



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #621

Representation of Adults Subject to Involuntary Civil Commitment, Protective Placement, or Involuntary Administration of Psychotropic Medication (SPD)

Bill Agency

[LFB 2007-09 Budget Summary: Page 456, #3]

CURRENT LAW

The Office of the State Public Defender (SPD) is constitutionally and statutorily required to provide representation to indigent criminal defendants facing a sentence that includes incarceration, certain children involved in proceedings under the Children's and Juvenile Justice Codes (Chapters 48 and 938), indigent persons facing involuntary civil commitment or protective placement, and certain appellants.

The SPD determines indigency based on an analysis of the applicant's income, assets, family size and essential expenses. If a person's assets, less "reasonable and necessary living expenses" (both factors as determined by Wisconsin statutes and administrative rules), are not sufficient to cover the anticipated cost of effective representation when the likely length and complexity of the proceedings are taken into account, the person is determined to be indigent. "Reasonable and necessary living expenses" under the current SPD financial eligibility standard are linked to a 1987 Aid to Families with Dependent Children cost of living table, plus other specified, emergency or essential costs. If an individual does not meet the statutory indigency standard, but is nonetheless determined by a circuit court to have a constitutional right to counsel, the court may appoint an attorney at county, rather than state, expense.

The SPD is required to determine whether a person has some ability to pay the costs of representation. The Public Defender Board is required to establish, by rule, fixed payments for the cost of SPD representation in various types of cases. Known as the prepayment option, an indigent defendant may elect to prepay the amount if a determination has been made that the

person has some ability to pay for his or her representation. If an indigent person elects to pay this fixed amount, the individual cannot be held liable for any additional payment for counsel. For the 2005-07 biennium, the SPD increased these prepayment amounts for SPD clients by 20%. Persons determined to be indigent who receive SPD representation and do not exercise the prepayment option are required to pay for the cost of SPD representation, subject to their ability to pay.

The SPD utilizes client fees to offset the cost of providing private bar counsel to the indigent. In 2005-06, the SPD utilized \$1,404,100 PR in client fees to offset the costs of private bar counsel. It is estimated that there will be \$1,563,800 PR in client fees in 2006-07 that will be available to offset the costs of private bar counsel.

The SPD has trial (280.0 full-time equivalent (FTE) positions) and appellate (27.5 FTE positions) staff attorneys who provide representation to indigent defendants. Private bar attorneys are assigned: (a) overflow cases; and (b) cases where a staff attorney has a conflict of interest that precludes the attorney from providing representation.

GOVERNOR

Provide \$320,500 GPR in 2008-09, to permit the SPD to represent adults subject to involuntary civil commitment, protective placement, or involuntary administration of psychotropic medication, without making a finding of indigency, first effective with case appointments on July 1, 2008.

Elimination of Certain Indigency Evaluations. Modify the current requirement that the SPD have all potential adult clients complete a pre-representation indigency evaluation. Specify that in any situation under Chapter 51 (mental health act) or Chapter 55 (protective service system) of the statutes in which an adult individual has a right to be represented by counsel, the individual would have to be referred as soon as practicable to the SPD, which would have to appoint counsel for the individual without a determination of indigency. [This new requirement would generally not apply to the SPD under Chapter 51 in those instances in which the adult individual knowingly and voluntarily waived the right to counsel.] Further, provide that an adult individual under both statutory chapters would maintain the right to retain private counsel of his or her own choosing at his or her own expense.

Revised Collection Process for Commitment and Protective Placement Clients. Specify that at, or after, the conclusion of a proceeding under Chapter 51 or Chapter 55 in which the SPD provided counsel for an adult individual, the court could inquire as to the individual's ability to reimburse the state for all or part of the cost of representation. If the court determined that the individual was able to make reimbursement for all or part of the cost of representation, the court could order the individual to reimburse the state an amount not to exceed the maximum amount established by the SPD Board, by rule, for the type of case at issue. (The reimbursement amounts set by rule would be based on the average cost, as determined by the SPD Board, for

each applicable type of case under Chapters 51 and 55.) Upon the court's request, require the SPD to conduct a determination of indigency and report the results of the determination to the court.

Any reimbursement ordered by the court would have to be paid to the clerk of courts for the county where the proceedings took place. Require the clerk of courts to transmit reimbursement payments to the county treasurer, who would be required to deposit 25% of the reimbursement payment in the county treasury and transmit the remaining 75% to the Secretary of Administration. Reimbursement payments transmitted to the Secretary of Administration would have to be credited to the SPD's PR-funded private bar and investigator reimbursement appropriation. Specify that by January 31st of each year, the clerk of courts for each county would have to report to the SPD the total amount of court ordered reimbursements under Chapters 51 and 55 in the previous calendar year, and the total amount of such reimbursements paid to the clerk in the previous calendar year.

