SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

Senate Bills 431 and 432 (as reported without amendment)
Sponsor: Senator Frederick Dillingham
Committee: Education and Mental Health

Date Completed: 5-8-90

RATIONALE

Under the Mental Health Code, county community mental health programs are required to provide a range of mental health services (such as diagnostic, inpatient\outpatient, and rehabilitation services) for persons located in the county. In addition, the School Code requires a local school district to provide special education programs and services for each handicapped person in the district in accordance with the intermediate school district's (ISD's) special education plan. A district can achieve this by operating its own program or service or contracting with an ISD, among others. Furthermore, the School Code requires a local school district that contracts for provision of a special education program or service to provide transportation for participants in that program or service. To fulfill these responsibilities, a number of community mental health boards and a few school boards contract with private companies in the State for transportation service for special education students and developmentally disabled adults. Reportedly, some private transporters of these special needs clients are experiencing difficulty in obtaining liability insurance, and when such insurance is found, it can be expensive. Some people feel that liability protection should be extended to these private transportation providers who, otherwise, could face going out of business because they could not either obtain or afford insurance. Although governmental agencies, including school districts, and their employees are protected against tort liability by the governmental immunity Act, that Act does not extend to private enterprises that contract with a governmental agency.

CONTENT

Senate Bill 431 would amend the Mental Health Code to provide that the board of a county community mental health program, a private agency that the board contracted with, or an employee of the board or private agency would not be liable for civil damages as a result of acts or omissions by an employee in transporting a person to participate in a county community mental health program or receive a mental health service. The bill specifies that this provision would not provide immunity from civil liability if the acts or omissions amounted to gross negligence or willful and wanton misconduct.

Senate Bill 432 would amend the School Code to provide that a local school district and its employees, or a private organization with which the school district contracted and the private organization's employees, would not be liable for civil damages as a result of acts or omissions that occurred in transporting a handicapped person as an ancillary or related service, or to enable the person to participate in a special education program or service. The bill specifies that it would not apply to an act or omission that amounted to gross negligence or willful or wanton misconduct.

MCL 330. 1247 (S.B. 431)
380.1756 (S.B. 432)

FISCAL IMPACT

Senate Bill 431 would have an indeterminate fiscal impact on State and local government. The bill could enable community mental health boards to avoid an increase in State funding that they may experience under current law if

S.B. 431 & (5-8-90)

they are unable to contract for transportation services due to liability concerns. (Boards pass on costs to the State by the contracting process with the Department of Mental Health.) The costs to local operations for transportation services seem to be lessened by the boards' ability to contract for these services, as opposed to supplying the equipment and personnel to transport clients. Two boards that do operate transportation services budget the services in a range from $168,000 to $250,000 for fiscal year 1989-90.

Senate Bill 432 would have no fiscal impact on the State. There would be indeterminate cost savings to local school districts from not being liable for ordinary negligence. It is not known how much is currently being paid for actions arising out of negligent acts in transporting handicapped persons.

ARGUMENTS

Supporting Argument

There are school districts and community mental health boards across the State that contract with private organizations to provide transportation services for special education students and developmentally disabled adults. Some community mental health boards contract for transportation services to complete the provision of mental health services as part of a client's service plan. Private contractors are experiencing difficulty in obtaining insurance because insurance companies reportedly perceive a higher risk of liability in the transportation of disabled persons. As a result, these companies either are not able to obtain insurance for their operations, or are finding that when coverage is available the cost is prohibitive. It is critical that liability relief, similar to that given to governmental agencies, be afforded to contractual transportation operators, since they provide a service that school districts and community mental health boards otherwise would have to provide. If these companies do not receive liability relief, they could cease operations. As a result, school districts and community mental health boards that currently contract for transportation services would be forced to provide such services, which they are not equipped--either financially or operationally--to do.

Response: It should be noted that most school districts, or ISDs, operate their own special transportation services and only a few districts contract for such services. Where there are contractual arrangements, the service may vary from a private contractor providing daily transportation to special education students in a multi-county area, to a district contracting with a company that uses station wagons as well as buses and vans, to a large city district contracting with taxicab or other private companies to transport disabled students within the city. In addition, if private contractors are concerned about accelerating insurance costs and decreasing availability of insurance, perhaps the issue is one of needed reforms in the regulation of insurance cost structures and coverage provisions, rather than an issue of liability relief.

Opposing Argument

While the bills may be aimed at helping handicapped students and mental health clients by ensuring them the availability of transportation, the bills actually could harm those very individuals by denying them the opportunity to recover for their injuries in the event of an accident.

