

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2033 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2034

2001 SENATE JUDICIARY

SB 2034

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2034

Senate Judiciary Committee

Conference Committee

Hearing Date January 15th, 2001

Tape Number	Side A	Side B	Meter #
1		X	14.8-end
2	X		0-29.2
January 17th, 2001 (tape 3)	X		0.0-26.5
Committee Clerk Signature			

Minutes: SENATOR TRAYNOR opened the hearing on SB 2034: A BILL FOR AN ACT TO CREATE AND ENACT TWO NEW SECTIONS TO CHAPTER 25-03.3 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE REFERRAL OF INMATES FOR CIVIL COMMITMENT AND RULEMAKING; AND TO AMEND AND REENACT SECTIONS 25-03.3-01, 25-03.3-02, 25-03.3-03, 25-03.3-07, AND 25-03.3-08, SUBSECTION 2 OF SECTION 25-03.3-09, SECTIONS 25-03.3-10, 25-03.3-11, 25-03.3-12, AND 25-03.3-13, SUBSECTION 1 OF SECTION 25-03.3-18, AND SECTION 25-03.3-19 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE CIVIL COMMITMENT OF SEXUAL PREDATORS.

REPRESENTATIVE JOHN MAHONEY, representing district 33, favors SB 2034. Looking at people mentally retarded that can't stand through trial proceedings. Allow for civil commitment for sexual predators, which includes mentally retarded people. Includes a plethora of protection rights to these people so their due process is given. Records in these proceedings will be

**Page 2**

**Senate Judiciary Committee**

**Bill/Resolution Number SB 2034**

**Hearing Date January 15th, 2001**

confidential. However, when they become committed it will be out for the public. This is in section 4 page 3. Due process requirements are scattered throughout the bill. Section 4 referring to state's attorneys on release of the committed six months thereafter. Facilities are covered on page 6. Not all locality can take in these individuals. Change made in section 11 extends 30 to 90 days for hearing, finding probable cause for commitment hearing. Evaluation of 30 days was found to be not appropriate.

SENATOR TRAYNOR this not only covers mentally retarded but other areas that are required?

REPRESENTATIVE MAHONEY, yes.

VONETTE RICHTER, attorney for legislative council. (testimony attached:Recommmendations), neutral on SB 2034. (meter # 23.0-28)

SENATOR LYSON under section page 5 where it gives notification where the inmates meet the definition of sexual predators. Everything is in singular there and I'm not so sure the notification should be going to the county of the prosecution, because he's going to be going back and forth.

VONETTE RICHTER in terms of drafting we always use the singular.

SENATOR WATNE do you know anything about the fiscal note?

VONETTE RICHTER I don't.

JOHN OLSON, appearing on behalf of the North Dakota State Attorneys association also representing peace officers association, favors the bill. On page 6 line 7 which relates to the filing of the petition. All we want to do is take out the language after respondents choice.

SENATOR TRAYNOR if respondent doesn't have right to choose would the state's attorney?

JOHN OLSON that, I believe, would be left to the court. The states attorney wouldn't choose.

JEAN MULLEN, assistant attorney general, in favor of SB 2034. (testimony attached)

SENATOR TRAYNOR does the amendment speak to the precautions you mentioned?

JEAN MULLEN yes. We do oppose an amendment that would require a hearing whenever any individual committed to the care custody control of the executive director. It says anytime an individual is moved to a less restrictive environment there must be a hearing for them to be moved to a more restrictive environment, and we believe that this interferes with the professional judgment of the treatment staff. This would interfere with them and would make them hesitate to get involved in any process. (Tape 2:side A) This was enacted not to take place of state penalty, it was never intended to do this. We want civil commitment no detention. Want to have choice for individual. In regard to Mr. Olson's I would like to look at it.

SENATOR TRYANOR would you discuss this with MR. OLSON?

JEAN MULLEN yes I can.

SENATOR TRAYNOR I appreciate that.

DAVID BOECK, state employee and lawyer for the Protection & Advocacy Project. (testimony attached) Neutral in regards to SB 2034.

SENATOR TRAYNOR your position is the constitution right of the respondent to have a hearing at that point.

DAVID BOECK right.

SENATOR TRAYNOR and the attorney general disagrees.

JEAN MULLEN no. We would agree to some degree of hearing. I disagree in regards to the transfers to the dept. of corrections and rehabilitation. Until the dept. of human services issues regulations that the professions will design about release. After care for the patient and continuation of it and until we see it I would like to wait and see what the medical profession does.

Page 4

Senate Judiciary Committee

Bill/Resolution Number SB 2034

Hearing Date January 15th, 2001

SENATOR TRAYNOR do you think that the language submitted by MR BOECK could be modified to satisfied to fulfill your needs and his intentions.

JEAN MULLEN um...it probably could be.

SENATOR TRAYNOR would you be willing to work with him?

JEAN MULLEN certainly.

SENATOR TRAYNOR would you be willing to work with MS. MULLEN

DAVID BOECK certainly.

SENATOR TRAYNOR we want a satisfactory amendment for both parties.

ALEX SWITZER, Superintendent of the North Dakota State Hospital in Grafton, in favor of SB 2034. Finds nothing wrong with the bill. Excluding the hearings of the treatment of JOHN OLSONS, which we haven't read yet.

CRYSTAL DUEKER, resident of Fargo ND, concerned about bills including the naked body.

Using universal terms. Sex predators and nudists may or may not be put in same category.

JOHNATHAN BYERS, testifying on behalf of the attorney general, testifies in favor of SB 2034, offender A 34 years old assaults a three year old girl. Civil commitment was dismissed because of retardation. Criminal charges dismissed because of his retardation, and was deemed not competent to assist in his own defense. Offender B, has same examples as above.

SENATOR TRAYNOR you feel SB 2034 addresses this vacancy?

JOHNATHAN BYERS I do.

TOM WALLNER, executive director of the North Dakota State Council on Developmental Disabilities, supports SB 2034. (testimony attached)

SENATOR WATNE are you supportive of MR. BOECK'S amendments.

TOM WALLNER yes.

Page 5

Senate Judiciary Committee

Bill/Resolution Number SB 2034

Hearing Date January 15th, 2001

JOHN EMTER, Laws can be opposed. Is neutral about the bill. Tried to commit him. Spent 4 years in navy. Laws can be used against innocent people. Extreme cases like the ones I use can be used as entrapment.

SENATOR TRAYNOR closed the hearing on SB 2034. (meter # 27.1)

January 17th, 2001, page 3, meter # 0.0-26.5

JEAN MULLEN, presented the committee with proposed amendments and explained them to the committee. Protections are covered in the bill. I disagree with putting them in an insitution as an alternative to prison. This is language that I prefer to theirs.

SENATOR LYSON why won't this work?

JEAN MULLEN these are individual who are in state hospital.

SENATOR WATNE you were going to meet with those two men?

JEAN MULLEN all other amendments, we don't oppose Mr. Boeck's amendments.

The reason we oppose him is the language which he hasn't seen. Attorney general would prefer the language I have suggeseted.

SENATOR NELSON lets go one step further. Would the attorney general rather see the bill passed as now, rather than the five added amendments.

JEAN MULLEN Attorney General is not opposed, he might find some useful.

SENATOR TRAYNOR is there a fiscal note attached to Mr. Boeck's amendments?

JEAN MULLEN I'm sure there would be.

SENATOR TRAYNOR page 6, line 7, Mr Olson moved rewards of respondants choice. We both read that this could be removed. Attorney General can work with State Attorney.

SENATOR TRAYNOR purpose was to have attorney present.

JEAN MULLEN that's why we would like this bill.

2-17-01

SENATOR LYSON we have Federal regulations with holding mentally retarded people.

SENATOR TRENBEATH page 4 of 5 of Mr. Boeck's. Designed to replace 2nd sentence.

JEAN MULLEN entire paragraph.

SENATOR NELSON if we accepted yours and Mr Boeck's amendments. How would this bill look?

JEAN MULLEN 30 days is to short. Pg. 8 line 18 under section 13 pg 3 Mr Boeck's changes 90 to 60 days. I don't agree.

Page 5 of Mr Boeck's, lists every individual right. I said you can't do that. Its not necessary. It gives you the rights we don't think is necessary; Mail, Telephone, TV. I redrafted amendment to limit there rights which is in accordance with their penalty.

SENATOR TRAYNOR would Mr. Boeck's pg 5 of 5 address sexual predators.

JEAN MULLEN yes.

SENATOR TRAYNOR closed the hearing on SB 2034.

**SENATOR NELSON MOTIONED TO AMEND WITH OLSON AMENDMENTS.**

**SECONDED BY SENATOR WATNE. VOTE INDICATED 7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING. SENATOR WATNE MOTIONED TO DO PASS AS AMENDED.**

**SECONDED BY SENATOR BERCIER. VOTE INDICATED 7 YEAS, 0 NAYS, AND 0 ABSENT AND NOT VOTING.**

## FISCAL NOTE

Requested by Legislative Council

03/16/2001

Bill/Resolution No.:

Amendment to:           Engrossed  
                                  SB 2034

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				\$245,209		\$511,891
Expenditures			\$105,089	\$245,209	\$219,382	\$511,891
Appropriations			\$105,089	\$245,209	\$219,382	\$511,891

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This proposed bill incorporates language concerning those with mental retardation and adds a reference to the Developmental Center at Westwood Park as a treatment facility to existing NDCC relating to the civil commitment of sexual predators. There will be a fiscal impact should additional residents be added to the Developmental Center. The 2001-2003 budget for the Developmental Center is based on an average population of 145 which is the current census. Additional residents referred under this bill will also require 24 hour care for 365 days a year. It is anticipated there would be three (3) referrals during the 2001 - 2003 biennium with another three (3) referrals anticipated in the 2003 - 2005 biennium.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Federal revenues would increase as these costs would be eligible for Medicaid reimbursement. All revenue would be from Title XIX Medicaid.

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The majority of the costs associated with the fiscal impact are salary costs for approximately seven (7) FTE to provide 24 hour care for 365 days of the year along with minimal operating costs for the 2001 - 2003

biennium. The costs associated with the 2003 - 2005 biennium would again include salary costs for the initial estimated seven (7) FTE with the addition of another seven (7) should additional referrals occur along with minimal operating costs.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The fiscal impact noted above is not included in the Department's budget request for the 2001 - 2003 biennium. If the proposed bill is passed the amounts will need to be included in the Department's budget.

<b>Name:</b>	Brenda M. Welsz	<b>Agency:</b>	Department of Human Services
<b>Phone Number:</b>	328-2397	<b>Date Prepared:</b>	03/19/2001

# FISCAL NOTE

Requested by Legislative Council  
01/22/2001

Bill/Resolution No.:

Amendment to: SE 2034

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>				\$245,209		\$511,891
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1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
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**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This proposed bill incorporates language concerning those with mental retardation and adds reference to the Developmental Center at Westwood Park as a treatment facility to existing NDCC relating to the civil commitment of sexual predators. There will be a fiscal impact should additional residents be added to the Developmental Center. The 2001 - 2003 budget for the Developmental Center is based on an average population of 145 which is the current census. Additional residents referred under this bill will also require 24 hour care for 365 days a year. It is anticipated there would be three (3) referrals during the 2001 - 2003 biennium with another three (3) referrals anticipated in the 2003 - 2005 biennium.

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<b>Name:</b>	Brenda M. Welsz	<b>Agency:</b>	Department of Human Services
<b>Phone Number:</b>	328-2397	<b>Date Prepared:</b>	01/23/2001

# FISCAL NOTE

Requested by Legislative Council  
12/22/2000

Bill/Resolution No.: SB 2034

Amendment to:

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
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The fiscal impact noted above is not included in the Department's budget request for the 2001 2003 biennium. If the proposed bill is passed the amounts will need to be included in the Department's budget.

<b>Name:</b>	Brenda M. Weisz	<b>Agency:</b>	Department of Human Services
<b>Phone Number:</b>	328-2397	<b>Date Prepared:</b>	01/11/2001

PROPOSED AMENDMENTS TO SENATE BILL NO. 2034

Page 1, line 1, replace "two" with "three"

Page 1, line 3, remove the "second" "and"  
Page 1, line 4, remove "and"

Page 1, line 5, after the first comma insert "and 25-03.3-17,"

Page 6, line 7, remove "at the respondent's choice"

Page 7, line 28, after the period insert "An individual with mental retardation may be elevated under this chapter at a facility only if that facility provides care and treatment to individuals with mental retardation."

Page 8, line 17, replace "ninety" with "sixty"

Page 9, after line 10, insert:  
Page 10, after line 5, insert:

<sup>4/2</sup> "SECTION 13. A new section to chapter 25-03.3 of the 1999 Supplement to the North Dakota Century Code is created and enacted as follows:

Individual rights. For so long as a committed individual is placed in and resides at a treatment facility, the committed individual has the same rights as other residents of the facility, subject to the following limitations and restrictions:

1. The individual's rights are subordinate to legitimate safety precautions and to the terms of the applicable individualized habilitation or treatment plan.
2. If an individual's rights are inconsistent with the provisions of this chapter in a particular situation, the specific provisions of this chapter prevail."

<sup>12</sup> "SECTION 15. A new subsection to section 25-03.3-17 of the North Dakota Century Code is created and enacted as follows:

If the executive director moves a committed individual from a placement in the community to a placement in a secure treatment facility that is more restrictive, the committed individual shall have the right to challenge the move at a hearing to be held within thirty days after the move in accordance with procedures established by the department of human services."

may

Renumber accordingly





**REPORT OF STANDING COMMITTEE**

**SB 2034: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS and BE REREFERRED to the Appropriations Committee (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2034 was placed on the Sixth order on the calendar.**

Page 1, line 1, replace "two" with "three"

Page 1, line 3, remove the second "and"

Page 1, line 4, remove "and"

Page 1, line 5, after the first comma insert "25-03.3-17,"

Page 6, line 7, remove ", at the respondent's choice,"

Page 7, line 28, after the period insert "An individual with mental retardation may be elevated under this chapter at a facility only if that facility provides care and treatment to individuals with mental retardation."

Page 8, line 17, replace "ninety" with "sixty"

Page 9, after line 10, insert:

**"SECTION 12.** A new subsection to section 25-03.3-17 of the 1999 Supplement to the North Dakota Century Code is created and enacted as follows:

If the executive director moves a committed individual from a placement in the community to a placement in a secure treatment facility that is more restrictive, the committed individual may challenge the move at a hearing to be held within thirty days after the move in accordance with procedures established by the department of human services."

Page 10, after line 5, insert:

**"SECTION 16.** A new section to chapter 25-03.3 of the North Dakota Century Code is created and enacted as follows:

Individual rights. For so long as a committed individual is placed in and resides at a treatment facility, the committed individual has the same rights as other residents of the facility, subject to the following limitations and restrictions:

1. The individual's rights are subordinate to legitimate safety precautions and to the terms of the applicable individualized habilitation or treatment plan.
2. If an individual's rights are inconsistent with this chapter in a particular situation, the specific provisions of this chapter prevail."

Renumber accordingly

2001 SENATE APPROPRIATIONS

SB 2034

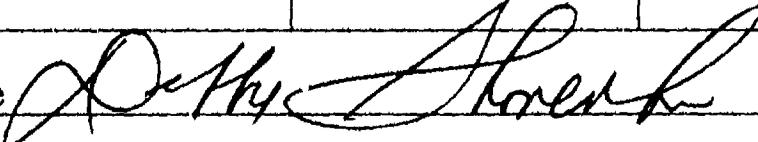
2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2034

Senate Appropriations Committee

Conference Committee

Hearing Date January 29, 2001

Tape Number	Side A	Side B	Meter #
1		Commitment Sexual Predators	0.0-37.4
Committee Clerk Signature 			

Minutes:

Senator Nething opened the hearing on SB 2034.

Yonette Richter, Legislative Council, explained the amendments to the SB 2034, and Sections 1-16 from a handout for Criminal Justice Final Report. The fiscal note attached to the bill was also identified.

Senator Solberg: Is this bill only for the mentally retarded sexual predators?

Yonette Richter: No, it is for all sexual predators.

Senator Solberg: Has this been expanded?

Yonette Richter: This and other issues, and adding local correctional facilities.

Senator Schobinger: Page 15, line 15 of the bill, next sentence, any referral presumed in good faith, explain this.

Yonette Richter: Creating a presumption in good faith then evidence. Challenge the assessment and the burden of the accusation.

Page 2

Senate Appropriations Committee

Bill/Resolution Number SB 2034

Hearing Date January 29, 2001

Senator Nething: Where do the 7 FTE's come into place?

Vonette Richter: I can't answer that.

Alex Schweitzer, ND Hospital, explained the fiscal note \$245,209 from federal funds, \$105,089 general funds this biennium; projects from general funds based on 3 DVD sex offenders with program now having 14 offenders with the units being full. The 7 FTE's to cover for certain individuals, 365 days a year. Growth of three now and possibly 3 next biennium. Since civil commitment bill passed now to 7; this projection is the reason for the fiscal note.

Senator Solberg: Housed in the same complex or need for more?

Alex Schweitzer: The building is now full and more offenders will mean an additional ward.

Senator Solberg: What is the cost per offender now in housing?

Alex Schweitzer: Not sure of individual cost; the average cost is \$48,000 per employee. This fiscal note is for caregivers to monitor the individuals. This is up to a group of 14 offenders.

Senator Andrist: 7 people; how many can they handle?

Alex Schweitzer: Could add probably another 4 individuals; need additional staff if additional ward is opened, that is what this fiscal note is for; if there are no additions this fiscal note is not needed, hard to tell at this point.

Senator Nething: Then the bill could stand alone?

Alex Schweitzer: If no additional admissions for the second ward, the bill can stand alone and the fiscal note is not needed.

Senator Solberg: What is the number of sex offenders and locations?

Alex Schweitzer: 2 DD sex offenders-3 state hospital.

Senator Solberg: Are you moving any offenders?

Alex Schweitzer: None of the DD sex offenders.

Page 3

Senate Appropriations Committee

Bill/Resolution Number SB 2034

Hearing Date January 29, 2001

Senator Robinson: Can you operate without the fiscal note if ward two is opened?

Alex Schweitzer: We need the money only if ward two is opened; the bill is needed and can be worked out without the fiscal note.

Senator Schobinger: I have a question of definitions; page 3, line 24 of the bill, treatment facility including center at westwood park; why is this stated with specific facility?

Alex Schweitzer: This is a development center not for civil commitment for the bill; only to treat individuals; not sure why it specifies this certain facility.

Jean Mullen, Assistant Attorney General, testified on behalf of Attorney General Stenchjem on the proposed amendments to Chapter 25-03.3 (testimony attached).

David Boeck, state employer and lawyer, Protection & Advocacy Project, testified with proposed amendments previously presented to the Senate Judiciary Committee (testimony attached) and to address cost factors relevant to these proposals.

Senator Nething: You are addressing only the appropriation amendments to this bill and not amendments addressed to the Judiciary Committee?

David Boeck: Yes, directly committee to Exhibit "B" of his testimony, (has no page number). This would save costs for uncertainties and litigation.

With no opposition to the bill, hearing was closed. Tape #1, Side B, meter 37.4

Page 4

Senate Appropriations Committee

Bill/Resolution Number SB 2034

Hearing Date ~~January 29, 2001~~

2-16-01

February 16, 2001 Full Committee Action: (Tape #1, Side B; Meter No. 43.7-49.6)

Senator Nething reopened the hearing on SB2034. Discussion.

Senator Solberg moved a DO PASS; Senator Tomac seconded. No discussion; Roll Call Vote:

14 yes; 0 no; 0 absent and not voting. Floor assignment was given to Senator Carolyn Nelson

original carrier of the bill.

Date: 2-16-01

Roll Call Vote #: \_\_\_\_\_

**2001 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB 2034**

Senate Appropriations Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken As pass

Motion Made By Sen Solberg Seconded By Sen Tomac

Senators	Yes	No	Senators	Yes	No
Dave Nething, Chairman	✓				
Ken Solberg, Vice-Chairman	✓				
Randy A. Schobinger	✓				
Elroy N. Lindaas	✓				
Harvey Tallackson	✓				
Larry J. Robinson	✓				
Steven W. Tomac	✓				
Joel C. Heitkamp	✓				
Tony Grindberg	✓				
Russell T. Thane	✓				
Ed Kringstad	✓				
Ray Holmberg	✓				
Bill Bowman	✓				
John M. Andrist	✓				

Total Yes 14 No 0

Absent 0

Floor Assignment Senator Gordon Nelson

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

**REPORT OF STANDING COMMITTEE (410)**  
February 16, 2001 11:39 a.m.

**Module No: SR-29-3644**  
**Carrier: C. Nelson**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2034, as engrossed: Appropriations Committee (Sen. Nething, Chairman)**  
**recommends DO PASS (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).**  
Engrossed SB 2034 was placed on the Eleventh order on the calendar.

