MINUTES
SENATE FINANCE COMMITTEE
February 28, 2001
9:02 AM

TAPES

SFC-01 # 28, Side A
SFC 01 # 28, Side B
SFC 01 # 29, Side A

CALL TO ORDER

Co-Chair Dave Donley convened the meeting at approximately 9:02 AM.

PRESENT

Senator Dave Donley, Co-Chair
Senator Pete Kelly, Co-Chair
Senator Lyda Green
Senator Gary Wilken
Senator Lyman Hoffman
Senator Donald Olson
Senator Loren Leman

Also Attending: LISA KIRSCH, Assistant Attorney General, Human Services Section, Department of Law; JANET CLARKE, Director, Division of Administrative Services, Department of Health and Social Services; BOB LABBE, Director, Division of Medical Assistance, Department of Health and Social Services; BARBARA RITCHIE, Deputy Attorney General, Civil Division, Department of Law; DEAN GUANELI, Chief Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law

SUMMARY INFORMATION

SB 73-SUPPLEMENTAL APPROPRIATIONS/AMEND APPROP.

The Committee heard from the Department of Health and Social Services and the Department of Law. The bill was held in Committee.

#SB 73

SENATE BILL NO. 73
"An Act making supplemental appropriations and making and amending other appropriations; and providing for an effective

date."

Co-Chair Donley announced that the bill would not report from Committee at this hearing.

Department of Health and Social Services

LISA KIRSCH, Assistant Attorney General, Human Services Section, Department of Law stated that she was the attorney that represented the Department of Health and Social Services in the Planned Parenthood versus Perdue case that dealt with abortion funding. She said she was prepared to either give a brief history of the case or just answer questions if appropriate.

Co-Chair Kelly requested a brief history.

Ms. Kirsch recounted that the case first arose in June of 1998, after the General Relief Medical program was eliminated from the FY 99 budget. She specified that the issue arose as a challenge to the constitutionality of eliminating funding for abortions when the state provided funding for other pregnancy related services. She noted there were other grounds as well, but the reasoning used in the superior court ruling against the state was that the funding practice was "a violation of the expressed right of privacy in the Alaska constitution that made this action unconstitutional."

Ms. Kirsch told the Committee that the ruling was appealed and at the same time, the state requested a stay for the portion of the order that required the Department of Health and Social Services to immediately pay for the abortion services. She explained the stay was requested because the Department of Health and Social Services felt there was no appropriation that was reasonably available to cover these services for a variety of reasons. Some of the reasons, she said relate to the way Medicaid is funded jointly from both the federal government and the state. She listed another reason as that Alaska had an entirely separate program, General Relief Medical, which paid for services that did not receive federal matching funds.

Ms. Kirsch continued that the stay was denied at the superior court level and that the state renewed the motion for the stay to the Supreme Court but did not prevail there either. As a result, she stated, the department had exhausted all options in terms of requesting a stay and was in the position of having been ordered by both courts to pay for the services.

Ms. Kirsch noted that this was the status of the situation during

the 2000 legislative session and that the agency requested a supplemental appropriation. At approximately the same time, she stated the state filed a motion to "show cause why we shouldn't be held in contempt for failing to comply with the court order." She said that after the legislative session, hearings were held on the contempt issue and that the court did not actually hold the state in contempt although the ruling directed the Department of Health and Social Services to pay for these services within 90 days, including those services that had been pended during the time of the appeal.

Ms. Kirsch then stated that in November 2000, the case was argued before the Supreme Court and that currently the parties are waiting for a decision. Meanwhile, she said the department has been paying for the services using general funds appropriated to the Medicaid program.

Senator Ward had a question regarding the author of the judge's order instructing the department to pay for the services.

Ms. Kirsch replied that there were several different, interrelated documents. She noted that initially, "at the hearing, the court ruled from the bench." She detailed the various documents pertaining to the court order, saying that the attorneys for the plaintiffs, Planned Parenthood and the ACLU of New York, prepared the final judgment at the request of the judge.

Senator Ward asked about the judge's ruling regarding the use of Medicare general funds.

Ms. Kirsch responded that the judge felt there was nothing that prevented the department from taking the money out of general funds that had been appropriated for Medicaid to pay for the abortion services. She explained that when the judge rules from the bench, the judge will often ask the prevailing party to draft the judgment. Therefore, she said, this instance is not unusual.

Senator Ward next asked if the Department of Law had performed a legal analysis as to whether or not those Medicaid funds are proper funds under the law to be spent on abortions.

