

**1999 DRAFTING REQUEST**

**Bill**

Received: 01/07/1999

Received By: **kenneda**

Wanted: **As time permits**

Identical to LRB:

For: **Fred Risser (608) 266-1627**

By/Representing: **Leslie (aide)**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact:

Alt. Drafters:

Subject: **Mental Health - miscellaneous  
Courts - immunity liability**

Extra Copies: **RPN, TAY**

**Pre Topic:**

No specific pre topic given

**Topic:**

State agent status for certain psychiatrists who are county employes or provide services under certain county contracts

**Instructions:**

Redraft 97 SB 266 (LRB 97-1152), plus SA 1 (LRBa2104)

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kenneda 03/24/1999	chanaman 03/25/1999		_____			S&L
/1			jfrantze 03/26/1999	_____	lrb_docadmin 03/26/1999	lrb_docadmin 12/17/1999	
				_____	lrb_docadmin 08/25/1999		
				_____	lrb_docadmin 08/25/1999		

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1?	kenneda	CMT 1 3/25	13/ 20/26	16/ 3/26			

FE Sent For:

<END>



SOON - In edit 3/24  
State of Wisconsin  
1999 - 2000 LEGISLATURE

D-NOTE

LRB-1642/1  
...DAK:.....  
cmj

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

1 AN ACT ...; relating to: ???

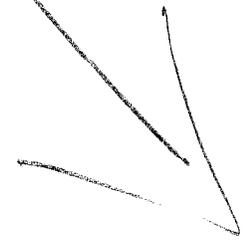
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*Analysis by the Legislative Reference Bureau*

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

2 (END)



# 1997 SENATE BILL 266

July 24, 1997 - Introduced by Senators RISSER, PLACHE, HUELSMAN and GROBSCHMIDT, cosponsored by Representatives DOBYNS, GRONEMUS, BOYLE, BLACK, WASSERMAN, MURAT and TURNER. Referred to Committee on Health, Human Services, Aging, Corrections, Veterans and Military Affairs.

for the provision of those services

refer back

1 AN ACT to amend 895.46 (1) (a); and to create 51.035, 165.25 (6) (d), 655.003 (4),  
2 893.82 (2) (d) 4. and 895.46 (5) (c) of the statutes; relating to: state agent status  
3 for certain psychiatrists who ~~are county employees~~ provide services under  
4 certain county contracts.

publicly funded

### Analysis by the Legislative Reference Bureau

This bill provides that psychiatrists who ~~are county employees or who~~ contract directly with counties and who provide psychiatric services are state agents of the department of health and family services (DHFS) for the purposes of representation by the department of justice in any court actions that arise from their provision of these psychiatric services. The bill also provides that psychiatrists who are employed by or are under contract with private, nonprofit agencies that contract with county departments of community programs or developmental disabilities services are state agents of DHFS under the following conditions:

1. The board of the relevant county department of community programs or developmental disabilities services approves, after determining that certain criteria apply, a joint application of the psychiatrist and the private, nonprofit agency.
2. The department of administration (DOA) approves the application for a period of one year and so notifies the applicants. Prior to its approval, DOA may transmit the joint application to the medical examining board for review.

Amounts that are recoverable by civil suit against these psychiatrists as state agents of DHFS are limited to \$250,000 and judgments against them in these suits that exceed applicable liability insurance are payable by the state.

to provide the psychiatrist's services

**SENATE BILL 266**

*# The bill requires that a psychiatrist who is covered under the bill identify himself or herself as a state agent to each patient receiving the publicly funded services.*

Lastly, the bill prohibits a psychiatrist or county that is covered under the bill from being required to purchase liability insurance for the provision of the psychiatric services that are covered under the bill.

For further information see the **state and local** fiscal estimate, which will be printed as an appendix to this bill.

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

1           SECTION 1. 51.035<sup>X</sup> of the statutes is created to read:

2           **51.035 Psychiatrists as state agents.** (1) In this section:

3           (a) "Medical assistance" has the meaning given under s. 49.43<sup>X</sup> (8).

4           (b) "Medicare" means coverage under Part A or Part B of Title XVIII of the  
5 federal Social Security Act, 42 USC 1395 to 1395ccc.

