disabilityrights WISCONSIN
Protection and advocacy for people with disabilities.

Date: December 3, 2018

To: Senator Alberta Darling and Representative John Nygren, Co-chairs Joint Finance Committee
Joint Finance Committee Members

Re: December 2018 Extraordinary Session Bills

Thank you for the opportunity to provide testimony on the Extraordinary Session bills. Disability Rights Wisconsin (DRW) is the federally mandated Protection and Advocacy agency for the State of Wisconsin; our testimony will address the impact of the proposals on Wisconsinites with disabilities.

DRW is deeply concerned by the Legislature's rush to push forward bills released late Friday with a public hearing today, and possible vote by the Legislature tomorrow. The proposals give oversight of Wisconsin Medicaid waivers to the legislature, leaving state agencies potentially unable to carry out their core mission. This shift has the possibility to affect services that are critical to adults and families of children with disabilities, including Family Care, IRIS, mental health services, Children's Long-Term Waiver and Katie Beckett. The rush to advance these dramatic changes without time for careful analysis and for constituents to weigh in with their legislators, puts our most vulnerable community members at risk.

The bills unnecessarily interject the legislature into areas which have historically been within the purview of state agencies to decide, and will create unneeded bureaucracy. This will limit the ability of the Department of Health Services to be responsive to community needs, including the needs of Wisconsinites with disabilities who rely heavily on Medicaid and other DHS programs.

Proposed changes to Wisconsin elections and absentee voting would decrease participation of voters with disabilities in the electoral process, create confusion, and add to the difficulties and cost for Wisconsin's 1800 plus municipalities to administer the elections and to provide legally required support for voters with disabilities.

Disability Rights opposes AB 1070, AB 1071, AB 1072, and AB 1073. We ask the legislature to slow down this process and to allow time for full public input on these major changes.

AB 1070 and AB 1073

DRW opposes both AB 1070 and 1073. Both of these bills are antithetical to the concept of separation of powers among three coequal branches of the government. If enacted, they would shift authority to the legislature over areas that have historically been reserved to the executive branch. This would upset the careful system of checks and balances envisioned by our country's and this state's founders. It will tip this balance in favor of the legislative branch in areas where it is not competent to act. From the perspective of people with disabilities, these bills would create

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bureaucratic inefficiencies which would make it more difficult and time-consuming for administrative agencies to do their day-to day work. These inefficiencies will disproportionately impact people with disabilities, many of whom are dependent on government agencies for the services and supports they need to exist.

DRW's comments on these proposals are informed by years of experience representing people with disabilities in fair hearings and appeals, in a variety of forums including employment discrimination, Medicaid, and Division of Vocational Rehabilitation. Specifically, we have major concerns with the proposed changes to Wisconsin's Administrative Procedure Act (Ch. 227 Wis. Stats.) and the unnecessary burdens they place on administrative agencies. The changes will result in major agency inefficiencies and will encourage meritless litigation against state agencies. Furthermore, it will make it more difficult and much more time consuming for agencies to engage in the normal business of making sure that people with disabilities who are entitled to benefits and services get them in a timely manner, and are protected from abuse, neglect and rights violations.

These provisions are especially problematic:

- **Prohibiting courts from granting any deference to any agency interpretation of law.** This provision would mean that in a court review of an agency decision (like a DHA Medicaid case or an ERD employment case) the court will no longer be required to give any deference to the agency's collective experience or expertise with respect to an issue. This will certainly encourage more court actions challenging agency decisions across the board and make it difficult for agencies to maintain any consistency in their application of the laws and regulations that they are charged with implementing. It will cause inefficiencies by distracting agencies and diverting agency resources away from their principal purposes.

- **Requiring all contested case decisions to be approved by the secretary of the agency that issued them.** This proposal prohibits a blanket delegation of final decision status to DHA and will result in havoc at DHA. DRW estimates that at least 95% of all DHA decisions relating to public benefit programs are issued as final decisions by DHA. This means currently, in the case of DHS, these decisions do not get sent to the DHS secretary for approval because they involve application of contested facts to well-settled law and contract provisions. Simply put, there is no reason for the DHS Secretary to have to read and approve every one of these decisions. DHA issues thousands of Medicaid and FoodShare cases each year, not to mention a myriad decisions in other, smaller, public assistance programs. This additional step in the decision process is also likely to significantly delay the issuance of decisions. In those cases where a client wins the case, actions to implement the decision will likely be delayed, perhaps by months. In a case where a client loses the hearing and had requested continuing benefits pending the outcome, the amount the client will be obligated to repay may be significantly higher. This may discourage clients from requesting continuing benefits, resulting in a potentially life-threatening interruption in services.

- **Defining "guidance document" and making those documents subject to unnecessary public notice and comment process.** Guidance documents include every publicly issued memo/letter/explanatory statement written by an agency employee that isn't a formal regulation or a brief in a contested case. The current proposal prohibits a guidance document from having the force of law or implementing a "standard, requirement, or threshold." It then requires every guidance document to be subject to public notice and comment. This will make it very difficult for DHS (or any agency) to do its day-to-day work. This extra step will result in the shifting of personnel resources away from the actual business of the agencies or, will simply discourage agencies from committing their policies to writing, making for uneven and contradictory implementation of programs. Both results are bad for people with disabilities.

