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MEMORANDUM

March 5, 2021

SUBJECT: Legality of EO 119 (Work Order No. 32-GS1695\A)

TO: Representative Tiffany Zulkosky
Attn: Logan Basner

FROM: Andrew Dunmire 
Legislative Counsel

You asked for a legal memo examining the legality of the substance and timing of Executive Order 119 (EO 119), an executive order that would split the Department of Health and Social Services (DHSS) into the Department of Family and Community Services (DFCS) and the Department of Health (Health). On February 22, 2021, our office sent your office a memo discussing the timing of EO 119. This memo discusses the substantive legal issues with EO 119.¹

Article III, sec. 23 of the Alaska Constitution grants the governor authority to reorganize executive departments. To accomplish this, the governor may issue executive orders to reassign or transfer executive branch functions, but he may not delete or add functions or make other substantive changes. The majority of EO 119 consists of permissible uses of the executive power – examples include bill sections that rename the applicable department(s), move statutory duties from DHSS to DFCS, and fix citations to repealed statutes. However, some sections of the executive order impermissibly make substantive changes to existing law. This memorandum identifies sections of EO 119 that may create a substantive change in law or raise a different legal issue. Those sections are detailed below.

Sec 2. This section changes current law by preventing registered nurses from pronouncing the death of a patient at the Alaska Pioneers' Home or the Alaska Veterans' Home. This function is not transferred under EO 119 and is a substantive change to existing law.

Secs. 3 - 4. These sections create new board positions on the Controlled Substances

¹ Note that the enrollment process for executive orders differs from the normal process described in Uniform Rule 43. If the legislature does not disapprove EO 119 within 60 days, the governor's office will deliver the executive order to Legal Services for enrollment. It will not be modified by the editors or revisor: it will instead be enrolled exactly as received from the governor and sent to the print shop for inclusion in the session laws and resolves.

Advisory Committee and the Criminal Justice Information Advisory Board. Currently, the commissioner of DHSS is a member of each committee. These two sections declare that the commissioners of Health and DFCS would both be members of those two boards. EO 119 would bring both boards from an odd number (nine) to an even number (ten) of members. Creating a new board position and assigning a commissioner to that position is a substantive change to existing law.

Sec. 11. This section adds a member to the Council on Domestic Violence and Sexual Assault. This extra board member is created by naming the commissioners of both new departments to the council. This change results in the council going from an odd number of members (nine) to an even number (ten). Creating a new board position and assigning a commissioner to that position is a substantive change to existing law.

Sec. 15. This section amends AS 25.27.125(b), which regulates an account funded from charges by state agencies under AS 37.10.050. The current statute provides that the legislature may make appropriations to DHSS for certain specified purposes, but this section removes the language indicating that the appropriation goes to DHSS. While the section does not otherwise change the purposes that the appropriations may be used for, this change may be substantive.

Sec. 16. This bill section adds the commissioner of family and community services as a new member to the Alaska State Emergency Response Commission. This results in the commission going from an odd number of members (15) to an even number (16). Creating a new board position and assigning a commissioner to that position is a substantive change to existing law.

Secs. 17 - 18. Both of these sections add new language to AS 37.05.146(c) that reference "fees received under AS 47.32." This is problematic, because both Health and DFCS would have authority over fees received under AS 47.32.

Sec. 30. The DHSS commissioner currently has statutory authority to establish a schedule of fees for the services found in AS 44.29.020(a)(1), (8), and (14). Section 30 would substantively change the commissioner's powers by giving the commissioner authority to establish fee schedules for the programs that are currently codified at (a)(1) - (7) and (14), while removing the commissioner's authority to establish fees for (a)(8).²

Sec. 31. Currently, AS 44.29.022(d) permits a regulation establishing a fee for services that are part of the integrated comprehensive mental health program under AS 47.30. AS 47.30 currently contains 12 articles, each covering a distinct area of the law. Section 31 of EO 119 amends AS 44.29.022(d) so that Health would only have authority to adopt fee-for-services regulations related to Article 4 (Alcoholism and Drug Abuse) and Article 5 (Community Mental Health Services Act).

² The numbering in AS 44.29.020(a) is modified by sec. 29 of EO 119, which repeals (a)(8) and (12). Those two programs are reenacted at AS 44.30.020 by sec. 36.

Some, but not all, of the regulating power for the other parts of AS 47.30 would be transferred to the commissioner of DFCS. More specifically, sec. 36 gives this rulemaking power to DFCS for AS 47.30.655 and 47.30.660 (Article 6) and AS 47.30.670 - 47.30.915 (Articles 8 - 11).³

Additionally, EO 119 repeals Article 1 and reenacts it within AS 44.25,⁴ and it repeals Article 7 and reenacts it within AS 44.29.⁵ It appears that neither DFCS nor Health would have authority to adopt regulations related to Articles 1 or 7 after EO 119 goes into effect.

Sec. 33. Like sec. 31, this section confines rulemaking powers to only two of the articles within AS 47.30. Once again, it is unclear why this section was included in the executive order, but it appears to make a substantive change to the law.

Sec. 35. This section enacts definitions in AS 44.29.890 that are applicable to the statutes governing the Alaska Mental Health Board. These definitions come from existing statutes found at AS 47.30.669 and 47.30.915. However, sec. 35 contains a blank definition for "inpatient,"⁶ a term that is not used within AS 44.29.800 - 44.29.890. Several of the definitions included under AS 44.29.890 are not used in any of the statutes that the terms are defined for. Page 40, lines 8 – 10 includes a definition for "state" that does not make sense since the occurrences of "state" in these sections refer exclusively to Alaska. Additionally, page 33, line 4 cites to AS 44.29.610 - 44.29.670, when it should cite to AS 44.29.600 - 44.29.670.

