

ESSB 5048 - H AMD TO H AMD (H-2540.1/17) **346**

By Representative Muri

NOT ADOPTED 03/30/2017

1 On page 113, after line 3, insert the following:

2 "(33) During the 2017-19 fiscal biennium, a disciplining authority
3 identified in RCW 18.130.040 may not take adverse licensing action
4 against a health care professional based solely on the standards
5 articulated in the state supreme court's 2016 ruling in *Volk v.*
6 *DeMeerleer*, unless the disciplining authority determines that the
7 professional failed to provide a warning when there was an actual
8 threat of physical violence that posed a serious or imminent threat to
9 the health or safety of a reasonably identifiable person or persons."

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11 On page 251, after line 9, insert the following:

12 "NEW SECTION. **Sec. 756. FOR THE DEPARTMENT OF ENTERPRISE**
13 **SERVICES OFFICE OF RISK MANAGEMENT--VOLK LIABILITY AND INDEMNIFICATION**
14 General Fund--State Appropriation (FY 2018) \$5,00,000
15 General Fund--State Appropriation (FY 2019) \$5,00,000
16 TOTAL APPROPRIATION \$10,000,000

17 (1) The legislature finds that there is an important state
18 interest in promoting provision of behavioral health care services in
19 a variety of practice settings. The legislature further finds that
20 the 2016 decision of the state supreme court in *Volk v. DeMeerleer*
21 will impair access to these services due to broader tort liability for
22 behavioral health care professionals who provide care in an outpatient
23 setting, the consequent impact on these professionals' ability to
24 secure insurance, and the resulting increased costs that will be borne
25 by consumers and taxpayers. To mitigate these effects on access to
26 behavioral health care, the legislature establishes the behavioral
27 health care professionals indemnity pool. In addition, *Volk* may

1 create new tort liability for the state, and ultimately the taxpayers,
2 through the state's employment of, contracts with, or licensure of,
3 behavioral health care professionals. This requires the legislature
4 to account for these risks in the state's self-insurance liability
5 program.

6 (2) Of the amounts provided in this section, \$4,500,000 of the
7 general fund--state appropriation for fiscal year 2018 and \$4,500,000
8 of the general fund--state appropriation for fiscal year 2019 are
9 provided solely for expenditure into the behavioral health care
10 professionals indemnity pool account for purposes of subsection (3) of
11 this section.

12 (3) (a) The behavioral health care professionals indemnity pool
13 account is created in the custody of the state treasurer. Only the
14 director of the office of risk management of the department of
15 enterprise services or the director's designee may authorize
16 expenditures from the account. An appropriation is not required for
17 expenditures.

18 (b) If a final judgment is entered against a behavioral health
19 care professional, and if the director determines that all or a
20 portion of the judgment is based on the standards established in *Volk*
21 for a special relationship and failure to warn foreseeable victims in
22 an outpatient setting, then the director may authorize expenditures
23 from the behavioral health care professionals indemnity account to
24 wholly or partially indemnify the professional. If the director
25 determines that the judgment is partially based on *Volk* and partially
26 on other legal bases, then the director may provide partial
27 indemnification in proportion to the portion of the judgment that the
28 director determines is attributable to *Volk* liability. However, the
29 director may not provide indemnification if the director determines
30 that the judgment is based on the behavioral health professional's
31 failure to warn when there was an actual threat of physical violence
32 that posed a serious or imminent threat to the health or safety of a
33 reasonably identifiable person or persons.

34

1 (4) Of the amounts provided in this section, \$500,000 of the
2 general fund--state appropriation for fiscal year 2018 and \$500,000 of
3 the general fund--state appropriation are provided solely for
4 expenditure into the state self-insurance liability account. This
5 funding is provided to account for future state liability under the
6 *Volk* standard for behavioral health care professionals employed,
7 contracted, or licensed by the state.

8 (5) For purposes of this section, "behavioral health care
9 professional" means:

10 (a) An adviser or counselor certified under chapter 18.19 RCW;

11 (b) A chemical dependency professional licensed under chapter
12 18.205 RCW;

13 (c) A marriage and family therapist licensed under chapter 18.225
14 RCW;

15 (d) A mental health counselor licensed under chapter 18.225 RCW;

16 (e) A physician licensed under chapter 18.71 RCW who is board-
17 certified in psychiatry;

18 (f) An osteopathic physician licensed under chapter 18.57 RCW who
19 is board-certified in psychiatry;

20 (g) An advanced registered nurse practitioner licensed under
21 chapter 18.79 RCW who is board certified in advanced practice
22 psychiatric and mental health nursing;

23 (h) An physician assistant licensed under chapter 18.71A RCW
24 working with a supervising psychiatrist;

25 (i) An osteopathic physician assistant licensed under chapter
26 18.57A RCW working with a supervising psychiatrist;

27 (j) A psychologist licensed under chapter 18.83 RCW;

28 (k) An advanced social worker or independent clinical social
29 worker licensed under chapter 18.225 RCW; and

30 (l) A social worker associate--advanced or social worker associate-
31 independent clinical licensed under chapter 18.225 RCW."

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33 Renumber remaining sections consecutively and correct internal
34 references accordingly.

1 Correct the title.

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EFFECT: Appropriations and provisos are added related to the 2016 ruling of the state Supreme Court in *Volk v. DeMeerleer*. *Volk* held that mental health professionals who have a special relationship with a patient in an outpatient setting have a duty to act consistently with the standards of the mental health profession to protect the foreseeable victims of the patient.

Department of Health: During the 2017-19 fiscal biennium, health professions disciplinary authorities may not take adverse action against a health professional solely for failure to warn based on the *Volk* standard. However, this restriction does not apply if the professional failed to provide a warning when there was an actual threat of physical violence that posed a serious or imminent threat to the health or safety of a reasonably identifiable person or persons.

Special Appropriations

- **Findings.** Legislative findings are made regarding the *Volk* decision and its effect on access to behavioral health care.
- **Behavioral Health Care Professionals Indemnity Account (Indemnity Account).** \$9 million GFS is appropriated into the new non-appropriated Indemnity Account. The Director of the Office of Risk Management within the state Department of Enterprise Services may make expenditures from the Indemnity Account to wholly or partially indemnify behavioral health professionals for judgments arising from liability under the *Volk* standard. However, the Director may not provide indemnification from the Indemnity Account if the professional failed to provide a warning when there was an actual threat of physical violence that posed a serious or imminent threat to the health or safety of a reasonably identifiable person or persons.

Self-Insurance Liability Account (SILA). \$1 million is appropriated into the SILA, which is the non-appropriated account that the Office of Risk Management uses to pay tort claims against the state. The legislature declares that the funding is provided to address future state tort liability arising from the *Volk* ruling.

FISCAL IMPACT:

Increases General Fund - State by \$10,000,000.

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