MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1217

2007 HOUSE JUDICIARY

HB 1217

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1217

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/17/07

Recorder Job Number: 1243, 1244

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will open the hearing on HB 1217.

Wayne Stenehjem, AG: (see attached testimony).

Rep. Kingsbury: Do you have more examiners that the reports go to the two experts.

Wayne Stenehjem: The two experts each have to conduct an independent evaluation of the individual.

Rep. Kingsbury: There are other examiners doing this and reporting to the two experts.

Wayne Stenehjem: No.

Rep. Kingsbury: Now you're going to be down to one expert.

Wayne Stenehjem: The respondent has a right, under the statute at state's expense if he can't afford an expert, to get an expert of his own.

Rep. Kingsbury: You're saying that the two experts have to concur.

Wayne Stenehjem: Yes, under the current law both have to do an independent evaluation and they both have to agree before you can proceed.

Rep. Kingsbury: I'm just wondering about the timeline, do they wait a long time.

Wayne Stenehjem: It will shorten the timeline because there are two evaluators at the State Hospital and now they won't each have to do one for every offender. They'll be able to cut their workload in half.

Rep. Meyer: Has there been any record on successes of treatment.

Wayne Stenehjem: Dr. Schweitzer is here, he can perhaps explain the actual treatment program; and what successes they have had. This is a long term program. They are there for a long time. I don't think that anybody has been released since the program was started in 1997. It's very long term because these are people that have serious mental health issues, are likely to reoffend, and are very difficult to treat.

Rep. Charging: You were talking about the older majority, what's happening in ND with underage activities.

Wayne Stenehjem: The underage activities are growing, or at least public awareness is growing, which is probably a good thing. In the treatment program in Jamestown, there is a wide range of people. You can go to the website and you can see pictures and demographics with regard to people who are actually in the state hospital in the treatment program. It is a growing problem. I think the public is becoming more aware, and less tolerant.

Chairman DeKrey: Thank you. Further testimony in support of HB 1217.

Ryan Bernstein, Legal Counsel for Governor's Office: Again, this legislation was proposed by the Governor, with the AG and legislators to help further strengthen the civil commitment process for sexually dangerous individuals, by making it clear that the judges have the ultimate authority to decide whether there is sufficient evidence to commit a person as a sexually dangerous individual for treatment. As the AG mentioned, this legislation really came from a case in Cass County, where a judge felt like he had to deny treatment to an individual because he didn't have two experts concluding that this individual was a sexually

predatory individual. This legislation removes that requirement of two psychologists and makes it clear that the judge is responsible to decide whether to commit an offender based on all the evidence as presented to him/her. Removing that requirement of two experts, it does not lower the burden of the state to show a congenital or acquired condition that manifests itself as a sexual disorder. The state will still be required to prove, by clear and convincing evidence that this is a sexually dangerous individual. This removes any perceived requirement of applying a rigid formula and gives the judge the ultimate authority. We hope you support this and vote a Do Pass.

Chairman DeKrey: Thank you. Further testimony in support of HB 1217.

Aaron Birst: I am a former criminal prosecutor from Cass County. I was the one who prosecuted the case in Cass County which brought about some of these issues. I just want to thank the AG for the work he's given, the tools he's given prosecutors, and I also want to thank the Governor's office. Personally, I do support this. The problem with the Cass County case was the judge felt the language of the experts concluded that the person needed to be committed. The judge felt that tied his hands. I think this language, while probably not as specific as I would probably write, I think it at least puts back the ability for the Judge to conclude that no it's not just based on the two doctors conclusions; I have to make the call on this. I was not planning on testifying on behalf of this bill for my organizations, but I feel I need to mention it. In the Cass County case, the two doctors that did the evaluation couldn't conclude one way or the other. The fact that he had been involved in some successful treatment in the state penitentiary, basically had them throw up their hands and say we're not quite sure. In that, lies the rub. In fact, quite frankly, I lost some credibility with some of the judges for even taking that case, but I thought it was important. I'd be more than happy to address any questions.

