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Initial Report on 2013 Act 203,

Establishing the Milwaukee County Mental Health Board

This report includes information and Opinions of this Office on initial questions and issues that have arisen from 2013 Wisconsin Act 203, which created the Milwaukee County Mental Health Board (“MHB”). The Act made a number of substantial changes in the way mental health services are governed, administered and funded in Milwaukee County.

Neither the list of issues addressed nor the analysis provided is intended to be exhaustive. This report is intended as a practical guide for officials, administrators and employees during the early stages of the transition to MHB governance. Some of the information in this report addresses specific questions that have been posed to this Office. As additional questions arise, they can be addressed in detail by this Office or by others.¹

At this early stage, there are no court rulings, administrative decisions or other precedents to guide interpretation of the new statutes. The language of the Act is clear in most places but potentially ambiguous or contradictory in others. Some of the observations in this report are sure to change over time. Unions or others are likely to raise legal challenges that could affect interpretations. And MHB may have differing interpretations once seated.

¹ MHB appointments and related matters have been addressed elsewhere. In summary, 9 of MHB’s initial 11 members are to be appointed by the Governor by June 9, 2014, based on suggestions from the County Executive and the County Board, with two *ex officio* members. MHB will be attached to state DHS until January 1, 2015, when it becomes a County entity.

In the meantime, mental health services – as a matter both of statutory directive and moral obligation – must be provided with “no interruption.” Wis. Stat. § 51.41(12)(a). This report is intended to assist in doing so.

I. Background

The Act was passed by both houses of the Legislature in Spring 2014. It was signed by Governor Walker on April 8 and published on April 9, 2014. It became effective April 10, 2014.

The Act contains 52 sections that amend dozens of state statutes, primarily in chapters 15, 46, and 51. Some of the provisions are automatically repealed as of January 1, 2015, and replaced by other provisions of the Act. Section 53 of the Act contains non-statutory provisions that aid in interpretation, set dates, etc.

The text can be found at <https://docs.legis.wisconsin.gov/2013/related/acts/203>

II. As of April 10, 2014, mental health policy and function lies with MHB; the County Board has no jurisdiction over mental health.

The Act removes all mental health jurisdiction from the County Board; mental health in Milwaukee County is now under the jurisdiction of the Mental Health Board. This is stated numerous times in the Act’s statutory changes:

- MHB “shall adopt the policies ... regarding mental health and mental health institutions, programs, and services” in Milwaukee County. § 46.21(2)(a).
- MHB shall “[m]ake the final determination on mental health policy in Milwaukee County.” § 51.41(1s)(c).
- MHB shall “[r]eplace the Milwaukee County board of supervisors in all mental health functions that are typically performed by a county board of supervisors.” § 51.41(1s)(d).
- “The county board of supervisors may not form policies regarding mental health or mental health institutions, programs or services.” § 46.21(2)(a).
- “The Milwaukee County board of supervisors has no jurisdiction over any mental health policy, functions, programs or services.” § 51.41(5)(a).
- “The Milwaukee County board of supervisors may not create new mental health functions, programs, or services that are under the jurisdiction of the board of supervisors.” § 51.41.(5)(a).

- “The Milwaukee County board has no jurisdiction and may not take any actions, including under s. 59.52(6) and (31), 66.0301, and 66.0607(2), related to mental health functions, programs and services.” § 59.53(25).²

The County Board retains responsibility for the developmentally disabled, except where explicitly delegated to MHB. § 51.41(1)(b).

Because the Act took effect and removed County Board jurisdiction April 10, 2014, but the MHB is not likely to be seated until about July 1, 2014, there is a gap in policy governance over BHD.

BHD, under the control of the County Executive, will continue to operate its day-to-day operations in the interim (which were outside County Board purview in any event, *see* § 59.794(3)(a)(“the Board may not exercise day-to-day control of any county department or subunit of a department. Such control may be exercised only by the county executive as described in s. 59.17”)). Governance delegated to MHB over broader issues will be assumed by MHB when it convenes.

III. MHB jurisdiction applies to two County operational areas: Behavioral Health Division and Community Programs/Services

MHB has jurisdiction over the “functions, programs, and services that Milwaukee County included in its 2014 budget under the behavioral health division unit 6300 and under the behavioral health community services branch of unit 8700.” 2013 Act 203 §53(3) (non-statutory provisions).

