

From: Rep.Jagler
Sent: Wednesday, September 27, 2017 10:05 AM
To: *Legislative All Assembly <ALLASM@legis.wisconsin.gov>; *Legislative All Senate <ALLSEN@legis.wisconsin.gov>
Subject: SHORT DEADLINE: Co-Sponsorship of LRB 1983/1

To: Legislative Everyone


From: Representative John Jagler
Senator Rob Cowles
Representative Eric Genrich
Senator Janis Ringhand

Date: September 27, 2017

SHORT DEADLINE: Tuesday, October 2nd, 2017

RE: Co-sponsor LRB 1983/1 – Regulatory Clarification and Federal Law Alignment for Mental Health Crisis Treatment

Under Wisconsin law, if an individual with a mental illness is a danger to themselves or others, that individual may be placed under a 72 hour “emergency detention” to evaluate the need for commitment and de-escalate the chance of violence occurring. Generally, only law enforcement, with the approval of the county mental health crisis agency, may place an individual on an emergency detention without a court order. Wisconsin’s law does not permit health care providers to place an individual on an emergency detention without a court order and LRB 1983 does *not* change that. Instead, it brings Wisconsin emergency detention statute into better alignment with a health care provider’s responsibilities and authorities under federal and state law.

Wisconsin law provides immunity to any individual who acts in accordance with Wisconsin’s emergency detention statute. However, in situations in which  a treating health care provider believes that an emergency detention is medically necessary but law enforcement and/or the county crisis agency will not initiate an emergency detention, the Attorney General has opined that the statutory immunity as written may not extend to the treating health care provider in such a situation. This interpretation creates a mismatch of liabilities, responsibilities, and authorities under Wisconsin’s emergency detention statute.

LRB 1983 makes key changes to Wisconsin’s emergency detention statute in order to better ensure that the liabilities and responsibilities of treating health care providers are consistent with their authorities under the statute and their responsibilities under federal law. This bill provides

better clarity in statute so that a health care provider's liability to an individual or third party is more clearly limited to the health care provider's authority to seek, but not impose, an emergency detention on the individual.

In those instances when a health care provider or law enforcement officer believes that someone is a danger to someone else, that person should be able to provide information to law enforcement, county crisis or others about the patient's substantial probability of serious physical harm to that person. LRB 1983 would clarify that a health care provider or law enforcement officer may share information in a good faith effort to prevent or lessen a serious and imminent threat to the health and safety of a person or the public. However, it is important to note that HIPAA regulations would still be in place and are not weakened by this legislation.

Finally, the bill also provides that when an individual is in a hospital emergency department and in custody under an emergency detention, hospital staff have a role in determining whether plans for transferring the individual to an emergency detention facility is medically appropriate for the patient.

The bill addresses a regulatory concern by emergency department providers that Wisconsin's emergency detention law can come into conflict with federal Emergency Medical Treatment and Labor Act (EMTALA) duties on emergency departments. Federal EMTALA obligations to ensure appropriate transfer of a patient are not unique to patients who are under an emergency detention and apply to all patients that are transferred from a hospital emergency department to another health care facility. The bill aligns Wisconsin law with federal EMTALA duties on emergency departments and health care providers regarding appropriate transfers of patients in custody under an emergency detention that are in need of services that the hospital does not have the capability to treat, by providing that law enforcement may not transport an individual in custody of law enforcement from an emergency department until hospital staff have communicated to law enforcement that the transfer of the individual to the detention facility is appropriate.

This legislation is supported by the Wisconsin Hospital Association (WHA) and was crafted after a nearly three-year long conversation between WHA and the Wisconsin Counties Association and recent consultation with the Badger State Sheriffs' Association and the Wisconsin Sheriffs and Deputy Sheriffs Association. The bill is a proposal that maintains our current system's structure while establishing regulatory clarification for health care providers who are trying to safely and effectively treat patients in Wisconsin's unique system. This bill aligns Wisconsin's emergency detention statutes with hospital obligations required under federal law.