Chairman DeKrey: Thank you. Further testimony in support, testimony in opposition. We will close the hearing.

(Reopened later in the same session)

Chairman DeKrey: What are the committee's wishes in regard to HB 1217?

Rep. Kingsbury: I move a Do Pass.

Rep. Kretschmar: Seconded.

Rep. Meyer: I was just wondering about the fact that there hasn't been one successful case. No one has been allowed to leave the facility.

Alex Schweitzer, Superintendent of the ND State Hospital: That's correct. The program was initiated in 1997, with two individuals. We're up to 58 at this point in time. Some of the individuals to what we have in terms of treatment system, where they are actually in a less restrictive environment, but still within the program. No one's ever been discharged.

Rep. Meyer: I don't understand, why aren't they placed back in prison, or doesn't that happen.

Alex Schweitzer: This is a civil commitment program. They have already completed their prison sentences. Under this law, they have to be deemed appropriate to be returned to the community.

Chairman DeKrey: One of the reasons for the longer sentences in the state, you can keep them in prison longer with stiffer sentences. Once they've been adjudicated and served their sentence, you cannot keep them as prisoners.

Rep. Meyer: That's when they go into this program.

Chairman DeKrey: Yes, the state's attorney does a civil commitment.

Rep. Meyer: Then with supervised probation on the 20 year mandatory sentence on the previous bill, then would they go into this program.

Chairman DeKrey: One of the things that we've heard is that these individuals actually state-shop. The AG's office has gotten calls asking how they deal with sexual offenders in the state of ND. The reason they are doing that is that they are trying to find a state where they will be the least hassled. At the time we heard that, Arkansas was a state they liked to move to. Vermont is also a state to go to.

Chairman DeKrey: The clerk will call the roll on a DP motion on HB 1217.

13 YES 0 NO 1 ABSENT DO PASS CARRIER: Rep. Meyer

Date: 1-17-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1217

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep. Kingsbury Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	—				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. Meyer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1217: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1217 was placed on the Eleventh order on the calendar.

2007 SENATE JUDICIARY

HB 1217

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1217**

Senate **Judiciary Committee**

☐ Check here for Conference Committee

Hearing Date: February 12, 2007

Recorder Job Number: 3360

Committee Clerk Signature Mona L Solby

Minutes: Relating to the proof required by sexually dangerous individual civil commitment.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Testimony in Favor of the Bill:

Sen. Nick Hacker, Dist. #42 spoke in support of the bill.

Attorney General Wayne Stenehjem, Introduced the bill. Att. #1 and spoke of the history of this legislation in; 1995 the fist bill was introduced and in 1997 it was in acted on. This is new language for the bill.

Sen. Nething asked (5:59) if a committed person wanted a second opinion, they could request it? Yes There will still be two evaluations done if this bill is passed. In any conflict of opinion the cases are not prosecuted. Out of 75 civil commitments in three cases the opinions differed and the cases are dismissed. Spook of the follow up process and a specific case. They discussed placing an emergency clause on the bill

Ryan Bernstein, Legal Counsel for the Governors office (meter 7:57) spoke in support of the bill – Att. #2

Testimony Against the bill:

David Boeck, State employee and lawyer for the Protection and Advocacy Project. – Att. #3

Testimony Neutral to the bill:

Michael Mullen, Attorney Generals Office (meter 15:11) gave his testimony – Att. #4a and submitted an amendment – Att. #4b and stated the emergency clause would be receptive.

Senator David Nething, Chairman closed the hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1217**

Senate **Judiciary Committee**

☐ Check here for Conference Committee

Hearing Date: February 27, 2007

Recorder Job Number: 3998

Committee Clerk Signature Maria L Salberg

Minutes: Relating to the proof required by sexually dangerous individual civil commitment.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Reviewed the Amendment – Att. # 4b from 2/12 hearing. They discussed that the judge could order an additional "expert's" advice if he chooses. They were not limited to only this. The committee also reviewed the records part of the bill.