Ms. Kirsch affirmed and noted this is one basis for the appeal. She stated that this point has been before the superior court and the Supreme Court as well.

Senator Leman requested a timeline of events. He asked for the dates of the ruling from the bench and the date the Department of Health and Social Services made the first payment.

Ms. Kirsch informed that the Committee would be receiving a chronology. She listed the dates of the evidentiary hearing on the contempt issue: June 21, 2000; oral arguments and bench ruling: July 27, 2000; release of the court order: September 18, 2000.

Senator Leman referred to the 90-day deadline for the department to begin making payments and asked when the count began.

Ms. Kirsch answered that the 90-day deadline began July 27, because that was the date the court first ruled. She said the matter is somewhat complex due to the three different groups of claims. She explained that some claims had been tended since the appeal, others were received during the process and that still others would be coming in the future. Therefore, she stated, each group had a different time frame in which to be paid.

Ms. Kirsch answered Senator Leman's next query stating that the case had been appealed to the Supreme Court, 30 days after the superior court's original decision in April 1999. This, she noted was before the superior court judge issued the 90-day deadline.

Senator Leman asked if the superior court judge could order the department to pay for the services, knowing the case was on appeal.

Ms. Kirsch affirmed and detailed the procedure of requesting a stay. She stated that the stay issue is resolved in advance of the contempt matter. She then explained that the issue of contempt arose because the department was not in compliance with the April 1999 order. She added that the stay issue was first heard in the superior court because it is the superior court's order that the department was charged with not complying with.

Senator Leman requested the date that the department issued the first payment.

JANET CLARKE, Director, Division of Administrative Services, Department of Health and Social Services, responded that the department commenced payment of claims on September 26, 2000 and, "that was just in time of the 90-day requirement from the judge from the July 27th hearing."

Senator Green and Senator Leman questioned whether this was 60 or 90-days.

Ms. Clarke clarified that there is a month-long timeframe in which the state issues warrants. She explained that the exercise began on September 26 to ensure that the checks were actually mailed prior

to the October 26 deadline.

Senator Leman requested a list of recipients of those payments and the amount of the payments to each provider.

Ms. Clarke spoke to confidentiality concerns about providing specific information about clients saying she was unsure how they apply to vendors.

Ms. Kirsch added that this data has been provided in the past but with all identifying information withheld.

Senator Leman asked for "whatever information you can provide to the fullest extent."

Co-Chair Kelly asked the witness to clarify her earlier statement about the prevailing party writing the judgments.

Ms. Kirsch explained that, often when a judge rules from the bench, the judge then directs the prevailing party, the party the judge ruled in favor of, to draft a judgment, or a final order for the judge's signature. She continued that the judgment would then be "lodged" with the court, which is different than "filed", because it is a document that is subject to the opposing party's objections. She noted that the opposing party has three days to raise objections if for instance a prevailing party inserted language contrary to what the court said, or the opposing party believes misinterpreted what the judge said or possibly implied something that was not clearly stated.

Co-Chair Kelly asked if the judgment and the Memorandum Of Decision were the same.

Ms. Kirsch replied that they usually are, but that judges operate differently. She stated that often, after a ruling from the bench there is not a Memorandum of Decision. However, she noted other times the court would take the matter under advisement at the hearing and announce that a Memorandum of Understanding is forthcoming.

Co-Chair Kelly wanted to know if the Memorandum of Decision dated March 16, 1999, and signed by Judge Sentan was written by the judge or by Planned Parenthood.

Ms. Kirsch responded that this decision was produced by the court and granted summary judgment to the plaintiff.

Co-Chair Kelly then asked the definition of "elective" versus

"therapeutic" abortion.

Ms. Kirsch read the definition for therapeutic abortion from 7 AAC 47.290(8), "the termination of a pregnancy certified by a physician as medically necessary to prevent the death or disability of a woman or to ameliorate a condition harmful to the woman's physical or psychological health or that results from actions that would constitute a crime of sexual assault under AS 11.41.410, 11.41.425, a crime of sexual abuse of minor under 11.41.434 to 440, or the crime of incest under 11.41.450.

Ms. Kirsch answered Co-Chair Kelly's next question stating that a physician must certify an ameliorating psychological health condition.

Co-Chair Kelly requested from the Department of Health and Social Services, data on the number of abortions that were performed due to an ameliorating psychological health condition versus those performed due to incest or rape or for the immediate physical health of the mother. He also requested of the rape or incest situations, "how many of those were actually taken to court and proven to be rape or incest."

Ms. Clarke agreed to compile that information.

