in correctional institutions.

Analysis Prepared by the Department of Health and Social Services

These rules interpret ch. 48 and s. 46.03 (1), (6) and (7), Stats., regarding the maintenance of order, humane treatment and punishment, and segregation of youths in correctional institutions. A related ch. HSS 334, concerning administrative confinement also interprets ch. 48 and s. 46.03, Stats., and provides for the segregated confinement of youths who are found to be dangerous.

These rules provide for an involuntary or voluntary but nonpunitive observation status used for the temporary confinement of a youth to ensure his or her safety and the safety of others if the youth is mentally ill and dangerous or is suspected of having a disease or another medical condition that requires separation from the population for treatment. Extended stays in observation are provided for but must be preceded by a review of the youth's status which affords him or her substantial due process rights.

Pursuant to authority vested in the Department of Health and Social Services by s. 227.014(2), Stats., the Department hereby adopts rules interpreting ch. 48 and s. 46.03 (1), (6) and (7), Stats., as follows:

SECTION 1. Chapter HSS 335 of the Wisconsin Administrative Code is created to read:

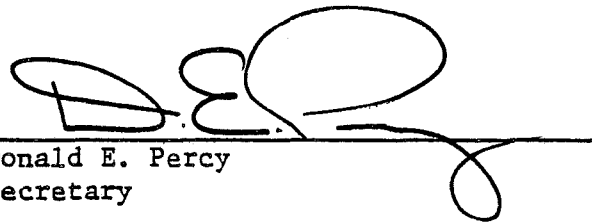
The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.026(1), Stats.

Dated: 8.24.82

Department of Health and Social Services

By: _____

Donald E. Percy
Secretary

A handwritten signature in black ink, appearing to read 'D. E. Percy', is written over a horizontal line. The signature is stylized with large loops and a long tail that extends to the right.

SEAL:

HSS 335

OBSERVATION STATUS IN YOUTH
CORRECTIONAL INSTITUTIONS

HSS 335.01 Purpose
HSS 335.02 Applicability

HSS 335.03 Definitions
HSS 335.04 Observation

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HSS 335.01 PURPOSE.

The purpose of this chapter is to provide for an involuntary or voluntary nonpunitive status used for the temporary confinement of a youth to ensure his or her safety and the safety of others if the youth is mentally ill and dangerous or has a medical problem that requires separation from the population for treatment.

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State of Wisconsin \

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF POLICY AND BUDGET

September 22, 1982

1 WEST WILSON STREET
MADISON, WISCONSIN 53702

Mr. Orlan Prestegard
Revisor of Statutes
411 West, State Capitol
Madison, WI 53702

Dear Mr. Prestegard:

On August 24, 1982, we filed with your office Ch. HSS 335, Wis. Adm. Code, administrative rules concerning observation status in youth correctional institutions. Inadvertently, we omitted from the filed copy s. HSS 335.01, which is page 1 of the filed rule, the backside of which is the table of contents for the chapter. Please insert the attached sheet as the table of contents page and page 1 of Ch. HSS 335 as filed.

Very truly yours,

A handwritten signature in cursive script that reads "Paul E. Menge".

Paul E. Menge
Administrative Rules Manager

PM:jmb

Attachment

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SEP 22 1982



DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF CORRECTIONS

CHAPTER HSS 335

Observation Status in Youth
Correctional Institutions

August, 1982 a

HSS 335.02 APPLICABILITY.

This chapter applies to the department of health and social services and to all youth under its legal custody in correctional institutions. It interprets s. 46.03 (1), (6) and (7), Stats., and ch. 48 Stats.

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HSS 335.03 DEFINITIONS.