BHD (6300) includes:

- Management and support services
- Adult Crisis Services
- Inpatient Services (Adult & Children)
- Inpatient (Rehab Central)
- Inpatient (Hilltop)

The 2014 Adopted Budget has \$78.4 million in expenditures, a tax levy of \$47.2 million, revenues of \$31.2 million, and 525 FTE.

Behavioral Health Community Services Branch (8700) includes:

- Adult Day Treatment
- AODA (detox, outpatient, medication assisted treatment)
- Family Intervention Support Services
- CATC Wraparound and non-court-ordered Wraparound
- Mobile Urgent Treatment

² As to the statutes referenced in § 59.53(25), § 59.52(6) deals with acquisition of property, § 59.52(31) deals with contract review and approvals post-Act 14, § 66.0301 deals with intergovernmental agreements, and § 66.067(2) deals with disbursements from the treasury.

The 2014 Budget has \$101.4 million expenditures, a tax levy of \$10.3 million, revenues of \$91.1 million, and 100 FTE.

Totals for the two units as shown in the adopted 2014 budget:

- **\$179.8 million expenditures**
- **\$57.5 million tax levy**
- **\$122.3 million revenues**
- **625 FTE, including 753 individuals**

Until January 1, 2015, with the approval of the state DHS Secretary, MHB may transfer to itself jurisdiction over any other Milwaukee County function, service, or program that pertains to mental health or is highly integrated with mental health services and that is not already under its jurisdiction. § 51.41(5)(b). Starting January 1, 2015, such new jurisdiction may be claimed by MHB with the concurrence of the County Board. § 51.41(5)(b).

IV. MHB has substantial duties and powers

MHB shall “oversee the provision of mental health programs and services in Milwaukee County,” budget and allocate monies for them, and attempt to achieve cost savings. § 51.41(1s). MHB must commit to certain treatment concepts, such as community-based services and early intervention. *Id.*

MHB “has the primary responsibility for the well-being, treatment and care of the mentally ill, alcoholic, and other drug dependent citizens residing within Milwaukee County, including emergency services they need. § 51.42(1)(b).

MHB (rather than County Board) is now responsible for an annual cash reserve contribution of 2% of original cost or appraised value of buildings of “existing mental health infirmary structures and equipment.” § 46.18(13).

MHB is to meet six times a year and may also meet at the call of its chair or a majority of its members. § 51.41(3). MHB must hold an annual public hearing. § 51.41(3).

As a unit of local government, *see* § 19.42(7w)(e), MHB is subject to public records and open meetings laws.

V. Directors, appointments, duties.

The County Executive appoints the county DHS director as Community Programs director. § 51.42(6m). “Community Programs” in this context is broader than budget unit 8700 and includes essentially all of BHD (unit 6300) as well.

The County Executive nominates the BHD administrator, and sets the salary, benefits and job duties. § 54.41(9). *But see* § 46.21(3) (MHB determines the mental

health administrative and executive powers to be placed under the jurisdiction of the BHD administrator). The nomination is subject to MHB confirmation. *Id.*

The Executive also appoints, subject to MHB confirmation, a transition liaison to serve up to 12 months. § 54.41(11). The County Board cannot hire or remove the transition liaison or change salary or duties. *Id.*

The County DHS director, in his or her role as Community Programs director, has substantial oversight over federally or state funded inpatient and outpatient care and treatment, residential facilities, partial hospitalization, emergency care and supportive transitional services. *See* § 51.42(ar)4.

MHB may also (but is not required to) delegate mental health functions to the county DHS director. § 46.21(3).³

VI. Mental health personnel now are now under the control of MHB, the County Executive and mental health administrators, and are not governed by general County ordinance.

Summary: Either specifically or as part of the overall authority and structure of Act 203, control over personnel who work in MHB programs is exercised by MHB or by mental health administrators including the county DHS director, the BHD administrator and the County Executive or their delegates. This includes setting salaries and work conditions. The lone collective bargaining agreement, with the nurses' union, continues in force until it expires at the end of 2014. Under Act 10, it deals only with wages. Any replacement contract will go to MHB, not the County Board, for approval.

General County ordinances such as “status quo,” minimum wage provisions, and wage and salary scales will not apply to mental health employees unless MHB or Mental Health Administrators choose to adopt them or to apply them in the interim.

The Civil Service Commission, rather than the Commission's Personnel Review Board, will hear appeals of terminations and disciplines directly.