Senator Green asked if the first payments made on September 26 equaled $98,300.

Ms. Clarke affirmed.

Senator Green wanted to know if the services were continuing and the bills were accruing during the process of the hearing and trial.

Ms. Clarke detailed the three payments made in September, October and November that were included in the supplemental request. She pointed out that the first payment, of $98,3000 was large because the judge ordered the department to pay all the claims pended from the prior year.

Senator Green asked if that included claims for services performed in 1999.

Ms. Clarke answered that it did.

Senator Green then asked where the department obtained the money to pay those claims.

Ms. Clarke replied that the department did argue in court that all the state funds in the Medicaid account were general fund matching funds to the federal Medicaid program. That argument did not prevail, she noted, and the department was faced with taking those general fund match dollars that had been appropriated such and using them as straight general funds.

Senator Green did not see how the judge could require the general fund match funds to be spent as straight general funds.

Ms. Clarke added that without a separate appropriation, other funds beside those in the Medicaid account could not be used for the court-ordered Medicaid payments.

Senator Green next wanted to know if the department submitted information to the federal government regarding these claims.

Ms. Clarke replied that the department reports to the federal government those abortions that are consistent with the Hyde Amendment. She explained that the federal government pays a portion of the costs for abortions covered under that amendment. She noted that those services performed that do not qualify for federal reimbursement are not reported to the federal government, because the state is not requesting funds.

Senator Ward wanted to know if the funds used were federal Medicaid funds and if that was the reason the department did not report the claims.

Mr. Clarke explained that the federal government pays 60 percent of Medicaid costs of submitted claims. However, she reiterated, because the federal government would not pay a portion of these claims, they were not submitted. She defined the federal Hyde Amendment as prohibiting the use of federal funds to pay for abortions except for situations of rape, incest or when the life of the mother is at risk. She noted that the services in question do not qualify under the provisions of the Hyde Amendment and therefore would not receive federal reimbursement. She stressed that the payments in question only involve state funds.

Ms. Clarke answered Senator Ward's next question noting that a few of the performed abortions did qualify for federal funding under the Hyde Amendment provisions, but that most did not.

Senator Ward remained unclear as to whether the funds were state or federal.

Ms. Kirsch reiterated that the funds used to make the court ordered

payments were state funds. She explained the Medicaid procedure where state funds are used to initially pay the entire claim. She continued that the department then submits the claims that qualify under the federal Medicaid rules, to the federal government and receives reimbursement of 60 percent in federal funds for those services. She noted that the state funds involved could be designated by the legislature as funds designed to be federally matched, which is the case with the funds in question. This point, she continued, was argued before the court stressing upon the fact that the legislature has appropriated these funds with a condition upon them that they would be used for services that will be federally matched. She stated that, "The court, in its order, was very clear that it was not directing us to spend money, to spend state money, in such a way that we would be requesting federal reimbursement."

Senator Ward next asked if the state funds had been first spent for federally matched services, the federal reimbursement was received and then that money was used to pay for the abortion services. He inquired, "I'm just trying to find out if the dollars were spent before the match was achieved."

Ms. Clarke answered that the state funds in question had only been used for the abortion claims. She repeated that no federal dollars were spent on abortion services unless they were consistent with the Hyde Amendment.

Senator Ward clarified, "the money was taken out of a specific appropriation for a match and spent on something other than what it was appropriated for."

Ms. Clarke affirmed.

Senator Ward asserted that in this case, a judge appropriated money rather than the legislature. He explained this is because the legislature appropriated funds to be used for federally matched services, but the judge instructed the department to use those funds for non-federally matched services.

Senator Green asked what the difference is between a medically necessary abortion and a therapeutic abortion.

Ms. Kirsch stressed that she has urged the court to use the term "therapeutic" because it is defined in regulations. She stated that "medically necessary", is a term that is commonly used within the Medicaid program, and can mean slightly different things in the context of different types of service. "But in a very broad and general sense, medically necessary, usually means that a physician

needs to certify it as something that the patient needs to ameliorate some kind of harmful condition," she stated. She noted that in other services, such as transplants, medically necessary could be defined much more specifically. She gave an example of a liver transplant that might be medically necessary only when the patient is in the end stages of a disease, or that perhaps a certain type of transplant is medically necessary. But generally it means physician certified or physician recommended, she remarked.

Senator Green remained unclear about the medically necessary abortions that qualify for federal reimbursement under the Hyde Amendment, and those that are required by the Alaska court.

