disabilityrights WISCONSIN
Protection and advocacy for people with disabilities.

April 28, 2021

TO: Assembly Committee on Corrections

Re: AB 228: Assembly Bill 228; Relating to: excluding time for evaluation and treatment of certain medical conditions from the time limit for emergency detention without a hearing.

FROM: Disability Rights Wisconsin, Kristin Kerschensteiner, Director of Legal and Advocacy Services

Chairman Schraa, Vice Chairman Callahan and members of the Committee, thank you for this opportunity to share DRW's concerns and perspective on AB 228 with this Committee. Disability Rights Wisconsin is designated under state law as Wisconsin's federally mandated Protection and Advocacy agency for Wisconsin. In this capacity we advocate for the civil and human rights of people with disabilities across the state.

As a preliminary matter, DRW regards the Committee's failure to permit remote oral testimony or electronic submission of written testimony during a pandemic to be a violation of the Americans with Disabilities Act. The Committee's practice limits the options for many members of the public who are most impacted by this issue - people with disabilities - to safely share their perspective on this legislation. We object to the Committee's practice.

I have spent a good portion of my legal career working on issues related to mental health and the rights of persons living with mental illness, including a number of legal and systemic challenges to mental health statutes and service system revisions that ran contrary to existing law or the needs of the communities that they served. None are more complicated and fraught with challenges than the detention of individuals without due process protections. Although protecting people from harm is important, so is due process, which the 72-hour time limit is intended to provide.

The authority to confine an individual involuntarily based on mental health concerns implicates an individual's liberty interests protected by due process under both the Wisconsin and United States constitutions. In recognition of the constitutionally protected liberty interest Wisconsin statutes as well as state and federal courts have placed tight time limits on involuntary detention proceedings. Wisconsin statutes purposely frame the time limit for holding a probable cause hearing in hours, not days.

It is well established in the law that the moment the individual is no longer free to go they are considered detained. §51.15(3) specifically states that an individual is in custody when under the physical control of the law enforcement officer. There are two separate processes for what happens at that point. In counties with a population over 750,000 (which currently is only

Milwaukee County) §51.15(4)(b) allows the treatment director up to 72 hours after the individual is taken into custody to file the statement of detention, at which point there is a fresh 72 hours in which to hold the probable cause hearing required under §51.20 (7). The remainder of the state follows a different procedure under §51.15(5). Instead of the treatment director, a law enforcement official signs the detention statement.

However, pursuant to §51.15(2)(b) if an individual is in a hospital's emergency department, the individual may not be transported to a detention facility until the hospital employee or medical staff member who is treating the individual determines that the transfer is medically appropriate. It seems likely that this would be the scenario envisioned by AB228, however there is no reference or incorporation of the provision of this section in the proposed amendment. Further, Wisconsin statue §51.15(3) specifically states that an individual is in custody when under the physical control of the law enforcement officer. Therefore, despite the medical hold, the individual remains in custody if the officer executes and files the detention statement. It would present both law enforcement and hospitals with a practical dilemma if they were suddenly thrust into long-term detentions situations. Both these provisions add layers of complexity to the situation where an individual begins their emergency detention in a medically fragile state in a general hospital emergency room. that are not addressed in AB 228.

Finally, on a separate but important note, reliance in AB 228 on the criteria that the individual be "unobservable" is fraught with problems and likely void for vagueness. It leaves far too much open for interpretation. Does it include problems with video-equipment, unavailability of a qualified clinician or inconvenience of scheduling an assessment? What if the individual refuses to speak to the evaluator, as is their right? There are far too many scenarios where the person might be described as "unobservable" that would fall outside any flexibility that due process may provide.

Forced mental health care is never appropriate, except when there are immediate and serious safety risks. And even then, listening to consumers and respecting their choices is essential to designing service plans that succeed. For choice to be real, systems must offer a wide array of interventions and supports, and consumers must understand their benefits and risks. DRW does not dispute that well-intended clinicians aim to deliver services that are beneficial, not harmful, person-centered, and fair. However, civil commitment proceedings inevitably introduce an element of adversity and pose challenges to the ethical principles of services delivery. Psychiatrists and other treatment professionals understand that the symptoms of mental illness can wax and wane over periods of time, thus the need to evaluate the patient is very time sensitive and must reflect the current state of affairs for that individual. Placing an indefinite hold on someone's liberty is a harsh price when there are other, better ways to handle the situation that are available under current law and can better accommodate the need for the most current assessment of state of the patient's mental health and their due process rights.

DRW thanks you for the opportunity to present our concerns regarding AB228 before this