If you would like to co-sponsor LRB 1983/1, please contact Kat in Rep. Jagler's Office at katherine.bates@legis.wi.gov or by phone (6-9650) or Heather in Sen. Cowles' office at heather.moore@legis.wi.gov or by phone (6-0484).



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-1983/1
TJD:wlj

2017 BILL

1 **AN ACT to renumber and amend** 51.15 (2); **to amend** 48.207 (1) (h), 48.207 (1m)
2 (d), 51.15 (2) (title), 51.15 (4m) (c), 51.15 (5), 51.15 (11), 51.15 (11g), 51.20 (16)
3 (e), 322.0767 (1) (e), 322.0767 (1) (f), 938.207 (1) (h), 971.14 (6) (b) and 971.17
4 (3) (e); and **to create** 51.15 (2) (b), 51.17 and 146.816 (2) (b) 4. of the statutes;
5 **relating to:** transfer for emergency detention and warning of dangerousness.

Analysis by the Legislative Reference Bureau

Generally, this bill prohibits the transfer of an individual from a hospital's emergency department for emergency detention until a hospital employee or medical staff member determines the transfer is medically appropriate. The bill also specifies the actions that satisfy the duty to warn of the dangerousness of a person, and provides immunity from civil and criminal liability for actions taken in good faith to warn of dangerousness.

Transportation to detention facility

Under current law, a law enforcement officer or certain other persons may take an individual into custody for purposes of emergency detention if the officer or other person has cause to believe that the individual is mentally ill, drug dependent, or developmentally disabled, and that the individual shows any of the following: 1) a substantial probability of physical harm to himself or herself; 2) a substantial probability of physical harm to other persons; 3) a substantial probability of physical impairment or injury to himself or herself due to impaired judgment; or 4) due to

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mental illness, the inability to satisfy certain basic needs. The individual may not be detained by the officer or other person and the facility for more than a total of 72 hours after the individual is taken into custody for the purposes of emergency detention. The county department of community programs must approve the need for detention and may not do so unless a psychiatrist, psychologist, or other mental health professional has performed a crisis assessment on the individual and agrees with the need for detention and the county department believes the individual will not voluntarily consent to evaluation, diagnosis, and treatment. Under the bill, if an individual is in a hospital's emergency department, the law enforcement officer or other person may not transport the individual for detention until a hospital employee or medical staff member who is treating the individual determines that the transfer of the individual to the detention facility is medically appropriate.

Duty to warn

The bill specifies that a health care provider fulfills any duty to warn by taking any of the following actions: contacting law enforcement or the relevant county department and disclosing knowledge of potential evidence of the individual's substantial probability of harm, approving the emergency detention of the individual if the health care provider is in the position to do so, and taking any other action that a reasonable health care provider would consider as fulfilling the duty to warn a third party of substantial probability of harm. The bill explicitly allows any health care provider and any law enforcement officer to disclose information that an individual poses a substantial probability of serious bodily harm to another person in a good faith effort to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Under the bill, any person who discloses information evidencing substantial probability of serious bodily harm or a health care provider who takes one of the actions that fulfill a duty to warn is not civilly or criminally liable for actions taken in good faith. The bill explicitly exempts from the state's requirements for confidentiality of patient health information the good faith disclosure of protected patient health information made in an effort to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 48.207 (1) (h) of the statutes is amended to read:
- 2 48.207 (1) (h) A place listed specified in s. 51.15 (2) (d) if the child is held under
- 3 s. 48.20 (5).
- 4 **SECTION 2.** 48.207 (1m) (d) of the statutes is amended to read:

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1 48.207 **(1m)** (d) A place listed specified in s. 51.15 (2) (d) if the adult expectant
2 mother is held under s. 48.203 (4).

3 **SECTION 3.** 51.15 (2) (title) of the statutes is amended to read:

4 51.15 **(2)** (title) FACILITIES FOR DETENTION; TRANSPORT; APPROVAL.