Ms. Kirsch explained that part of the confusion could be a result of the fact that the federal decisions are based on the federal constitution, whereas this case deals with a state claim in the state court and therefore subject to the state constitution, which is different from the federal constitution. She stated, "in terms of what it would require in order to be constitutional in terms of a privacy right, there's a different body of case law that applies to that. I believe that that's the root of the inconsistency that you're seeing there."

Senator Leman asked if the department distinguished between the abortions that qualify for federal funding under the Hyde Amendment and those that do not, and if it intends to seek reimbursement from the federal government for those that would qualify. He requested a breakdown of those services.

Ms. Clarke replied that the qualifying services are submitted to the federal government and that she would provide more details.

Section 8 (a)
Department of Health and Social Services
Medicaid Budget Request Item (BRU)
Medicaid caseload growth of 7% and higher average cost per month, particularly for hospital and pharmacy costs.
$9,124,700 general funds
$50,652,700 federal funds
$11,412,900 statutory designated program receipts

Ms. Clarke stated that the department had prepared answers to the questions raised on this request during the previous meeting. She detailed the clarification made to the children's services data. She used a graph to show that while the trend continued to rise, the rate of growth was leveling out. She added that Medicaid services are usually in greater demand during the winter.

Section 8 (b)
Department of Health and Social Services
Medicaid BRU
Implement facility rate-setting settlements with Medicaid service providers.
$23,100 general funds
$34,800 federal funds

Ms. Clarke explained that this request is to pay settlements currently before the Medicaid Rate Advisory Commission on matters related to payment of rates to health care facilities. She noted that there are three different settlements involved: Ketchikan General Hospital, Cordova Community Medical Center and St. Ann's Care Center. She explained that these settlements challenge how rates had been set for these facilities and include audits, Medicaid and Medicare cost reports, and their implementation. She stated that the reason these settlements are included as a Department of Health and Social Services request rather than in the Judgment and Claims section, is because payments to the facilities are made through the department's established payment system, which the Department of Law does not have.

Senator Hoffman requested an explanation of the different match percentages.

Ms. Clarke responded that it might have to do with the particular claim involved, the year of the claim and whether the services were provided while the state was under a 50-percent rate rather than the current sixty-forty percent match rate with the federal government.

Section 8 (c)
Department of Health and Social Services
Catastrophic and Chronic Illness BRU
Caseload growth and increased pharmacy costs, which exceed budgeted amount.
$430,400 general funds

Ms. Clarke stated that this request is to support the state Catastrophic and Chronic Illness Assistance (CAMA) program through the end of FY 00. She noted that the legislature authorized $4.3 million to CAMA for FY 01, but that the funds needed to cover the FY 00 costs are in a separate appropriation and the department could not transfer funds from other sources. She reminded the Committee that the legislature established up this program after eliminating the General Relief Medical program. She stressed that those eligible for CAMA are the "poorest of the poor." She explained that to qualify for this program, participants must have

less than $500 in assets, less than $300 monthly income, do not qualify for any other program or coverage and also have a qualifying medical condition. She listed the qualifying medical conditions as: terminal illness, in-patient hospitalization, chemotherapy treatment for cancer, or chronic conditions, such as diabetes, seizure disorder, chronic illness or hypertension. She noted that most of the funds used in this program cover the costs of prescription drugs. She added that this program helps participants remain independent and out of institutionalized care facilities.

Senator Austerman asked if this program operates solely with state funds.

Ms. Clarke affirmed.

Senator Green wanted to know if there was a comparable federal program that could provide services to this group of people.

BOB LABBE, Director, Division of Medical Assistance, Department of Health and Social Services, replied he was unaware on any. He pointed out that a number of states have similar programs. He stressed that the Medicaid program is targeted to serve those who are elderly, blind, disabled or families with children. The people served by CAMA, he explained, are usually single adults and childless couples, under age 65, who would not meet the disabilities requirement for Medicaid coverage. He noted that some eventually qualify for full disability benefits under the Medicaid program.

Senator Austerman further clarified that the federal program covers those with incomes below 200-percent of the national poverty level. He asked if needy individuals, "once they fall down so far, they can fall out of all the federal programs."

Mr. Labbe replied that the question is not primarily about income, but rather because Medicaid doesn't pay for single people unless they are disabled or elderly.

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Mr. Labbe continued that there are some individuals who have very low incomes, but because they are childless or under 65 and not disabled, they would not qualify for Medicaid.