In this chapter:

- (1) "Assistant superintendent" means an assistant superintendent of an institution, or designee.
- (2) "Department" means the department of health and social services.
- (3) "Division" means the department of health and social services, division of corrections.
- (4) "Hearing officer" means the person or committee authorized under ch. HSS 333, Wis. Adm. Code, to impose disciplinary measures for youth misconduct.
- (5) "Misconduct" means behavior in violation of state or federal statutes or the rules of the department.
- (6) "Prehearing security" has the meaning designated in s. HSS 333.02, Wis. Adm. Code.
- (7) "Shift supervisor" means the shift supervisor of an institution, or designee.
- (8) "Superintendent" means the superintendent of an institution, or designee.

- (9) "Youth" means a person or persons under the age of 19 years placed under the legal custody and supervision of the department for correctional purposes by the dispositional order of a court.
- (10) "Administrator" means administrator of the division of corrections, or designee.

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HSS 335.04 OBSERVATION.

- (1) CRITERIA. Observation is an involuntary or voluntary nonpunitive status used for the temporary confinement of a youth to ensure his or her safety and the safety of others if:
 - (a) The youth is suspected of being mentally ill and dangerous to self or others; or
 - (b) The youth has, or is suspected of having, a communicable disease or infection or other medical problem that requires separation from the population for treatment by a physician.
- (2) MENTALLY ILL. A youth is mentally ill if there is substantial probability that he or she has a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life in an institution, but does not include alcoholism or other drug abuse.
- (3) DANGEROUS. A youth is dangerous if he or she evidences a substantial probability of physical harm to self or to other persons as manifested by:

- (a) Recent homicidal or other violent behavior; or
 - (b) The reasonable fear by others of violent behavior and serious physical harm because of a recent overt act, attempt or threat to do such physical harm; or
 - (c) Serious self-destructive behavior or a threat of such behavior.
- (4) PLACEMENT AUTHORITY. If there is reasonable cause to believe that the criteria under sub. (1) are met, a youth may be placed in observation by:
- (a) A psychologist or physician;
 - (b) A hearing officer with immediate notification to the superintendent or designee for approval;
 - (c) The superintendent;
 - (d) A clinical or medical professional staff member if a clinical psychologist or physician is not available for consultation either directly or by telephone; or
 - (e) An assistant superintendent.

(5) EXAMINATION. (a) If a youth is placed in observation under sub. (4) by anyone other than a physician or psychologist, the physician or psychologist or, in the case of a sub. (1)(b) placement, a health services staff member shall be notified and should examine the youth and evaluate the placement to verify a condition under sub. (1) within 8 hours of placement, but in no case may the examination take place later than 18 hours after placement. Such a reevaluation shall result in a youth's continued confinement in or immediate release from observation. Pursuant to sub. (12), the appropriate privileges and properties permitted for the youth in observation shall be determined after consultation with the supervisor of the unit. Youth in observation shall be provided appropriate treatment services. Consistent with the needs of the youth, the least restrictive setting shall be used to treat youth under this chapter.

(b) If a youth suspected of being mentally ill and dangerous to self or others is placed in observation under sub. (4) or continued in observation under par. (a), a clinical psychologist or physician shall evaluate the youth as needed, but at least every 3 working days, to determine if continuation of the status is necessary. If a determination is made by the clinical psychologist or physician that the youth needs treatment in a mental health facility, the youth and the youth's parents shall be asked to consent to transfer, and if they do consent and the department approves, the transfer shall be made within 72 hours of their consent.

- (c) If a youth who has or is suspected of having a medical problem that requires separation from other youth for treatment by a physician is placed in observation under sub. (4) or continued in observation under par. (a), the youth's treatment needs shall be documented and the youth's status shall be reviewed periodically, as needed, by a physician or nurse. If a youth's medical needs cannot be met at the institution, the youth shall be transferred to an appropriate medical facility. A youth may appeal under sub. (17)(a) at any time following decision to continue the status.
- (6) RECOMMENDATION FOR PLACEMENT. Any staff member or youth may recommend to any person noted under sub. (4) that a youth be placed in observation. The staff member or youth shall state the reasons for the recommendation and describe the youth's conduct that underlies the recommendation.
- (7) LIMITS ON TIME IN STATUS. (a) No youth suspected of being mentally ill and dangerous to self or others may remain in observation for longer than 5 working days from placement or from the examination under sub. (5), if there is one, unless notice of review of the youth's status in accordance with sub. (9) has been served and mandatory commitment proceedings have been initiated pursuant to sub. (8).