5 **SECTION 4.** 51.15 (2) of the statutes is renumbered 51.15 (2) (a) and amended
6 to read:

7 51.15 **(2)** (a) The Subject to par. (b), the law enforcement officer or other person
8 authorized to take a child into custody under ch. 48 or to take a juvenile into custody
9 under ch. 938 shall transport the individual, or cause him or her to be transported,
10 for detention, if the county department of community programs in the county in
11 which the individual was taken into custody approves the need for detention, and for
12 evaluation, diagnosis, and treatment if permitted under sub. (8).

13 (c) The county department may approve the detention only if a physician who
14 has completed a residency in psychiatry, a psychologist licensed under ch. 455, or a
15 mental health professional, as determined by the department, has performed a crisis
16 assessment on the individual and agrees with the need for detention and the county
17 department reasonably believes the individual will not voluntarily consent to
18 evaluation, diagnosis, and treatment necessary to stabilize the individual and
19 remove the substantial probability of physical harm, impairment, or injury to
20 himself, herself, or others. For purposes of this subsection paragraph, a crisis
21 assessment may be conducted in person, by telephone, or by telemedicine or video
22 conferencing technology.

23 (d) Detention under this section may only be in a treatment facility approved
24 by the department or the county department, if the facility agrees to detain the
25 individual, or a state treatment facility.

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1 **SECTION 5.** 51.15 (2) (b) of the statutes is created to read:

2 51.15 **(2)** (b) If an individual is in a hospital's emergency department, the law
3 enforcement officer or other person as described under par. (a) may not transport the
4 individual for detention until a hospital employee or medical staff member who is
5 treating the individual determines that the transfer of the individual to the
6 detention facility is medically appropriate and communicates that determination to
7 the law enforcement officer or other person.

8 **SECTION 6.** 51.15 (4m) (c) of the statutes is amended to read:

9 51.15 **(4m)** (c) *Facilities for detention.* The treatment director or treatment
10 director designee shall transport the individual, or cause him or her to be
11 transported, for detention to any of the facilities described in sub. (2) (d) and shall
12 approve evaluation, diagnosis, and treatment if permitted under sub. (8).

13 **SECTION 7.** 51.15 (5) of the statutes is amended to read:

14 51.15 **(5)** DETENTION PROCEDURE; OTHER COUNTIES. In counties having a
15 population of less than 750,000, the law enforcement officer or other person
16 authorized to take a child into custody under ch. 48 or to take a juvenile into custody
17 under ch. 938 shall sign a statement of emergency detention that shall provide
18 detailed specific information concerning the recent overt act, attempt, or threat to
19 act or omission on which the belief under sub. (1) is based and the names of persons
20 observing or reporting the recent overt act, attempt, or threat to act or omission. The
21 law enforcement officer or other person is not required to designate in the statement
22 whether the subject individual is mentally ill, developmentally disabled, or drug
23 dependent, but shall allege that he or she has cause to believe that the individual
24 evidences one or more of these conditions. The statement of emergency detention
25 shall be filed by the officer or other person with the detention facility at the time of

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1 admission, and with the court immediately thereafter. The filing of the statement
2 has the same effect as a petition for commitment under s. 51.20. When, upon the
3 advice of the treatment staff, the director of a facility specified in sub. (2) (d)
4 determines that the grounds for detention no longer exist, he or she shall discharge
5 the individual detained under this section. Unless a hearing is held under s. 51.20
6 (7) or 55.135, the subject individual may not be detained by the law enforcement
7 officer or other person and the facility for more than a total of 72 hours after the
8 individual is taken into custody for the purposes of emergency detention, exclusive
9 of Saturdays, Sundays, and legal holidays.

10 **SECTION 8.** 51.15 (11) of the statutes is amended to read:

11 51.15 (11) LIABILITY. Any individual who acts in accordance with this section,
12 including making a determination that an individual has or does not have mental
13 illness or evidences or does not evidence a substantial probability of harm under sub.
14 (1) (ar) 1., 2., 3., or 4. or a determination under sub. (2) (b) that the transfer of an
15 individual is medically appropriate, is not liable for any actions taken in good faith.
16 The good faith of the actor shall be presumed in any civil action. Whoever asserts
17 that the individual who acts in accordance with this section has not acted in good
18 faith has the burden of proving that assertion by evidence that is clear, satisfactory
19 and convincing.