Section 8 (a)

Department of Health and Social Services
Medicaid Budget Request Item (BRU)
Medicaid caseload growth of 7% and higher average cost per month, particularly for hospital and pharmacy costs.
$9,124,700 general funds
$50,652,700 federal funds
$11,412,900 statutory designated program receipts

Ms. Clarke resumed answering the questions posed to the department at the last hearing. She addressed the Denali KidCare program cost to the state and the comparison of the children's health expansion and the federal Medicaid authorized percentage phasing. She referred to Attachment A [copy on file] that shows the increases that occurred when the legislature passed the children's health expansion. At this time, she pointed out, the Medicaid percentage increased from 50 percent to 59.8 percent, resulting in a $30 million saving to the state. The chart, she said, compares the $30 million savings to the general fund amount spent on the children's health expansion. She detailed the amount of money the state spent in FY 99, FY 00 and FY 01, as listed on the chart.

Ms. Clarke then referred to Attachment B, which provides information about the poverty level standards for different family sizes.

Mr. Labbe pointed out that 200 percent of the national poverty level is the standard measurement for qualification into the Denali KidCare program. He informed that monthly income is used for this purpose.

Senator Wilken wanted to know if eligibility for Denali KidCare program is based on gross income.

Mr. Labbe replied that the program primarily considers gross income.

Senator Wilken asked if the gross income includes permanent fund dividend income.

Mr. Labbe believed permanent fund dividend income is excluded under state statute.

Senator Wilken shared that he learned that permanent fund dividend income is excluded from income eligibility requirements for daycare programs. He stated that if the requirement were different for Denali KidCare, he would like to know about it. He then calculated the qualifying income for a family of four at approximately $21 per hour.

Mr. Labbe affirmed that this family would qualify for insurance coverage for the children. He noted that the figures listed on the chart reflect the policy that goes into effect April 1, 2002 and are based on the latest federal poverty level information.

Senator Wilken questioned the one-member family category shown on the chart.

Mr. Labbe replied that this is possible in certain situations because KidCare covers children up to age 19. He explained that 17 and 18-year-olds living on their own could participate in the program.

Senator Wilken was interested to see the distribution of KidCare recipients with regards to family size.

Senator Green asked if Medicaid benefits are paid to the father/husband under the Denali KidCare program.

Mr. Labbe answered that adult coverage is only provided for pregnant women.

Senator Green asked if therefore, the family size only counted the women and children in that family.

Mr. Labbe answered that all family members are counted.

Co-Chair Kelly asked if dividends from Native Corporations are included in the computation of gross income.

Mr. Labbe believed the dividends are counted as income in the month received, unless they are used for an allowable investment, such as the purchase of a home. He admitted that the eligibility requirements are technical and he offered assistance of a staff member with more knowledge on the issue.

Senator Ward asked if the shareholders of Cook Inlet Regional Corporation were disqualified after receiving the recent $50,000 dividend.

Mr. Labbe predicted that they did not qualify during the month that the dividend was received. He was not aware of the specifics of the situation.

Senator Ward requested that information.

Co-Chair Donley expressed that it was "amazing" that a one-income

family with five children earning over $60,000 annually, qualify for this program.

Co-Chair Kelly added that the same family, if members of Cook Inlet Regional Corporation, could receive an additional $100,000 in Native corporation dividends and still be eligible for Denali KidCare coverage, with the exception of the one month the dividends were received.

Senator Green also noted that this hypothetical family is also eligible for Indian health services.

Ms. Clarke proceeded to Attachment C [copy on file.]

Mr. Labbe detailed that after Denali KidCare was implemented, the department constructed a project with the Public Assistance Quality Control Unit to review some questions that were raised. One question, he shared, is whether participants had health insurance, or if it was available at the time that they applied for participation in the program. He stated that the statistical samples reviewed, showed that 12 percent of participants had other health insurance at the time of application. Of the remaining 88 percent, he said, 91 percent did not have any insurance available.

Ms. Clarke then referred to Attachment D [copy on file] that addresses the department's marketing program. She pointed out that the bulk of the funds in question were from a Robert Wood Johnson grant to encourage marketing and outreach efforts.

Senator Green asked if this is the exclusive purpose of the grant.

Ms. Clarke answered it is.

Senator Wilken asked if the grants require state matching funds.

Ms. Clarke answered that they do not.

Ms. Clarke summarized there are a number of factors driving up the cost of Medicare. She referenced the increased number of adults, disabled and elderly people seeking care as well as the children's expansion program, which accounts for approximately five-percent of the general fund in FY 00. She listed the amount of general fund allocated to Medicaid that are spent on services to the disabled as 35 percent, 16 percent for the elderly and 15 percent on adults. She stated that the elderly and disabled are two groups of particular concern with increased growth projected.