2001 HOUSE JUDICIARY

SB 2034

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2034

House Judiciary Committee

Conference Committee

Hearing Date 03-05-01

Tape Number	Side A	Side B	Meter #
TAPE I		x	2161 to 3265
TAPE I		x	5430 to 6233
TAPE II	x		01 to 3718
Committee Clerk Signature <i>Joan Diers</i>			

Minutes: Chairman DeKrey opened the hearing on SB 2034. Relating to the civil commitment of sexual predators.

**Rep Mahoney:** District 33, Chairman of the Interim Criminal Justice Committee. One significant change would be that the mentally retarded were brought back into the bill with rights. The Senate added section sixteen of the bill. Page four of the engrossed bill deals with confidentially of the proceedings. The bottom of page four, section four, relates to people who have been committed for sexual offenses and gone through treatment and rehabilitation. Through the Department of Corrections, referrals will be made to the States Attorney, before they are released so that the States Attorney can consider whether they want to proceed with a civil commitment.

**Rep Deimore:** Did you see the fiscal note that is on this bill.

**Rep Mahoney:** I would rather let other people from the Attorney General's Office address the fiscal note.

Page 2  
House Judiciary Committee  
Bill/Resolution Number SB 2034  
Hearing Date 03-05-01

Yonette Richter: attorney for the Legislative Council, staffed the Interim Criminal Justice Committee. We are neutral on the bill. Goes over the bill and explains the changes in detail.(see attachment).

Vice Chr Kretschmar: Do you have information on the fiscal note.

Yonette Richter: I don't.

Chairman DeKrey: We are going to take a break and let a lady testify on another bill and then continue with SB 2034.

Jean Mullen: Assistant Attorney General (see attached testimony)

#### TAPE II SIDE A

Jean Mullen testimony continues.

Rep Onstad: In several places it makes reference to "if the states attorney knows or believes" is that common to that type of thing, it seems you put a lot of lea way to the states attorney.

Jean Mullen: When the states attorney is dealing with a person he thinks might be mentally retarded but is not sure. If you don't have a diagnoses, or not sure, this will allow for protection in to place during the evaluation.

Rep Delmore: Can you shed any light on the fiscal note that was put on this bill? I'm really wondering why this new money on the fiscal note.

Jean Mullen: Karen Larson can answer that.

Karen Romig Larson: Allen Swietzer, superintendent of all the institutions here in the state of North Dakota was unable to be here today. He will write an explanatory piece for this fiscal note.

Chairman DeKrey: We will need it quite soon, as we need to get this to Appropriations.

Karen Romig Larson: we can have it to you by tomorrow morning.

Chairman DeKrey: If there are no questions, thank you for appearing.

David Boeck: state employee and lawyer for the Protection & Advocacy Project (see attached testimony) offered amendments, they were presented to the Senate, but not adopted.

Rep Mahoney: Did your task force review and vote to support this, sometime recently.

David Boeck: we met the most recently in December.

Rep Mahoney: Did Ms Mullen participate at all in the review, are you keeping her in the loop as far as the amendments.

David Boeck: Yes, I will meet with Assistant Attorney General Mullen and a couple of others from the attorney general staff and will be able to complete that before the committee takes action on the bill.

Chairman DeKrey: we will hold this bill for a while yet. Did the Human Services take part in this too.

Melissa Hauer: Yes.

David Boeck: we have the time set for the meeting as Thursday at 2:30 pm.

Rep Klemin: On page six of your hand out, regarding the special advocate. You are talking about a special advocate and a guardian ad litem. I assume there might be some cases to have more than one special advocate may have to have multi special advocates.

David Boeck: That is right.

Rep Mahoney: You are offering a whole hog house to the bill, did you think of offering your own bill.

David Boeck: We did not, we wanted to make all this work.

Rep Mahoney: Did you get much input from Ms Mullen.

Page 4

House Judiciary Committee

Bill/Resolution Number SB 2034

Hearing Date 03-05-01

David Boeck: I asked but what help we got was spotty.

Rep Delmore: How many times has your committee met.

David Boeck: The amendments are only three pages, but decided to put in Legislative Council format and descriptive form as that would be more helpful.

Rep Delmore: How often did you meet and were all the members active/

David Boeck: Every member listed was active and we met 4 or 5 times and then had a sub committee working in between times.

Chairman DeKrey: Are there any questions, then thank you for appearing before the committee.

Is there anyone else wishing to testify?

Tom Wallner: Executive Director of the North Dakota State Council on Developmental Disabilities. (see attached testimony).

Chairman DeKrey: Which amendments do you refer to?

Tom Wallner: Mr Boeck's amendments.

Chairman DeKrey: If there are no questions, thank you for appearing before the committee.

Rep Mahoney: I thought that I heard from Mr Boeck, that the state agencies were not taking a position on this bill.

Tom Wallner: The legislative task force had a briefing on the amendments and did just recently defer to the judgment to the Protection & Advocacy on these amendments and want to support.

Rep Mahoney: And you are under the umbrella of the Department of Human Services.

Tom Wallner: Right, but we don't speak for the department.

Chairman DeKrey: If there are no further questions, we will close the hearing on SB 2034

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2034b

House Judiciary Committee

Conference Committee

Hearing Date 03-13-01

Tape Number	Side A	Side B	Meter #
TAPE I	x		01 to 3288
Committee Clerk Signature <i>Joan Diers</i>			

Minutes: Chairman DeKrey called the committee to order on SB 2034.

DISCUSSION

The committee had questions and there were amendments that were proposed after the hearing on the bill. Jeanne Mullen came to the committee to explain the amendments that were proposed. David Boeck came to have input on the wording of one of the amendments. The committee asked for many points to be clarified.

Chairman DeKrey: If there are no further questions, thank you for appearing before the committee.

COMMITTEE ACTION

Chairman DeKrey: What are the wishes of the committee. Rep Mahoney moved the written amendments and the three additional amendments, seconded by Rep Maragos. A voice vote was taken and the motion passes. Rep Delmore moved a DO PASS as amend, seconded by Rep Maragos.

Page 2

House Judiciary Committee

Bill/Resolution Number sb 2034

Hearing Date 03-13-01

DISCUSSION

Chairman DeKrey: The clerk will call the roll on a DO PASS as amend motion on SB 2034. The motion passes with 13 YES, 0 NO and 2 ABSENT. Carrier Rep Mahoney. Rep Delmore moved to refer SB 2034 to Appropriations, seconded by Rep Wrangham.

**PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2034**

1. Page 1, line 5, after the first comma insert "subsection 1 of section"
2. Page 1, line 18, replace "Disorder" with "Disorders"
3. Page 1, line 21, after the period insert "For purposes of evaluating an individual with mental retardation, the qualified expert must have specialized knowledge in sexual offender evaluations of individuals with mental retardation."
4. Page 2, line 17, after "with" insert "For these purposes," and remove the overstrike over "mental"  
  
Page 2, line 18, remove the overstrike over "retardation" and insert immediately thereafter "is not a sexual disorder, personality disorder, or other mental disorder or dysfunction" and remove the overstrike over the period
5. Page 3, line 4, overstrike "suffers from" and insert immediately thereafter "has"  
  
Page 3, line 5, overstrike "mental disease or defect" and insert immediately thereafter "disability", overstrike "renders" and insert immediately thereafter "substantially impairs" and overstrike "victim incapable of" and insert immediately thereafter "victim's"  
  
Page 3, line 6, after "understanding" insert "of"
6. Page 3, line 7, overstrike "hospital", and insert immediately thereafter "treatment facility, health care facility", overstrike "prison", and insert immediately thereafter "correctional facility".
7. Page 3, line 8, overstrike "or" and insert immediately thereafter an underscored comma and after "control" insert ", or care"
8. Page 5, line 11, replace "medical director of" with "superintendent of the developmental center and"
9. Page 6, line 15, after the period add "An individual with mental retardation may be detained in a correctional facility prior to the probable cause hearing only when no other secure facility is accessible, and then only under close supervision."

10. Page 6, line 21, overstrike "be signed by" and insert immediately thereafter "the respondent's" and overstrike "for the respondent" and insert immediately thereafter "shall separately certify that counsel has explained to respondent the proceedings, respondent's rights, the disadvantages of proceeding without counsel, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings"
11. Page 7, line 10, overstrike "chooses to waive" and insert immediately thereafter "knowingly waives"
12. Page 9, after line 11, insert:

**"SECTION 12. AMENDMENT.** Section 25-03.3-17 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- "1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large and ~~has received the maximum benefit of treatment.~~"

Renumber accordingly

**Revised PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2034**

1. Page 1, line 5, after the first comma insert "subsection 1 of section"
2. Page 1, line 16, replace "Disorder" with "Disorders"
3. Page 1, line 21, after the period insert "For purposes of evaluating an individual with mental retardation, the qualified expert must have specialized knowledge in sexual offender evaluations of individuals with mental retardation."
4. Page 2, line 17, after "with" insert "For these purposes," and remove the overstrike over "mental"  
  
Page 2, line 18, remove the overstrike over "retardation" and insert immediately thereafter "is not a sexual disorder, personality disorder, or other mental disorder or dysfunction" and remove the overstrike over the period
5. Page 3, line 4, overstrike "suffers from" and insert immediately thereafter "has"  
  
Page 3, line 5, overstrike "mental disease or defect" and insert immediately thereafter "disability", overstrike "renders" and insert immediately thereafter "substantially impairs" and overstrike "victim incapable of" and insert immediately thereafter "victim's"  
  
Page 3, line 6, after "understanding" insert "of"
6. Page 3, line 7, overstrike "hospital" and insert immediately thereafter "treatment facility, health care facility" and overstrike "prison" and insert immediately thereafter "correctional facility".
7. Page 3, line 8, overstrike "or" and insert immediately thereafter an underscored comma and after "control" insert ", or care"
8. Page 5, line 11, replace "medical director of" with "superintendent of the developmental center and"
9. Page 6, line 15, after the period add "An individual with mental retardation may be detained in a correctional facility prior to the probable cause hearing only when no other secure facility is accessible, and then only under close supervision."

10. Page 6, line 21, overstrike "be signed by" and insert immediately thereafter "the respondent's" and overstrike "for the respondent" and insert immediately thereafter "shall separately certify that counsel has explained to respondent the proceedings, respondent's rights, the disadvantages of proceeding without counsel, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings"
11. Page 7, line 5, overstrike "and" insert immediately thereafter an underscored comma, and overstrike "or" and insert immediately thereafter "and"
12. Page 7, line 10, overstrike "chooses to waive" and insert immediately thereafter "knowingly waives"
13. Page 9, after line 11, insert:

**"SECTION 12. AMENDMENT.** Section 25-03.3-17 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:  
"1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large and ~~has received the maximum benefit of treatment.~~"
14. Page 9, line 28, overstrike "and" insert immediately thereafter an underscored comma, and overstrike "or" and insert immediately thereafter "and"
15. Page 10, line 8, overstrike "and" insert immediately thereafter an underscored comma, and overstrike "or" and insert immediately thereafter "and"

Renumber accordingly

Date: 03-13-01  
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB-2034

House JUDICIARY Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number 10112.0301 .0400

Action Taken Do Pass as amend

Motion Made By Rep Delmore Seconded By Rep Maragos

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR -- Wm E Kretschmar	✓				
Rep Curtis E Brekke					
Rep Lois Delmore	✓				
Rep Rachael Disrud	✓				
Rep Bruce Eckre	✓				
Rep April Fairfield					
Rep Bette Grande	✓				
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney	✓				
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 13 No 0

Absent 2

Floor Assignment Rep Mahoney

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

*Rep Delmore + be referred  
Rep Wrangham*

**REPORT OF STANDING COMMITTEE**

SB 2034, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the Appropriations Committee (13 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2034 was placed on the Sixth order on the calendar.

Page 1, line 5, after the first comma insert "subsection 1 of section"

Page 1, line 16, replace "Disorder" with "Disorders"

Page 1, line 21, after the period insert "For purposes of evaluating an individual with mental retardation, the qualified expert must have specialized knowledge in sexual offender evaluations of individuals with mental retardation."

Page 2, line 17, after "with" insert "For these purposes." and remove the overstrike over "mental"

Page 2, line 18, remove the overstrike over "~~retardation~~" and insert immediately thereafter "is not a sexual disorder, personality disorder, or other mental disorder or dysfunction" and remove the overstrike over the period

Page 3, line 4, overstrike "suffers from" and insert immediately thereafter "has"

Page 3, line 5, overstrike "mental disease or defect" and insert immediately thereafter "disability", overstrike "renders" and insert immediately thereafter "substantially impairs", and overstrike "victim incapable of" and insert immediately thereafter "victim's"

Page 3, line 6, after "understanding" insert "of"

Page 3, line 7, overstrike "hospital" and insert immediately thereafter "treatment facility, health care facility" and overstrike "prison" and insert immediately thereafter "correctional facility"

Page 3, line 8, overstrike "or" and insert immediately thereafter an underscored comma and after "control" insert ", or care"

Page 5, line 11, replace "medical director of" with "superintendent of the developmental center and"

Page 6, line 15, after the underscored period insert "An individual with mental retardation may be detained in a correctional facility before the probable cause hearing only when no other secure facility is accessible, and then only under close supervision."

Page 6, line 21, overstrike "be signed by" and insert immediately thereafter "the respondent's" and overstrike "for the respondent" and insert immediately thereafter "shall separately certify that counsel has explained to the respondent the proceedings, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings"

Page 7, line 5, replace "and" with an underscored comma and replace "or" with ", and"

Page 7, line 10, overstrike "chooses to waive" and insert immediately thereafter "knowingly waives"

Page 9, after line 11, insert:

**"SECTION 12. AMENDMENT.** Subsection 1 of section 25-03.3-17 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large ~~and has received the maximum benefit of treatment.~~

Page 9, line 28, replace "and" with an underscored comma and replace "or" with ", and"

Page 10, line 8, replace "and" with an underscored comma and replace "or" with ", and"

Renumber accordingly

2001 HOUSE APPROPRIATIONS

SB 2034

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2034

House Appropriations Committee

Conference Committee

Hearing Date March 26, 2001

Tape Number	Side A	Side B	Meter #
1	x		119 - 2147
Committee Clerk Signature <i>Ly Dasher</i>			

Minutes:

**House Appropriations Committee hearing on SB2034.**

**Rep. Timm:** We will open the hearing on SB2034.

**Jean Mullen, Assistant Attorney General, Representing the Attorney General:** I didn't prepare any testimony I was just going to give you a few comments, this bill is really an amendment to an existing statute that provides for the civil commitment of sexual predators, these are individuals who have often come out of the penitentiary, there untreated sexual predators and the actual and clinical studies have been determined to be likely to sex offend again. They are committed to a treatment program at the state hospital and they are there until they are considered safe to be in the community. Alex Schweitzer is here and he can address more of the issues from the state hospital prospective or from the perspective that you are interested in the fiscal note. The amendments are mostly tweaking things over the last four years since the original statute was enacted that has been determined to be needed either because the

Page 2

House Appropriations Committee

Bill/Resolution Number SB2034

Hearing Date March 26, 2001

state hospitals implementing and the states attorney has been implementing it or others or the courts have found that there are some amendments that are needed. There is one significant amendment and that is to bring in pursuant to the statute individuals with mental retardation this was determined to be necessary, because there was a gap left in the 1997 legislature when what we understood was going to be a companion bill was not enacted and there is a problem with the criminal statute's when an individual with mental retardation who is a sexual predator is brought before the courts, that individual is found not competent to stand trial and has been released back onto the streets to re offend again and since that bill that we thought was going to come before the legislature in 1997 never did and there are still a few individuals out in the communities who should be brought within the possibility of civil commitment. If you have any questions I would be more than happy to answer them.

**Rep. Timm:** Do all sexual predators that have been sentenced to prison have to go through this program?

**Jean Mullen:** No, This only for ones that are found on the way out as it were, in here it does codify a process that the state penitentiary already has where they do an evaluation about six months before they are to be released they do an evaluation of anyone that has been committed as a sexual predator or sex offender and through their evaluation they look at an actuarial evaluation they do the clinical, they look to see whether they have gone through treatment and what there past crimes were or offenses that they know about and if they did go through treatment and as a result of all of that assessment they make a determination if they fall within a certain percentage or certain place on their scoring they will refer them to the states attorney's office, then the state's attorney's office makes a decision whether they want to file a petition.

**Rep. Byerly:** Doesn't section 17 the new language in this bill just beg for a lawsuit where it talks about individuals rights or subordinate to legitimate safety precautions and then the second one is that if the individuals rights are inconsistent with this chapter that the chapter prevails is that just begging a lawsuit?

**Jean Mullen:** No, I think that is a necessary and important aspect of this because an individual who is civilly committed under this statute would have certain problems that if they were not restricted more the lawsuit would occur, under our existing statute an individual who is either committed to the state hospital or the mental center at Grafton have certain rights that they must have, those include such rights as being able to use the telephone when they want and various other things, those are the kinds of things that a sexual predator might abuse such as calling prior victims, calling future victims, so to subordinate there rights here would be very important and would be considered to be proper under the constitution.

**Rep. Byerly:** Has this existing statute been challenged?

**Jean Mullen:** The statute as it exists before this bill was challenged and went to the North Dakota State Supreme Court and they found it constitutional on the grounds they looked at it and other issues that were raised, they found not to significant with that particular commitment, the statute out of Kansas was challenged at the US Supreme court and found to be constitutional, it had more restrictive provisions in it than our statute does.

**Rep. Wald:** How does this interact with any federal laws if any? I thought there was a federal statute that congress had acted on a couple of years ago.

**Jean Mullen:** There is nothing that they have acted on in the civil commitment area, if they had this probably would have been a criminal statute affecting federal crimes.

**Rep. Koppelman:** You said there were six committed since the 1997 law, what is the status, have they been released?

**Jean Mullen:** No, none have been released yet. I don't think the first one went in until probably 1978. Normally, it is considered to be, assuming the individual is not so much in denial that they are refusing to participate in the program, its normally considered to be a 4 to 5 year program for once the behavior modification, I think Mr. Schweitzer can talk to you better on this subject.

**Rep. Carlisle:** I was on that interim committee and she's right, its a small group of dangerous individuals that we know that we can't have them on the streets.

**Rep. Delzer:** Section nine of the bill, page 7 it says that the court can receive evidence that would otherwise be inadmissible at a commitment hearing, what is the reason for that and what kind of evidence are we talking about?

**Jean Mullen:** Were talking here about hearsay testimony, and this is during the probable cause and the probable cause and the purpose of that is just to make a determination as to whether the individual should be referred to the state hospital for an evaluation. Generally, the individuals who are testify are a social worker or therapist from the state penitentiary and somebody who has been involved with the individual in the law enforcement area.

**Rep. Kerzman:** When I think of civil I think of some kind of monetary compensation, is there any bonding in here? Can you explain that a little bit.

**Jean Mullen:** Civil commitment is more along the lines of civil commitment of the mentally ill, so its that type of civil commitment that we are talking about.

**Rep. Timm:** I think we have some other testimony here, and we better finish this up.

**Alex Schweitzer, Superintendent North Dakota State Mental Hospital:** Just to kind of clarify and expand a little on some of the things that were said in regard to the program, we currently

have 5 individuals who are civilly committed to the state hospital under chapter 25, civil commitment for sex offenders, we have an additional 2 that are under evaluation at this point in time. We took our first admission in December of 1997 so it has been a rather slow process in terms of admissions not as much as we had projected to begin with, and in addition we have fourteen people at the developmental center but we have to clarify that as only three are under any type of commitment, and those three aren't even under civil commitment, a lot of those are voluntary, you have to look at the level of danger, obviously the people at the state hospital are more of your dangerous sexual predators. This bill and the part that were concerned about is the addition of individuals with mental retardation being added to the program. I think that is necessary because occasionally you do have that individual that is quite dangerous in terms of sexual predatory behavior that you can't commit, so we have no problem with that. There is a fiscal impact, were not here to ask you to put any money or attach any money to this bill, we feel that we can deal with any admissions within the next biennium and our current budget can handle that.