20 **SECTION 9.** 51.15 (11g) of the statutes is amended to read:

21 51.15 (11g) OTHER LIABILITY. Subsection (11) applies to a director of a facility,
22 as specified in sub. (2) (d), or his or her designee, who under a court order evaluates,
23 diagnoses or treats an individual who is confined in a jail, if the individual consents
24 to the evaluation, diagnosis or treatment.

25 **SECTION 10.** 51.17 of the statutes is created to read:

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1 **51.17 Warning of dangerousness. (1) DEFINITION.** In this section, “health
2 care provider” has the meaning given in s. 146.81 (1).

3 **(2) AUTHORIZATION.** Any health care provider, as permitted by s. 146.816 (2) (b)
4 4., and any law enforcement officer may make a disclosure of information evidencing
5 that an individual poses a substantial probability of serious bodily harm to any other
6 person in a good faith effort to prevent or lessen a serious and imminent threat to the
7 health or safety of a person or the public.

8 **(3) DUTY; HEALTH CARE PROVIDERS. (a)** Any health care provider that reasonably
9 believes an individual has a substantial probability of harm to himself or herself or
10 to another person under s. 51.15 (1) (ar) 1., 2., 3., or 4. fulfills any duty to warn a 3rd
11 party by doing any of the following:

12 1. Contacting a law enforcement officer regarding the individual and disclosing
13 knowledge of potential evidence of a substantial probability of harm under s. 51.15
14 (1) (ar) 1., 2., 3., or 4.

15 2. Contacting the county department that the health care provider reasonably
16 believes is responsible for approving the need for emergency detention of the
17 individual under s. 51.15 (2) and disclosing knowledge of potential evidence of a
18 substantial probability of harm under s. 51.15 (1) (ar) 1., 2., 3., or 4.

19 3. If the health care provider is an agent of the county department that is
20 responsible for approving the need for emergency detention under s. 51.15 (2) and
21 is authorized by that county department to approve or disapprove the need for
22 emergency detention under s. 51.15 (2), approving the emergency detention of the
23 individual.

24 4. Taking any other action that a reasonable health care provider would
25 consider as fulfilling the duty to warn a 3rd party of substantial probability of harm.

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1 (b) If an individual is not in custody of a facility under s. 51.15 (3) and is not
2 voluntarily admitted to a inpatient psychiatric unit, a health care provider that takes
3 any of the actions under par. (a) has no further duty to any person to seek involuntary
4 treatment, emergency detention, emergency stabilization, or commitment of the
5 individual; to physically restrain or isolate the individual; to prevent the individual
6 from leaving the hospital; or to provide treatment or medication without the
7 individual's consent.

8 (4) LIABILITY. Any person or health care provider that acts in accordance with
9 this section is not civilly or criminally liable for actions taken in good faith. The good
10 faith of the actor shall be presumed in a civil action. Whoever asserts that the
11 individual who acts in accordance has not acted in good faith has the burden of
12 proving that assertion by evidence that is clear, satisfactory, and convincing.

13 **SECTION 11.** 51.20 (16) (e) of the statutes is amended to read:

14 51.20 (16) (e) If the court determines or is required to hold a hearing, it shall
15 thereupon proceed in accordance with sub. (9) (a). For the purposes of the
16 examination and observation, the court may order the patient confined in any place
17 designated in s. 51.15 (2) (d).

18 **SECTION 12.** 146.816 (2) (b) 4. of the statutes is created to read:

19 146.816 (2) (b) 4. For purposes of disclosing information about a patient in a
20 good faith effort to prevent or lessen a serious and imminent threat to the health or
21 safety of a person or the public.

22 **SECTION 13.** 322.0767 (1) (e) of the statutes is amended to read:

23 322.0767 (1) (e) If the court-martial determines under par. (a) or (d) that the
24 person is not likely to become competent to proceed, the court-martial may order
25 that the person be delivered to a facility under s. 51.15 (2) (d), an approved public

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1 treatment facility under s. 51.45 (2), or an appropriate medical or protective
2 placement facility.