- **Allowing the Joint Committee on Review of Administrative Rules the authority to issue multiple suspensions of a proposed rule.** Under current law, Joint Committee on Review of Administrative Regulations can temporarily suspend a rule and then introduce a bill to correct whatever the perceived problem with the rule is. If the bill doesn't pass, the agency can go ahead and implement the rule and JCRAR can't suspend it again. This proposal impedes the promulgation of legitimate administrative rules for extended periods of time without requiring JCRAR to even articulate what its objection to the rule is.

- **Requiring agencies to include the federal or state statutory or regulatory citation to any statement of or interpretation of law they make in print or post to a website.** This is simply a "make work" requirement that results in the diversion of agency resources to unnecessary tasks at the expense of the agency's capacity to engage in its core mission.

- **Requiring each agency to report quarterly to Joint Finance on all expenditures it has made in the previous quarter.** This will create a significant time burden on already inadequate staff resources at agencies. Again, it will divert resources from the agency's core mission.

- **Remove the ability of the Attorney General to discontinue or compromise a lawsuit without consent of the Joint Committee on Finance.**
  Currently, the Governor approves the Attorney General's action to discontinue or compromise an action in which the Attorney General is represents the state when it is in the best interest of the state to do so. By changing this to require passive review by the Joint Committee on Finance, this proposal again disrupts the balance constitutionally mandated between the three co-equal branches. Additionally, requiring approval of the Joint Committee on Legislative Organization to approve any settlement plan that concedes the unconstitutionality or other invalidity of a statute removes the ability of the Attorney General to exercise the legal judgement required of the office.

AB 1071

AB-1071 would move the presidential primary to a date between the February and April elections in 2020, resulting in three elections in a three month period, as well as reducing the time available for early voting.

DRW opposes these changes as they are likely to decrease participation of voters with disabilities in the electoral process, create confusion, and add to the difficulties and cost for Wisconsin's 1800 plus municipalities to administer the elections and to provide legally required support for voters with disabilities. The Wisconsin Election Commission has estimated that creating an additional election would result in additional costs to municipalities and counties of approximately $6.4 million to $6.8 million. This estimate likely does not include all local costs, or the costs to voters, and it does not include additional WEC costs to revise training and information resources and to make changes to agency IT applications.

DRW's opposition to AB-1071 is based on our frontline perspective providing nonpartisan education and assistance to voters with disabilities, service providers, families, guardians, election officials, and others who may help to support voters with disabilities to fully participate the electoral process. **AB 1071 would decrease the time available for early voting**. DRW strongly opposes any efforts to restrict early voting, which has significantly increased the opportunity for Wisconsinites with disabilities to vote by extending the time period, and providing additional opportunities for voters to secure transportation to the early voting site in their municipality.

- An example of the challenge created by holding three elections in a three month period relates to the ability of municipalities to appoint and dispatch Special Voting Deputies to conduct absentee voting at Residential Care Facilities. Special deputies play a key role in administering absentee ballots for voters with disabilities and older adults who live in a residential care facility such as a Nursing Home, Community Based Residential Facility, Residential Care Apartment Complex, or Adult Family Home. Municipal clerks are required to use SVDs in residential care facilities if there are at least five registered electors of the municipality who are occupants of the facility and if the clerk has at least one absentee ballot application from an occupant of the facility.

  It will be extremely challenging and potentially impossible for municipal clerks to oversee provision of Special Voting Deputies for three elections over a three month period. As a result, many Wisconsinites with disabilities may be disenfranchised and be at risk to not have the opportunity to vote.

AB-1072
DRW opposes AB 1072 in its totality and specifically the requirement that State agencies receive legislative approval for new and existing federal waivers such as Medicaid.

This bill would grant unprecedented authority to the Wisconsin legislature to interfere with one of the primary functions of State agencies; namely to submit, modify, renew, withdraw, suspend or terminate waivers of federal laws or rules, and request implementation of a pilot program or demonstration project.

The proposal would require the governor to seek approval from the legislature for nearly *any* new policy decision related to Medicaid or SNAP – including seeking federal approval to make even very small changes to Medicaid waivers, or seeking relief in case of a natural disaster or other emergency.
In the area of Medicaid waivers, this would do great harm to the existing process whereby the state Department of Health Services engages in negotiation with the federal Center for Medicaid Services to arrive at an agreement that will best serve the participants in Medicaid programs such as Family Care, IRIS and CLTS. This would result in impacting people with disabilities negatively because DHS would be hamstrung in making changes, adjustments and improvements to Medicaid programs in order to make them more responsive to the needs of recipients or correct technical or other problems that may arise and which could affect our continued or increased federal funding.

In the past, the legislature has been able to engage with the Department of Health Services over individual Medicaid waivers, both through the budget process and by legislating direction or oversight, when believed necessary, without resorting to oppressive measures such as those contained in AB 1072. The federal Medicaid regulatory scheme is extremely complex, requiring content expertise and experience in the Department of Health Services. Managing and adjusting these programs in conjunction with the federal government is a continual process that requires strict compliance with deadlines. Failure to timely comply with the many intricate and complicated rules and regulations could jeopardize Wisconsin's continued ability to receive necessary funds to provide services to the many vulnerable Wisconsin residents who rely on these programs for their very lives.

Thank you for your consideration of DRW's comments.

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