**Rep. Timm:** The fiscal note shows \$105,000 general fund, \$245,000 other funds. The \$105,000 you are going to take out of your budget is that what you said. Response was yes.

**Rep. Koppleman:** I asking a question about the prognosis for these folks, and the bottom line answer that I remember from 4 years ago was that there was no cure for this kind of disorder and yet, my understanding of the program is to do behavior modification effort, and I'm kind of curious to see what kind of success your seeing, and if you foresee people graduating out of the program.

**Mr. Schweitzer:** Your right, there is no know cure it is cognitive restructuring program. They go into three stages and most of the patients we have are still in stage one.

**Page 6**

**House Appropriations Committee**

**Bill/Resolution Number SB2034**

**Hearing Date March 26, 2001**

**Rep. Timm:** These people have got to be the worst case scenarios of sexual predators is that right?

**Schweltzer:** That is correct. That's why it is so important to have the ability to commit these people because they are very dangerous.

**Rep. Timm:** Any other questions? Any other testimony in support of SB2034? Any opposition to SB2034? Closed the hearing on SB2034.

**End House Appropriations Committee hearing on SB2034.**

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2034A

House Appropriations Committee

Conference Committee

Hearing Date March 27, 2001

Tape Number	Side A	Side B	Meter #
1		x	90 - 541
Committee Clerk Signature <i>Z Z Bankin</i>			

Minutes:

**HOUSE APPROPRIATIONS COMMITTEE ACTION ON SB2034A.**

**Rep. Timm:** Let us take action on SB2034., This is the bill on sexual predators, it has a fiscal note of \$105,000. Let's have a motion.

**Rep. Carlisle:** I move a DO PASS on SB2034, seconded Rep. Kempenich.

**Rep. Timm:** Any discussion? Rep. Carlisle do you want to expand on why you made the motion.

**Rep. Carlisle:** We had this in the interim in our criminal justice committee, and basically for untreated sexual predators that sometimes have been released and the civil commitment as Mr. Schweitzer said, there is a few down there now and there are just a few of these folks that are ever going to get out and to protect the public they need them off the streets.

**Rep. Delzer:** I'm pretty sure this is going to pass but I guess I can't let that statement go without saying this is about a \$400 a day getting them off the streets, its very expensive, I have some problem with the fact that we, I understand why they did not do it, but the fact that we did not put

anything in here to say that plea bargains are not anything we can do, because I think when this was passed originally we wanted to make sure that nobody got in under a plea bargain and I guess that is probably the way it will work, but I sure would like to see some legislative intent that's what it is supposed to be.

**Rep. Kliniske:** I don't like this bill for a different reason, and that is the fact that having mental retardation is what this bill does, it adds people with mental retardation to the list of people who are civilly committed. Mental retardation is not treatable, it is a condition of the individual, you don't go into treatment and all of a sudden your no longer mentally retarded and so I have a severe problem with civilly committing people who don't realize and will never realize that what they are doing is wrong and I sit on the board for protection and advocacy and I asked the question, how many people are we talking about here, is this a huge problem and the response was, well no. There has been two cases involving individuals with mental retardation and both of those cases were dismissed. I don't know where we think were going with this but I think its a bad idea.

**Rep. Wald:** I would like to ask Rep. Kliniske a question on what she just said on page 2 lines 21 22, 23, where it says "For these purposes mentally retardation is not a sexual disorder, personnel disorder, or other dysfunction" it certainly is a dysfunction is it not?

**Rep. Kliniske:** I don't know the medical and technical terms for these things and I'm not on the interim committee and I don't know how the technicalities of the bill were written , all I'm saying is that bill was meant to treat sexual offenders and behavioral patterns to keep them from offending. You don't treat mental retardation, you just can't treat that, so I don't know what the technical language is going to do or if it will make a difference.

**Page 3**

**House Appropriations Committee**

**Bill/Resolution Number SB2034A**

**Hearing Date March 27,2001**

**Rep. Timm:** Any other discussion on the motion? We have a motion for a DO PASS. Call the roll for a DO PASS. (13) YES (7) NO (1) absent and not voting. Motion passes. Rep. Carlisle will carry the bill to the floor.

**End of House Appropriations Committee action on SB2034A.**

Date: 3/27/01  
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2034

House APPROPRIATIONS Committee

Subcommittee on \_\_\_\_\_

or

Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken DO PASS

Motion Made By CARLISLE Seconded By KEMPERNICH

Representatives	Yes	No	Representatives	Yes	No
Timm - Chairman	✓				
Wald - Vice Chairman		✓			
Rep - Aarsvold	✓		Rep - Koppelman		
Rep - Boehm		✓	Rep - Martinson	✓	
Rep - Byerly	✓		Rep - Monson		✓
Rep - Carlisle	✓		Rep - Skarphol	✓	
Rep - Delzer		✓	Rep - Svedjan		✓
Rep - Glassheim	✓		Rep - Thoreson		✓
Rep - Gulleson	✓		Rep - Warner	✓	
Rep - Huether	✓		Rep - Wentz	✓	
Rep - Kempenich	✓				
Rep - Kerzman	✓				
Rep - Klinisko		✓			

Total (Yes) 13 No 7

Absent 1

Floor Assignment CARLISLE

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

2001 SENATE JUDICIARY

CONFERENCE COMMITTEE

SB 2034



**Insert LC: .**

**REPORT OF CONFERENCE COMMITTEE**

**SB 2034, as engrossed:** Your conference committee (Sens. Traynor, Watne, C. Nelson and Reps. Maragos, Wrangham, Delmore) recommends that the **SENATE ACCEDE** to the House amendments on SJ pages 1029-1030 and place SB 2034 on the Seventh order.

Engrossed SB 2034 was placed on the Seventh order of business on the calendar.

2001 TESTIMONY

SB 2034

### **Civil Commitment of Sexually Dangerous Individuals Statutes**

The 1997 Legislative Assembly enacted NDCC Chapter 25-03.3, which establishes a judicial procedure for the civil commitment of sexually dangerous individuals, similar to the procedure for the commitment of mentally ill individuals. Section 25-03.3-01 defines a sexually dangerous individual as one who has:

**[S]hown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others.**

Under NDCC Chapter 25-03.3, sexually predatory conduct is conduct that is similar to the conduct required for the crime of gross sexual imposition. Chapter 25-03.3 provides that the burden of proof for commitment is clear and convincing evidence and that the person to be committed has the right to counsel, to be present, to testify, and to present and cross-examine witnesses. If a person is found to be a sexually dangerous individual, the court commits that person to the care, custody, and control of the executive director of the Department of Human Services. The executive director has the duty to place the sexually dangerous individual in an appropriate facility or program at which treatment is available. Unless the sexually dangerous individual is already in the custody of the Department of Corrections and Rehabilitation, the executive director may not place the individual at the State Penitentiary or affiliated penal facilities.

The court must release the individual once the individual is no longer sexually dangerous. Each committed individual must have an examination of that individual's mental condition at least once a year. In addition, once a year the executive director must give written notice of the right to petition for discharge to the committed individual. If the committed individual files a petition for discharge and has not had a hearing during the preceding 12 months, the committed individual must receive a hearing.

### **Testimony and Committee Considerations**

The goals of the study were to review sections of the Century Code which relate to sexual offenses, the sentencing of sexual offenders, and the sexual offender commitment treatment. The committee's considerations centered on five main areas: the civil commitment of sexually dangerous individuals; age differentials in sexual offender statutes; adultery and unlawful cohabitation statutes; luring of minors by computer; and miscellaneous sexual offense statutes.

### **Civil Commitment of Sexually Dangerous Individuals**

The committee received testimony regarding the need for some amendments to the state's civil commitment of sexually dangerous individuals statutes. The law establishes a judicial procedure for the commitment of mentally ill individuals. For commitment to occur, the state's attorney, as petitioner, must show the individual has engaged in further acts of sexually predatory conduct, making the individual a danger to the physical or mental health or safety of others. The commitment is to the Department of Human Services for treatment

in the least restrictive environment. Commitment continues until the individual is safe to be at large and has received the maximum benefit of treatment. A statute similar to the North Dakota law was challenged before the United States Supreme Court on substantive due process, double jeopardy, and ex post facto grounds in 1997 and was found to be constitutional. The North Dakota Supreme Court reviewed the North Dakota law in 1999 on the issue of double jeopardy and found the statute constitutional.

The committee received testimony that indicated that as the result of the civil commitments that have been made in the state, a number of areas have been discovered in which adjustments could be made to the statute. According to the testimony, a study group composed of representatives of the affected entities, including the Attorney General's office, the State Hospital, and state's attorneys, was formed to review the civil commitment statutes. It was noted the study group had consulted with the treatment staffs of the Department of Corrections and Rehabilitation, with the Department of Human Services, and with the Protection and Advocacy Project to learn of any concerns those agencies may have with the inclusion of the mentally retarded in the civil commitment statute.

The first area of concern was the definition of sexually dangerous individual. North Dakota Century Code Section 25-03.3-01(7) excludes an individual with mental retardation from the definition. According to the testimony, the exclusion of individuals with mental retardation creates a dangerous situation that arises when an individual who is charged with gross sexual imposition or a similar sexual offense is found to lack fitness to proceed at trial. If the individual charged is a mentally retarded person, the proceedings must be dismissed against this individual. It was suggested that if the definition were amended to eliminate the exclusion of mentally retarded individuals, the remainder of the commitment process, with some minor adjustments, would provide for a process of commitment for mentally retarded persons. If found to meet the criteria for commitment, a court would commit the individual to the care, custody, and control of the Department of Human Services. Depending on the level of mental retardation, the individual could be placed in the Developmental Center at Westwood Park's treatment program or in the State Hospital.

The second area of concern was the venue provisions of NDCC Section 25-03.3-02, which require the commitment proceeding to be held in the county in which the respondent resides or is located. The suggestion was to broaden venue to allow a commitment proceeding to be held in any appropriate county in which the respondent has had or intends to have a presence. The change was suggested as a result of venue issues that had arisen when an inmate who is due to be released and who has been referred by the Penitentiary states an intent to reside in a different county from the county in which the inmate resided at the time of entering the Penitentiary.

A third concern involved the detention of respondents under NDCC Section 25-03.3-08, which provides that the respondent is to be detained at a treatment facility for a 72-hour period before the probable cause hearing. Because of the lack of treatment facilities in small communities, it was suggested the law be amended to provide that the respondent be taken into custody and transferred to a local treatment facility "or correctional facility" to be held pending the probable cause hearing.

The fourth area of concern involved the closed and open proceedings under NDCC Sections 25-03.3-11 and 25-03.3-13. According to the testimony, the hearings should be closed and the records sealed because of the sensitive nature of the information released

during a commitment hearing. The results of the commitment proceedings, however, to the extent that an individual is committed, need not be confidential.

A fifth area of concern was the maximum of 30 days between the probable cause hearing and the commitment hearing provided for in NDCC Section 25-03.3-13. According to the testimony, 30 days is not enough time to gather the necessary material and to complete the psychological evaluations and risk assessments. A time period of 60 or 90 days was suggested as being workable and would not unduly infringe on the respondent's rights.

The sixth area of concern was with regard to commitments under plea bargains under NDCC Section 25-03.3-14. According to the testimony, concerns have been raised about individuals who are being civilly committed to a sexual predator treatment program under a plea agreement in which the criminal sentence is deferred or suspended while the individual is under commitment. The underlying concept of the civil commitment statute is that a sexual offender who is under a criminal indictment, whenever possible, should be committed to a correctional facility rather than be offered a plea agreement that could result in civil commitment as an option to the criminal sentence. According to the testimony, state's attorneys thought it would be inadvisable to prohibit through legislation such a plea agreement as there may be unusual situations when it is necessary and appropriate. The testimony indicated the concerns regarding plea agreement need not be addressed legislatively but rather could be addressed by further educating state's attorneys and judges on the civil commitment statute and by distributing a protocol to state's attorneys that emphasizes criminal prosecution.

The seventh area of concern involved assessments and referrals from the Penitentiary. The testimony indicated there is a need for a more complete assessment by the Penitentiary of individuals who may be referred to a state's attorney for possible commitment. It was also noted more information should be included in the referral letter the Penitentiary sends to state's attorneys for civil commitment of a prisoner who is about to be released.

The final area of concern involved the need for a transitional process for releasing individuals into the community. According to the testimony, a transitional process could be adopted through legislation or through the rulemaking process.

The committee considered a bill draft that provided for changes to the state's civil commitment of sexual predators statutes contained in NDCC Chapter 25-03.3. The bill draft provided for the inclusion of individuals with mental retardation under the civil commitment procedures of the chapter by amending the definition of sexually dangerous individuals. The bill draft also included changes to numerous other sections of Chapter 25-03.3 to provide that individuals with mental retardation receive due process during the commitment proceedings, including the appointment of a guardian ad litem for an individual with mental retardation; the provision that the right to counsel may not be waived; notice requirements; and the appointment of an expert to perform an evaluation on behalf of the respondent. The bill draft also provided for expanded venue for bringing a petition; confidentiality of the petition and all proceedings, but the result of the commitment proceeding and the discharge from treatment would be open records; an assessment and referral process to be used by the Department of Corrections and Rehabilitation for inmates who have been convicted of an offense that involves sexually predatory conduct; detention of an individual in a local correctional facility; admission of certain evidence to establish probable cause which otherwise may not be admitted at a commitment hearing; and provided for an increase from

30 days to 90 days the time period during which the commitment proceeding must be held.

Testimony in support of the bill draft indicated the amendments to NDCC Chapter 25-03.3 would assist state's attorneys, the courts, the Department of Corrections and Rehabilitation, and the State Hospital in carrying out their duties and responsibilities under the civil commitment statute and would assist in achieving a more effective and efficient implementation of the goals of the statute. Other testimony regarding the bill draft indicated that there are concerns over the referral process in the bill draft and that it may increase the number of referrals and thereby increase the growth of the program at the State Hospital. According to the testimony, the State Hospital anticipates an increase of 12 beds for the sexual offender treatment program during the 2001-03 biennium.

The committee also received testimony from representatives of the Protection and Advocacy Project regarding the bill draft. According to the testimony, a number of interested persons had formed a task force to review the bill draft and the state's civil commitment statutes. The testimony indicated additional changes to NDCC Chapter 25-03.3 should be included in the bill draft to increase the likelihood that a committed individual will get appropriate treatment and be released from a residential facility to rejoin the community with appropriate supervision. The proposed changes to the bill draft included adding a definition of mental retardation; clarifying that mental retardation does not cause any individual to engage in sexually predatory conduct; authorizing judges to appoint a nonattorney "special advocate" to help a victim, witness, or respondent with mental retardation to understand the proceedings and to better participate in the proceedings; continuing the ban on detaining a respondent in jail but providing the option of detaining a respondent in a secure local treatment facility before the preliminary hearing; improving notice to a respondent and the respondent's decisionmakers; establishing individualized treatment teams to develop, review, and revise an individual's treatment plan; identifying the rights that apply to a respondent or committed individual; articulating a committed individual's right to have a court review of any transfer to a more restrictive treatment setting; increasing the standard time allowed for an evaluation from 30 to 45 days; and granting rulemaking authority to the Department of Human Services to implement the chapter. Concerns were raised by committee members that the additional proposed changes are substantial steps beyond what the committee had originally considered and that the more things are defined in statute, the more open the law will be to litigation. The committee agreed to incorporate into the bill draft a reference to the definition of mental retardation in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*; to include proposed changes to the definitions of respondent and treatment facility; and to provide for rulemaking authority. The committee recommended the Attorney General and the task force work together to resolve some of the task force's concerns before the legislative session.

### Recommendations

The committee recommends Senate Bill No. 2034 to provide for changes to the state's civil commitment of sexual predators statutes contained in NDCC Chapter 25-03.3. The bill removes the current exclusion of individuals with mental retardation from the statute; extends the time period for experts to complete evaluations from 30 days to 90 days, codifies the procedures to be used by the Penitentiary for referring inmates scheduled for discharge; clarifies what portion of commitment proceedings are open; allows an individual to choose to be detained in a local correctional facility before a probable cause hearing; and provides rulemaking authority for the Department of Human Services.

The committee recommends Senate Bill No. 2035 to provide for the creation of a crime for luring minors by computer, to criminalize street gang initiation sexual acts, to separate disorderly conduct-type behavior from the indecent exposure statute and to make indecent exposure a crime for which a person is required to register as a sex offender, and to expand the statute of limitations for gross sexual imposition to seven years.

TESTIMONY ON SB 2034  
AMENDMENTS TO N.D.C.C. CH. 25-03.3  
PROVIDING FOR CIVIL COMMITMENT OF SEXUAL PREDATORS

BEFORE THE  
SENATE JUDICIARY COMMITTEE  
JANUARY 15, 2001

JEAN R. MULLEN  
ASSISTANT ATTORNEY GENERAL

Chairman Traynor and Members of the Committee, I am pleased to be here on behalf of Attorney General Stenehjem to testify about the proposed amendments to Chapter 25-03.3 of the North Dakota Century Code, which provides for civil commitment of sexual predators. The statute providing for civil commitment of sexual predators was enacted in 1997. During the past few years of initial implementation, concerns have arisen about a few of the procedures provided under the statute. The Attorney General believes the amendments contained in SB 2034 will address those concerns and provide a more consistent and effective implementation of the statute.

BACKGROUND

Chapter 25-03.3 establishes a judicial procedure for commitment of sexually dangerous predators, similar to the procedure for commitment of mentally ill individuals. For commitment to occur, the state's attorney, as petitioner, must show the individual has engaged in sexually predatory conduct and has a mental condition 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. A respondent is 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 safe to be at large.

A statute similar to North Dakota's law was challenged on substantive due process, double jeopardy, and ex post facto grounds in 1997 before the United States Supreme Court and found to be constitutional. The North Dakota statute was reviewed by the North Dakota Supreme Court in 1999. The court addressed the issue of double jeopardy and found the statute constitutional.

When the law was originally enacted in 1997, it was anticipated that there might be as many as seven commitments during the first biennium. In the last two biennia, there have only been six individuals who have been committed. One of those individuals has also been sentenced to the State Penitentiary where he is currently serving his sentence. There are currently two additional individuals who are at the State Hospital for evaluation.

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 State Hospital staff to address concerns. In implementing the statute, state's attorneys, staff at the State Hospital, and the Attorney General's Office have found that adjustments could be made to the statute to more accurately reflect the realities of the commitment process. It was for this reason the Attorney General proposed, during the interim legislative period, most of the amendments contained in SE 2034. For the most part, these changes can be

characterized as "fine tuning." One, however, is a more significant change -- that of including individuals with mental retardation under the provisions of the statute.

### SB 2034 AMENDMENTS

The following is an explanation of the primary amendments proposed by the Attorney General contained in S. 2034.

1. Definition of sexually dangerous individual (Section 1 of SB 2034): The current definition excludes an individual with mental retardation from the definition of "sexually dangerous individual." This exclusion was provided in the original legislation because the Department of Human Services had a study group that was preparing companion legislation to provide for civil commitment to the Developmental Center's sexual treatment program of individuals with mental retardation. In the end, that legislation was not introduced.

Unfortunately, this perpetuates a dangerous situation which arises when an individual who is charged with gross sexual imposition or similar sexual crime is found to lack fitness to proceed at trial and will not attain fitness to proceed within a reasonable period of time. This has occurred in cases involving individuals with mental retardation. Under the applicable criminal statute, the proceedings against the defendant in this situation must be dismissed. This puts the individual back on the streets even though the individual would otherwise fit the definition of "sexually dangerous individual."

SB 2034 provides for civil commitment of individuals with mental retardation. If found to meet the criteria for commitment, a court would commit the

individual to the care, custody and control of the executive director of the Department of Human Services who could then place the person in the most appropriate setting. Depending upon the level of mental retardation, the individual could be placed in the Developmental Center's treatment program or in the State Hospital's program. Other amendments, which are mainly self-evident, provide additional due process protections for those individuals during the commitment process, for example, in the area of notice, appointment or waiver of counsel, and appointment of a guardian ad litem.