3 **SECTION 14.** 322.0767 (1) (f) of the statutes is amended to read:

4 322.0767 (1) (f) If the person is discharged from the military forces while
5 subject to a commitment order under par. (a), the court-martial shall suspend or
6 terminate the commitment order and may order that the person be delivered to a
7 facility under s. 51.15 (2) (d), an approved public treatment facility under s. 51.45 (2),
8 or an appropriate medical or protective placement facility.

9 **SECTION 15.** 938.207 (1) (h) of the statutes is amended to read:

10 938.207 (1) (h) A place ~~listed~~ specified in s. 51.15 (2) (d) if the juvenile is held
11 under s. 938.20 (5).

12 **SECTION 16.** 971.14 (6) (b) of the statutes is amended to read:

13 971.14 (6) (b) When the court discharges a defendant from commitment under
14 par. (a), it may order that the defendant be taken immediately into custody by a law
15 enforcement official and promptly delivered to a facility specified in s. 51.15 (2) (d),
16 an approved public treatment facility under s. 51.45 (2) (c), or an appropriate medical
17 or protective placement facility. Thereafter, detention of the defendant shall be
18 governed by s. 51.15, 51.45 (11), or 55.135, as appropriate. The district attorney or
19 corporation counsel may prepare a statement meeting the requirements of s. 51.15
20 (4) or (5), 51.45 (13) (a), or 55.135 based on the allegations of the criminal complaint
21 and the evidence in the case. This statement shall be given to the director of the
22 facility to which the defendant is delivered and filed with the branch of circuit court
23 assigned to exercise criminal jurisdiction in the county in which the criminal charges
24 are pending, where it shall suffice, without corroboration by other petitioners, as a
25 petition for commitment under s. 51.20 or 51.45 (13) or a petition for protective

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1 placement under s. 55.075. This section does not restrict the power of the branch of
2 circuit court in which the petition is filed to transfer the matter to the branch of
3 circuit court assigned to exercise jurisdiction under ch. 51 in the county. Days spent
4 in commitment or protective placement pursuant to a petition under this paragraph
5 shall not be deemed days spent in custody under s. 973.155.

6 **SECTION 17.** 971.17 (3) (e) of the statutes is amended to read:

7 971.17 (3) (e) An order for conditional release places the person in the custody
8 and control of the department of health services. A conditionally released person is
9 subject to the conditions set by the court and to the rules of the department of health
10 services. Before a person is conditionally released by the court under this subsection,
11 the court shall so notify the municipal police department and county sheriff for the
12 area where the person will be residing. The notification requirement under this
13 paragraph does not apply if a municipal department or county sheriff submits to the
14 court a written statement waiving the right to be notified. If the department of
15 health services alleges that a released person has violated any condition or rule, or
16 that the safety of the person or others requires that conditional release be revoked,
17 he or she may be taken into custody under the rules of the department. The
18 department of health services shall submit a statement showing probable cause of
19 the detention and a petition to revoke the order for conditional release to the
20 committing court and the regional office of the state public defender responsible for
21 handling cases in the county where the committing court is located within 72 hours
22 after the detention, excluding Saturdays, Sundays, and legal holidays. The court
23 shall hear the petition within 30 days, unless the hearing or time deadline is waived
24 by the detained person. Pending the revocation hearing, the department of health
25 services may detain the person in a jail or in a hospital, center or facility specified

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1 by s. 51.15 (2) (d). The state has the burden of proving by clear and convincing
2 evidence that any rule or condition of release has been violated, or that the safety of
3 the person or others requires that conditional release be revoked. If the court
4 determines after hearing that any rule or condition of release has been violated, or
5 that the safety of the person or others requires that conditional release be revoked,
6 it may revoke the order for conditional release and order that the released person be
7 placed in an appropriate institution under s. 51.37 (3) until the expiration of the
8 commitment or until again conditionally released under this section.

9 (END)