Section 8 (d)

Department of Health and Social Services
Subsidized Adoptions BRU
Maintain existing appropriation level for subsidized adoption and guardianship by replacing TANF funds, which could not be used for these costs as anticipated.
$1,000,000 general funds
$1,000,000 Inter-Agency Receipts

Ms. Clarke explained that this item is a fund source change request. She shared that during the previous session, the department told the legislature that Temporary Assistance for Needy Families (TANF) funds could be used for this program. However, she since learned that those funds could not be used. She said that 1,200 of the 1,500 adoptions and guardianships the department facilitates each month qualify for a federal 4-E program. However, she informed that the federally provided TANF funds could not be used to provide the state match to those 4-E funds.

Ms. Clarke stated, "TANF funds must be used to support a family." She defined this as a minor child with a custodial parent or a caretaker. She said that adoptions and guardianships by relatives qualify, but that non-relative guardianships do not.

Ms. Clarke then shared that to qualify for TANF funds for guardianships, the department is able to consider only the income of the child. For adoptions however, she stated that income of the entire family must be considered. She relayed department concerns about imposing on the adoptive families requesting income information after these families have agreed to adopt special needs children. Therefore, she stated that TANF funds would not be used for those adoptions. She also noted that Alaska's TANF funds could not be used to fund out of state guardianships and adoptions. All that remained, she stressed, were the approximately 126 relative guardianships in Alaska each month, at a monthly cost of $900,000.

Ms. Clarke continued that the department planned to utilize TANF funds for the approximately 126 qualifying cases. However, she said that the amount paid in a guardianship is considered "basic maintenance" and therefore subject to all of the standing TANF rules. In particular, she pointed out the assignment of child support and work requirements.

Ms. Clarke summarized that under these circumstances, the department was unable to use the TANF funds in the subsidized adoption program. She assured "if we could have used this money we would have."

Senator Hoffman wanted to know what the TANF funds were then spent

on.

Ms. Clarke replied that the funds were not being spent. She explained that to do so, the department would have to receive legislative authority to spend the funds elsewhere.

Senator Hoffman asked if the funds would lapse.

Ms. Clarke replied that the TANF funds are part of the state block grant and do not lapse. She explained that the state does not receive the funds until they are expended, but that they are located in an "Alaska" account in Washington DC. She added that the department tracks the balance of the account and that the state does not earn interest.

[Note: the spreadsheet supplied by the Office of Management and Budget separates Section 8 (d) into two items.]

Section 8 (d)
Department of Health and Social Services
Community Development Disabilities Grants BRU
Technical correction in fund source from $120,000 GF to GF/Mental Health.

And

Section 8 (d)
Department of Health and Social Services
Services to Chronically Mentally Ill BRU
Technical correction in fund source from $203,000 GF to GF/Mental Health.

Ms. Clarke shared these one-time fund source changes make a technical correction as recommended by the Department of Law.

Section 8 (e)
Department of Health and Social Services
Probation Services BRU
Appropriate interest earnings on the Juvenile Accountability Incentive Block Grant trust to the program.
$125,000 Statutory Designated Program Receipts

Ms. Clarke spoke to this request from the Division of Juvenile Justice. She noted that the fund source is interest earned on the Federal Juvenile Accountability Incentive block grant. She explained one of the requirements of this block grant is to earn interest on the grant and spend it on qualifying programs. She said an oversight prevented the inclusion of this item in the regular FY

01 budget.

Co-Chair Donley asked what projects the division planned to spend the funds on.

Ms. Clarke replied that $75,000 would be spent for production of a training video for use in the Alaska Court System for juveniles, caregivers and victims. She said the remaining $50,000 would be used to improve the Wide-Area Network Program Connectivity to law enforcement, courts and schools. She warned that if the funds were not expended by June 30, 2001, they would be revoked.

Co-Chair Donley wanted to know who decided the best use of these funds.

Ms. Clarke answered that it was the division director. She added that the intent is to use the funds on one-time items, and that they must be spent for qualified purposes.

> Section 8 (f)
> Department of Health and Social Services
> CMHG/Designated Evaluation and Treatment BRU
> Growth in services needed for Designated Evaluation and Treatment.
> $974,100 general funds

Ms. Clarke stated this request is for general fund/mental health funds for grants to those hospitals that participate in the Designated Evaluation and Treatment program. She explained that this "last resort" payment program provides mental health evaluation and treatment in local hospitals for indigent individuals.