Sen. Nelson made the motion to Do Pass Amendment – Att. #4b from 2/12 and Amendment and **Sen. Lyson** seconded the motion. All members were in favor and the motion passes.

Sen. Olafson made the motion to Do Pass HB 1217 as amended and **Sen. Nelson** seconded the motion. All members were in favor and the motion passes.

Carrier: **Sen. Nething**

Senator David Nething, Chairman closed the hearing.

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Title.0200

Adopted by the Judiciary Committee
February 27, 2007

2-28-07

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1217

Page 1, line 1, after "reenact" insert "subsection 2 of section 25-03.3-05 and"

Page 1, line 2, replace "proof required for" with "civil commitment of" and replace "individual civil commitment" with "individuals; and to declare an emergency"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Subsection 2 of section 25-03.3-05 of the North Dakota Century Code is amended and reenacted as follows:

2. For purposes of this chapter, the disclosure of individually identifiable health information by a treating facility or mental health professional ~~shall, if requested, disclose individually identifiable health information~~ to ~~a court,~~ the state hospital~~, state's attorney, retained counsel,~~ or ~~other~~ a mental health professional, including an expert examiner, ~~and the disclosure~~ is a disclosure for treatment. A retained or appointed counsel has the right to obtain individually identifiable health information regarding a respondent in a proceeding under this chapter. In any other case, the right of an inmate or a patient to obtain protected health information must be in accordance with title 45, Code of Federal Regulations, part 164."

Page 2, after line 6, insert:

"**SECTION 3. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

Date: 2-27-07
Roll Call Vote # 1 of 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1217

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass Amend. 4b 2/12

Motion Made By Sen. Nelson Seconded By Sen. Lyson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	✓		Sen. Fiebiger	✓	
Sen. Lyson	✓		Sen. Marcellais	✓	
Sen. Olafson	✓		Sen. Nelson	✓	

Total Yes 6 No 0

Absent 0

Floor Assignment Sen.

If the vote is on an amendment, briefly indicate intent:

Date: 2-27-07

Roll Call Vote # 2 of 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1217

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Sen. Olafson Seconded By Sen. Nelson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	✓		Sen. Fiebiger	✓	
Sen. Lyson	✓		Sen. Marcellais	✓	
Sen. Olafson	✓		Sen. Nelson	✓	

Total Yes 6 No 0

Absent 0

Floor Assignment Sen. Nething

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1217: Judiciary Committee (Sen. Nething, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1217 was placed on the Fourteenth order on the calendar.

Page 1, line 1, after "reenact" insert "subsection 2 of section 25-03.3-05 and"

Page 1, line 2, replace "proof required for" with "civil commitment of" and replace "individual civil commitment" with "individuals; and to declare an emergency"

Page 1, after line 3, insert:

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Page 2, after line 6, insert:

"**SECTION 3. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

2007 TESTIMONY

HB 1217

TESTIMONY ON H.B. 1217
AN AMENDMENT TO THE STATUTE PROVIDING FOR
CIVIL COMMITMENT OF SEXUAL PREDATORS

BEFORE THE
HOUSE JUDICIARY COMMITTEE
JANUARY 17, 2007

WAYNE STENEHJEM
ATTORNEY GENERAL

Chairman DeKrey and Members of the Committee, I am pleased to be here to testify about H.B. 1217, which amends Chapter 25-03.3 of the North Dakota Century Code. Chapter 25-03.3 is the statute that provides for the civil commitment for treatment of sexual predators. The amendment will eliminate the requirement that the state's attorney must provide evidence that "two experts" agree an individual meets the criteria for civil commitment as a sexually dangerous individual and replace it with a requirement that there must be "expert evidence" establishing that the individual meets the criteria for commitment.

Chapter 25-03.3 establishes a judicial procedure for commitment of sexually dangerous predators, similar to the procedure for commitment of mentally ill individuals. Under the chapter, a state's attorney usually receives a referral from the North Dakota State Penitentiary treatment staff that an inmate is being released within the following six months who, the treatment staff believes, will meet the criteria for civil commitment.