2. Venue (Section 2 of SB 2034): Under the statute currently, venue for filing a petition for commitment is limited to the county in which the respondent resides or is located. This can create a problem when an inmate ready for release has been found by the treatment professionals at the State Penitentiary to be appropriate for referral to a state's attorney for consideration of proceeding with commitment. Sometimes an inmate will indicate that he is not returning to the place where he was convicted or where he "resides" at the time of sentencing but rather will be going to a new location. Under this provision, the state's attorney in the new locale would not have authority to bring a petition for civil commitment. To address this, SB 2034 provides that a proceeding under the chapter may be tried in any appropriate county in which the respondent has had, or intends to have, a presence. This also includes Burleigh County if the respondent is an inmate.

3. Closed/Open Proceedings (Sections 3 of SB 2034): The statute as originally enacted does not specifically provide the probable cause or commitment

hearings should be closed to the press or public. The decision to limit attendance or to close the hearings is left to the court's discretion. At the time the legislation was drafted, it was recognized that these are civil commitment proceedings similar to those providing for commitment of the mentally ill. Those proceedings are closed hearings with sealed records. It was also recognized that the primary danger of these individuals is not to themselves, but to the general public who have a right to know their status. Recognizing these conflicting interests, it was left to the court's discretion to close the hearing if it believed it was appropriate in a particular case.

The courts have gone both ways: some have held open hearings/open records; others have held closed hearings and sealed the records. The N.D. Supreme Court looked at the issue in In re M.D. (1999) but did not decide it on the grounds that dismissal of the petition was not a proper remedy for disclosure of information about the filing of the petition. To bring consistency to the process, the interim committee determined the hearings should be closed and the records should be sealed, except that the fact of an individual respondent's commitment and subsequent release from treatment could be public information.

4. North Dakota State Penitentiary referrals (Section 4 of SB 2034): Currently the State Penitentiary Treatment Department staff review an incarcerated sex offender about six months before a scheduled release. Their process includes a review of the inmate's records and treatment progress including any available information on prior predatory acts, completion of an actuarial

recidivism screening on the inmate, and a staffing to evaluate the inmate's likelihood of future sexual predatory acts.

During the staffing, based upon all available information and the inmate's score on the actuarial screening, the team makes a determination as to whether the inmate should be referred for civil commitment. If they decide he should, they forward a letter to the state's attorney who sent the individual to them.

Most states have codified the requirement for referral from correctional facilities. North Dakota has had some problem with state's attorneys responding to the referrals -- in part, because they receive so little information through the referral process. Formalizing the State Penitentiary referral, including what information is to be sent out with the referral, would assist in providing state's attorneys with sufficient information to make informed decisions about civil commitment proceedings. Section 4 of SB 2034 provides the referral process. This section was drafted with treatment staff of the State Penitentiary.

5. Detention (Section 6 of SB 2034): The current statute provides that the respondent is to be detained at a "treatment facility" for the period prior to the probable cause hearing, not to exceed 72 hours. Because of lack of "treatment facilities" in many small communities, this usually requires detention at the State Hospital. This effectively removes the respondent from access to his locally appointed attorney and puts more burden on law enforcement who have to escort the respondent to and from Jamestown for the probable cause hearing. Some respondents have requested that they be held locally, even though it has meant

staying in a local correctional facility, to have access to counsel while preparing for the probable cause hearing.

To address this issue, SB 2034 provides that the respondent be taken into custody and transferred to a local treatment facility "or correctional facility," if the respondent chooses, to be held pending the probable cause hearing.

6. Evidence admissible at Probable Cause Hearing (Section 9 of SB 2034): This amendment is to clarify that during the probable cause hearing evidence, such as hearsay, may be admitted for purposes of showing probable cause. That is the general law in criminal proceedings and is important in this type of case where the only purpose of the preliminary hearing is to determine whether the individual should be held for evaluation to determine whether he has the requisite mental disorder.

7. Evaluation period (Section 11 of SB 2034): Under the current statute, there is only a 30 day period between probable cause and the commitment hearing. This time period has proved too short for the State Hospital to complete the State's required two evaluations and is much too short if the respondent is also attempting to have an evaluation by his own expert. The amendment provides for increasing the amount of time for the evaluation to 90 days.

8. Provision for Department of Human Services to promulgate rules (Section 14 of SB 2034): Section 14 of the bill provides a new section to the statute to authorize the Department of Human Services to adopt rules to implement the chapter.

I want to thank the Chairman and the Members of the Committee for giving me the opportunity to present testimony on behalf of the Attorney General. As many of you are aware, he has supported this statute from its inception and continues to believe that this is an effective tool for protecting our children -- and all members of our society -- from sexual predators.

Thank you.

PROPOSED AMENDMENTS TO SENATE BILL 2034

Page 1, line 21, after the period Insert "A psychiatrist or psychologist is not a qualified expert for purposes of evaluating an individual with mental retardation unless the psychiatrist or psychologist has specific expertise in sexual offender evaluations of individuals with mental retardation.

Page 2, line 17, after "with" Insert "For the purpose of this definition," and remove the overstrike over "mental"

Page 2, line 18, remove the overstrike over "retardation", Insert immediately thereafter "shall not be regarded as a sexual disorder, personality disorder, or other mental disorder or dysfunction that makes an individual likely to engage in further acts of sexually predatory conduct", and remove the overstrike over the period

Page 3, line 4, overstrike "suffers from" and immediately thereafter insert "has"

Page 3, line 5, overstrike "mental disease or defect", immediately thereafter insert "disability", overstrike "renders", immediately thereafter insert "substantially impairs", overstrike "victim incapable of", and immediately thereafter insert "victim's"

Page 3, line 6, after "understanding" insert "of"

Page 3, line 7, after "hospital," insert "treatment facility, health care facility, correctional facility,

Page 3, line 9, after "of" insert ", or is receiving direct care from"

Page 5, line 21, after "item" insert "and special advocate" and after the period insert "1."

Page 5, after line 28 insert:

"2. As soon as the court learns that a respondent, committed individual, victim, or witness may have mental retardation, the

court may appoint an attorney or non-attorney as a special advocate for that individual. A special advocate is appointed to help the individual understand the allegations, all applicable rights, and the proceedings, and to help the individual to communicate effectively within the context of the proceedings. A special advocate must keep confidential all information acquired from the individual or otherwise acquired in the proceedings to the same extent as the individual's attorney must keep information confidential, except as reasonably necessary to help the individual communicate effectively within the context of the proceedings. The department of human services shall pay the expense of the special advocate fee as established by the court."

Page 6, line 17, replace "Subsection" with "Subsections 1 and"

Page 6, after line 18, insert:

"1. Every respondent is entitled to legal counsel. Unless an appearance has been entered on behalf of the respondent, the court, within twenty-four hours from the time the petition was filed, ~~exclusive of weekends or holidays~~ served upon the respondent, shall appoint counsel to represent the respondent. If a respondent retains counsel, the retained counsel immediately shall notify the court of that fact."

Page 6, line 29, after the period insert "If the state's attorney has reason to believe the respondent may have mental retardation, the state's attorney shall refer the respondent to the protection and advocacy project."

Page 7, line 11, overstrike "chooses to waive" and insert immediately after it "knowingly, intelligently, and voluntarily waives"

Page 7, line 18, overstrike "transferred to" and insert immediately after it "placed at"

Page 7, line 25, overstrike "transferred to" and insert immediately after it "placed at"

Page 7, after line 28, insert as a paragraph: "An individual with mental retardation may be evaluated under this chapter at a facility only if that facility provides care and treatment to individuals with mental retardation."

Page 8, line 17, replace "ninety" with "sixty"

Page 9, line 19, replace "is mentally retarded" with "has mental retardation"

Page 9, line 20, replace "and" with ", special advocate," replace "or" with ", and", and remove ", if any"

Page 9, line 28, replace "is a mentally" with "has mental"

Page 9, line 29, replace "retarded individual" with "retardation"

Page 9, line 30, replace "and" with ", special advocate," and replace "or" with ", and"

Page 10, after line 5, insert:

"Section 15. **AMENDMENT.** Section 25-03.3-17 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**25-03.3-17. Postcommitment proceeding, discharge, and further disposition.**

1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large ~~and has received the maximum benefit of treatment.~~
2. Each committed individual must have an examination of that individual's mental condition at least once a year. A report regarding the examination must be provided to the court that committed the individual. At the time of the annual examination, the committed individual has the right to have an expert examine the individual, and, upon the request of an indigent committed individual, the court shall appoint a qualified

- expert to examine the committed individual and report to the court. The department of human services shall compensate a qualified expert appointed by the court in a reasonable amount based on time and expenses. That expert must have reasonable access to the committed individual and to all records relating to the committed individual, including confidential records.
3. If a committed individual has been committed to an out-of-state facility by the executive director for purposes of treatment, an expert from that state may be appointed by the court as a qualified expert for an indigent committed individual for any postcommitment proceeding. An expert from another state must have comparable qualifications to those required of an expert from North Dakota.
  4. After any report pursuant to this section is provided to the court, the court may order further examination and investigation of the committed individual as the court considers necessary. The court may set the matter for a hearing. At the hearing, the committed individual is entitled to be present and to the benefit of the protections afforded at the commitment proceeding. The state's attorney shall represent the state at the hearing. After the hearing, the court shall determine whether the committed individual is to be discharged or to be retained as a sexually dangerous individual in the care, custody, and control of the executive director.
  5. If the executive director moves a committed individual from a placement outside a facility to a more restrictive placement inside a facility, the new placement must be in the least restrictive setting that can provide appropriate treatment to the individual. If the executive director moves a committed individual from a placement outside any facility to a more restrictive setting inside a facility or transfers a committed individual to the department of corrections and rehabilitation, the executive director shall file a notice of that action with the committing court within 24 hours and the committed individual shall have the right to challenge the move at a hearing to be held within 30 days after the move.
  6. The executive director may only discharge a sexually dangerous individual from commitment pursuant to a court order. The executive director may petition the committing court at any time for the discharge of the committed individual. The executive director shall give the state's attorney notice of any petition for discharge the executive director files with the court. Before the petition is granted, the state's attorney has the right to be heard

by the court on the petition. The state's attorney may waive this right."

"Section 16. A new section to chapter 25-03.3 of the 1999 Supplement to the North Dakota Century Code is created and enacted as follows:

**Individual rights.**

For so long as a committed individual is placed in and resides at a treatment facility, the committed individual has the same rights as other residents of the facility, subject to the following limitations and restrictions:

1. The individual's rights are subordinate to legitimate safety precautions and to the terms of the applicable individualized habilitation or treatment plan.
2. If an individual's rights are inconsistent with the provisions of this chapter in a particular situation, the specific provisions of this chapter prevail."

Renumber accordingly

**STATE OF NORTH DAKOTA**  
**FIFTY-SEVENTH LEGISLATIVE ASSEMBLY**  
**SENATE JUDICIARY COMMITTEE**

**N.D.C.C. CHAPTER 25-03.3**

Hearing scheduled for SB 2034, 10:00 a.m., Monday, January 15, 2001.

**CHAIRMAN TRAYNOR AND COMMITTEE MEMBERS:**

Good morning. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project, which provides advocacy services for people with disabilities including people who may be subject to the proposed amendments to chapter 25-03.3.

The Attorney General's office and the Interim Criminal Justice Committee began working on a package of proposed amendments to chapter 25-03.3 over a year ago. A primary purpose of the proposals was to change the law so it would apply to an individual who had mental retardation and who had engaged in sexually predatory conduct.

Several North Dakota professionals heard about the proposed changes and took responsibility to study them. The Protection & Advocacy Project helped establish an informal task force to coordinate those efforts. This task force includes individuals from law enforcement, corrections, psychiatry, guardians and service providers, victims' support, human services, and disabilities groups. A complete list is included in Exhibit A to this testimony.

The task force began with the premise that the Legislature would amend chapter 25-03.3 to include individuals with mental retardation among those who could be committed under the law. The task force did not make a decision about whether individuals with mental retardation should be committable under the law. The task force's goal is to improve the chapter so North Dakota can most effectively and legally treat any individual with mental retardation who is committed as a sexually dangerous individual.

The task force first presented its recommendations to the Interim Criminal Justice Committee last October. The Interim Criminal Justice Committee endorsed some of the task force's recommendations and asked the task force and the Attorney General's office to collaborate to develop a consensus on recommendations for amendments to this law.

I now present these consensus recommendations to this Committee. If the Committee adopts these recommendations, it will substantially amend SB 2034.

The most significant proposed changes would:

- (a) Clarify that "mental retardation" does not cause any individual to engage in sexually predatory conduct.
- (b) Authorize judges to appoint a "special advocate" to help a victim, witness, or respondent with mental retardation to understand

the proceedings and to more effectively participate in the proceedings.

- (c) Improve the notice that goes to a respondent and to the respondent's legal decision-makers.
- (d) Identify the rights that apply to a respondent or committed individual. This should reduce substantially the likelihood that the State will get trapped in litigation over what rights are protected by the Constitution. This recommendation would make all individual rights subordinate to community safety, an individual's legitimate treatment program, and the terms of the chapter on commitment.
- (e) Recognize a committed individual's right to have a hearing over any transfer from outside a facility to inside a facility.

These revisions will increase the likelihood that a committed individual will get appropriate treatment and, when ready, rejoin the community with appropriate supervision.

Exhibit B to my testimony contains an explanation of each proposed amendment.

Please let me know if you would like me to draft a revision of any part of the draft bill. Thank you.

PROPOSED AMENDMENTS TO SENATE BILL 2034

<b>Amendment</b>	Page 1, line 21, after the period insert " <u>A psychiatrist or psychologist is not a qualified expert for purposes of evaluating an individual with mental retardation unless the psychiatrist or psychologist has specific expertise in sexual offender evaluations of individuals with mental retardation.</u> "
<b>Subsection</b>	25-03.3-01 (4)
<b>Present law</b>	Defines a "qualified expert" who may evaluate an alleged sexually dangerous person
<b>Consensus proposal</b>	Modifies the qualifications necessary for an expert when the expert will be evaluating an individual with mental retardation
<b>Rationale</b>	<p>An expert cannot competently evaluate an individual with mental retardation who exhibits sexually dangerous behaviors, unless the expert has specific expertise for evaluating individuals with mental retardation who are exhibiting sexually dangerous conduct. An individual with mental retardation who exhibits sexually dangerous behaviors is unique from individuals who exhibit sexually dangerous behaviors but do not have mental retardation.</p> <p>Several professionals in North Dakota have adequate credentials to evaluate individuals with mental retardation who exhibit sexually dangerous behaviors. More are working to establish the expertise and still more have expressed interest in developing the expertise. The Developmental Center currently applies these standards to those who conduct evaluations at the Developmental Center.</p> <p>This amendment would not change the qualifications required of an expert who evaluates individuals who do not have mental retardation.</p>

<b>Amendment</b>	Page 2, line 17, after "with" insert " <u>For the purpose of this definition.</u> " and remove the overstrike over "mental" Page 2, line 18, remove the overstrike over "retardation", insert immediately thereafter " <u>shall not be regarded as a sexual disorder, personality disorder, or other mental disorder or dysfunction that makes an individual likely to engage in further acts of sexually predatory conduct</u> ", and remove the overstrike over the period
<b>Subsection</b>	25-03.3-01 (7)
<b>Present law</b>	Defines "sexually dangerous individual"
<b>Consensus proposal</b>	Clarifies that mental retardation is not a predisposing factor for sexually dangerous conduct
<b>Rationale</b>	Without this provision, a state's attorney or judge might mistakenly assume that mental retardation is "a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct." Professionals agree that mental retardation does not cause or predispose anyone to engage in sexually predatory conduct.

<b>Amendment</b>	Page 3, line 4, overstrike "suffers from" and immediately thereafter insert " <u>has</u> " Page 3, line 5, overstrike "mental disease or defect", immediately thereafter insert " <u>disability</u> ", overstrike "renders", immediately thereafter insert " <u>substantially impairs</u> ", overstrike "victim incapable of", and immediately thereafter insert " <u>victim's</u> " Page 3, line 6, after "understanding" insert "of"
<b>Subsection</b>	25-03.3-01 (9)(a)(5)
<b>Present law</b>	Defines "sexually predatory conduct" and identifies one kind of especially vulnerable victim as someone with a mental disease or defect that makes that person "incapable" of understanding the nature of a sexual act or contact.
<b>Consensus proposal</b>	Relaxes the requirement that the vulnerable victim be completely "incapable" of understanding the nature of the sexual act or contact. The new standard would be "substantially impairs."

<b>Rationale</b>	<p>This proposal would provide greater protection for victims with disabilities by establishing a more realistic standard. The current standard, "Incapable," is an absolute value that is very difficult to prove.</p> <p>The proposed standard, "substantially Impaired," is a more practical standard. This will eliminate litigation over whether an individual victim with a disability is "Incapable" of understanding rather than "substantially Impaired" in understanding the nature of a sexual act or contact.</p> <p>This proposal also protects individuals whose understanding is impaired by any disability, not just by a mental disease or defect.</p>
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<b>Amendment</b>	Page 3, line 9, after "of" insert " <u>, or is receiving direct care from</u> "
<b>Subsection</b>	25-03.3-01 (9)(a)(6)
<b>Present law</b>	Defines "sexually predatory conduct" and identifies one feature of one type of predatory person as someone with supervisory or disciplinary control over a victim in official custody or detention
<b>Consensus proposal</b>	Appropriately enlarges the group of sex offenders who could be committed under this law by adding individuals who provide direct care to a vulnerable person who is in official custody or detention.
<b>Rationale</b>	This proposal would recognize a broader group of individuals who are in a position of trust that affords them unique opportunities to victimize vulnerable persons. For purposes of identifying a predator, these individuals are substantially similar to those who have supervisory or disciplinary authority over vulnerable people. This would include personal care attendants, nurse assistants, therapy assistants, and others who can betray that trust with little chance of getting caught.

<b>Amendment</b>	Page 3, line 7, after "hospital," insert " <u>treatment facility, health care facility, correctional facility,</u>
<b>Subsection</b>	25-03.3-01 (9)(a)(6)
<b>Present law</b>	Defines "sexually predatory conduct" and identifies facilities in which a vulnerable person might reside.
<b>Consensus proposal</b>	Identifies facilities in language that is more consistent with the terms used in the rest of this chapter.

<b>Rationale</b>	This reduces the risk of misinterpretation.
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<b>Amendment</b>	<p>Page 5, line 21, after "Item" insert "<u>and special advocate</u>" and after the period insert "1."</p> <p>Page 5, after line 28 insert:</p> <p><u>"2. As soon as the court learns that a respondent, committed individual, victim, or witness may have mental retardation, the court may appoint an attorney or non-attorney as a special advocate for that individual. A special advocate is appointed to help the individual understand the allegations, all applicable rights, and the proceedings, and to help the individual to communicate effectively within the context of the proceedings. A special advocate must keep confidential all information acquired from the individual or otherwise acquired in the proceedings to the same extent as the individual's attorney must keep information confidential, except as reasonably necessary to help the individual communicate effectively within the context of the proceedings. The department of human services shall pay the expense of the special advocate fee as established by the court."</u></p>
<b>Section</b>	25-03.3-07
<b>Present law</b>	None
<b>Consensus proposal</b>	Authorizes the court to appoint a "special advocate" to help an individual with mental retardation to understand the proceedings and to effectively communicate throughout.
<b>Rationale</b>	<p>A special advocate is someone with skills at communicating with individuals with mental retardation. A court could appoint a counselor, a professional from the human services center, a school counselor, a lawyer, a disabilities advocate from the Protection &amp; Advocacy Project, . . . anyone with the necessary skills.</p> <p>The carefully designed statutory commitment process is meaningless if key "participants" with mental retardation cannot effectively participate because they do not understand what is happening or because they cannot communicate effectively.</p> <p>Appointment of a special advocate is a reasonable accommodation for an individual with a disability that impairs communication or understanding. This reasonable accommodation is consistent with state and federal laws about providing access to individuals with disabilities.</p>

<b>Amendment</b>	<p>Page 6, line 17, replace "Subsection" with "Subsections 1 and"</p> <p>Page 6, after line 18, insert:</p> <p>"1. Every respondent is entitled to legal counsel. Unless an appearance has been entered on behalf of the respondent, the court, within twenty-four hours from the time the petition was filed, <del>exclusive of weekends or holidays</del> <u>served upon the respondent</u>, shall appoint counsel to represent the respondent. If a respondent retains counsel, the retained counsel immediately shall notify the court of that fact."</p>
<b>Subsection</b>	25-03.3-09 (1)
<b>Present law</b>	Requires a judge to appoint a lawyer for a respondent within 24 hours but excludes weekends and holidays.
<b>Consensus proposal</b>	Requires a judge to appoint a lawyer for a respondent within 24 hours, including weekends and holidays.
<b>Rationale</b>	<p>The state has seven judicial districts. Each has a well-established system for appointing lawyers in appropriate cases. Every judicial district has at least one "duty judge" during every evening, weekend, and holiday, to sign search warrants, arrest warrants, and other emergency documents. It would add very little to the workload of any judicial district to require its duty judge to use the regular appointment plan to appoint a lawyer on a rare weekend or holiday for chapter 25-03.3 cases.</p> <p>The current law went into effect August 1, 1997. There have been only seven commitments under this law during the past three and a half years. That is about one case every six months. The cases are from several different judicial districts.</p> <p>No case would likely come up suddenly during a weekend or holiday. These cases develop over time. Ordinarily, an individual comes into the chapter 25-03.3 commitment process when (1) a court has found a defendant incompetent to stand trial or (2) a convicted offender is about to be released from the penitentiary. In either situation, the state's attorney would know about the case well in advance and would not have to file a petition for commitment outside regular office hours.</p>

<b>Amendment</b>	Page 6, line 29, after the period insert " <u>If the state's attorney has reason to believe the respondent may have mental retardation, the state's attorney shall refer the respondent to the protection and advocacy project.</u> "
<b>Section</b>	25-03.3-10
<b>Present law</b>	No provision.
<b>Consensus proposal</b>	Requires the state's attorney to refer a respondent with mental retardation to the Protection & Advocacy Project.
<b>Rationale</b>	This gives the respondent the option of contacting the Protection & Advocacy Project for assistance. The respondent could decline to contact the Protection & Advocacy Project and the Protection & Advocacy Project could decline to represent the respondent.