A. Wages, working conditions

The Community Programs director (DHS director) is required by statute to “Establish salaries and personnel policies of the programs of the county department of community programs,” subject only to County Executive and MHB approval. § 51.42(6m)(i).

This appears to cover most mental health employees. Any remaining employees would be covered by § 46.19(4), which specifies that “the salaries of any visiting

³ Much of the statutory language in Ch. 46, dealing with county hospitals and other institutions, lay dormant in Milwaukee County, apparently for decades. Nonetheless, Act 203 amended many Ch. 46 provisions, stating that MHB shall now perform such functions as naming “trustees” who shall name a “superintendent” for an “institution” that, at least under a plain reading of the statute, includes the BHD residential, acute and emergency treatment units. *See* §§ 4.18(1), 46.19, 51.08. On the one hand, this could be seen a source of additional authority for MHB and the mental health administrators. On the other hand, this assumes meaning for language that has been ignored for decades.

physician and necessary additional officers and employees whose duties are related to mental health shall be fixed by the county executive.”⁴

Given the definitions included in § 53(3) of Act 203 (non-statutory provisions), these personnel provisions apply to employees in the 6300 and 8700 budget units, not to employees elsewhere in the County who may be peripherally related to mental health, e.g., an employee in the Comptroller’s office who handles mental health accounts.

As noted, the County Board “has no jurisdiction and may not take any actions ... related to mental health functions, programs and services.” § 59.53(25). In addition, the mental health budget is now under the control of MHB and the County Executive, with no control or approval of the County Board. *See* Sec. VII, *below*. In the face of these statutory directives, the County Board has no means to impose the provisions of general personnel ordinances on mental health employees, including the numerous Ch. 17 ordinances that concern matters ranging from position classification and advancement to salary structures and benefits. Likewise, no jurisdiction exists for the County Board to apply the “status quo” ordinances in sections 17.015 to 17.018 to mental health workers, nor to apply the minimum wage ordinances in Ch. 111.

Admittedly, questions here remain under study, for example application of existing County benefit and pension programs to mental health workers absent any direction to the contrary by MHB. Additional information on labor relations issues also could be required if the courts modify the implementation of Act 10.

B. No change was made in the indemnification requirements of § 895.46

§ 895.46 provides that a judgment entered against a public official or government employee because of acts committed while acting within the scope of his or her employment must be paid by the official’s or employee’s employer, i.e., Milwaukee County. This provision was not amended by Act 203 to account for MHB. Thus any such judgments will remain a general obligation of the County, as now.

C. Mental health employees remain subject to the Civil Service System, administered for MHB by the County Human Resources department.

General employment provisions found in the state civil service and public employee statutes will continue to apply to MHB and the mental health employees. *See*, e.g., § 46.19(3), applying the civil service system explicitly to employees who are “remove[d]” from a BHD or other institution; *see also* § 63.03(1), establishing civil service for “all office and positions in the public service in the county;” *see also generally* §§ 63.01-63.17, Stats., establishing Civil Service Commission for Milwaukee County.

⁴ Some potential ambiguities can be identified. For example, §§ 59.60(10) and 63.11 of the statutes provide general position-creation and salary setting powers to the County Board under its “organizational” and civil service powers. However, under standard rules of statutory construction, the newer, specific MHB provisions most likely would be interpreted by a court as trumping those older, general provisions. And the BHD director is authorized to “appoint” necessary employees, signifying also the ability to appoint employees to new positions.

The civil service procedures require the appointing authority to fill vacancies through an eligible list process (§§ 63.05, 63.08) and observe temporary appointment limits (§ 63.07), as assisted by the county personnel director. Given the County Board's lack of jurisdiction over mental health, § 51.45(5)(a), and MHB's authority to replace the County Board in all mental health functions, § 51.41(1s)(d), and MHB's budget authority, *see below*, MHB becomes the appointing authority.

D. Appeals of terminations, demotions and appealable suspensions will be heard by the Civil Service Commission, not the Personnel Review Board.