- (b) A youth who has or is suspected of having a medical problem that requires separation from other youth for treatment by a physician may remain in observation for a reasonable period of time for diagnosis and, if necessary, treatment until the disease or condition is in remission or the youth has passed the communicable stage of the disease or infection.
- (8) NEED FOR ADDITIONAL TREATMENT. If, in the opinion of the attending clinical psychologist or physician, a youth in observation for the reason indicated in sub. (1)(a) is in need of additional treatment at a mental health or medical facility, such recommendation shall be made to the superintendent for approval and the youth may be transferred pursuant to s. 51.20 or 51.35(3)(e), Stats.
- (9) REVIEW OF NEED FOR CONTINUED OBSERVATION. (a) If there is substantial probability that a youth in observation is mentally ill and dangerous and requires continued observation in excess of the 5 working day period noted under sub. (7) and commitment proceedings have been initiated, a clinical psychologist or physician, other than a person who made the original placement, may make a decision for continued confinement of the youth following notice under par. (b). A youth may then be continued in observation after a review in accordance with this section.
- (b) A youth placed in observation for the reason indicated in sub. (1)(a) shall be given written notice of the review under par. (a) within 10 working days of the examination under sub. (5). Notice shall include:

1. The allegation of the youth's mental illness and dangerousness;
2. The standards used to determine mental illness and dangerousness;
3. The evidence to be considered at the review;
4. The sources of information relied upon unless such disclosure would threaten personal safety or institution security;
5. An explanation of the possible consequences of any decision;
6. An explanation of the youth's rights at the review which are:
 - a. The right to be present;
 - b. The right to deny the allegation;
 - c. The right to an advocate in accordance with s. HSS 333.70, Wis. Adm. Code, and the right to present or have the advocate present information obtained from witnesses;

- d. The right to present documentary evidence;
 - e. The right to question witnesses in accordance with par. (d);
 - f. The right to receive a written decision, stating the reasons for it based upon the evidence; and
 - g. The right to appeal the finding in accordance with sub. (17); and
7. The date, time, and place of the review and an order that the youth appear at the review.
- (c) The review under par. (a) shall take place not sooner than 2 working days and not later than 5 working days after service of notice to the youth. The youth may not waive this review or the time limits under this subsection.
- (d) At the review under par. (a), the allegations of the youth's dangerousness and mental illness shall be read aloud and all witnesses present including the youth and the staff member who recommended the placement into observation shall have a chance to speak. The clinical psychologist or physician may require medical evidence to be offered. Direct questions may be permitted or the youth may be required to submit questions to be

asked of the witnesses. Repetitive, disrespectful, or irrelevant questions may be forbidden. Whenever the clinical psychologist, physician, or crisis intervention worker determines that a witness shall not be called, or that the identities of sources of information relied upon or any statements or evidence should not be included in a written record because personal safety or institution security is implicated, the fact of the omission in the record shall be recorded.

- (10) DECISION-MAKING FOLLOWING REVIEW. After the review, under sub. (9), the clinical psychologist or physician shall deliberate in private considering only the evidence presented, the youth's records, and the standard for dangerousness as defined under sub. (3) and mental illness as defined under sub. (2). The clinical psychologist or physician, shall decide whether a youth is mentally ill and dangerous and, if so, the youth shall be continued in observation. The reasons for the decision shall be given to the youth in writing.
- (11) PERIODIC REVIEW. There shall be a review under sub. (9)(a) of a youth in observation for the reason indicated in sub. (1)(a) at least once every 15 working days and the procedures for review under sub. (9) shall be followed.
- (12) HOUSING. A youth in observation shall be confined alone in a comfortably warm, well-ventilated, sanitary, secure room equipped with an observation port. The youth may have access to common areas if his or her behavior permits such access and shall be entitled to the same privileges and properties as a youth in the general population unless:

- (a) The staff member under sub. (4) who places the youth in observation reasonably believes that these privileges or properties may be used by the youth, or another youth also in observation, to harm self or to harm others; or
 - (b) The properties cannot be moved conveniently to the observation room; or
 - (c) The privileges cannot be offered due to the secured nature of the observation unit.
- (13) SUPERVISION. A staff member shall have unimpeded access to a youth in observation for the reason indicated in sub. (1)(a), shall observe the youth at least once every 15 minutes, and shall accompany the youth at all times while the youth is out of the room. Every effort shall be made to keep youth interacting throughout each day with clinical and nonclinical staff.
- (14) WITHDRAWAL OF PRIVILEGES. If any of the privileges or properties noted under sub. (12) is used by the youth or another youth also in observation for self-harm or harm to others, it shall be withdrawn immediately by the staff member noting the problem. The superintendent shall reevaluate and either approve the withdrawal or reinstate the privilege or property as soon as possible.

- (15) END OF OBSERVATION. Unless there is a continuation under sub. (9)(a), or a transfer or commitment under sub. (8), the youth shall be returned to previous status and assignment if possible and advisable or shall be reassigned by the institution programming authority after expiration of the initial 5 working day period under sub. (7), with particular attention given, as appropriate, to the special needs which occasioned placement in observation status. A youth may be returned at any earlier time upon the written recommendation of the attending clinical psychologist or physician. Similarly, after any termination of a continuation or after return transfer from a mental health or medical facility, the youth shall resume his or her assignment or be reassigned.
- (16) REPORTING TO RESIDENTIAL CARE OFFICE. All placements into, releases from, and transfers from observation as well as any suicide attempts prior to or during placement in observation shall be reported to the residential care office. The attending physician, clinical psychologist, or crisis intervention worker shall be informed by the residential care director of any suicide attempts or other self-harm made prior to placement in observation.
- (17) APPEAL. (a) A youth suspected of being mentally ill and dangerous to self or others and placed in observation under sub. (4) who does not receive timely reviews in accordance with this section or who has had a decision under sub. (10) shall have the immediate right to appeal to

the director of the bureau of juvenile services. Any youth placed in observation for the reason indicated in sub. (1)(b) for more than 5 days who wishes to challenge his or her placement, shall have the immediate right to appeal such placement to the director of the bureau of institutional health services. The director of the bureau of institutional health services or the director of the bureau of juvenile services may request an additional clinical or medical assessment of the youth's condition prior to the director's written decision which shall be issued to the youth and appropriate staff within 5 working days of receipt of the appeal.

(b) A youth may appeal a decision under sub. (5)(a) to the administrator who shall issue a written decision within 5 working days.

(18) RECORDS. A daily entry shall be made in the youth's record describing progress with treatment. Specific descriptions of incidents that may reveal the youth's mental illness and dangerousness, or lack of these, or other medical condition shall be recorded.

NOTE: HSS 335 provides for the temporary confinement of a youth who is mentally ill and dangerous or who has, or is suspected of having, a disease or condition requiring treatment and isolation from the population.

Observation is not a punishment. It is meant to ensure the safety of the youth and others during the crisis period. Hopefully, by confining the youth under observation for a short time, the personal crisis will subside without any harm being done to the youth or to others. Examples of personal crises are

situations in which a youth receives discouraging or disheartening news from his or her family and evidences a mental health problem and dangerousness and temporarily needs emotional support and observation because of the possibility of attempted self harm or harm to others; or when a youth is in an emotional depression and needs to be carefully watched because of the possibility of attempted self harm or harm to others; or when a youth has attempted to commit suicide and shows signs of another attempt. Sometimes a youth requires isolation from the general population because his or her mental condition has deteriorated to the point that the youth may be victimized by others or the youth presents a danger to others. Other persons may be brought to see the youth, if the youth's condition allows or requires such visits.

