

LEGAL SERVICES

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MEMORANDUM

March 28, 2017

SUBJECT: Disability designation (SCS HB 16(STA);
Work Order No. 30-LS0194\D)

TO: Representative Steve Thompson
Attn: Lynette Bergh

FROM: Hilary V. Martin 
Legislative Counsel

You have asked two questions related to SCS HB 16(STA).

1. How can you be assured that it is a voluntary action to choose the disabled designation on the identification card or driver's license by the person who is disabled, particularly if the person is under guardianship or something similar?

This bill allows for a voluntary designation of a disability on an identification card or a driver's license. This means that no one is required to have the designation, and the designation would have to affirmatively be chosen or requested.

Under AS 13.26.201:

Guardianship for an incapacitated person shall be used only as is necessary to promote and protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person, and shall be ordered only to the extent necessitated by the person's actual mental and physical limitations. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.

If a court finds that a person is incapacitated, the court has to determine the extent of the incapacity and determine whether a partial or full guardianship, or an alternative to guardianship will meet the needs of the person.¹

¹ AS 13.26.251.

If a person has been determined to be incapacitated and has a guardian appointed, the person has been determined by a court to be incapable of making certain decisions. By law, the guardian is the person authorized to make those decisions. Because it is a voluntary designation, the guardian would make the choice regarding the designation.

It is possible to write an exception to the guardianship statutes regarding this situation, but a guardianship is not the only situation where a person can be determined incapable of making certain decisions. However, you should consider what should be done in a situation where the disabled person is unable to understand and make a choice regarding the disability designation.

2. Could this bill result in increased liability to the state if a person alleges unfair treatment because of a disability?²

Having a disability designation on a driver's license or identification card would not result in increased liability based on discrimination. It is illegal in the state to discriminate against someone based on a physical or mental disability.³ The disability designation may be used as evidence that a person knew of a disability in a case involving discriminatory treatment as any other type of evidence of a person's intent.

SCSHB 16(STA) requires the Police Standards Council (Council) to train peace officers in recognizing people with disabilities, appropriate interactions with persons with disabilities, to make resources available to persons with disabilities and to those interacting with persons with disabilities, and the requirements of Title II of the Americans with Disabilities Act. The SCS also allows a person with a disability to voluntarily designate on an identification card or driver's license that the person has a disability.

AS 09.50.250 sets out the types of actions that may be brought against the state. Specifically, the statute limits the types of claims that can be brought, and prevents claims if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state exercising due care in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of, or

² Please be aware that any litigation based on actions of peace officers will be highly fact specific and it is impossible to predict how a court might rule on a specific case.

³ AS 18.80.200.

the failure to impose or establish, a quarantine or isolation, or by other actions, by the state or its agents, officers, or employees under AS 18.15.355 - 18.15.395, except for damages caused by negligent medical treatment provided under AS 18.15.355 - 18.15.395 by a state employee, or except that, if a state employee quarantines or isolates a person with gross negligence or in intentional violation of AS 18.15.385, the state shall pay to the person who was quarantined or isolated a penalty of \$500 for each day of the improper quarantine;

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(4) arises out of the use of an ignition interlock device certified under AS 33.05.020(c); or

(5) arises out of injury, illness, or death of a seaman that occurs or manifests itself during or in the course of, or arises out of, employment with the state; AS 23.30 provides the exclusive remedy for such a claim, and no action may be brought against the state, its vessels, or its employees under the Jones Act (46 U.S.C. 30104 - 30105), in admiralty, or under the general maritime law.

A number of claims would be barred under this language for acts or omissions by peace officers.⁴ The key consideration is if a peace officer exercised due care in the execution of the peace officer's duties and whether there is a duty to act. In analyzing whether the officer exercised due care, a court will likely look at and analyze the required training under this bill and whether the peace officer's acts were consistent with the training. If the officer failed to follow the training in a manner that causes damages or injury, a court could find that the officer did not exercise due care, or acted negligently, and the state could be liable for that peace officer's actions.

Whether the state or a peace officer owes a duty to a person that could give rise to liability is a highly fact-specific finding. In *City of Kotzebue v. McLean*, for example, the Alaska Supreme Court found that the City owed a duty to a victim who was injured after the police department ignored a call regarding a life-threatening situation and did not respond in a timely manner, leading to injury to the victim.⁵ The court stated that when analyzing whether a duty of care exists under particular circumstances, the following factors apply:

⁴ You should be aware that while state troopers are state employees, municipal police officers are municipal employees and their actions would not give rise to a claim of liability against the state. Municipal immunity is laid out in AS 09.65.070.

⁵ 702 P.2d 1309, 1314 - 1315 (Alaska 1985).

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.^[6]

While the criteria for whether the state would be immune from suit if HB 16 is enacted is not changed by this bill, the factors that a court will consider in a case to determine if a peace officer exercised due care and if the state owed a duty to a person injured would include whether a peace officer acted in line with the disability training the officer received.

If I may be of further assistance, please advise.

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⁶ *Id.* at 1314.