Opposing Argument

There appears to be a certain amount of confusion about whether the immunity proposed by the bills for private organizations and their employees would be the equivalent of the immunity extended to governmental agencies and their employees under the governmental immunity Act, and about the meaning of the terms "gross negligence" and "willful and wanton misconduct". In regard to the first issue, the governmental immunity Act grants immunity from tort liablity to governmental agencies (such as school districts) engaged in the exercise or discharge of a governmental function (with certain exceptions, such as the negligent operation by an agency employee of a motor vehicle owned by the agency). The Act grants immunity to governmental employees (such as school bus drivers), as well as volunteers and board members, for injury or damage caused by an individual in the course of employment or service if the individual is acting within the scope of his or her authority, the agency is engaged in the exercise or discharge of a governmental function, and the individual's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. "Governmental function"

refers to an activity mandated or authorized by law.

For purposes of the statutory exception to individual immunity, the Act specifically defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". The bills, which would retain liability if an employee's acts or omissions amounted to "gross negligence" or "willful and wanton misconduct", would not define either term. Although "gross negligence" is used in both the statute and the bills, it cannot be assumed that a court would use the statutory definition in interpreting the bills. In fact, in a case involving the recreational land users Act, which also provides for immunity except in cases of gross negligence or willful and wanton misconduct but does not define the terms, the Michigan Supreme Court held that "no actionable claim for gross negligence is made out in the plaintiffs' pleadings because there is no allegation therein of the defendant's subsequent negligence" (Burnett v City of Adrian, 414 Mich 448 (1982)). In other words, a plaintiff can recover under a gross negligence claim only if the plaintiff is negligent first, and the defendant is negligent subsequently. As the concurring opinion in Burnett explained:

> The common-law definitions of gross negligence and wilful and wanton misconduct were set forth by this Court more than 50 years ago in Gibbard v Cursan... The doctrine of gross negligence, developed to mitigate the harsh effects of the rule of contributory negligence extant at the time of Gibbard, allowed a negligent plaintiff to recover for his injuries in certain circumstances. Specifically..., the Gibbard Court rejected the argument that gross negligence refers to degrees of negligence, holding that the concept cannot mean greater negligence, but must be confined to subsequent negligence... [The rule of contributory negligence denied a plaintiff any recovery if he or she was at all negligent, and has been replaced by comparative negligence, which reduces a plaintiff's recovery by his or her degree of fault.]
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> In today's jurisprudence, this notion of subsequent, or gross, negligence has been essentially restated in the form of the last clear chance doctrine.

The last clear chance doctrine, adopted by the Michigan Supreme Court in 1976, defines the circumstances under which a person can recover if he or she is 1) a "helpless plaintiff", who has negligently subjected himself or herself to a risk of harm from the defendant's subsequent negligence, or 2) an "inattentive plaintiff", who could have discovered the danger created by the defendant's negligence in time to avoid harm. Whether gross negligence is referred to as "subsequent negligence" or "the last clear chance doctrine", however, the Court clearly does not assign it the definition contained in the governmental immunity Act.

The term "willful and wanton misconduct" also is potentially confusing. According to the majority opinion in Burnett, "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does. Willful and misconduct is not, as the Gibbard Court observed, a high degree of carelessness."

Because of the lack of clarity and consensus over the meaning of these terms, some have suggested incorporating into the bills a definition of "gross negligence" similar to that contained in the governmental immunity law. Reportedly, that definition was included specifically to avoid the subsequent negligence or last clear chance meaning that has been given to the term by the judiciary.

Opposing Argument

Some people say that the motor vehicle is the most dangerous weapon in our society, and kills more Americans each year that were killed during 10 years in Viet Nam. In view of this alarming statistic, the State should encourage people to drive more--not less--responsibly. Creating immunity from tort liability, however, sends a strong message that people are not going to be held accountable for their driving habits. Furthermore, giving private entities protection from liability that is analagous to governmental immunity would set a poor precedent, and open the door to any number of groups requesting that they be similarly immunized simply because they contract with the government and may be experiencing

difficulty obtaining liability insurance. Once again, the Legislature is being asked to deny injured parties their right to recover, in order to address a situation involving the unavailability or unaffordability of insurance.

Opposing Argument

Under the governmental immunity Act, governmental agencies are liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle that the governmental agency owns (MCL 691.1405). Under the bills, however, persons who used special transportation services provided by private contractors would not be able to sue a private transportation company when an accident occurred that was the result of negligent operation. It appears that Senate Bills 431 and 432 could create a double standard depending upon who the defendant was--a standard that would prohibit disabled persons from suing for negligent operation of a vehicle operated under contract with a school district, but would allow persons to sue in situations involving the negligent operation of a vehicle owned by the school district. Furthermore, while the bills would create a double standard based on who the defendant was, they would not distinguish between classes of plaintiffs, but would preclude all injured parties--handicapped or not--from suing, if an accident were caused by a private entity under contract to a school district or mental health board. Finally, it is not clear what impact the bills would have on the no-fault automobile insurance system, in an accident involving a private vehicle transporting handicappers and a private automobile.

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