Alcoholic and drug dependent youths are to be placed in observation only if treatment is necessary and cannot be provided while the youth is in the general population.

A youth who violates a disciplinary rule and satisfies the criteria under subsection (1), may be placed in observation under this section prior to or after disciplinary action. This sometime occurs because the individual's mental illness becomes apparent during the disciplinary process. Typically, such a mentally ill person is not disciplined, but is placed in observation status. Confinement in observation is not a penalty for rule infractions, however. Administrative confinement is reserved for a youth who is found dangerous but not mentally ill. A youth who is mentally ill and dangerous may be transferred to a medical or mental health facility under s. 51.37(5) or 51.20, Stats., for treatment if release into the previous status is deemed unwise after the stay in observation.

Subsection (2) and (3) set forth the standards to be used in determining dangerousness and mental illness under this chapter. They are similar to the standards used to determine dangerousness and mental illness for involuntary civil commitment under s. 51.20, Stats. The analogy between the standards is apt since both are vehicles for removing dangerous persons from the population in which they live.

Subsection (4) authorizes certain people to place a youth in observation. Ideally, placement should be made by highly trained personnel, and the clinical psychologist, physician, or superintendent should authorize all placements. However, experience teaches that this is not always possible. Thus, others are authorized to place youths in observation, but in such cases the clinical psychologist or physician examines that placement as soon as practicable and authorizes either the continued confinement with allowed privileges and properties or the immediate release of the youth from observation. It is anticipated that, if a youth is placed in observation by a staff member, the youth will be in observation only for 8 hours prior to such an examination.

If the time limits in subsection (7) for youth admitted to observation under subsection (1)(a) are not sufficient to properly handle the crisis, the institution must initiate civil commitment procedures under s. 51.20, Stats., or transfer procedures under s. 51.37(5), Stats. However, experience teaches that mental health institutions are reluctant to accept transfers of youth for commitment or transfer under ss. 51.20 and 51.35(3)(e), Stats., and hopefully the provisions under subsection (9) will be adequate to handle a youth's crisis.

Subsection (9) provides that a youth may be continued in observation after a special review. This review contains due process protections of the major disciplinary hearing. Due process protections are important and are afforded the few youths affected by this provision because the seriousness of this confinement parallels civil commitment. At this special review, dangerousness and mental illness are the only criteria for placement in this status. Both findings are prerequisites for continuation of confinement in observation.

Safety and security may be breached if certain testimony or evidence is allowed into the open record. In such cases, review shall deal with the omissions. See the major disciplinary procedures.

Placement of a youth in observation status is not thought to implicate the interests cited in Vitek v. Jones 100 S. Ct. 1254 (1980). In Vitek, the transfer was to a separate institution which was solely for mentally ill people. A person in observation status in Wisconsin frequently will remain in his or her own room. Sometimes, the person is transferred to a different room, for their own protection or so that they can be more carefully observed to prevent self-destructive conduct. Most important, if a youth is in observation status for 10 days from the examination, commitment proceedings pursuant to ch. 51 Stats., are commenced. These proceedings do more than Vitek requires for the transfer of a youth to a mental health institution.

Under subsection (13) a staff member must have unimpeded access to a youth in the event that a problem develops, and a staff member must observe the youth often to ensure that the youth is safe. It is also important that the staff member accompany the youth, for the youth's protection, at all times while he or she is out of the room.

If observation is not continued under subsection (9) or the youth is not transferred under s. 51.20 or 51.37(5), Stats., the youth is returned to his or her previous status. Since observation is a nonpunitive status, every attempt should be made to have youths resume previous assignments. If the attending psychologist, crisis intervention worker, or physician and youth believe that a return to the assignment would have a harmful effect (e.g., rekindle the emotions that prompted the crisis), the youth should be recommended for reassignment by the institution programming authority under subsection (15).

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