<b>Amendment</b>	Page 7, line 11, overstrike "chooses to waive" and insert immediately after it " <u>knowingly, intelligently, and voluntarily waives</u> " Page 7, line 18, overstrike "transferred to" and insert immediately after it " <u>placed at</u> " Page 7, line 25, overstrike "transferred to" and insert immediately after it " <u>placed at</u> "
<b>Section</b>	25-03.3-11
<b>Present law</b>	Permits a respondent to waive the preliminary hearing and requires a respondent to transfer to an appropriate treatment facility for an evaluation.
<b>Consensus proposal</b>	Uses the constitutional standard for giving up a preliminary hearing. Two additional amendments clarify that a judge need not transfer a respondent to another facility for an evaluation if the respondent is already at an appropriate treatment facility.
<b>Rationale</b>	The statute should include the constitutional standard for waiving a right. It would be inefficient to require a respondent who is already in an appropriate treatment facility to transfer to another appropriate treatment facility just for an evaluation.

<b>Amendment</b>	Page 7, after line 28, insert as a paragraph: " <u>An individual with mental retardation may be evaluated under this chapter at a facility only if that facility provides care and treatment to individuals with mental retardation.</u> "
<b>Section</b>	25-03.3-11
<b>Present law</b>	No provision.
<b>Consensus proposal</b>	An individual with mental retardation may be evaluated at a facility only if that facility provides care and treatment to individuals with mental retardation.
<b>Rationale</b>	This is a professional standard that should be included in the statute.

<b>Amendment</b>	Page 8, line 17, replace "ninety" with "sixty"
<b>Section</b>	25-03.3-13
<b>Present law</b>	Establishes thirty days as the timeline for an evaluation.
<b>Consensus proposal</b>	Establishes sixty days as the timeline for an evaluation.
<b>Rationale</b>	SB 2034 proposes ninety days as the appropriate timeline for an evaluation. Consensus was reached among the task force, State Hospital administration, and the Attorney General's office that sixty days is a more appropriate timeline.

<b>Amendment</b>	Page 9, line 19, replace " <u>is mentally retarded</u> " with " <u>has mental retardation</u> " Page 9, line 20, replace " <u>and</u> " with " <u>, special advocate,</u> " replace " <u>or</u> " with " <u>, and</u> ", and remove " <u>, if any</u> " Page 9, line 28, replace " <u>is a mentally</u> " with " <u>has mental</u> " Page 9, line 29, replace " <u>retarded individual</u> " with " <u>retardation</u> " Page 9, line 30, replace " <u>and</u> " with " <u>, special advocate,</u> " and replace " <u>or</u> " with " <u>, and</u> "
<b>Subsection</b>	25-03.3-18 (1)
<b>Present law</b>	Establishes annual notice of right to petition for discharge.
<b>Consensus proposal</b>	Modifies some outdated language and adds special advocate to list of those who get annual notice.

<b>Rationale</b>	The special advocate should get annual notice of the committed individual's right to petition for discharge since the special advocate is responsible to see that the committed individual understands applicable rights and proceedings.
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<b>Amendment</b>	1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large <del>and has received the maximum benefit of treatment.</del> and
	3. If a committed individual has been committed to an out-of-state facility by the executive director for purposes of treatment, an expert from that state may be appointed by the court as a qualified expert for an indigent committed individual for any postcommitment proceeding. <u>An expert from another state must have comparable qualifications to those required of an expert from North Dakota.</u>
<b>Section</b>	25-03.3-17
<b>Present law</b>	Imposes "maximum benefit of treatment" standard and establishes no standard for out-of-state experts
<b>Consensus proposal</b>	Removes "maximum benefit of treatment" language and establishes that an out-of-state expert must have comparable qualifications to those required of an expert from within North Dakota.
<b>Rationale</b>	<p>The phrase "maximum benefit of treatment" is a problem because (1) it has no agreed upon meaning, (2) it could be misused to justify release of someone who would not benefit from further treatment though the individual is unstable, and (3) the state may not have the constitutional authority to hold an individual for involuntary treatment once the individual can be safely discharged.</p> <p>The standard, "safe to be at large," is adequate.</p> <p>The chapter declares criteria that a North Dakota professional must meet and an out-of-state expert should meet comparable qualifications.</p>

<b>Amendment</b>	<u>5. If the executive director moves a committed individual from a placement outside a facility to a more restrictive placement inside a facility, the new placement must be in the least restrictive setting that can provide appropriate treatment to the individual. If the executive director moves a committed individual from a placement outside any facility to a more restrictive setting inside a facility or transfers a committed individual to the department of corrections and rehabilitation, the executive director shall file a notice of that action with the committing court within 24 hours and the committed individual shall have the right to challenge the move at a hearing to be held within 30 days after the move.</u>
<b>Subsection</b>	25-03.3-17 (5)
<b>Present law</b>	None
<b>Consensus proposal</b>	Allows a committed individual to challenge a placement decision that moves the committed individual from outside all facilities to inside a facility.
<b>Rationale</b>	<p>An individual's constitutional due process rights require the State to provide the opportunity for a hearing when the State acts to so drastically impair the individual's liberty.</p> <p>Three important aspects of this provision are: (1) The proposed statute does not require that the hearing be a judicial hearing, so a "hearing" could be an internal grievance process, any other kind of administrative hearing, or a trial; (2) The Department of Human Services could promulgate rules to establish the particulars of its processes; and (3) The State can take the challenged action without waiting for a final decision from the hearing.</p>

<b>Amendment</b>	<p>For so long as a committed individual is placed in and resides at a treatment facility, the committed individual has the same rights as other residents of the facility, subject to the following limitations and restrictions:</p> <ol style="list-style-type: none"> <li>1. An individual's rights are subordinate to legitimate safety precautions and to the terms of the applicable individualized habilitation or treatment plan.</li> <li>2. If an individual's rights are inconsistent with the provisions of this chapter in a particular situation, the specific provisions of this chapter prevail.</li> </ol>
<b>Section</b>	New law.
<b>Present law</b>	None.

<b>Consensus proposal</b>	Establishes a common base for individual rights.
<b>Rationale</b>	This provision clarifies individual rights, along with their limitations and restrictions.

2034 I am concerned about this law + its impact on citizens who live in North Dakota  
I am concerned when the nude body is <sup>sometimes</sup> connected with lewd behavior rising to the level of a crime punishable with a jail term of longer than 1 year or a fine higher than \$5000

Dep't Human Services -

both parents supported the marriage

this man was ready just school / got a job marry the girlfriend + give children

1999 State At Gen -

Wisconsin - 18 year old male 15 or 16 year old

2034 girl/few pregnant - on trial expertise - child molester - contact for sexual gratification

rape of an individual against their will

definition of a sexual predator sometimes

~~includes~~ includes nude adults with minor children

in the household into the same category

If the male is not the father of the

children - some authorities question the

adult males motives ~~regarding~~ his state of nudity

They tend to question their mental capabilities

+ stability in society as

productive citizens

Criteria - <sup>physical</sup> harm; emotional harm, +/or <sup>prevents</sup> personalities

progress of achieving emotional health + responsibility

develop

standard of healthy sexual behavior

+ develop a positive adult relationship

with another individual

and become or remain an employed person in

our communities + able to take care of themselves

+ their families

**SB 2034**

**Testimony of Tom Wallner**

**Before the Senate Judiciary Committee**

**January 15, 2001**

**Mr. Chairman, members of the Committee, my name is Tom Wallner and i am the Executive Director of the North Dakota State Council on Developmental Disabilities. One of the Council's roles is to advocate on public policy matters that affect people with developmental disabilities. All 16 members of the Council are appointed by the Governor. The Council is organizationally located in state government under the Department of Human Services umbrella. However, public policy recommendations made by the Council in no way reflect the Governor's positions or positions taken by the Department of Human Services.**

**The Developmental Disabilities Council has followed the work of the broadly-based Civil Commitment Task Force that helped to develop this legislation. The Council is satisfied that this legislation, with the proposed amendments, balances adequate protections for persons with developmental disabilities against public safety concerns. Therefore, the D.D. Council supports this proposed legislation.**

**Mr. Chairman, this concludes my testimony.**

**T:\eod\sb2034**

**BISMARCK**  
Abused Adult Resource Center  
222-8370

**BOTTINEAU**  
Crisis Center  
1028

**GRAND FORK**  
Shelters for  
Abused Families  
1-888-662-7378

**DICKINSON**  
Domestic Violence and  
Rape Crisis Center

225-4506  
**ELLENDALE**  
Kedish House  
349-4729

**FARGO**  
Rape and Abuse Crisis Center  
800-344-7273

**FORT BERTHOLD RESERVATION**  
Coalition Against  
Domestic Violence

627-4171  
**FORT YATES**  
Tender Heart Against  
Domestic Violence

854-3402  
**GRAFTON**  
Tri-County Crisis  
Intervention Center

352-4242  
**GRAND FORKS**  
Domestic Violence  
Crisis Center

**JAMESTOWN**  
S.A.F.E. Shelter  
888-353-7233

**MCLEAN COUNTY**  
McLean Family  
Resource Center

800-651-8643  
**MERCER COUNTY**  
Women's Action and  
Resource Center

873-2274  
**MINOT**  
Domestic Violence Crisis  
Center

852-2258  
**RANSOM COUNTY**  
Abuse Resource Network  
683-5061

**STANLEY**  
Domestic Violence Program,  
NW, ND

628-9233  
**VALLEY CITY**  
Abused Persons Outreach  
Center

1078  
**WILLISTON**  
Family Crisis Center  
672-6773

Senator Jack Traynor  
Chair, Senate Judiciary Committee  
SB2034  
January 15, 2001

Chair Traynor and Members of the Committee:

I wish to express the support of the ND Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota for the compromise amendments presented today.

Our coalition has been part of the task force which has been meeting for a year or more to address concerns of a wide variety of advocacy groups relating to the proposed changes in the sexual predator law. I have been extremely impressed with how hard this group has worked to achieve common ground and with the skill of P&A staff in facilitating and then following up on the discussions we had.

As a sexual assault coalition, one might think that we would automatically favor the strongest possible sanctions against sex offenders. Believe me, we had intense discussions among ourselves about this issue. However, the key reality which emerged was that even though we all agree that dangerous sex offenders must be removed from society no matter what their mental disability might be, we also share concerns that when we as a society take such drastic measures as embodied in 2034, it is our responsibility to assure that all due process rights are afforded. In the case of people with mental disabilities, this means we may need to provide some extra supports for those accused.

As victim service providers, we are also increasingly aware of the fine line which often exists between victim and perpetrator, especially among vulnerable populations. And so it is to everyone's advantage to create a system which is not only just, but realistic and fair.

Please give your utmost consideration to the compromise amendments. Thank you.

Sincerely,

Bonnie Palecek  
Executive Director  
NDCAWS/CASAND



PROPOSED AMENDMENT TO SENATE BILL 2034

[Page \_\_\_\_, line \_\_\_\_, add a new subsection to section 25-03.3-17 of the North Dakota Century Code

If the executive director moves a committed individual from a placement in the community to a placement in a secure treatment facility that is more restrictive, the committed individual shall have the right to challenge the move at a hearing to be held within thirty days after the move in accordance with procedures established by the department of human services.

Prepared by North Dakota State's Attorneys Association  
and North Dakota Peace Officers Association

**PROPOSED AMENDMENTS TO SB 2034**

Page 6, line 7, remove "at the respondent's choice."

Renumber accordingly

SB 2034

**STATE OF NORTH DAKOTA**  
**FIFTY-SEVENTH LEGISLATIVE ASSEMBLY**  
**SENATE APPROPRIATIONS COMMITTEE**

Senate Bill 2034

Hearing scheduled for Monday, January 29, 2001.

**CHAIRMAN NETHING AND COMMITTEE MEMBERS:**

Good morning. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project, which provides advocacy services for people with disabilities including people who may be subject to the terms of SB 2034 if it is enacted into law.

I am presenting proposed amendments that I previously presented to the Senate Judiciary Committee. The Senate Judiciary Committee declined to adopt these amendments when it considered SB 2034 at a January 17 working session that I was unable to attend. Today I will address cost factors relevant to these proposals.

These amendments are the recommendations of an informal task force that was formed to review proposals to broaden the "Commitment of Sexually Dangerous Individuals" law to include individuals with mental retardation. Participants in the task force include individuals from law enforcement, corrections, psychiatry, guardians and service providers, victims' support, human services, and disabilities groups. A complete list is included in Exhibit A to this testimony.

**Fifty-seventh  
Legislative Assembly**

I emphasize that the task force includes the administrator of the State Hospital, which houses the state's treatment program for sexually dangerous individuals who are committed under chapter 25-03.3, and the Developmental Center, which will house any treatment program for sexually dangerous individuals with mental retardation who are committed under chapter 25-03.3.

The task force includes the psychologist who directs the current program at the Developmental Center for treatment of individuals with mental retardation who have problematic sexual behaviors. This psychologist will direct any treatment program established at the Developmental Center for sexually dangerous individuals with mental retardation who are committed under chapter 25-03.3.

The task force began with the premise that the Legislature will amend chapter 25-03.3 so individuals with mental retardation can be committed as sexually dangerous individuals under this law. The task force did not address the question of whether individuals with mental retardation should be committable under this law. The task force's goal was to improve the chapter to appropriately include sexually dangerous individuals with mental retardation, not to block their inclusion.

The task force's recommendations would increase the likelihood that a committed individual will get appropriate treatment and be released from a residential facility to rejoin the community with appropriate supervision.

**Fifty-seventh  
Legislative Assembly**

Analyses of the task force's specific recommendations are presented in Exhibit B to my testimony.

Please let me know if you have any questions or if you would like me to draft a revision for any part of SB 2034. Thank you.

Fifty-seventh  
Legislative Assembly

Testimony of David Boeck

**Exhibit A**

Members of the Informal task force

Groups	Individual Participants
Bismarck Police Department	Chief Deborah Ness and Lieutenant Duffy Heinle
Bureau of Criminal Investigation	Dallas Carlson
Catholic Family Service and N.D. Association of Community Facilities	Donna Byzewski and Paul Griffin
Council on Abused Women's Services	Linda Isaakson and Bonnie Palechek
Council on Developmental Disabilities	Tom Wallner
Dakota Center for Independent Living and Partners in Policymaking	Joyce Smith
Department of Human Services	Melissa Hauer
Developmental Disabilities Division of the Department of Human Services	Robbin Hendrickson
Mental Health Association In N.D.	Rose Stoller and Susan Helgeland
N.D. Psychiatric Association	Dave Peske
Northeast Human Service Center	Myron Veestra, Ph.D.
Protection & Advocacy Project	Teresa Larsen, Corinne Hofmann, and David Boeck
People First of N.D.	Raylynn Lauderdale
State Developmental Center	Paul Kolstoe, Ph.D.
State Hospital	Alex Schweitzer
State Penitentiary	Steve Larson

NOTE: Several participants are employed through the Department of Human Services. While these professionals participated in the task force's work, none spoke officially for the Department. The Department of Human Services, as a state agency, has not taken a formal position on the task force's recommendations.

Exhibit B to the testimony of David Boeck, Protection & Advocacy Project  
January 29, 2001

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2034

<b>Amendment</b>	Page 1, line 21, after the period insert " <u>A psychiatrist or psychologist is not a qualified expert for purposes of evaluating an individual with mental retardation unless the psychiatrist or psychologist has specific expertise in sexual offender evaluations of individuals with mental retardation.</u>
<b>Present law</b>	N.D.C.C. 25-03.3-01 (4) defines a "qualified expert" who may evaluate an alleged sexually dangerous person
<b>Consensus proposal</b>	Specifies the qualifications necessary for an expert when the expert will be evaluating an individual with mental retardation

**Rationale**

An expert cannot competently evaluate an individual with mental retardation who exhibits sexually dangerous behaviors, unless the expert has specific expertise for evaluating individuals with mental retardation who are exhibiting sexually dangerous conduct. An expert who is qualified to evaluate an individual without mental retardation is not qualified to evaluate an individual with mental retardation unless the expert has additional specialization.

Several professionals in North Dakota are qualified to evaluate individuals with mental retardation who exhibit sexually dangerous behaviors. Several more professionals are working to acquire the qualifications and still more have expressed interest in acquiring the qualifications. The Developmental Center currently applies these standards to those who conduct evaluations at the Developmental Center.

This amendment would not change the qualifications required of an expert who evaluates individuals who do not have mental retardation.

Fifty-seventh  
Legislative Assembly

<b>Expense</b>	<p>This proposed amendment would not add cost to commitment or treatment. Failure to adopt this proposed amendment invites avoidable and protracted litigation over evidentiary and constitutional issues. This litigation would tie up valuable state resources that would otherwise be dedicated to other purposes.</p> <p>These state resources include lawyers, paralegals, secretaries, and supervisory staff from the Attorney General's office; judges, law clerks, court reporters, court recorders, clerks of court staff, and secretaries from the state judicial branch; and lawyers, law clerks, and secretaries from state's attorneys' offices.</p> <p>In many cases, the state would also pay for court-appointed lawyers to represent a respondent who was challenging (1) the sufficiency of the evidence when the state had used an inadequately qualified "expert" to justify commitment or (2) the deprivation of constitutionally guaranteed due process of law when a district judge had appointed an inadequately qualified "expert" as the respondent's independent expert evaluator.</p> <p>This unnecessary and expensive litigation can be avoided by establishing appropriate qualification standards in the statute now.</p> <p>During appellate litigation, there may be uncertainty about validity or legality of a district court order that was supposed to commit the respondent to treatment. This creates a dilemma about whether the state can continue to detain the respondent and, if it can continue to detain the respondent, whether it can begin treatment. If the state is not allowed to detain the respondent during appellate litigation, this puts the community at risk. If the state is allowed to detain the respondent during appellate litigation but not to begin treatment, it wastes state treatment resources.</p>
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Fifty-seventh  
Legislative Assembly

<b>Amendment</b>	Page 2, line 17, after "with" insert " <u>For the purpose of this definition,</u> " and remove the overstrike over "mental" Page 2, line 18, remove the overstrike over "retardation", insert immediately thereafter " <u>shall not be regarded as a sexual disorder, personality disorder, or other mental disorder or dysfunction that makes an individual likely to engage in further acts of sexually predatory conduct</u> ", and remove the overstrike over the period
<b>Present law</b>	N.D.C.C. 25-03.3-01 (7) defines "sexually dangerous individual"
<b>Consensus proposal</b>	Clarifies that mental retardation is not a predisposing factor for sexually dangerous conduct
<b>Rationale</b>	Without this provision, a state's attorney or judge might mistakenly assume that mental retardation is "a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct." Professionals agree that mental retardation does not cause or predispose anyone to engage in sexually predatory conduct.
<b>Expense</b>	Omission of this recommended amendment invites misunderstanding and confusion for judges, prosecutors, and the public. Misunderstanding and confusion lead to mistakes. Mistakes lead to additional litigation in which judges declare what the legislature meant. As stated for the first recommended amendment, unnecessary litigation wastes public resources. The Legislature has the opportunity now to articulate a standard, so judges will not substitute a judicial policy for a gap in legislative policy.