After an investigation, if the state's attorney makes a similar finding, the state's attorney files a petition for civil commitment of the individual as a sexually dangerous individual under Chapter 25-03.3 and also requests the court issue an order to detain the

individual for evaluation. Within three days of the petition, a hearing is held to determine whether the court agrees there is probable cause to believe the individual will meet the criteria as a sexually dangerous individual. If the court is persuaded, then the individual is transferred to the North Dakota State Hospital for an evaluation, which must be completed within 60 days.

Under the statute, an individual cannot be committed unless there is evidence establishing that at least two experts have concluded the individual meets the criteria of the statute for civil commitment, i.e., that the individual has engaged in sexually predatory conduct and has a mental disorder that makes the individual likely to engage in further acts of sexually predatory conduct, thus making the individual a danger to the physical or mental health or safety of others. If the petition is successful, a respondent is, under the current program, committed to the care, custody, and control of the executive director of the Department of Human Services for treatment in the least restrictive environment. The commitment is until the individual is considered safe to be in the community. In this regard, each year the individual has the right to a hearing on whether the individual meets the criteria for release from the State Hospital. Again, one of the State Hospital's experts must complete an evaluation and preparation for any hearing.

The Attorney General's Office, which originally initiated the commitment legislation, has continued to be involved in the implementation of the statute, working with state's attorneys and the Department of Human Services, most specifically the State Hospital staff, to address concerns that have arisen since the statute's enactment in 1997. A recent concern that has arisen is the time and resources involved for two experts to complete an evaluation of a respondent who has been referred for commitment.

Currently, two State Hospital staff members, either psychiatrists or psychologists, must both evaluate the individual to ensure that the state's attorney will have two concurring experts to proceed with the commitment. The evaluations must be completely independent. It takes approximately 60 to 80 hours for each expert to complete an evaluation of the respondent. In addition, both evaluators must travel to the county in which the commitment is to be held and provide testimony. Depending on the distance, this can also be very time consuming.

At present, there are 18 individuals at the State Hospital who are either undergoing evaluation or have had an evaluation completed and are waiting for their commitment hearing. Another 42 have been committed and 18 evaluations were done with no commitment. Most of these numbers represent the last few years work. While the numbers of individuals referred for commitment were very limited in the early years of the program, the number has increased dramatically since the death of Dru Sjodin. In 2006, approximately 22 sex offenders were evaluated at the State Hospital. This has placed a considerable burden on the two evaluators that the State Hospital has available to do the evaluations for commitment. There have been some evaluations in the past that were not completed within the 60-day time period provided by the statute.

The failure to timely complete evaluations has raised concerns with the North Dakota Supreme Court. In two recent cases, the Supreme Court has admonished the State for failure to be prepared for the commitment hearing within the 60-day time limit because of delays by the State's experts to complete their evaluations.[1] While the Supreme Court, in these two cases, found that there was no prejudice to those particular

[1] In re J.M., 2006 ND 96, 713 N.W.2d 518; In re P.F., 2006 ND 82, 712 N.W.2d 610.

respondents, it chided the State that in the future it would not look kindly on failure to meet the 60-day time limit because the State Hospital staff were not able to complete the evaluations timely because of workload.

The requirement for two experts was originally believed to provide more protection to a respondent. If two experts had to agree that the individual meets the criteria for civil commitment, there would be less chance of a state's attorney pursuing a petition with insubstantial evidence. However, the evaluations have not supported that hypothesis. Despite the complete independence of the evaluations, the two experts at the State Hospital have disagreed on whether an individual meets the criteria only three times out of approximately 75 evaluations. There has been no showing that having one expert complete the evaluation results in unsupportable petitions proceeding to a commitment hearing.

