

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1642/1dn
DAK:cmh:jf

March 26, 1999

To Senator Risser:

This bill is a redraft of 1997 Senate Bill 266, as amended by Senate Amendment 1. I have made several minor technical changes to the bill. Substantively, I have changed s. 51.035 (2), as created in the bill, to delete status as a state agent of DHFS for a psychiatrist who is employed by a county to provide psychiatric services, on a full-time or part-time, including hourly, basis. I have made this deletion for the following reasons:

1. The purpose of this bill, as I understand it, is to provide state agency status to certain psychiatrists who provide psychiatric services, funded under s. 51.42 or s. 51.437, stats., for a county department. Sections 165.25 (6), 893.80, 893.82 (3) and 895.46, stats., provide limitations procedurally on the types of actions that may be brought against a state officer, employe or agent, require that the attorney general provide a defense, require payment of judgments by the state and limit judgments to \$250,000. "State agency status", therefore, would obviate the need for private psychiatrists to purchase liability insurance and would provide an incentive for these psychiatrists to engage in this work. However, ss. 893.80 and 895.46, stats., together provide limitations procedurally on the types of actions that may be brought against a *county* agent or employe, require payment of judgments by the county and limit judgments to \$50,000 (representation by the attorney general is not provided, but, presumably, the county corporation counsel would provide the representation). Therefore, providing state agency status to a *full-time* county employe is redundant to protections already provided that employe.

2. In 1997 Senate Bill 266, however, state agency status was also provided to county employes providing psychiatric services on a *part-time, including hourly*, basis. Here, the question is whether a person who is paid on a part-time or hourly basis is an employe or is, instead, an independent contractor. According to Mr. Charles Hoornstra of the Department of Justice, interpretation of s. 893.80, stats., has been very strict with respect to physicians, to require that they be *employed*; other contractual arrangements do not suffice, because it is difficult to ascertain what is an independent contractor when the general constitutional standard of the "right to direct and control details of work" is applied. (The common law differentiation between an employe and an independent contractor is codified in the definition of "independent contractor" in s. 102.07 (8), stats.) Also, *Kettner v. Wausau Insurance Cos.*, 191 Wis. 2d 724 (Ct. App.

1995), clarifies that an independent contractor is not an agent under s. 893.80, stats., and is not protected by the liability limits (and other provisions) under that section. Thus, a county employe or agent who is a psychiatrist providing services funded under s. 51.42 or 51.437, stats., would receive protections under current law, but an independent contractor would not.

3. Section 51.035 (2) (b), created in 1997 Senate Bill 266, (and renumbered in this bill to be s. 51.035 (2) (a)) provides state agent status to independent contractors. Therefore, I deleted all reference to county employes (regardless of whether they are providing psychiatric services on a full-time or part-time, including hourly, basis), because county employes currently receive protections under s. 893.80, stats.; if a "county employe" who provides services on a part-time basis is ineligible for protection under s. 893.80, stats., because he or she is actually an independent contractor, this bill confers state agency status and its protections for such a person.

If you have any questions about this draft, or if any part of it does not meet your intent, I would be happy to meet with you to discuss your concerns.

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