Fifty-seventh  
Legislative Assembly

<b>Amendment</b>	<p>Page 3, line 4, overstrike "suffers from" and immediately thereafter insert "<u>has</u>"</p> <p>Page 3, line 5, overstrike "mental disease or defect", immediately thereafter insert "<u>disability</u>", overstrike "renders", immediately thereafter insert "<u>substantially impairs</u>", overstrike "victim incapable of", and immediately thereafter insert "<u>victim's</u>"</p> <p>Page 3, line 6, after "understanding" insert "of"</p>
<b>Present law</b>	<p>N.D.C.C. 25-03.3-01 (9)(a)(5) defines "sexually predatory conduct" and identifies one kind of especially vulnerable victim as someone with a mental disease or defect that makes that person "incapable" of understanding the nature of a sexual act or contact.</p>
<b>Consensus proposal</b>	<p>Strengthens the protection for vulnerable victims who may not be completely "incapable" of understanding the nature of the sexual act or contact. The proposed standard would protect a victim whose understanding is substantially impaired.</p>
<b>Rationale</b>	<p>This proposal would provide greater protection for victims with disabilities by establishing a more realistic standard. The current standard, "incapable," is an absolute value that is very difficult to prove.</p> <p>The proposed standard, "substantially impaired," is a more practical standard. This will eliminate litigation over whether an individual victim with a disability is "incapable" of understanding rather than "substantially impaired" in understanding the nature of a sexual act or contact.</p> <p>This proposal also protects individuals whose understanding is impaired by any disability, not just by a mental disease or defect.</p>
<b>Expense</b>	<p>As explained for the prior two recommended amendments, it saves public resources to avoid unnecessary litigation. Coincidentally, this recommended amendment would improve the state's ability to apprehend sexually dangerous persons who might otherwise victimize additional vulnerable persons. This saves personal and financial costs to those victims.</p>

Fifty-seventh  
Legislative Assembly

<b>Amendment</b>	Page 3, line 9, after "of" insert " <u>, or is receiving direct care from</u> "
<b>Subsection</b>	25-03.3-01 (9)(a)(6)
<b>Present law</b>	Defines "sexually predatory conduct" and identifies one feature of one type of predatory person as someone with supervisory or disciplinary control over a victim in official custody or detention
<b>Consensus proposal</b>	Appropriately enlarges the group of sex offenders who could be committed under this law by adding individuals who provide direct care to a vulnerable person who is in official custody or detention.
<b>Rationale</b>	This proposal would recognize a broader group of individuals who are in a position of trust that affords them unique opportunities to victimize vulnerable persons. For purposes of identifying a predator, these individuals are substantially similar to those who have supervisory or disciplinary authority over vulnerable people. This would include personal care attendants, nurse assistants, therapy assistants, and others who can betray that trust with little chance of getting caught.
<b>Expense</b>	This recommended amendment would not likely increase the state's costs for commitment and treatment. It likely would save personal and financial costs to the victims and their families.

<b>Amendment</b>	Page 3, line 7, after "hospital," insert " <u>treatment facility, health care facility, correctional facility,</u> "
<b>Present law</b>	N.D.C.C. 25-03.3-01 (9)(a)(6) defines "sexually predatory conduct" and identifies facilities in which a vulnerable person might reside.
<b>Consensus proposal</b>	Identifies facilities in language that is more consistent with the terms used in the rest of this chapter.
<b>Rationale</b>	This reduces the risk of misinterpretation.
<b>Expense</b>	As stated above, misinterpretation leads to mistakes. Mistakes lead to litigation. Unnecessary litigation is wasteful. This recommended amendment adds terms that are used and defined elsewhere in the chapter.

Fifty-seventh  
Legislative Assembly

<b>Amendment</b>	<p>Page 5, line 21, after "Item" Insert "<u>and special advocate</u>" and after the period Insert "1."</p> <p>Page 5, after line 28 Insert:</p> <p><u>"2. As soon as the court learns that a respondent, committed individual, victim, or witness may have mental retardation, the court may appoint an attorney or non-attorney as a special advocate for that individual. A special advocate is appointed to help the individual understand the allegations, all applicable rights, and the proceedings, and to help the individual to communicate effectively within the context of the proceedings. A special advocate must keep confidential all information acquired from the individual or otherwise acquired in the proceedings to the same extent as the individual's attorney must keep information confidential, except as reasonably necessary to help the individual communicate effectively within the context of the proceedings. The department of human services shall pay the expense of the special advocate fee as established by the court."</u></p>
<b>Present law</b>	N.D.C.C. 25-03.3-07. There is no provision in current law.
<b>Consensus proposal</b>	Authorizes the court to appoint a "special advocate" to help an individual with mental retardation to understand the proceedings and to effectively communicate throughout.

**Fifty-seventh  
Legislative Assembly**

<b>Rationale</b>	<p>A special advocate is someone with skills at communicating with individuals with mental retardation. A court could appoint a counselor, a professional from the human services center, a school counselor, a lawyer, a disabilities advocate from the Protection &amp; Advocacy Project, . . . anyone with the necessary skills.</p> <p>The carefully designed statutory commitment process is meaningless if key "participants" with mental retardation cannot effectively participate because they do not understand what is happening or because they cannot communicate effectively.</p> <p>Appointment of a special advocate is a reasonable accommodation for an individual with a disability that impairs communication or understanding. This reasonable accommodation is consistent with state and federal laws about providing access to individuals with disabilities.</p>
<b>Expense</b>	<p>The cost of a special advocate cannot accurately be estimated. A special advocate need not be a lawyer, so that makes it (likely) less expensive. There could be no additional direct costs if a district court appointed a special advocate from among qualified personnel at a human service center, the Protection &amp; Advocacy Project, or other public entities that serve individuals with mental retardation.</p> <p>In three and a half years, the state has tried to commit only seven people as sexually dangerous individuals. There is not a big backlog of individuals with mental retardation who will be immediately committed if SB 2034 becomes law. In other words, the potential cost is not very large.</p> <p>On the other hand, the state could be sued (in the right circumstances) for failure to reasonably accommodate an individual with mental retardation in the commitment process. A special advocate is an easy way to provide a reasonable accommodation and to avoid a civil rights lawsuit.</p>

<b>Amendment</b>	<p>Page 6, line 6, remove the overstrike over "<del>to be held</del>"</p> <p>Page 6, line 7, remove the overstrike over "<del>or local correctional facility to be held for</del>"</p>
<b>Present law</b>	<p>N.D.C.C. 25-03.3-08. The recommended amendment would keep this specific part of the law in its present form.</p>

Fifty-seventh  
Legislative Assembly

<b>Consensus proposal</b>	Do not detain a proposed patient in a jail cell.
<b>Rationale</b>	<p>The law is vulnerable to a constitutional challenge if it can be categorized as a criminal or punitive law. Putting a proposed patient in jail makes the proposed patient look like a criminal who is being treated like a criminal rather than as a candidate for treatment.</p> <p>There is an increased suicide risk for an individual held in a segregated cell after being apprehended. The greatest risk is within the first 24 hours. These detainees would be a substantial challenge for most local jails.</p>
<b>Expense</b>	<p>Ambiguities in the law invite litigation. Litigation is expensive. It is financially wise to avoid unnecessary litigation.</p> <p>It can be very expensive for the government when an individual in government custody commits suicide. It is wise to reduce this risk if possible.</p>

<b>Amendment</b>	Page 6, line 28, after the period insert " <u>If the state's attorney has reason to believe the respondent may have mental retardation, the state's attorney shall refer the respondent to the protection and advocacy project.</u> "
<b>Section</b>	25-03.3-10
<b>Present law</b>	No provision.
<b>Consensus proposal</b>	Requires the state's attorney to refer a respondent with mental retardation to the Protection & Advocacy Project.

Fifty-seventh  
Legislative Assembly

<b>Rationale</b>	This gives the respondent the option of contacting the Protection & Advocacy Project for assistance. The respondent could decline to contact the Protection & Advocacy Project and the Protection & Advocacy Project could decline to represent the respondent.
<b>Expense</b>	<p>This recommended amendment would add no new costs to the process. State and federal laws require the Protection &amp; Advocacy Project to protect the rights of individuals with disabilities. The state's attorney would inform a respondent with mental retardation that a resource is available to help with disabilities-related problems.</p> <p>If a respondent with mental retardation chose to follow through on the referral, the Protection &amp; Advocacy Project could check to see that the respondent's disabilities-related needs were appropriately addressed. The Protection &amp; Advocacy Project would provide direct assistance only for prioritized needs established under federal law.</p> <p>The referral from the state's attorney would help the Protection &amp; Advocacy Project avoid new expenses that might otherwise arise from the Protection &amp; Advocacy Project's obligation to monitor facilities that detain individuals with disabilities.</p>

<b>Amendment</b>	<p>Page 7, line 10, overstrike "chooses to waive" and insert immediately after it "<u>knowingly, intelligently, and voluntarily waives</u>"</p> <p>Page 7, line 17, overstrike "transferred to" and insert immediately after it "<u>placed at</u>"</p> <p>Page 7, line 24, overstrike "transferred to" and insert immediately after it "<u>placed at</u>"</p>
<b>Section</b>	25-03.3-11
<b>Present law</b>	Permits a respondent to waive the preliminary hearing and requires a respondent to transfer to an appropriate treatment facility for an evaluation.
<b>Consensus proposal</b>	Uses the constitutional standard for giving up a preliminary hearing. Two additional amendments clarify that a judge need not transfer a respondent to another facility for an evaluation if the respondent is already at an appropriate treatment facility.

Fifty-seventh  
Legislative Assembly

<b>Rationale</b>	<p>The statute should include the constitutional standard for waiving a right.</p> <p>It would be inefficient to require a respondent who is already in an appropriate treatment facility to transfer to another appropriate treatment facility just for an evaluation.</p>
<b>Expense</b>	<p>The recommended amendment would eliminate another possible cause of confusion. Confusion leads to mistakes. Mistakes lead to unnecessary litigation. Unnecessary litigation adds needless costs to the process.</p> <p>The second and third recommended amendments in this section would also eliminate a possible cause of confusion. The current statute requires the court to transfer a respondent to a treatment facility for an evaluation. If the respondent is already at the state hospital (or, for a respondent with mental retardation, at the developmental center), the court will not transfer the respondent anywhere. The language of the statute should instead be "placed at" or "assigned to".</p> <p>Changing this language will eliminate one cause for unnecessary litigation.</p>

<b>Amendment</b>	<p>Page 9, line 27, replace "<u>is mentally retarded</u>" with "<u>has mental retardation</u>"</p> <p>Page 9, line 28, replace "<u>and</u>" with "<u>, special advocate,</u>" replace "<u>or</u>" with "<u>, and</u>", and remove "<u>, if any</u>"</p> <p>Page 10, line 6, replace "<u>is a mentally</u>" with "<u>has mental</u>"</p> <p>Page 10, line 7, replace "<u>retarded individual</u>" with "<u>retardation</u>"</p> <p>Page 10, line 8, replace "<u>and</u>" with "<u>, special advocate,</u>" and replace "<u>or</u>" with "<u>, and</u>"</p>
<b>Subsection</b>	25-03.3-18 (1)
<b>Present law</b>	Establishes annual notice of right to petition for discharge.
<b>Consensus proposal</b>	Modifies some outdated language and adds special advocate to list of those who get annual notice.
<b>Rationale</b>	<p>The special advocate should get annual notice of the committed individual's right to petition for discharge since the special advocate is responsible to see that the committed individual understands applicable rights and proceedings.</p>
<b>Expense</b>	These changes are appropriate only if SB 2034 provides for a special advocate.

Fifty-seventh  
Legislative Assembly

<b>Amendment</b>	<p>1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large <del>and has received the maximum benefit of treatment.</del></p> <p>and</p> <p>3. If a committed individual has been committed to an out-of-state facility by the executive director for purposes of treatment, an expert from that state may be appointed by the court as a qualified expert for an indigent committed individual for any postcommitment proceeding. <u>An expert from another state must have comparable qualifications to those required of an expert from North Dakota.</u></p>
<b>Present law</b>	N.D.C.C. 25-03.3-17 Imposes "maximum benefit of treatment" standard and establishes no standard for out-of-state experts
<b>Consensus proposal</b>	Removes "maximum benefit of treatment" language and establishes that an out-of-state expert must have comparable qualifications to those required of an expert from within North Dakota.
<b>Rationale</b>	<p>The phrase "maximum benefit of treatment" is a problem because (1) it has no agreed upon meaning, (2) it could be misused to justify release of someone who would not benefit from further treatment though the individual is unstable, and (3) the state may not have the constitutional authority to hold an individual for involuntary treatment once the individual can be safely discharged.</p> <p>The standard, "safe to be at large," is adequate.</p> <p>The chapter declares qualifications required of a North Dakota professional; an out-of-state expert should meet comparable qualifications.</p>
<b>Expense</b>	Again, the recommended amendments would help to avoid unnecessary litigation.

SB 2034

TESTIMONY ON SB 2034  
AMENDMENTS TO N.D.C.C. CH. 25-03.3  
PROVIDING FOR CIVIL COMMITMENT OF SEXUAL PREDATORS

BEFORE THE  
SENATE APPROPRIATIONS COMMITTEE  
JANUARY 29, 2001

JEAN R. MULLEN  
ASSISTANT ATTORNEY GENERAL

Chairman Nething and Members of the Committee, I am pleased to be here on behalf of Attorney General Stenehjem to testify about the proposed amendments to Chapter 25-03.3 of the North Dakota Century Code, which provides for civil commitment of sexual predators. The statute providing for civil commitment of sexual predators was enacted in 1997. During the past few years of initial implementation, concerns have arisen about a few of the procedures provided under the statute. The Attorney General believes the amendments contained in SB 2034 will address those concerns and provide a more consistent and effective implementation of the statute.

BACKGROUND

Chapter 25-03.3 establishes a judicial procedure for commitment of sexually dangerous predators, similar to the procedure for commitment of mentally ill individuals. For commitment to occur, the state's attorney, as petitioner, must show the individual has engaged in sexually predatory conduct and has a mental condition 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. A respondent is 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 safe to be at large.

A statute similar to North Dakota's law was challenged on substantive due process, double jeopardy, and ex post facto grounds in 1997 by the United States Supreme Court and was held constitutional. The North Dakota statute was reviewed by the North Dakota Supreme Court in 1999. The court addressed the issue of double jeopardy and found the statute constitutional.

When the law was originally enacted in 1997, it was anticipated that there might be as many as seven commitments during the first biennium. In the last two biennia, there have only been six individuals committed. One of those individuals was also sentenced to the State Penitentiary where he is currently serving his sentence.

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 State Hospital staff to address concerns. In implementing the statute, state's attorneys, staff at the State Hospital, and the Attorney General's Office have found that adjustments could be made to the statute to more accurately reflect the realities of the commitment process. For this reason, the Attorney General proposed, during the interim legislative period, most of the amendments contained in SB 2034.

Most of these amendments can be fairly characterized as "fine tuning." One, however, is a more significant change -- that of including individuals with mental retardation under the provisions of the statute. Additional amendments have been

included that are designed to provide procedural protections to individuals with mental retardation that go through the commitment process. In addition to the amendments proposed in SB 2034 as introduced, the Senate Judiciary Committee added a few amendments that deal with the inclusion of individuals with mental retardation.

### FISCAL IMPACT

The primary, if not only, amendment to the statute that has a fiscal impact is the inclusion of individuals with mental retardation under the definition of "sexually dangerous individual" (Section 1 of SB 2034, page 2, line 17-18). Individuals with mental retardation were excluded under the original legislation in 1997 because the Department of Human Services had a study group that was preparing companion legislation to provide for civil commitment to the Developmental Center's sexual treatment program of individuals with mental retardation. In the end, that legislation was not introduced.

Unfortunately, this perpetuates a dangerous situation which arises when an individual who is charged with gross sexual imposition or similar sexual crime is found to lack fitness to proceed at trial and will not attain fitness to proceed within a reasonable period of time. This has occurred in cases involving individuals with mental retardation. Under the applicable criminal statute, the proceedings against the defendant in this situation must be dismissed. N.D.C.C. § 12.1-04-08(2). This puts the individual back on the streets even though the individual would otherwise fit the definition of "sexually dangerous individual."

SB 2034 provides for civil commitment of individuals with mental retardation. If found to meet the criteria for commitment, a court would commit the individual to the care, custody and control of the executive director of the Department of Human Services who could then place the person in the most appropriate setting. Depending upon the level of mental retardation, the individual could be placed in the Developmental Center's treatment program or in the State Hospital's program.

These individuals are no less sexual predators than those non-mentally-retarded individuals that are currently being committed under the statute. They are equally as dangerous. Further, citizens don't even have the option of these individuals spending time in prison as a means of removing them from the community. It is appropriate and necessary that the State address the treatment of individuals with mental retardation who are sexual predators just as it has addressed the treatment of individuals without mental retardation who are sexual predators.

I want to thank the Chairman and the Members of the Committee for giving me the opportunity to testify on behalf of SB 2034. As many of you are aware, the Attorney General has supported this statute from its inception and continues to believe it is an effective tool for protecting our children -- and all members of our society -- from sexual predators.

Thank you.

TESTIMONY ON SB 2034  
AMENDMENTS TO N.D.C.C. CH. 25-03.3  
PROVIDING FOR CIVIL COMMITMENT OF SEXUAL PREDATORS

BEFORE THE  
HOUSE JUDICIARY COMMITTEE  
MARCH 5, 2001

JEAN R. MULLEN  
ASSISTANT ATTORNEY GENERAL

Chairman DeKrey and Members of the Committee, I am pleased to be here on behalf of Attorney General Stenehjem to testify about the proposed amendments to Chapter 25-03.3 of the North Dakota Century Code, which provides for civil commitment of sexual predators. The statute providing for civil commitment of sexual predators was enacted in 1997. During the past few years of initial implementation, concerns have arisen about a few of the procedures provided under the statute. The Attorney General believes the amendments contained in SB 2034 will address those concerns and provide a more consistent and effective implementation of the statute.

BACKGROUND

Chapter 25-03.3 establishes a judicial procedure for commitment of sexually dangerous predators, similar to the procedure for commitment of mentally ill individuals. For commitment to occur, the state's attorney, as petitioner, must show the individual has engaged in sexually predatory conduct and has a mental condition 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. A respondent is 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 safe to be at large.

A statute similar to North Dakota's law was challenged on substantive due process, double jeopardy, and ex post facto grounds in 1997 before the United States Supreme Court and found to be constitutional. The North Dakota statute was reviewed by the North Dakota Supreme Court in 1999. The court addressed the issue of double jeopardy and found the statute constitutional.

When the law was originally enacted in 1997, it was anticipated that there might be as many as seven commitments during the first biennium. In the last two biennia, there have only been six individuals who have been committed. One of those individuals has also been sentenced to the State Penitentiary where he is currently serving his sentence. There are currently two additional individuals who are at the State Hospital for evaluation.

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 State Hospital staff to address concerns. In implementing the statute, state's attorneys, staff at the State Hospital, and the Attorney General's Office have found that adjustments could be made to the statute to more accurately reflect the realities of the commitment process. It was for this reason the Attorney General proposed, during the interim legislative period, most of the amendments contained in SB 2034. For the most part, these changes can be characterized as "fine tuning." One, however, is a more significant change -- that of including individuals with mental retardation under the provisions of the statute.

#### SB 2034 AMENDMENTS

The following is an explanation of the primary amendments contained in S. 2034.

1. **Definition of sexually dangerous individual (Section 1 of SB 2034):** The current definition excludes an individual with mental retardation from the definition of "sexually dangerous individual." This exclusion was provided in the original statute because the Department of Human Services had a study group that was preparing companion legislation to provide for civil commitment to the Developmental Center's sexual treatment program of individuals with mental retardation. In the end, that legislation was not introduced.