On the other hand, the amendment will reduce by half the commitment of staff required to complete an evaluation with the concomitant cost and resource savings to the State Hospital. It will also enhance the likelihood that commitments will be completed timely, thereby reducing the potential for prejudice to the respondent because of delay in proceeding with the commitment hearing.

Thank you for providing me an opportunity to discuss this amendment to the statute for civil commitment of sexual predators.

Att #1
2-12-07

TESTIMONY ON H.B. 1217
AN AMENDMENT TO THE STATUTE PROVIDING FOR
CIVIL COMMITMENT OF SEXUAL PREDATORS

BEFORE THE
SENATE JUDICIARY COMMITTEE
February 12, 2007

WAYNE STENEHJEM
ATTORNEY GENERAL

Chairman Nething and Members of the Committee, I am pleased to be here to testify about H.B. 1217, which amends Chapter 25-03.3 of the North Dakota Century Code. Chapter 25-03.3 is the statute that provides for the civil commitment for treatment of sexual predators. The amendment will eliminate the requirement that the state's attorney must provide evidence that "two experts" agree an individual meets the criteria for civil commitment as a sexually dangerous individual and replace it with a requirement that there must be "expert evidence" establishing that the individual meets the criteria for commitment.

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procedure for commitment of mentally ill individuals. Under the chapter, a state's attorney usually receives a referral from the North Dakota State Penitentiary treatment staff that an inmate is being released within the following six months who, the treatment staff believes, will meet the criteria for civil commitment.

After an investigation, if the state's attorney makes a similar finding, the state's attorney files a petition for civil commitment of the individual as a sexually dangerous individual under Chapter 25-03.3 and also requests the court issue an order to detain the individual for evaluation. Within three days of the petition, a hearing is held to determine whether the court agrees there is probable cause to believe the individual will meet the criteria as a sexually dangerous individual. If the court is persuaded, then the individual is transferred to the North Dakota State Hospital for an evaluation, which must be completed within 60 days.

Under the statute, an individual cannot be committed unless there is evidence establishing that at least two experts have concluded the individual meets the criteria of the statute for civil

commitment, i.e., that the individual has engaged in sexually predatory conduct and has a mental disorder that makes the individual likely to engage in further acts of sexually predatory conduct, thus making the individual a danger to the physical or mental health or safety of others. If the petition is successful, a respondent is, under the current program, committed to the care, custody, and control of the executive director of the Department of Human Services for treatment in the least restrictive environment. The commitment is until the individual is considered safe to be in the community. In this regard, each year the individual has the right to a hearing on whether the individual meets the criteria for release from the State Hospital. Again, one of the State Hospital's experts must complete an evaluation and preparation for any hearing.

The Attorney General's Office, which originally initiated the commitment legislation, has continued to be involved in the implementation of the statute, working with state's attorneys and the Department of Human Services, most specifically the State

Hospital staff, to address concerns that have arisen since the statute's enactment in 1997. A recent concern that has arisen is the time and resources involved for two experts to complete an evaluation of a respondent who has been referred for commitment.

Currently, two State Hospital staff members, either psychiatrists or psychologists, must both evaluate the individual to ensure that the state's attorney will have two concurring experts to proceed with the commitment. The evaluations must be completely independent. It takes approximately 60 to 80 hours for each expert to complete an evaluation of the respondent. In addition, both evaluators must travel to the county in which the commitment is to be held and provide testimony. Depending on the distance, this can also be very time consuming.

At present, there are 18 individuals at the State Hospital who are either undergoing evaluation or have had an evaluation completed and are waiting for their commitment hearing. Another 42 have been committed and 18 evaluations were done with no commitment. Most of these numbers represent the last few years

work. While the numbers of individuals referred for commitment were very limited in the early years of the program, the number has increased dramatically since the death of Dru Sjodin. In 2006, approximately 22 sex offenders were evaluated at the State Hospital. This has placed a considerable burden on the two evaluators that the State Hospital has available to do the evaluations for commitment. There have been some evaluations in the past that were not completed within the 60-day time period provided by the statute.