Sec. 40. This section enacts a substantive change in law by applying existing definitions to other existing statutes. It also uses an unusual span of statutes (AS 47.05.070 - 47.05.290), which includes part of Article 1 and the entirety of Article 2.

Sec. 61. This section repeals and reenacts AS 47.05.390. This section should be amended rather than repealed and reenacted, as sec. 61 merely removes the definition of "department" from the statute.

Sec. 62. This section enacts a new chapter within Title 47. The language used in this section differs from the existing law that it is replacing. For example, AS 47.05.010(1) - (2) currently tasks DHSS with administering and regulating adult public assistance, the Alaska temporary cash assistance program, diversion payments, and "all other assistance programs." Section 62 replaces the explicit list of programs with a vague term describing "applicable assistance programs." And sec. 62 similarly grants DFCS authority to adopt

³ EO 119, page 41, lines 26 - 30.

⁴ EO 119, page 12, line 15.

⁵ EO 119, page 37, line 8.

⁶ EO 119, page 40, line 2.

regulations "necessary for the conduct of its business," which appears to be a broader grant of authority than is currently found in the statute.

Additionally, sec. 62 omits AS 47.05.010(5) from DFCS's mandate. That paragraph currently declares that DHSS shall: "cooperate with the federal government in matters of mutual concern pertaining to adult public assistance, the Alaska temporary assistance program, and other forms of public assistance." EO 119 would keep that mandate within Health (*see* sec. 39). It is unclear why this paragraph would remain under Health.

Finally, sec. 62 makes substantial revisions to AS 47.05.012. Language from that statute would be codified at AS 47.06.030 to apply to DFCS.⁷ The current statute includes 16 paragraphs identifying categories of material that may be incorporated in future department regulations. However, the new statute that sec. 62 enacts would only include one such category.

Sec. 73. This section amends AS 47.30.660. The resulting change to that state would require Health to "administer AS 47.30.655,"⁸ which is a statute codifying the purpose and principles of a 1981 revision to Alaska's civil commitment statutes.

Section 73 would also mandate that the Mental Health Trust Authority must now prepare its comprehensive mental health program plan with both Health and DFCS. This appears to create a substantive change in law.

Additionally, sec. 73 simply omits paragraphs (10) - (16), which exist in the current statute. These paragraphs should have been included in the document regardless of whether or not the order amends them. As a result of the omission, the citation changes that EO 119 makes were not made to paragraphs (14) and (15), even though those two paragraphs contain the same citation span that is amended in (3), (8), and (9). This appears to be an oversight by the drafters, but it will result in inconsistent interpretation of the duties assigned to Health under AS 47.30.660(b).

Secs. 74 - 88. All of these sections remove a citation to AS 47.30.660, which may create a substantive change in law. (AS 47.30.660 is amended by sec. 73, as discussed above.) It appears that the order omits AS 47.30.660 because that section would be administered by Health, while the remaining sections cited in these statutes would be administered by DFCS. Additionally, sec. 88 changes the span for which the definitions in AS 47.30.915 apply, so the term "department" would no longer be defined for AS 47.30.660.

Section 85 also removes a citation to Article 8 within AS 47.30, which likely results in a substantive change. (Article 8 relates to voluntary admission to a medical facility for mental health treatment.) And sec. 85 appears to contain a typo: page 70, line 31 should probably contain the same citation as line 26. However, line 31 omits AS 47.30.670 -

⁷ EO 119, page 59, line 17.

⁸ EO 119, page 65, lines 14 – 15 and 28 and page 66, lines 2 - 3.

47.30.695.

Sec. 130. This section repeals AS 47.32.900(5), which defines "crisis stabilization center." EO 119 does not replace this definition anywhere else in the Alaska Statutes. This is a substantive change of law that will create unintended problems. For example, AS 12.25.031 cites to this definition.

Sec. 141. This section would enact an uncodified section of law that instructs both Health and DFCS to share confidential information with each other. This seems to be a substantive change in law, as it would grant the departments authority to disclose information with another department that would otherwise be confidential.

Secs. 142 - 145. The sections assign functions to both departments and there appears to be ambiguous overlap in the form of chapters to which both new departments would be assigned responsibilities. For example, sec. 142 instructs the revisor to replace a reference to DHSS with a reference to Health in AS 47.14.990(6).⁹ However, AS 47.14 codifies juvenile programs and institutions, so this change would result in both Health and DFCS overseeing this chapter.

Another problem exists with AS 47.14.400(c): sec. 143 instructs the revisor to change the reference in this statute to read "commissioner of health,"¹⁰ while sec. 145 instructs the revisor to change the reference to read "commissioner of family and community services."¹¹

Sections 142 - 145 contain several other problematic errors like these.

Conclusion. As documented above, it appears that this executive order would impermissibly create substantive changes to existing law. However, this is a lengthy, complex, and dense executive order and it is possible that additional legal questions and issues may exist. The executive order also contains multiple errors and technical issues that cannot be corrected by the revisor and editor through the enrollment process. I advise that if you have any questions about specific sections of the executive order, that you direct them to the governor's office.

If you have questions or if I may be of further assistance please advise.

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⁹ EO 119, page 101, line 14.

¹⁰ EO 119, page 103, line 21.

¹¹ EO 119, page 106, line 14.