Ms. Clarke listed the FY 00 and FY 01 costs for several communities to demonstrate the cost increase. She noted that Fairbanks and Juneau are the main participants in the program with Mat-Su participating primarily for transportation services. She stated that the Fairbanks Memorial Hospital expanded its psychiatric care unit in the middle of the previous year, and that the department was behind in planning for the increase in services.

Ms. Clarke stressed the main benefit of this program is the ability to address community concerns about mentally ill individuals in the correction system. Since inception, she pointed out, that community has severely reduced the number of mentally ill individuals sent to correctional institutions. She added that the number of patients transported from Fairbanks and Juneau to the Alaska Psychiatric Institute has been dramatically reduced.

Section 8 (g)
Department of Health and Social Services
Vital Statistics BRU
Reduce backlog of requests for birth, death and other certificates using increased receipts from fees.
$225,000 Receipt Supported Services

Ms. Clarke noted that this request would fund three items, the first being to cover the $10,000 cost of a new lease in the Fairbanks office. She continued that $35,000 would be used to hire nonpermanent employees to reduce or eliminate the current backlog of mail requests for vital records. She finished with the third item to utilize $170,000 in receipt supported services funds to replace the same amount of general funds, which would be transferred to Public Health Nursing to pay for the salary increase.

Section 18
Various Agencies
Miscellaneous Claims and Stale-dated Warrants BRU
$85,500 general funds
$141,100 federal funds

Ms. Clarke referred to the department's claims, noting that federal funds could be received to cover some of the claims. She stated that many of the claims are for medical services provided to children in state custody, which could be Medicaid eligible.

Co-Chair Donley interrupted to ask if there were any claims utilizing general funds.

Ms. Clarke answered yes and summarized these into two categories. The first category, she explained related to single-audits performed on grantees where it was determined that the department owes additional money from a prior fiscal year. She detailed the second category dealing with medical bills incurred by children while in state custody. She said it was initially thought that these children qualified for Medicaid or other health care coverage, but it was later learned that they did not qualify. Therefore, she stated, the state must pay for the medical services since the child was in state custody.

Section 19 (a) (6)
Department of Health and Social Services
Medicaid BRU
AR 22520-00 Medicaid Services Special FY 00 ratification.
$4,268,866.67 general funds

Ms. Clarke commented that this request "comes about from a variety reasons." She listed the primary reason as the understanding that the department would not have ratification at the end of FY 00. However, she said the federal government deferred federal revenues the department had claimed. She stressed that the department should still receive those funds, but without that revenue, the general fund ratification is necessary.

Ms. Clarke explained these claims qualify for 100 percent federal reimbursement under the Indian Health Service program. She detailed the process of deferring questionable claims. She said the deferred claims are reviewed a second time and if still found questionable, are disallowed. At this point, she stated, the decision could be appealed. She noted that the claims in question are in the deferral stage. She relayed that Mr. Labbe, Director, Division of Medical Assistance, has opined that claims would be approved, either in the review stage or during appeal.

Ms. Clarke assured that if the federal funds are received, the state funds would revert to the general fund.

Senator Green wanted to know if there would be a penalty for waiting to appropriate these funds until the following year.

Ms. Clarke replied that she did not think there would be except that, "it probably would make the accountants uncomfortable."

<u>Department of Law</u>

DEAN GUANELI, Chief Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law gave an overview of Civil Rule 82; the court rule that allows prevailing parties in litigation to recoup a portion of their attorney fees. He explained that the amount of attorney fees recouped is generally based on a percentage of the amount awarded in the case following a sliding scale. However, he pointed out that most of the cases that the state is involved in are public interest litigation pertaining to injunctions and changes in state policy, and do not include cash awards. For these cases, he continued, Civil Rule 82 provides for a recoup of 30 percent of the attorney fees if the case in question goes to trial and 20 percent if the case does not go to trial. He noted that the Planned Parenthood public interest litigation is the one case that the Criminal Division is currently involved.

Co-Chair Donley remarked that he was surprised that the Criminal Division has handling this. He asked how it became a Criminal Division matter.

Mr. Guaneli responded that the decision was made at the early states of the litigation based on review letters issued by the Civil Division that expressed doubts about the constitutionality of the legislative actions to withhold funding from the abortion services. He said that if the Civil Division handled that litigation, it might be perceived in some quarters that the division was not vigorously handling the case.