Unfortunately, this perpetuates a dangerous situation which arises when an individual who is charged with gross sexual imposition or similar sexual crime is found to lack fitness to proceed at trial and will not attain fitness to proceed within a reasonable period of time. This has occurred in cases involving individuals with mental retardation. Under the applicable criminal statute, the proceedings against the defendant in this situation must be dismissed. This puts the individual back on the streets even though the individual would otherwise fit the definition of "sexually dangerous individual."

SB 2034 provides for civil commitment of individuals with mental retardation. If found to meet the criteria for commitment, a court would commit the individual to the care, custody and control of the executive director of the Department of Human Services who could then place the person in the most appropriate setting. Depending upon the level of mental retardation, the individual could be placed in the Developmental Center's treatment program or in the State Hospital's program.

Other amendments, which are mainly self-evident, provide additional due process protections for those individuals during the commitment process, for example,

in the area of notice, appointment or waiver of counsel, and appointment of a guardian ad litem. Many of these were included in the bill at the request of Protection and Advocacy.

2. **Venue (Section 2 of SB 2034):** Under the statute currently, venue for filing a petition for commitment is limited to the county in which the respondent resides or is located. This can create a problem when an inmate ready for release has been found by the treatment professionals at the State Penitentiary to be appropriate for referral to a state's attorney for consideration for a commitment proceeding. Sometimes an inmate will indicate that he is not returning to the place where he was convicted or where he "resides" at the time of sentencing but rather will be going to a new location. Under this provision, the state's attorney in the new locale would not have authority to bring a petition for civil commitment. To address this, SB 2034 provides that a proceeding under the chapter may be tried in any appropriate county in which the respondent has had, or intends to have, a presence. This also includes Bunleigh County if the respondent is an inmate.

3. **Closed/Open Proceedings (Sections 3 of SB 2034):** The statute as originally enacted does not specifically provide the probable cause or commitment hearings should be closed to the press or public. The decision to limit attendance or to close the hearings is left to the court's discretion. At the time the legislation was drafted, it was recognized that these are civil commitment proceedings similar to those providing for commitment of the mentally ill. Those proceedings are closed hearings with sealed records. It was also recognized that the primary danger of these individuals is not to themselves, but to the general public who have a right to know their status.

Recognizing these conflicting interests, it was left to the court's discretion to close the hearing if it believed it was appropriate in a particular case.

The courts have gone both ways: some have held open hearings/open records; others have held closed hearings and sealed the records. The N.D. Supreme Court looked at the issue in In re M.D. (1999) but did not decide it on the grounds that dismissal of the petition was not a proper remedy for disclosure of information about the filing of the petition. To bring consistency to the process, the amendment provides the hearings should be closed and the records should be sealed, except that the fact of an individual respondent's commitment and subsequent release from treatment are open records.

4. North Dakota State Penitentiary referrals (Section 4 of SB 2034): Currently the State Penitentiary Treatment Department staff review an incarcerated sex offender about six months before a scheduled release. Their process includes a review of the inmate's records and treatment progress including any available information on prior predatory acts, completion of an actuarial recidivism screening tool for the inmate, and a staffing to evaluate the inmate's likelihood of future sexual predatory acts.

During the staffing, based upon all available information and the inmate's score on the actuarial screening, the team makes a determination as to whether the inmate should be referred for civil commitment. If they decide he should, they forward a letter to the state's attorney who sent the individual to them.

Most states have codified the requirement for referral from correctional facilities. North Dakota has had some problem with state's attorneys responding to the referrals -- in part, because they receive so little information through the referral process.

Formalizing the State Penitentiary referral, including what information is to be sent out with the referral, would assist in providing state's attorneys with sufficient information to make informed decisions about civil commitment proceedings. Section 4 of SB 2034 provides the referral process. This section was drafted with treatment staff of the State Penitentiary.

5. Detention (Section 6 of SB 2034): The current statute provides that the respondent is to be detained at a "treatment facility" for the period prior to the probable cause hearing, not to exceed 72 hours. Because of lack of "treatment facilities" in many small communities, this usually requires detention at the State Hospital. This effectively removes the respondent from access to his locally appointed attorney and puts more burden on law enforcement who have to escort the respondent to and from Jamestown for the probable cause hearing. Some respondents have requested that they be held locally, even though it has meant staying in a local correctional facility, to have access to counsel while preparing for the probable cause hearing.

To address this issue, SB 2034 as originally introduced provided that the respondent be taken into custody and transferred to a local treatment facility "or correctional facility," if the respondent chose, to be held pending the probable cause hearing. The Senate Judiciary Committee, at the request of the State's Attorneys Association, amended SB 2034 to remove the reference to the respondent's choice. This is to take account of the fact most counties have made arrangements for individuals with mental retardation who are being detained in a jail to be held at a nearby hospital for their safety. The State's Attorneys Association was concerned that

those individuals might choose to remain in a jail which the Association believes would be inappropriate.

6. Evidence admissible at Probable Cause Hearing (Section 9 of SB 2034): This amendment is to clarify that during the probable cause hearing evidence, such as hearsay, may be admitted for purposes of showing probable cause. That is the general law in criminal proceedings and is important in this type of case where the only purpose of the preliminary hearing is to determine whether the individual should be held for evaluation to determine whether he has the requisite mental disorder.

7. Evaluation period (Section 11 of SB 2034): Under the current statute, there is only a 30-day period between probable cause and the commitment hearing. This time period has proved too short for the State Hospital to complete the State's required two evaluations and is much too short if the respondent is also attempting to have an evaluation by his own expert. As introduced, SB 2034 provided for a 90-day evaluation period, however, at the request of Protection and Advocacy, the evaluation period was limited to 60 days.

8. Recommitment after community placement (Section 12 of SB 2034): This section was added to the bill by the Senate Judiciary Committee at the request of Protection and Advocacy. The purpose is to insure that an individual who has been moved into the community from an institutional treatment program will have an opportunity to challenge a return to an inpatient treatment program. The amendment provides the Department of Human Services will establish an administrative proceeding at which the individual may challenge the move to the more restrictive setting.

9. Provision for Department of Human Services to promulgate rules (Section 15 of SB 2034): Section 14 of the bill provides a new section to the statute to authorize the Department of Human Services to adopt rules to implement the chapter.

10. Retention of rights (Section 16 of SB 2034): This is a new amendment added in the Senate Judiciary Committee at the request of Protection and Advocacy to insure that individuals committed under chapter 25-03.3 would be provided the same rights as other individuals committed to the state hospital or the developmental center unless those rights pose safety problems or are inconsistent with the treatment program.

Finally, I would like to offer one additional, technical amendment. In the amendments providing for the referral from the State Penitentiary Treatment Department to the state's attorneys for inmates who are subject to release, it currently states the Treatment Department should provide a copy of the referral and summary to "the medical director of the state hospital." (Section 4 of SB 2034, page 5, lines 10-11.) The proper procedure would be to have copies of the referral sent to the Superintendent of the State Hospital and the Developmental Center. A copy of the proposed amendment is attached to this testimony.

I want to thank the Chairman and the Members of the Committee for giving me the opportunity to present testimony on behalf of the Attorney General. As many of you are aware, he has supported this statute from its inception and continues to believe that this is an effective tool for protecting our children -- and all members of our society -- from sexual predators.

Thank you.

PROPOSED AMENDMENT TO SENATE BILL 2034

Page 5, line 11, replace "medical director of" with "superintendent of the developmental center and".

**STATE OF NORTH DAKOTA**  
**FIFTY-SEVENTH LEGISLATIVE ASSEMBLY**  
**HOUSE JUDICIARY COMMITTEE**

Senate Bill 2034

Hearing scheduled for Monday, March 5, 2001

**CHAIRMAN DEKREY AND COMMITTEE MEMBERS:**

Good morning. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project, which provides advocacy services for people with disabilities including people who may be subject to the terms of SB 2034 if it is enacted into law.

I am presenting proposed amendments that I previously presented to the Senate Judiciary Committee. The Senate Judiciary Committee declined to adopt these amendments when it considered SB 2034 at a January 17 working session that I was unable to attend. Today, I request that you consider them.

These amendments are the recommendations of an informal task force that was formed to review proposals to broaden the "Commitment of Sexually Dangerous Individuals" law to include individuals with mental retardation. Participants in the task force include individuals from law enforcement, corrections, psychiatry, guardians and service providers, victims' support, human services, and disabilities groups. A complete list is included in Exhibit A to this testimony.

**Fifty-seventh  
Legislative Assembly**

I also want to mention two particular members of the task force:

- ▶ The administrator of the State Hospital and the Developmental Center. The State Hospital houses the state's treatment program for sexually dangerous individuals who are committed under chapter 25-03.3. The Developmental Center will house any treatment program for sexually dangerous individuals with mental retardation who are committed under chapter 25-03.3.
- ▶ The psychologist who directs the current program at the Developmental Center for treatment of individuals with mental retardation who have problematic sexual behaviors. This psychologist will direct any treatment program established at the Developmental Center for sexually dangerous individuals with mental retardation who are committed under chapter 25-03.3.

The task force began from the premise that the Legislature will amend chapter 25-03.3 so individuals with mental retardation can be committed as sexually dangerous individuals under this law. The task force did not address the question of whether individuals with mental retardation should be committable under this law. The task force's goal was to improve the chapter to appropriately include sexually dangerous individuals with mental retardation, not to block their inclusion.

**Fifty-seventh  
Legislative Assembly**

The task force's recommendations would increase the likelihood that a committed individual will get appropriate treatment and be released from a residential facility to rejoin the community with appropriate supervision.

Analyses of the task force's specific recommendations are presented in Exhibit B to my testimony.

Please let me know if you have any questions or if you would like me to draft a revision for any part of SB 2034. Thank you.

Attachment A  
 Testimony of David Boeck

Members of the Informal Task Force

Groups	Individual Participants
Bismarck Police Department	Chief Deborah Ness and Lieutenant Duffy Heinle
Bureau of Criminal Investigation	Dallas Carlson
Catholic Family Service and N.D. Association of Community Facilities	Donna Byzewski and Paul Griffin
Council on Abused Women's Services	Linda Isaakson and Bonnie Palechek
Dakota Center for Independent Living and Partners In Policymaking	Joyce Smith
Department of Human Services	Melissa Hauer
Developmental Disabilities Division of the Department of Human Services	Robbin Hendrickson
Mental Health Association in N.D.	Rose Stoller and Susan Helgeland
N.D. Psychiatric Association	Dave Peske
Northeast Human Service Center	Myron Veenstra, Ph.D.
Protection & Advocacy Project	Teresa Larsen, Corinne Hofmann, and David Boeck
People First of N.D.	Raylynn Lauderdale
State Developmental Center	Paul Kolstoe, Ph.D.
State Hospital	Alex Schweltzer
State Penitentiary	Steve Larson

NOTE: Several participants are employed through the Department of Human Services. While these professionals participated in the task force's work, none speaks officially for the Department. The Department of Human Services, as a state agency, has not taken a formal position on the task force's recommendations.

**Attachment B  
 Testimony of David Boeck**

**Summary of Remaining Task Force Recommendations**

This summary separately presents provisions from current law, parallel provisions from SB 2034, task force recommendations, and a brief statement of rationale supporting each task force recommendation.

Current law	<p><b>25-03.3-01. Definitions.</b>          In this chapter, unless the context otherwise requires:          . . . .          3. "Qualified expert" means an individual who has an expertise in sexual offender evaluations and who is a psychiatrist or psychologist trained in a clinical program and licensed pursuant to this state's law or a psychologist approved for exemption by the North Dakota board of psychology examiners.</p>
SB 2034	<p>3. "Qualified expert" means an individual who has an expertise in sexual offender evaluations and who is a psychiatrist or psychologist trained in a clinical program and licensed pursuant to this state's law or a psychologist approved for exemption by the North Dakota board of <del>psychology</del> psychologist examiners.</p>
Task Force Proposal	<p>4. "Qualified expert" means an individual who has an expertise in sexual offender evaluations and who is a psychiatrist or psychologist trained in a clinical program and licensed pursuant to this state's law or a psychologist approved for exemption by the North Dakota board of <del>psychology</del> psychologist examiners. <u>A psychiatrist or psychologist is not a qualified expert for purposes of evaluating an individual with mental retardation unless the psychiatrist or psychologist has specific expertise in sexual offender evaluations of individuals with mental retardation.</u></p>

**Rationale**

An expert cannot competently evaluate an individual with mental retardation who exhibits sexually dangerous behaviors, unless the expert has specific expertise for evaluating individuals with mental retardation who are exhibiting sexually dangerous behaviors. An individual with mental retardation who exhibits sexually dangerous behaviors is unique from individuals who exhibit sexually dangerous behaviors but do not have mental retardation.

Several professionals in North Dakota have adequate credentials to evaluate individuals with mental retardation who exhibit sexually dangerous behaviors. More are working to establish the expertise and still more have expressed interest in developing the expertise. The Developmental Center currently applies these standards to the experts who conduct evaluations at the Developmental Center.

If this sentence is not added, a judge or lawyer is apt to conclude that a person is a "qualified expert" if that person satisfies the criteria in the first sentence. It is unrealistic to expect judges and lawyers to realize that a "qualified expert" may not be qualified [to evaluate an individual with mental retardation who exhibits sexually dangerous behaviors].

A judge's erroneous conclusion would invite evidentiary and constitutional due process challenges that would be ultimately successful. It is much easier to avoid this problem through legislation than to invite litigation and risk the release of a sexually dangerous individual.

This amendment would not change the qualifications required of an expert who evaluates individuals who do not have mental retardation.

Current law	<p>25-03.3-01 Definitions.</p> <p>In this chapter, unless the context otherwise requires:</p> <p>7. "Sexually dangerous individual" means an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct. The term does not include an individual with mental retardation.</p>
SB 2034	<p>7. <del>8.</del> "Sexually dangerous individual" means an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct. <del>The term does not include an individual with mental retardation.</del></p>
Task Force Proposal	<p>7. <del>8.</del> "Sexually dangerous individual" means an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct. <del>The term does not include an individual with</del> <u>For these purposes, mental retardation is not "a sexual disorder, personality disorder, or other mental disorder or dysfunction".</u></p>

Rationale	<p>Most judges and lawyers probably think of mental retardation as a "mental disorder or dysfunction." This creates a risk of error in applying the statute to an individual with mental retardation.</p> <p>Professionals agree that mental retardation does not cause or predispose anyone to engage in sexually predatory conduct. The proposed amendment would substantially reduce the likelihood that a judge or state's attorney will commit an error on this point.</p>
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Current law	<p>25-03.3-01</p> <p>8. "Sexually predatory conduct" means:</p> <p>a. Engaging or attempting to engage in a sexual act or sexual contact with another individual, or causing or attempting to cause another individual to engage in a sexual act or sexual contact, if:</p> <p>....</p> <p>(5) The actor knows or should have known that the victim suffers from a mental disease or defect that renders the victim incapable of understanding the nature of the sexual act or contact;</p>
SB 2034	[no change]
Task Force Proposal	<p>(5) The actor knows or should have known that the victim <del>suffers from</del> <u>has a mental disease or defect</u> <del>disability</del> that renders <u>substantially impairs</u> the <del>victim</del> <u>victim's</u> incapable of understanding of the nature of the sexual act or contact;</p>
Rationale	<p>Task force members were concerned about victims with mental retardation. This provision addresses one of those concerns.</p> <p>The current law would not protect a victim if the victim does not understand the nature of the sexual act or contact but is capable of understanding it (with appropriate instruction and counseling over a period of time). This is not what the Legislature intended by enacting this provision.</p> <p>The proposal presents language that captures the legislative intent and provides a more workable evidentiary standard.</p>

Current law	<p><b>25-03.3-01</b></p> <p>8. "Sexually predatory conduct" means:</p> <p>a. Engaging or attempting to engage in a sexual act or sexual contact with another individual, or causing or attempting to cause another individual to engage in a sexual act or sexual contact, if:</p> <p>.....</p> <p>(6) The victim is in official custody or detained in a hospital, prison, or other institution and is under the supervisory authority or disciplinary control of the actor; or</p>
SB 2034	[no change]
Task Force Proposal	<p>(6) The victim is in official custody or detained in a <u>hospital treatment facility, health care facility, <del>prison</del> correctional facility</u>, or other institution and is under the supervisory authority, <u>or</u> disciplinary control, <u>or care</u> of the actor; or</p>
Rationale	<p>Task force members were concerned about victims with mental retardation. This provision addresses one of those concerns.</p> <p>This proposal would recognize a larger group of individuals who are in a position of trust that affords them unique opportunities to victimize vulnerable persons. For purposes of identifying a predator, these individuals are substantially similar to those who have supervisory or disciplinary authority over vulnerable people. This would include nurses, personal care attendants, nurse assistants, orderlies, therapy assistants, interns, and others who can betray that trust with little chance of being caught.</p> <p>The proposal also substitutes terms used in the rest of the chapter for "hospital" and "prison."</p>

Current law	<p><b>25-03.3-07. Appointment of guardian ad litem.</b></p> <p>At any stage of a proceeding under this chapter, on application of a party or on its own motion, the court may appoint a guardian ad litem for a minor who is a witness or otherwise involved in the proceeding, if the minor has no parent, guardian, or custodian appearing on the minor's behalf or the interests of those persons conflict with those of the minor. The department of human services shall pay the expense of the guardian ad litem fee as established by the court.</p>
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SB 2034	<p><b>25-03.3-07. Appointment of guardian ad litem.</b></p> <p>At any stage of a proceeding under this chapter, on application of <del>a party</del> <u>any individual</u> or on its own motion, the court may appoint a guardian ad litem for a minor <u>or an individual with mental retardation</u> who is a respondent or witness or otherwise involved in the proceeding, if the minor <u>or an individual with mental retardation</u> has no parent, guardian, or custodian appearing on the minor's <u>or the mentally retarded individual's</u> behalf or the interests of those persons conflict with those of the minor <u>or an individual with mental retardation</u>. The department of human services shall pay the expense of the guardian ad litem fee as established by the court.</p>
Task Force Proposal	<p><b>§ 25-03.3-07. Appointment of guardian ad litem and special advocate.</b></p> <p>1. At any stage of a proceeding under this chapter, on application of <del>a party</del> <u>any individual</u> or on its own motion, the court may appoint a guardian ad litem for a minor <u>or an individual with mental retardation</u> who is a witness or otherwise involved in the proceeding, if the minor <u>or the individual with mental retardation</u> has no parent, guardian, or custodian appearing on <u>behalf of the minor's minor or the individual with mental retardation</u> behalf or <u>if</u> the interests of those persons conflict with those of the minor <u>or the individual with mental retardation</u>. The department of human services shall pay the expense of the guardian ad litem fee as established by the court.</p> <p>2. <u>As soon as the court learns that a respondent, committed individual, victim, or witness may have mental retardation, the court may appoint an attorney or non-attorney as a special advocate for that individual. A special advocate is appointed to help the individual understand the allegations, all applicable rights, and the proceedings, and to help the individual to communicate effectively within the context of the proceedings. A special advocate must keep confidential all information acquired from the individual or otherwise acquired in the proceedings to the same extent as the individual's attorney must keep information confidential, except as reasonably necessary to help the individual communicate effectively within the context of the proceedings. The department of human services shall pay the expense of the special advocate fee as established by the court.</u></p>