Quarterly Reports to the Joint Committee on Finance. Modify current law to provide that in the SPD Board's quarterly reports to the Joint Committee on Finance, the Board report on reimbursements received for representation of adult individuals under Chapters 51 and 55 of the statutes.

Effective Date. These provisions would take effect on July 1, 2008.

DISCUSSION POINTS

1. Under Chapter 51 (state alcohol, drug abuse, developmental disabilities and mental health act) an individual may be involuntarily committed for treatment if he or she is: (a) mentally ill, drug dependent or developmentally disabled; (b) a proper subject for treatment; and (c) dangerous. A court may find that an individual is dangerous under Chapter 51 because he or she does any of the following: (a) evidences a substantial probability of physical harm to himself or herself; (b) evidences a substantial probability of physical harm to other individuals; (c) evidences such impaired judgment that there is a substantial probability of physical impairment or injury to himself or herself; (d) due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue; or (e) for an individual with mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives.

2. Prior to a final determination on involuntary civil commitment under Chapter 51 of the statutes, an individual may be taken into custody by law enforcement and detained by a court order of detention if the individual is mentally ill, drug dependent or developmentally disabled and is eligible for commitment under the criteria of the preceding paragraph, based upon specific recent

overt acts, attempts or threats to act, or on a pattern of omissions made by the individual. An individual generally has a right to a hearing to determine probable cause for civil commitment within 72 hours after the individual initially arrives at a detention facility.

3. An individual may be involuntarily committed for control of alcoholism under Chapter 51 if the condition of the person is: (a) such that he or she habitually lacks self-control as to the use of alcoholic beverages, and uses such beverages to the extent that health is substantially impaired or endangered and social or economic functioning is substantially disrupted; and (b) evidenced by a pattern of conduct which is dangerous to the person or to others.

4. Under Chapter 55 (protective service system), an individual may be subject to a court order for (involuntary) protective placement if all of the following standards are met: (a) the individual has a primary need for residential care and custody; (b) the individual has generally been adjudicated incompetent by a circuit court; (c) as a result of developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to himself or herself or others; and (d) the individual has a disability that is permanent or likely to be permanent.

5. Prior to a final determination on protective placement under Chapter 55 of the statutes, if it appears probable that an individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious physical harm to himself or herself or others as a result of developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacities if not immediately placed, the individual may be taken into protective custody and transported to an appropriate medical or protective placement facility. If an individual is subject to such an emergency protective placement, a preliminary hearing must generally be held within 72 hours to establish probable cause to believe the grounds for protective placement.

6. In addition to meeting the above requirements for ordering protective services under Chapter 55, the involuntary administration of psychotropic medication (with the consent of a guardian) may only be ordered if: (a) a physician has prescribed psychotropic medication for the individual; (b) the individual is not competent to refuse psychotropic medication; and (c) the individual has either refused to take the psychotropic medication voluntarily, or attempting to administer psychotropic medication to the individual voluntarily is not feasible or is not in the best interests of the individual.

7. "Not competent to refuse psychotropic medication" means that, for an individual with a developmental disability, or as a result of degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual either: (a) is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment and the alternatives to accepting treatment; or (b) is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her condition in order to make an informed choice as to whether to accept or refuse psychotropic medication. Psychotropic medication is a

prescription drug that is used to treat or manage a psychiatric symptom or challenging behavior.

8. Under current law, the SPD must determine that an adult individual is indigent before providing representation under Chapters 51 and 55 of the statutes. SPD staff indicates that at times the Office may have less than 24 hours to determine indigency and provide representation in an initial probable cause hearing. If the SPD does not provide counsel, a court may nonetheless determine that legal counsel must be provided at county expense. SPD staff indicates that county appointments of counsel are usually made at a higher cost.

9. The SPD indicates that, "Given the condition of applicants, obtaining reliable information for an eligibility evaluation, particularly under short time frames, is very difficult for staff and often traumatic for applicants. Mental illness can limit the ability of applicants to respond to questioning by their attorneys or accurately communicate their assets. Attempting to explain fees and payments to mentally ill clients can make it even more difficult for the attorney to build a working relationship."