The failure to timely complete evaluations has raised concerns with the North Dakota Supreme Court. In two recent cases, the Supreme Court has admonished the State for failure to be prepared for the commitment hearing within the 60-day time limit because of delays by the State's experts to complete their evaluations.[1] While the Supreme Court, in these two cases, found that there was no prejudice to those particular respondents, it chided the State that in the future it would not look kindly on failure

to meet the 60-day time limit because the State Hospital staff were not able to complete the evaluations timely because of workload.

The requirement for two experts was originally believed to provide more protection to a respondent. If two experts had to agree that the individual meets the criteria for civil commitment, there would be less chance of a state's attorney pursuing a petition with insubstantial evidence. However, the evaluations have not supported that hypothesis. Despite the complete independence of the evaluations, the two experts at the State Hospital have disagreed on whether an individual meets the criteria only three times out of approximately 75 evaluations. There has been no showing that having one expert complete the evaluation results in unsupportable petitions proceeding to a commitment hearing.

On the other hand, the amendment will reduce by half the commitment of staff required to complete an evaluation with the concomitant cost and resource savings to the State Hospital. It will also enhance the likelihood that commitments will be completed

[1] In re J.M., 2006 ND 96, 713 N.W.2d 518; In re P.F., 2006 ND 82, 712 N.W.2d 610.

timely, thereby reducing the potential for prejudice to the respondent because of delay in proceeding with the commitment hearing.

Thank you for providing me an opportunity to discuss this amendment to the statute for civil commitment of sexual predators.

Att #2

2-12-07

HB 1217

Senate Judiciary

February, 12, 2007

Mr. Chairman, members of the committee. My name is Ryan Bernstein, and I am Legal Counsel for the Governor.

I am here to testify in support of House Bill 1217. This proposed legislation was introduced in cooperation with Attorney General Wayne Stenehjem and several legislators to strengthen the civil commitment process for sexually dangerous individuals by making it clear that judges have the ultimate authority to decide whether there is sufficient evidence to commit a person as a sexually dangerous individual for treatment.

In a recent case, civil commitment was denied because a judge determined that our law required two psychologists to predict definitively that the offender would commit further acts of sexually predatory conduct. This legislation removes the requirement that two psychologists reach this conclusion, and makes it clear the judge is responsible to decide whether to commit an offender, based on all of the evidence presented in the case.

Removing the requirement that two psychologists conclude the individual is a sexually dangerous individual does not lower the burden on the state to show the congenital or acquired condition manifests itself by a sexual disorder. The state will still be required to prove by clear and convincing evidence that the respondent is a sexually dangerous individual. This would remove any perceived requirement of applying rigid formulas and give the judge the ultimate authority.

Mr. Chairman, members of the committee, thank you for your time and we hope you vote do pass on this bill.

AH #3
2-12-07

Sixtieth Legislative Assembly
Senate Judiciary Committee
February 12, 2007
HB 1217

Good morning Chairman Nething and Committee Members. I am David Boeck, state employee and lawyer for the Protection and Advocacy Project (P&A). P&A advocates for people with disabilities to pursue their disability-related rights and to protect them from abuse, neglect, and exploitation.

P&A is interested in HB1217 because it would lower the standards of proof necessary to commit someone as a sexually dangerous individual. This would increase risks for offenders who commit a sex offense and who have a mental illness or developmental disability.

Proponents should identify a problem in the current law before proposing changes. North Dakota has two highly-trained, experienced ~~**psychiatrists**~~ **psychologists** who assess, diagnose, testify, develop treatment plans, and treat each civilly committed, sexually dangerous individual.

The bill would compel commitment of an individual when North Dakota's two highly-regarded experts cannot agree that the individual is properly committable as sexually dangerous. Previous legislative assemblies, after study, have chosen two experts as the minimum necessary to legitimize commitment. This Legislative Assembly should

not abandon that standard without legislative studies to support that change.