6           (c) "Private agency" means a private, nonprofit corporation, as defined in s.  
7 ~~181.02 (9)~~ <sup>181.0103 (17)</sup>, which provides mental health services under a contract with a county  
8 department under s. ~~46.21 (2a)~~, 46.23, 51.42 or 51.437. <sup>46.215, 46.22</sup>

9           (d) "Psychiatrist" means a physician, as defined in s. 448.01<sup>✓</sup> (5), who specializes  
10 in psychiatry.

11           (2) All of the following are state agents of the department<sup>✓</sup> for the purposes of  
12 ss. 165.25<sup>X</sup> (6), 893.82<sup>X</sup> (3) and 895.46<sup>X</sup>:

13           (a) A psychiatrist who is employed by a county to provide, on a full-time or  
14 part-time, including hourly, basis, psychiatric services that are funded under s.  
15 51.42 or 51.437, for the provision of those services.

16           a (b) A psychiatrist who contracts with a county to provide, on a full-time or  
17 part-time, including hourly, basis, psychiatric services that are funded under s.  
18 51.42<sup>✓</sup> or 51.437<sup>✓</sup>, for the provision of those services.

## SENATE BILL 266

1 (b) A psychiatrist, for the employment or contracted services specified in subd.  
2 1., if the conditions of subd. 2. are met:

3 1. The psychiatrist provides psychiatric services, on a full-time or part-time,  
4 including hourly, basis, under employment by or under contract with a private,  
5 nonprofit agency that contracts with a county department under s. 51.42 or 51.437  
6 to provide <sup>the</sup> psychiatric services.

7 2. a. The psychiatrist and the private agency jointly submit an application to  
8 the county board appointed under s. 51.42 (4) (a) 1. or 2. or 51.437 (7) (a) 1. or 2. of  
9 the county department with which the private agency contracts and the board  
10 determines, after review, that the primary purpose of the private agency is to provide  
11 mental health services to patients in the public interest; that contracting with the  
12 private agency is a critical part of the mental health plan for the county under s. 51.42  
13 (3) (ar) 5. or of the proposed budget under s. 51.437 (4m) (j); and that a substantial  
14 majority of the mental health care received by a substantial majority of the patients  
15 served by the private agency is funded under s. 46.031 through the county  
16 department or is funded by medical assistance or medicare.

17 b. After a determination, if any, is made under subd. 2. a. that the conditions  
18 specified under subd. 2. a. apply, the psychiatrist and the private agency jointly  
19 submit the application to the department of administration and that department  
20 approves the application. Before approving an application, the department of  
21 administration may send the application to the medical examining board for  
22 evaluation. The medical examining board shall evaluate any application submitted  
23 by the department of administration and return the application to the department  
24 of administration with the board's recommendation regarding approval. The

SENATE BILL 266

SECTION 1

1 department of administration shall notify the psychiatrist and the private agency of  
2 the department's decision to approve or disapprove the application.

3 (3) Approval by the department of administration of a joint application of a  
4 psychiatrist and a private agency submitted under sub. (2) 2. b. is valid for one  
5 year. If a psychiatrist and a private agency wish to renew approval, they shall submit  
6 a joint renewal application to the department of administration. The department of  
7 administration shall provide renewal application forms that are developed by the  
8 department of health and family services and that include questions about the  
9 activities that the psychiatrist has undertaken as an employe of the private agency  
10 in the previous 12 months.

or under contract with

INSERT 4-10

11 SECTION 2. 165.25 (6) (d) of the statutes is created to read:

12 165.25 (6) (d) Psychiatrists under s. 51.035 are covered by this section and shall  
13 be considered agents of the department of health and family services for purposes of  
14 determining which agency head may request the attorney general to appear and  
15 defend them.

16 SECTION 3. 655.003 (4) of the statutes is created to read:

17 655.003 (4) A psychiatrist who provides professional services under the  
18 conditions described in s. 51.035 (2), with respect to those professional services  
19 provided by the psychiatrist for which he or she is covered by s. 165.25 and considered  
20 an agent of the department, as provided in s. 165.25 (6) (d).

21 SECTION 4. 893.82 (2) (d) 4. of the statutes is created to read:

22 893.82 (2) (d) 4. A psychiatrist under s. 51.035.