10. The SPD further indicates that, "The nature and timing of the proceedings make it unlikely that applicants-even those with financial assets-can retain counsel. A person in a psychiatric ward or nursing home, especially when suffering from a severe mental disorder, lacks the practical ability to hire a lawyer within the brief time available. Furthermore, family members are often supporting the commitment petition, making them unlikely to assist in selecting and retaining a defense attorney. Thus, even patients who theoretically have funds available often are not able to hire an attorney in a commitment case."

11. In 2005-06, the SPD opened 5,198 Chapter 51 civil commitment cases, and 353 Chapter 55 protective placement cases. Based on a six-week sample of caseload completed by the SPD, it is estimated that eliminating the eligibility determination will increase the annual Chapter 51 civil commitment caseload by 1,655 cases annually, and increase the annual Chapter 55 protective placement caseload by 17 cases annually. Based on an average civil commitment cost case of \$190.57, and an average protective placement case cost of \$298.78, the bill provides an additional \$320,500 GPR in 2008-09 in the private bar appropriation, to fund the additional caseload that would be created by eliminating the eligibility determination for Chapter 51 and Chapter 55 cases. This funding would be sufficient to address the fully annualized cost of eliminating eligibility determinations for these types of cases.

12. Under SB 40, however, the SPD would first be permitted to represent adults subject to involuntary civil commitment, protective placement, or involuntary administration of psychotropic medication (without a finding of indigency) for case appointments made on July 1, 2008, or thereafter. As a result, given that an average Chapter 51 case lasts 5.1 months, and that an average Chapter 55 case lasts 10.2 months, the fully annualized funding for the caseload increase associated with Chapter 51 and Chapter 55 cases would not be required in 2008-09. Funding provided under the bill could be reduced by \$138,400 GPR in 2008-09, and still fully fund the increased caseload associated with eliminating Chapter 51 and Chapter 55 eligibility determinations in that year. Full funding of the proposal would occur in the 2009-11 biennium and be based on

experience in 2008-09 and estimated caseload.

13. It is unclear what affect the bill's provisions would have on fees collected from Chapter 51 and Chapter 55 clients to offset the costs of SPD representation. While the SPD is required to try and collect fees from clients under current law who have some ability to pay, under SB 40 it is not known how frequently courts will utilize the collection procedure that could be utilized at the conclusion of a Chapter 51 or Chapter 55 representation. On the other hand, under the provisions of the bill the additional revenue that could be collected from clients who are not eligible for SPD representation under current law is unknown.

14. In summary, the Committee could reduce GPR funding to the SPD's private bar and investigator reimbursement appropriation by \$138,400 in 2008-09, and still permit the SPD to represent Chapter 51 and Chapter 55 clients (without making a finding of indigency) for case appointments made on or after July 1, 2008. It could be argued that this change would reduce county costs by assigning sole responsibility for representing Chapter 51 and Chapter 55 clients to the SPD. This change would arguably also eliminate the need for the mentally ill to navigate the eligibility determination process prior to receiving representation. SPD staff indicates that the eligibility determination process (in some cases) can also interfere with the development of a productive attorney-client relationship.

15. On the other hand, it could be argued that the change proposed in SB 40 would not be in keeping with legislative changes made to the SPD caseload over the last decade. The provisions of 1995 Wisconsin Act 27, in particular, eliminated SPD representation in a series of case types where there is no clear constitutional right to representation. The provisions of the bill would expand SPD representation to include Chapter 51 and Chapter 55 cases that currently do not receive representation because the individual may not meet the SPD's indigency standard for representation.

ALTERNATIVES TO BILL

1. Approve the Governor's recommendation to provide \$320,500 GPR in 2008-09 to the private bar appropriation, to permit the Office of the State Public Defender (SPD) to represent adults subject to involuntary civil commitment, protective placement, or involuntary administration of psychotropic medication, without making a finding of indigency, first effective with case appointments on July 1, 2008. Modify current law appointment provisions under Chapters 51 and 55 of the statutes to reflect this change. Create a court collection process for the partial recovery of costs associated with the representation of Chapter 51 and Chapter 55 clients.

ALT 1	Change to Bill Funding	Change to Base Funding
GPR	\$0	\$320,500

2. Reduce provided GPR funding by \$138,400 in 2008-09, to reflect that the fully annualized cost associated with this change would not be incurred by the SPD until 2009-10.

ALT 2	Change to Bill Funding	Change to Base Funding
GPR	- \$138,400	\$182,100

3. Delete provision.

ALT 3	Change to Bill Funding	Change to Base Funding
GPR	- \$320,500	\$0

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