The change proposed in HB1217 goes beyond cutting the necessary experts required for commitment. The language at page 1, line 15, would eliminate the requirement that an expert conclude the individual meets the statutory requirements for commitment as sexually dangerous. The new standard would require only expert evidence. This could be testimony from an "expert" who had never examined the individual.

So what would happen if the State could **not** find enough expert evidence to label an individual sexually dangerous? If the individual is mentally ill and without treatment would pose a serious risk of harm to himself, others, or property, the State could ~~**commit**~~ **pursue commitment of** him for treatment as a mentally ill person. During treatment, psychiatrists could observe him in treatment and agree as to the individual's sexual dangerousness.

What happens if an individual is inappropriately committed as sexually dangerous? He would begin living in a ward surrounded by 30 or more individuals who really are sexually dangerous. This is frightening. At present, no individual has left treatment after being committed in North Dakota as sexually dangerous.

It is obvious that any sexually dangerous individual must remain in treatment until treatment is successful. The State must protect potential victims from sexually dangerous individuals. The State has been appropriately cautious when it comes to declaring treatment successful.

There is no compelling reason to put anyone in the treatment program if the individual is not sexually dangerous. North Dakota has adequate programs to treat -- outside the sexually-dangerous treatment program -- its mentally ill and developmentally disabled individuals who are not sexually dangerous.

Thank you for the opportunity to testify on these issues. Please let me know if you have any questions or if you would like me to get additional information for you.

Att # 4c

HB 1217 Explanation of Amendments regarding Disclosure of Health Information

The purpose of this amendment is to clarify the circumstances in which an inmate recommended for treatment as a sex offender, or a patient who is receiving treatment as a sex offender, has a right to obtain his or her health information.

Since the sexual offender treatment law was enacted in 1997, it has contained two sections specifically related to the disclosure of mental health information. First, section 25-03.3-05 abrogates the psychiatrist-patient privilege so that communications between a psychiatrist (or psychologist), acting as an expert examiner for the state, and the respondent in a civil commitment proceeding can be disclosed to the court, the state's attorney, the respondent's attorney, and the respondent's own expert examiner. Second, section 25-03.3-06 provides that, upon request, the respondent's attorney and the respondent's expert examiner have a right to obtain a copy of any confidential records that are provided to the state's attorney. In essence, this is a due process, fairness rule assuring that the respondent has access to any evidence that is provided to the state's attorney, and which may be used to establish that the respondent is a person requiring civil commitment for treatment as a sex offender, or requiring a continuation of any such treatment.

In 2005, following the implementation of the federal HIPAA privacy rule, a new subsection 2 was added to section 25-03.3-05 to facilitate the disclosure of individually identifiable health information ***from*** community hospitals and clinics ***to*** the State Hospital for use by its expert examiners in conducting an evaluation to determine if a respondent is an individual who should be civilly committed for treatment as a sex offender. The purpose of this provision [section 25-03.3-05(2)] is to facilitate the disclosure of information in connection with an initial evaluation to determine if there should be a civil commitment, and the annual evaluation to determine if treatment should be continued. Because the current language of this subsection uses the phrase "upon request," an argument could be made that this subsection permits the disclosure of health information maintained by the State Hospital upon request at any time, for any reason or no reason. That was never the purpose of this provision.

The amendment clarifies that this subsection (25-03.3-05[2]) applies to the disclosure of health information in connection with a proceeding for civil commitment and the annual evaluation of the need for continued treatment under chapter 25-03.3. In any other case, a patient's right of access to, or a copy of, his or her "protected health information" is in accordance with the provisions of the HIPAA privacy rule.