The County Board created the Personnel Review Board in 1978 to assist the Civil Service Commission by hearing civil service appeals. The Board relied on an interpretation of home rule and similar powers contained in § 59.03 (originally enacted as § 59.025) and under the powers granted to the County Board in § 59.15(2)(a) "as to any ... commission, position or employee in county service...." *See* MCO 33.01, invoking provisions of Ch. 118, Laws of 1973. However, Act 203 expressly precludes County Board jurisdiction over any mental health function, § 51.45(5)(a), and expressly grants MHB the authority to replace the County Board in all mental health functions, § 51.41(1s)(d). The County Board's creation of PRB to hear employment appeals no longer applies to mental health workers in budget units 6300 and 8700.

Instead, appeals will be heard by the Civil Service Commission under the procedures set out in § 63.10, Stats. These will include appeals of: demotion, discharge, suspensions of more than 10 days, or more than two suspensions of any length within 6 months. § 63.10(a). Neither the appointing authority nor the employee has a right to counsel, although the commission has the discretion to allow counsel.

An administrative appeal process can provide a grievance procedure consistent with § 66.0509(1m) for other matters.

The Civil Service Commission has five members. It appears nothing in the statutes technically would prevent the commission from deciding to meet in panels of three (still a quorum) to hear appeals, if that proved an expedient way to hear more appeals. However, only a unanimous vote of a panel of three (majority of the commission) could grant an employee's appeal, raising certain due process issues.

As to pending appeals arising from incidents on April 10 or later that have not been heard by the Civil Service Commission within the 21-day statutory limit, § 63.10(2), it may be that jurisdiction to challenge those appeals has been lost.

E. Mental health workers could unionize.

Mental health workers would have the ability to form and certify a union to exercise the limited collective bargaining powers available to public employees under Act 10, mainly wage negotiation. Negotiations would be conducted with the Executive Office. § 59.17(2)b.1. As a mental health contract, the collective bargaining agreement would be approved by MHB, not by the County Board. Funds required for higher salaries under a collective bargaining agreement would need to be found by MHB within the mental health budget.

VII. The Milwaukee County mental health budget is set by the Executive and MHB, with the budgeted tax revenue levied by the County Board. § 51.41(4).

A. Budget process

1. MHB proposes the total mental health budget, the proposed tax levy and the community aids amount. The proposed levy must be \$53 million to \$65 million, unless an allotment is added for new programs. § 51.41(4)(b).

2. The Executive may include in his/her proposed County budget a different levy amount, but still from \$53 million to \$65 million. *Id.* It is unclear how MHB would make its budget if the Executive reduced MHB's requested levy.

3. The County Board "shall incorporate into the budget for Milwaukee County" the tax levy amount proposed by the County Executive and the mental health community aids amount determined based on previous years, along with the overall mental health budget amount first proposed by MHB. *Id.*

4. MHB, the County Board and the Executive may jointly agree to a levy greater than \$65 million or less than \$53 million. Otherwise the levy proposed by the Executive shall be adopted.

5. The mental health levy becomes part of the overall county levy that is subject to the state-imposed levy rate limits of § 59.605(2).

The mental health levy now resembles the levy on County residents for non-elected boards including MATC, MMSD, the Wisconsin Center and SEWRPC, although those levies are not subject to the § 59.605(2) levy limit.

B. Deficits, funds

There is no provision for the County to make good a deficit if MHB falls short. MHB will need to make its own arrangements. This could include seeking a fund transfer from other County entities, which would require approval by two-thirds of the County Board and the Executive. MHB could also possibly carry a small deficit into its following year's budget, although details need to be examined further. The Comptroller has stated he may be statutorily prevented from releasing disbursements for MHB obligations if deficits are too high too early in the year.⁵

MHB is to use surpluses to finance a reserve of up to \$10 million under § 51.41(4)(d).

MHB (rather than County Board) is now responsible for an annual cash reserve contribution of 2% of original cost or appraised value of buildings of "existing mental health infirmary structures and equipment." § 46.18(13).

In 2014 only, the County Board is required to provide funds for MHB's board expenses. § 51.41(6) ("payment of expenses of the [MHB] and for the performance of the audit and the completion of the report" required by Act § 53(4).)

⁵ Statutory obligations imposed on the Comptroller are complex and, as they may relate to MHB, are beyond the scope of this report.

C. Bonding

MHB does not have any direct bonding authority, and, from a lender's perspective may not have any guaranteed future source from which to repay bonds other than its annual operating levy. Capital projects could be paid from current operating revenues. Only if the County Board offered to make its authority available could MHB projects be bonded through the County.