23 SECTION 5. 895.46 (1) (a) of the statutes is amended to read:

24 895.46 (1) (a) If the defendant in any action or special proceeding is a public  
officer or employe and is proceeded against in an official capacity or is proceeded

proof  
with  
stat.

SENATE BILL 266

1 against as an individual because of acts committed while carrying out duties as an  
 2 officer or employe and the jury or the court finds that the defendant was acting within  
 3 the scope of employment, the judgment as to damages and costs entered against the  
 4 officer or employe in excess of any insurance applicable to the officer or employe shall  
 5 be paid by the state or political subdivision of which the defendant is an officer or  
 6 employe, except that the state shall pay a judgment entered against a psychiatrist  
 7 for the psychiatric services described in s. 51.035 (2) (a) (b) ~~or~~. This paragraph  
 8 may not be construed to require that a psychiatrist or the county of a county  
 9 department under s. 51.42 or 51.437 purchase liability insurance for the psychiatric  
 10 services described in s. 51.035 (2) (a) (b) ~~or~~. Agents of any department of the state  
 11 shall be covered by this section while acting within the scope of their agency.  
 12 Regardless of the results of the litigation the governmental unit, if it does not provide  
 13 legal counsel to the defendant officer or employe, shall pay reasonable attorney fees  
 14 and costs of defending the action, unless it is found by the court or jury that the  
 15 defendant officer or employe did not act within the scope of employment. The duty  
 16 of a governmental unit to provide or pay for the provision of legal representation does  
 17 not apply to the extent that applicable insurance provides that representation. If the  
 18 employing state agency or the attorney general denies that the state officer, employe  
 19 or agent was doing any act growing out of or committed in the course of the discharge  
 20 of his or her duties, the attorney general may appear on behalf of the state to contest  
 21 that issue without waiving the state's sovereign immunity to suit. Failure by the  
 22 officer or employe to give notice to his or her department head of an action or special  
 23 proceeding commenced against the defendant officer or employe as soon as  
 24 reasonably possible is a bar to recovery by the officer or employe from the state or  
 25 political subdivision of reasonable attorney fees and costs of defending the action.

proof  
w/  
state.

**SENATE BILL 266**

**SECTION 5**

1  
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3  
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9

The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employe legal counsel and the offer is refused by the defendant officer or employe. If the officer, employe or agent of the state refuses to cooperate in the defense of the litigation, the officer, employe or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

~~X~~  
**SECTION 6.** 895.46 (5) (c) of the statutes is created to read:

895.46 (5) (c) A psychiatrist under s. 51.035.

(END)

D-NOTE

INSERT 4-10

1997 - 1998 LEGISLATURE

LRBa2104/1

DAK:jlg:km

**SENATE AMENDMENT 1,  
TO 1997 SENATE BILL 266**

March 19, 1998 - Offered by COMMITTEE ON HEALTH, HUMAN SERVICES, AGING,  
CORRECTIONS, VETERANS AND MILITARY AFFAIRS.

At the locations indicated, amend the bill as follows:

1. Page 4, line 10: after that line insert:

(4) A psychiatrist who is a state agent of the department for the provision of services or employment as specified in sub. (2) shall identify himself or herself as a state agent to each patient to whom the psychiatrist provides those services.

(END)

(END OF INSERT)

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1642/?dn

...DAK:.....

cmj

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. Wuusuu 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 1977 Senate Bill 266, (and renumbered in this bill to be 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.

Debora A. Kennedy  
Managing Attorney  
Phone: (608) 266-0137

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1642/1dn  
DAK:cmlh: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:

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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.

Debra A. Kennedy  
Managing Attorney  
Phone: (608) 266-0137

**SUBMITTAL  
FORM**

**LEGISLATIVE REFERENCE BUREAU  
Legal Section Telephone: 266-3561  
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 03/26/1999

To: Senator Risser

Relating to LRB drafting number: LRB-1642

**Topic**

State agent status for certain psychiatrists who are county employes or provide services under certain county contracts

**Subject(s)**

Mental Health - miscellaneous, Courts - immunity liability

1. **JACKET** the draft for introduction Risser

in the **Senate**  or the **Assembly**  (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached \_\_\_\_\_.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction \_\_\_\_\_.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Debora A. Kennedy, Managing Attorney  
Telephone: (608) 266-0137