One other important clarification is required. The forensic mental health examination and report to the court required under section 25-03-13 is not a "health care service" providing "treatment" to a patient. It is a psychological-legal report made to a court for the purpose of determining if the respondent should be civilly committed for treatment. As noted by two expert forensic mental health status examiners:

> Forensic services do not constitute health services because they are intended to serve a legal [and not a therapeutic] purpose, often in response to [a] court order or [statutory] mandate, and are not recognized for payment purposes by third party health insurers. While forensic service may include formulation of a diagnosis, the purpose [of a forensic examination] is not to provide health care or treatment, but rather, to address a question before the court. ... In fact, it may mislead recipients of forensic services to offer a privacy notice using HIPAA language, or to otherwise imply that information gathered [by an expert examiner] for forensic purposes qualifies as "protected health information."[1]

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Let me explain briefly why the Attorney General and the Department of Human Services believe this amendment is important and necessary. Recently the attorney representing a patient receiving treatment as a sex offender obtained a court order requiring the disclosure of the patient's health information that was not connected

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[1] Mary Connell and Gerald P. Koocher, "HIPAA & Forensic Practice," 23 American Psychology Law Society News, No. 2 at p. 16-19 (2003), which is found at – http://www.kspope.com/ethics/hipaa.php#copy (last viewed February 11, 2007).

and to any pending proceeding. In fact, the patient had waived his right to a hearing and the court order was issued approximately 2 months after the date of the waived hearing. (The court order was never properly served on the state, so no records were disclosed under the order.). In another recent case, attorneys filed a demand for specific records more than three months after a hearing and final order that a patient required continuing treatment. This request was, therefore, not connected with any pending proceeding related to this patient's civil commitment.

There is a second type of situation that this amendment will clarify. Several patients in the sex offender treatment program recently requested administrative access to their medical records, a right recognized by the HIPAA privacy rule. 45 C.F.R. § 164.524(a). These patients are not seeking a copy of their protected health information in order to obtain a second opinion about their treatment plan or medication, such as a patient from rural area who might ask for a copy of his or her records in order to seek a second opinion from a medical specialist in Williston, Jamestown or Fargo, or even from the Mayo Clinic. Rather, these SDI patients are seeking access to their medical records in order to identify any therapists who have made negative comments about them in order to retaliate against those therapists. Although there have been only one or two cases of actual physical assault, there are numerous cases of harassment and threats that constitute an abuse of a patient's right of access to their records. Under the HIPAA privacy rule, a patient has a qualified right to obtain access to or a copy of his or her medical records, but this does not include a right to separately maintained "psychotherapy notes," which are detailed comments maintained by a therapist regarding individual and group therapy sessions with patients. See 45 C.F.R. § 164.501. The State Hospital is in the process of developing policies and providing additional training for therapists to provide guidance on the information that must be maintained in the patient's "chart" such as the start-stop time of therapy, progress notes, medication, etc., and a therapist's separate, private notes regarding communications with and observations about a patient. The amendment specifically states that any request for protected health information outside a civil commitment proceeding is subject to the requirements and limitations set forth in the HIPAA privacy rule.

Accordingly, it is important to note that the adoption of this amendment does not foreclose all rights of a patient to obtain access to or a copy of his or her medical records. In situations not involving a civil commitment proceeding or other litigation, a patient at the State Hospital may request access to medical records, specifically "protected health information," under the HIPAA privacy rule – although as noted that rule does contain certain limitations relating to the disclosure of psychotherapy notes, and also information that in the judgment of a healthcare professional presents a serious risk of death or bodily injury to the patient or other persons.

To summarize: This amendment to subsection 2 section 25-03.3-05 relates to the disclosure of a respondent's individually identifiable health information in a civil commitment proceeding. The Amendment states that in any other case the disclosure is in accordance with the HIPAA privacy rule, which contains specific requirements regarding a patient's right to obtain protected health information contained in a designated record set at the State Hospital or any other covered entity. 45 C.F.R. § 164.524(a). It is also important to observe that this Amendment to subsection 2 of Section 25-03.3-05 *do not address* the right of the patient to obtain other information relating to the State Hospital's policies regarding, for example telephone privileges, liability or discipline for the deliberate destruction of property, access to manuals for scoring evaluation tests (which may be trade secrets subject to restrictions on disclosure), etc. A patient's right of access to these records in a civil commitment proceeding will be will be controlled by the rules for the discovery of documents in a civil proceeding.

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