D. MHB determines the "manner" of mental health disbursements.

Under § 46.21(6), "Disbursements shall be made in the manner that the ... Milwaukee County mental health Board... adopts." The methods of disbursements adopted by MHB must be "consistent with sound accounting and auditing procedure and with applicable federal statutes and regulations, state statutes and rules and requirements of the county auditor and county department of administration," but need not necessarily be controlled by those entities. § 46.21(6).

MHB may place "administrative and executive powers and duties of managing, operating, maintaining and improving institutions and departments," including "functions related to the central service departments," under the jurisdiction of other county entities. § 46.21(3r).

This allows but does not require MHB to use other county services or departments if desired (facilities, IMSD, HR, financial and purchasing services, comptroller, etc.). While MHB can seek services from County departments, the intent of the legislation should be seen as preventing MHB from requiring County departments to make changes in operations at MHB's request. A provision to that effect was introduced but then eliminated by amendment. See Sen. Am. 1 to Sen. Sub. Am. 1, § 15.

County departments will cross-charge MHB for services, as they do now. MHB is not required to use these County "vendors" (unless there are statutory requirements, such as using the Comptroller for certain funds or HR for civil service processing). MHB could seek outside services if it felt cross-charges were too high. There do not appear to be limitations on MHB's ability to outsource services or personnel.

MHB's budget and spending authority extends to creating or eliminating positions as it sees fit, consistent with civil service rules.

Since MHB has control over mental health issues, MHB would be empowered to receive additional funds through grants, etc., that could be applied to expenditures over which MHB has control.

"The County Board may not sell the county mental health complex ... without approval of the Milwaukee County mental health board." § 51.08.

VIII. MHB has the approval authority for mental health contracts and disbursements in Milwaukee County. § 51.41(10).

Contracts of more than \$100,000 related to mental health to which Milwaukee County is a party take effect only if approved by MHB or if MHB does not vote to reject the contract within 28 days after it is signed and presented. § 51.41(10). The county executive is to countersign mental health contracts. *Id.*

Because these are, by statutory definition, “Contracts ... to which Milwaukee County is a party,” § 51.41.(10), comptroller and corporation counsel signatures are statutorily required. See § 59.42(2)(b); 59.255(2)(e).

The County Board is specifically barred from considering mental health contracts. “The county board of supervisors may not exercise approval or disapproval power over any contract relating to mental health or mental health institutions, programs, or services.” § 46.21(2)(j). Moreover, Milwaukee County cannot use central its central purchasing department for “matters that are related to mental health.” § 46.21(2)(j). The Milwaukee County Board may not take any mental health-related actions under the general contract review provisions of § 59.52(31) or the intergovernmental agreements provisions of § 66.0301. See § 59.53(25).

Because the County Board has no authority over mental health contracts, the bid, RFP, purchasing and appeal procedures found in MCO Chs. 32, 44, 56 and 110 will not apply to mental health contracts.

MHB approves the annual state DHS contract. The state submits the contract to MHB, and MHB “shall approve the contract before January 1 of the year in which it takes effect unless the [state] department grants an extension.” § 46.031(2g)(a). MHB “may appropriate funds not used to match state funds under ss. 46.495(1)(d) and 51.423.” § 46.031(2g)(b).

The Community Programs director, with the approval of MHB, provides or contracts for the Community Programs services relating to mental health. § 51.42(6m)(c).

IX. Reporting.

The state is to perform an audit by December 1, 2014, that includes recommendations for the state assuming oversight responsibility for emergency detention services and the psychiatric hospital of the Milwaukee County Mental Health Complex, developing a plan for closing the Milwaukee County Mental Health Complex, and developing a plan for state oversight of a regional facility for institutional, inpatient, crisis and behavioral health services, among other things. Act 203 § 53(4).

MHB reports annually by March 1 to the State, the Executive, the County Board and the public on its programs, improvements and efficiencies. § 51.48(8)(a).

By March 1, 2016, MHB is to report to the state, the Executive and the County Board on alternate funding sources for mental health services and programs. § 51.41.(8)(b).

The county DHS and BHD directors report annually on matters of mental health to MHB. § 46.21(6).

The County Board may request informational reports on mental health matters from the DHS director or the County Executive. § 59.794(3)(b).

Respectfully submitted,

A handwritten signature in blue ink that reads "Paul Bargren". The signature is written in a cursive style with a long, sweeping tail on the letter "g".

Paul Bargren
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