<p><b>Rationale</b></p>	<p>A special advocate is someone with skills at communicating with individuals with mental retardation. A court could appoint a counselor, a professional from the human services center, a school counselor, a lawyer, a disabilities advocate from the Protection &amp; Advocacy Project, . . . anyone with the necessary skills.</p> <p>The carefully designed statutory commitment process is meaningless if key "participants" with mental retardation cannot effectively participate because they do not understand what is happening or because they cannot communicate effectively.</p> <p>Appointment of a special advocate is a reasonable accommodation for an individual who has impaired communication or understanding due to a disability. This reasonable accommodation is consistent with state and federal laws that require access for individuals with disabilities.</p> <p>One important difference between a guardian ad litem and a special advocate:</p> <ul style="list-style-type: none"> <li>▶ A guardian ad litem decides what is best for the ward.</li> <li>▶ When working with a special advocate, the ward decides what to pursue. The special advocate makes sure the ward understands the proceedings, rights, and options. The special advocate helps the ward to make choices but the ward has the right to make the decisions.</li> </ul>
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<p><b>Current law</b></p>	<p><b>25-03.3-08. Sexually dangerous individual - Procedure on petition - Detention.</b></p> <p>Upon the filing of a petition pursuant to this chapter, the court shall determine whether to issue an order for detention of the respondent named in the petition. The petition may be heard ex parte. The court shall issue an order for detention if there is cause to believe that the respondent is a sexually dangerous individual. If the court issues an order for detention, the order must direct that the respondent be taken into custody and transferred to an appropriate treatment facility to be held for evaluation and subsequent hearing pursuant to this chapter. Under this section, the department of human services shall pay for any expense incurred in the detention or evaluation of the respondent.</p>
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SB 2034	<p><b>1.</b> Upon the filing of a petition pursuant to this chapter, the court shall determine whether to issue an order for detention of the respondent named in the petition. The petition may be heard ex parte. The court shall issue an order for detention if there is cause to believe that the respondent is a sexually dangerous individual. If the court issues an order for detention, the order must direct that the respondent be taken into custody and transferred to an appropriate treatment facility <del>to be held for evaluation and</del> <u>or local correctional facility to be held for</u> subsequent hearing pursuant to this chapter. Under this section, the department of human services shall pay for any expense incurred in the detention or evaluation of the respondent.</p>
Task Force Proposal	<p><b>1.</b> Upon the filing of a petition pursuant to this chapter, the court shall determine whether to issue an order for detention of the respondent named in the petition. The petition may be heard ex parte. The court shall issue an order for detention if there is cause to believe that the respondent is a sexually dangerous individual. If the court issues an order for detention, the order must direct that the respondent be taken into custody and transferred to an appropriate, <u>state</u> treatment facility <del>to be held for evaluation and</del> <u>or, if the respondent prefers, to a secure unit in an available, appropriate, local treatment facility to be held for subsequent preliminary</u> hearing pursuant to this chapter. Under this section, the department of human services shall pay for any expense incurred in the detention or evaluation of the respondent.</p>
Rationale	<p>The more chapter 25-03.3 looks like a criminal law, the more likely it violates the federal and state constitutions. Detaining a respondent in jail is consistent with our criminal laws. The involuntary civil commitment laws, chapter 25-03.1, strictly limit the detention of a proposed patient in a jail. See N.D.C.C. § 25-03.1-25 (3)(b).</p> <p>If the state detains a respondent with mental retardation in jail, the proceeding looks criminal and the state risks compromising its legitimate treatment goals.</p>

Current law	<p><b>25-03.3-09. Right to counsel - Waiver.</b></p> <p>.....</p> <p>2. After consultation with counsel, the respondent may waive the right to counsel or the right to any hearing provided pursuant to this chapter by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and be signed by counsel for the respondent.</p>
SB 2034	<p>2. After consultation with counsel, the respondent may waive the right to counsel or the right to any hearing provided pursuant to this chapter by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and be signed by counsel for the respondent. <u>No guardian, guardian ad litem, attorney, or other individual may waive the right to counsel on behalf of an individual with mental retardation.</u></p>
Task Force Proposal	<p>2. After consultation with counsel, the respondent may waive the right to counsel or the right to any hearing provided pursuant to this chapter by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and <del>be signed by respondent's counsel for the respondent</del> <u>must separately certify that counsel has explained to respondent the proceedings, respondent's rights, the disadvantages of proceeding without counsel, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings. No guardian, guardian ad litem, attorney, or other individual may waive the right to counsel on behalf of an individual with mental retardation.</u></p>
Rationale	<p>This amendment would not be necessary if the Legislature adopts the amendment proposed for section 25-03.3-07 (special advocate).</p> <p>If the amended law does not provide for a special advocate, this provision must be added. This is a reasonable measure to protect the rights of individuals with mental retardation.</p>

Current law	<p><b>25-03.3-10. Notice.</b></p> <p>If a respondent is detained pursuant to section 25-03.3-08, the state's attorney shall provide the respondent, or the respondent's guardian, if appropriate, with a copy of the petition filed with the court. The state's attorney shall provide the respondent with written notice of the respondent's right to a prelliminary hearing and a commitment hearing, if probable cause is found to exist; the right to counsel and that counsel will be appointed for the respondent, if the respondent is indigent; and the right to have an expert of the respondent's choosing conduct an evaluation and testify on the respondent's behalf or, if the respondent is indigent, that the court will appoint a qualified expert for the respondent. The notice must state the date, time, and place for the prelliminary hearing.</p>
SB 2034	<p>If a respondent is detained pursuant to section 25-03.3-08, the state's attorney shall provide the respondent, or the respondent's guardian, if appropriate, with a copy of the petition filed with the court. The state's attorney shall provide the respondent with written notice of the respondent's right to a prelliminary hearing and a commitment hearing, if probable cause is found to exist; the right to counsel and that counsel will be appointed for the respondent, if the respondent is indigent; and the right to have an expert of the respondent's choosing conduct an evaluation and testify on the respondent's behalf or, if the respondent is indigent, that the court will appoint a qualified expert for the respondent. The notice must state the date, time, and place for the prelliminary hearing. <u>If notice is given to a respondent who the state's attorney knows or believes is an individual with mental retardation, the state's attorney also shall give notice to the respondent's attorney and guardian or guardian ad litem, if any.</u></p>

<p><b>Task Force Proposal</b></p>	<p>If a respondent is detained pursuant to section 25-03.3-08, the state's attorney shall provide the respondent, or the respondent's guardian, if appropriate, with a copy of the petition filed with the court. <u>If the state's attorney has reason to believe the respondent may have mental retardation, the state's attorney shall refer the respondent to the protection and advocacy project.</u> The state's attorney shall provide the respondent with written notice of the respondent's right to a preliminary hearing and a commitment hearing, if probable cause is found to exist; the right to counsel and that counsel will be appointed for the respondent, if the respondent is indigent; and the right to have an expert of the respondent's choosing conduct an evaluation and testify on the respondent's behalf or, if the respondent is indigent, that the court will appoint a qualified expert for the respondent. The notice must state the date, time, and place for the preliminary hearing. <u>If notice is given to a respondent who the state's attorney knows or believes is an individual with mental retardation, the state's attorney also shall give notice to the respondent's attorney, guardian, and guardian ad litem, if any.</u></p>
<p><b>Rationale</b></p>	<p>This gives the respondent the option of contacting the Protection &amp; Advocacy Project for assistance. Respondents with mental retardation may have problems with conditions of confinement and with ongoing services. Referral to the Protection &amp; Advocacy Project is one way to help protect the respondent from mistreatment and neglect.</p> <p>The respondent could decline to contact the Protection &amp; Advocacy Project and the Protection &amp; Advocacy Project could decline to represent the respondent.</p> <p>The last sentence requires that notice be given to both the guardian and the guardian ad litem. This sentence would need another change to add the special advocate if the special advocate provision is adopted (section 25-03.3-07).</p> <p>This change is a simple measure that would increase the likelihood that the respondent would receive actual notice.</p>

Current law

**25-03.3-11. Preliminary hearing - Probable cause.**

The respondent is entitled to a preliminary hearing within seventy-two hours of being taken into custody pursuant to an order of the court, excluding weekends and holidays, unless the respondent chooses to waive the preliminary hearing pursuant to section 25-03.3-09. The respondent has a right to be present, to testify, and to present and cross-examine witnesses at any preliminary hearing. Every individual not necessary must be excluded, except that the court may admit any individual having a legitimate interest in the proceeding. If the court determines after a preliminary hearing that there is probable cause to believe the respondent is a sexually dangerous individual, the court shall order that the respondent be transferred to an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct. If the court determines that probable cause does not exist to believe that the respondent is a sexually dangerous individual, the court shall dismiss the petition. If the respondent waives the preliminary hearing, then the respondent must be immediately transferred to an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct.

SB 2034

The respondent is entitled to a preliminary hearing within seventy-two hours of being taken into custody pursuant to an order of the court, excluding weekends and holidays, unless the respondent chooses to waive the preliminary hearing pursuant to section 25-03.3-09. The respondent has a right to be present, to testify, and to present and cross-examine witnesses at any preliminary hearing. The court may receive evidence that would otherwise be inadmissible at a commitment hearing. Every individual not necessary must be excluded, except that the court may admit any individual having a legitimate interest in the proceeding. If the court determines after a preliminary hearing that there is probable cause to believe the respondent is a sexually dangerous individual, the court shall order that the respondent be transferred to an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct. If the court determines that probable cause does not exist to believe that the respondent is a sexually dangerous individual, the court shall dismiss the petition. If the respondent waives the preliminary hearing, then the respondent must be immediately transferred to an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct. An individual with mental retardation may be evaluated under this chapter at a facility only if that facility provides care and treatment to individuals with mental retardation.

<p><b>Task Force Proposal</b></p>	<p>The respondent is entitled to a preliminary hearing within seventy-two hours of being taken into custody pursuant to an order of the court, excluding weekends and holidays, unless the respondent <del>chooses to waive</del> <u>knowingly, intelligently, and voluntarily waives</u> the preliminary hearing pursuant to section 25-03.3-09. The respondent has a right to be present, to testify, and to present and cross-examine witnesses at any preliminary hearing. <u>The court may receive evidence that would otherwise be inadmissible at a commitment hearing.</u> Every individual not necessary must be excluded, except that the court may admit any individual having a legitimate interest in the proceeding. If the court determines after a preliminary hearing that there is probable cause to believe the respondent is a sexually dangerous individual, the court shall order that the respondent be <del>transferred to</del> <u>placed at</u> an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct. If the court determines that probable cause does not exist to believe that the respondent is a sexually dangerous individual, the court shall dismiss the petition. If the respondent waives the preliminary hearing, then the respondent must be immediately <del>transferred to</del> <u>placed at</u> an appropriate treatment facility for an evaluation as to whether the respondent has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in further acts of sexually predatory conduct. <u>An individual with mental retardation may be evaluated under this chapter at a facility only if that facility provides care and treatment to individuals with mental retardation.</u></p>
<p><b>Rationale</b></p>	<p>Judges and lawyers may need a reminder that the same constitutional standard for an effective waiver applies to respondents who have mental retardation. A waiver is effective under the constitution only if provided "knowingly, intelligently, and voluntarily."</p> <p>The "<del>transferred to</del>" and "<u>placed at</u>" distinction would allow a respondent at the Developmental Center to be evaluated there. The current language requires that a respondent be "transferred to" somewhere else for an evaluation.</p>

Current law	<b>25-03.3-17. Postcommitment proceeding, discharge, and further disposition.</b> 1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large and has received the maximum benefit of treatment.
SB 2034	[no change]
Task Force Proposal	1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large <del>and has received the maximum benefit of treatment.</del>
Rationale	The "maximum benefit of treatment" is an unattainable standard. No matter how much a committed individual has improved, he can always improve more. A committed individual, who is untreatable, would meet that standard immediately because treatment would provide no benefit. That is, no benefit is the maximum he can get from treatment. From a constitutional due process perspective, the State does not have sufficient interest to justify continuing to hold a committed individual once he is "safe to be at large."

Current law	<b>25-03.3-17. Postcommitment proceeding, discharge, and further disposition.</b> ..... 3. If a committed individual has been committed to an out-of-state facility by the executive director for purposes of treatment, an expert from that state may be appointed by the court as a qualified expert for an indigent committed individual for any postcommitment proceeding.
SB 2034	[no change]

Task Force Proposal	3. If a committed individual has been committed to an out-of-state facility by the executive director for purposes of treatment, an expert from that state may be appointed by the court as a qualified expert for an indigent committed individual for any postcommitment proceeding. <u>An expert from another state must have comparable qualifications to those required of an expert from North Dakota.</u>
Rationale	This is similar to the issue discussed above for § 25-03.3-01 (3), the definition of a "qualified expert." The same evidentiary and constitutional issues arise.

Current law	<b>25-03.3-17. Postcommitment proceeding, discharge, and further disposition.</b> [new subsection]
SB 2034	<u>If the executive director moves a committed individual from a placement in the community to a placement in a secure treatment facility that is more restrictive, the committed individual may challenge the move at a hearing to be held within thirty days after the move in accordance with procedures established by the department of human services.</u> 15 16 17 18.
Task Force Proposal	5. <u>If the executive director moves a committed individual from a placement outside a facility to a more restrictive placement inside a facility, the new placement must be in the least restrictive setting that can provide appropriate treatment to the individual. If the executive director moves a committed individual from a placement outside any facility to a more restrictive setting inside a facility or transfers a committed individual to the department of corrections and rehabilitation, the executive director shall file a notice of that action with the committing court within 24 hours and the committed individual shall have the right to challenge the move at a hearing to be held within 30 days after the move.</u>

<b>Rationale</b>	<p>This proposal would require the custodian to provide relevant information to the committing court. At the very least, a committing court (and the sentencing court) should have a current record of the committed individual's whereabouts.</p> <p>Transferring an individual from the prison to the state hospital and transferring an individual from the state hospital to the prison have due process ramifications. At a minimum, the federal and state constitutions require the convicted individual be given notice and opportunity for a hearing.</p>
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The U.S. Supreme Court's January 17 decision in Seling v. Young seems to invite challenges to the constitutionality of state laws for the commitment of sexually dangerous individuals. The Legislature must take every possible step to make certain chapter 25-03.3 falls within the bounds of the federal and state constitutions.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2034

Page 1, line 16, replace "Disorder" with "Disorders"

Page 1, line 21, after the period insert "A psychiatrist or psychologist is not a qualified expert for purposes of evaluating an individual with mental retardation unless the psychiatrist or psychologist has specific expertise in sexual offender evaluations of individuals with mental retardation."

Page 2, line 17, after "with," insert "For these purposes," and remove the overstrike over "~~mental~~"

Page 2, line 18, remove the overstrike over "~~retardation.~~", insert immediately thereafter "is not a sexual disorder, personality disorder, or other mental disorder or dysfunction, and after the period insert underscored quotation marks

Page 3, line 4, overstrike "suffers from" and insert immediately thereafter "has"

Page 3, line 5, overstrike "mental disease or defect", insert immediately thereafter "disability", overstrike "renders", insert immediately thereafter "substantially impairs", overstrike "victim", insert immediately thereafter "victim's", and overstrike "incapable of"

Page 3, line 6, after "understanding" insert "of"

Page 3, line 7, overstrike "hospital", insert immediately thereafter "treatment facility, health care facility", overstrike "prison", and insert immediately thereafter "correctional facility"

Page 3, 8, after "authority" insert an underscored comma, overstrike "or", and after "control" insert ", or care"

Page 5, line 21, after "Item" insert "and special advocate", after the period insert

"1."

Page 5, line 28, after the period insert

"2. As soon as the court learns that a respondent, committed individual, victim, or witness may have mental retardation, the court may appoint an attorney or non-attorney as a special advocate for that individual. A special advocate is appointed to help the individual understand the allegations, all applicable rights, and the proceedings, and to help the individual to communicate effectively within the context of the proceedings. A special advocate must keep confidential all information acquired from the individual or otherwise acquired in the proceedings to the same extent as the individual's attorney must keep information confidential, except as reasonably necessary to help the individual communicate effectively within the context of the proceedings. The department of human services shall pay the expense of the special advocate fee as established by the court."

Page 6, line 6, overstrike "transferred to", insert immediately thereafter "held at", and after "appropriate" insert ", state"

Page 6, line 7, replace "local correctional facility to be held" with ", if the respondent prefers, to a secure unit in an available, appropriate, local treatment facility", overstrike "subsequent", and insert immediately thereafter "preliminary"

Page 6, line 21, overstrike "be signed by", insert immediately thereafter "respondent's", overstrike "for the respondent", insert immediately thereafter "must separately certify that counsel has explained to respondent the proceedings, respondent's rights, the disadvantages of proceeding without counsel, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings."

Page 6, line 28, after the period insert "If the state's attorney has reason to believe the respondent may have mental retardation, the state's attorney shall refer the respondent to the protection and advocacy project."

Page 7, line 5, replace "and" with an underscored comma and replace "or" with ", and"

Page 7, line 10, overstrike "chooses to waive" and insert immediately thereafter "knowingly, intelligently, and voluntarily waives"

Page 7, line 17, overstrike "transferred to" and insert immediately thereafter "placed at"

Page 7, line 24, overstrike "transferred to" and insert immediately thereafter "placed at"

Page 9, lines 14 through 15, replace the text from "in" on line 14 through the underscored comma on line 15 with "outside a facility to a more restrictive placement inside a facility, the new placement must be in the least restrictive setting that can provide appropriate treatment to the individual. If the executive director moves a committed individual from a placement outside any facility to a more restrictive setting inside a facility or transfers a committed individual to the department of corrections and rehabilitation, the executive director shall file a notice of that action with the committing court within 24 hours and"

Page 9, line 16, replace "may" with "shall have the right to"

Page 9, lines 17 through 18, remove the text beginning with "in" on line 17 through "services" on line 18

Page 9, line 28, replace "and" with an underscored comma and replace "or" with ", and"

Page 10, line 8, replace "and" with an underscored comma and replace "or" with ", and"

Page 10, after line 22, insert:

**"SECTION 17. AMENDMENT.** Subsection 1 of section 25-03.3-17 is amended and reenacted as follows:

- "1. A committed individual must remain in the care, custody, and control of the executive director until, in the opinion of the executive director, the individual is safe to be at large ~~and has received the maximum benefit of treatment.~~

**"SECTION 18. AMENDMENT.** Subsection 3 of section 25-03.3-17 is amended and reenacted as follows:

- "3. If a committed individual has been committed to an out-of-state facility by the executive director for purposes of treatment, an expert from that state may be appointed by the court as a qualified expert for an indigent committed individual for any postcommitment proceeding. An expert from another state must have comparable qualifications to those required of an expert from North Dakota."

**SB 2034**

**Testimony of Tom Wallner**  
**Before the House Judiciary Committee**

**March 5, 2001**

**Mr. Chairman, members of the Committee, my name is Tom Wallner and I am the Executive Director of the North Dakota State Council on Developmental Disabilities. One of the Council's roles is to advocate on public policy matters that affect people with developmental disabilities such as mental retardation. All 16 members of the Council are appointed by the Governor. The Council is organizationally located in state government under the Department of Human Services umbrella. However, public policy recommendations made by the Council are in no way meant to reflect the Governor's positions or positions taken by the Department of Human Services.**

**The Developmental Disabilities Council has followed the work of the broadly-based Civil Commitment Task Force that helped to develop this legislation. The Council is satisfied that this legislation, with the amendments proposed, balances adequate protections for persons with mental retardation against public safety concerns. Therefore, the D.D. Council supports this legislation with the amendments.**

**Mr. Chairman, this concludes my testimony.**

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## Memorandum

**To:** Representative Duane DeKrey  
Chairman - House Judiciary Committee

**From:** Alex C. Schweitzer, Superintendent - Department of Human Services Institutions

**Date:** 3-05-01

Mr. Chairman and members of the House Judiciary Committee, I am forwarding the following information on Senate Bill 2034 and its fiscal impact on the Grafton Developmental Center. I apologize for not being able to appear at the hearing and hopefully this information will be helpful during your deliberations on the bill. Please feel free to contact me at 701-253-3964 or my e-mail address on the state system, if you have any questions or concerns.

I presented the same information to the Senate Appropriations Committee prior to crossover and the committee decided to take up the fiscal impact of the bill during general discussion of the Developmental Center's overall budget. The Senate passed the bill without a fiscal note.

This proposed bill incorporates language concerning people with mental retardation and adds reference to the Developmental Center at Westwood Park as a treatment facility to the existing North Dakota Century Code relating to the civil commitment of sexual predators. There only will be a fiscal impact if additional residents are admitted to the Developmental Center during the 2001 - 2003 biennium.

It is difficult to guess the number of referrals to the Developmental Center because of this change to the Century Code. The language change was brought forward to deal with certain sex offenders with mental retardation, that cannot be committed under the current statute. Unfortunately, we do not have good statistics as to the number of potential offenders that would qualify for the program at the Developmental Center. The fiscal note analysis is based on the admission of three (3) individuals during the 2001 - 2003 biennium. This best guess estimate is based on information from the correctional system, the attorney general's office and the average admissions to the State Hospital's program for treatment of sex offenders during the last two bienniums.

Thus, we are estimating a fiscal impact of \$350,298 during the 2001 - 2003 biennium, with \$105,089 coming from the general fund and \$245,209 from federal funds. The majority of costs associated with the fiscal impact are salary costs for approximately seven (7) FTE's to provide 24 hour care for 365 days of the year for these individuals, along with minimal operating costs.

I am recommending that the House of Representatives pass the bill and that the fiscal impact be considered as a part of the 2001 - 2003 agency appropriation for the Developmental Center.