

WISCONSIN HOSPITAL ASSOCIATION, INC.



Date: September 27, 2017

To: Members of the Wisconsin State Legislature

From: Kyle O'Brien, Senior Vice President Government Relations
Matthew Stanford, General Counsel

Re: WHA Request to Co-Sponsor LRB 1983/1 – Providing Regulatory Clarification and Aligning State Law with Federal Law Requirements During Mental Health Crisis

The Wisconsin Hospital Association (WHA) strongly supports LRB 1983/1 - bipartisan legislation being circulated by Rep. John Jagler, Sen. Rob Cowles, Rep. Eric Genrich and Ren. Janis Ringhand that will align Wisconsin's emergency detention statutes with the obligations that currently exist for hospitals and health care providers under federal law. In addition, this legislation provides necessary liability alignment between a health care provider's responsibilities and authorities when the health care provider believes an individual is a danger to themselves or others.

The legislation is a product of nearly three years of conversations between the Wisconsin Hospital Association and the Wisconsin Counties Association to find a compromise policy that helps better align Wisconsin emergency detention law and federal EMTALA (Emergency Medical Treatment and Active Labor Act) law. The public policy concern addressed in this bill was raised by Wisconsin hospitals during the 2013 bipartisan Speaker's Task Force on Mental Health. This legislation does not change the process to initiate an emergency detention, but necessarily and correctly leans on the medical judgment of health care professionals in hospital emergency departments to ensure a patient transfer is medically appropriate.

Under Wisconsin law, if an individual with mental illness is a danger to his or herself (suicide) or others (violence against others), that individual may be placed under a 72 hour "emergency detention" to immediately prevent the dangerousness and evaluate the need for commitment. 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. Thus, if law enforcement or a county crisis agency drops or will not initiate an emergency detention, a health care provider may not place an individual under an emergency detention, even if the health care provider reasonably believes the person is a danger to his/herself or others.

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 drops or 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.

As a result, health care providers are concerned that they may be liable to a patient or third party for letting the patient leave a health care facility against medical advice following a law enforcement

officer or county crisis agency's determination to not proceed with an emergency detention, even though the health care provider is not permitted under statute to personally place the individual under an emergency detention.

To address those concerns and reduce the likelihood of conflicts between medical staff, law enforcement, and county crisis staff, this bill provides better clarity in statute so that a health care provider's liability to an individual or third party more is more clearly limited to the health care provider's authority to seek, but not impose, an emergency detention on the individual. The bill further clarifies that a health care provider may fulfill a duty to warn by contacting law enforcement or the county crisis agency.

The bill also addresses a 2010 Court of Appeals case that concluded that an individual may be prohibited under Wisconsin law from disclosing information in good faith to a person in order to warn the person about a patient's substantial probability of serious physical harm to the person. The bill clarifies that a health care provider or law enforcement officer may disclose health care information in a good faith attempt to warn others of a patient's substantial probability of serious physical harm to the person. Federal restrictions on the sharing of patient health information (HIPAA) still apply.

Finally, the bill also addresses a concern by emergency department providers that Wisconsin's emergency detention law can come into conflict with federal EMTALA duties on hospitals, providers and hospital emergency departments. The bill better aligns Wisconsin law with federal EMTALA duties by explicitly establishing a role in Wisconsin's emergency detention statute for emergency department staff. Under the bill, law enforcement may not transport an individual in custody of law enforcement from an emergency department until a hospital employee or medical staff have communicated to law enforcement that the transfer of the individual to the detention facility is medically appropriate.

WHA asks you to co-sponsor LRB 1983/1 in order to better align Wisconsin law with the federal requirements established by EMTALA and provide necessary liability clarifications to health care providers who are concerned about a patient in need of mental health crisis services. Please contact Rep. Jagler or Sen. Cowles office before the October 2nd deadline.