Co-Chair Donley wanted to know if the Civil Division transferred funds to the Criminal Division to cover the costs of defending this case. He spoke of additional funds appropriated to the Criminal Division to offset increased funding to the Public Defenders Agency.

Mr. Guaneli assured that the Criminal Division did receive funds from the Civil Division for this purpose. He added that because the case has proceeded faster than anticipated, that all of the funds had not yet been expended.

Mr. Guaneli continued detailing the attorney fee award to Planned Parenthood. He stated that approximately $77,000 in attorney fees was awarded to Planned Parenthood for the trial court portion of the litigation, and $27,000 in attorney fees for the appeal portion. He calculated 20 percent of the trial court amount to be $15,000 and 20 percent of the appeal court amount at approximately $5,000.

Mr. Guaneli emphasized however, "The 20 percent figure in Rule 82 in these kinds of cases really is just a starting point. There is a whole laundry list of factors the court can consider in adjusting that presumptive fee up or down." He shared that in fact, one of the justices that dissented from the adoption of that "laundry list" said, "this is really gonna unduly complicate and prolong attorney's fees litigation because any attorney worth his or her salt, is going to try to find a way under those list of exceptions to try to bury that amount." In addition, Mr. Guaneli pointed out, there is a "catchall" exception that allows, "any other equitable factor that the court deems relevant." Therefore, he stated the court has the flexibility to adjust the presumptive 20 percent. He surmised that in public interest litigation the adjustment would most often be an increase. He shared that the court takes into consideration for example, the complexity of the issues, the reasonableness of the fees and the difficulty of the work. He opined that unless the court awards an amount close to the full cost of attorney fees, attorneys would be discouraged from arguing public interest litigant cases. He speculated that the court would also award an amount higher than the 20 percent figure in this

case.

Co-Chair Donley wanted to know how much more than 20 percent did the court award.

Mr. Guaneli was unable to detail all the exceptions but pointed out that the state was ordered to pay a little over $100,000, while the total 20 percent calculation is $20,000 under Rule 82.

BARBARA RITCHIE, Deputy Attorney General, Civil Division, Department of Law, addressed the three public interest litigation items of the Civil Division. She listed them as: Trustees for Alaska, Cook Inlet Keeper versus State of Alaska, Department of Natural Resources, pertaining to the permit for leasing and the beluga whale issue, and the superior court and Supreme Court levels of Northern Alaska Environmental Center and Sierra Club et. al. versus State of Alaska, the Northern Intertie case. She noted that in addition to the reasons given by Mr. Guaneli regarding the difficulties in determining attorney's fees, these cases are considered Administrative Appeals and are subject to additional factors. She explained these cases are appeals of the final agency decision brought under Appellate Rule #601 Appeals, and are not original actions. Therefore, she stressed, Civil Rule #82, which applies to original actions, does not apply to these cases under current law. She continued that in administrative appeals cases, attorney's fees are determined under Appellate Rule #508, which states that attorney's fees are determined by the court and gives no presumptive schedule.

Co-Chair Donley asked the witness to review the cases that did have trial decisions.

Ms. Ritchie responded that these cases did have trial court decisions, but were administrative appeal cases and subject to Appellate Rule #508.

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Ms. Ritchie continued that most Administrative Appeals would not go to trial, but would instead have briefings and arguments in an "appellate capacity" with the superior court sitting as the first level appeal. Therefore, she stated it is difficult to ascertain whether the attorney's fee reimbursement rate of 20-percent for non-trial cases, or 30-percent for trial cases, would apply.

Ms. Ritchie used the previous explanations to address the Northern

Intertie case. She stated that at the superior court level, the court awarded $54,000 for reasonable attorney's fees. She noted that the plaintiff had requested $108,000, and through litigation, the Department of Law received a fifty-percent reduction. She calculated the 30-percent rate at $16,230, and the 20-percent reimbursement rate at $10,820. Similarly, she listed the figures for the Supreme Court, noting that the court awarded $45,000, of the $102,000 requested for attorney's fees, which would be $13,500, using the 30-percent rate calculation and $9,000 under the 20-percent rate calculation.

Co-Chair Donley shared that he has received correspondence from individuals who have read public reports on judgments the state pays and are distressed at the amount of money the executive branch pays to particular advocacy groups. He stressed it is important to discuss the issue and to dispel the appearance of impropriety.

Ms. Ritchie next addressed the Cook Inlet Keeper case. She shared that the appellants had requested almost $118,000 in attorney's fees and the department obtained a reduced amount of $76,000. She calculated that a 30-percent award would have been $23,000 and a 20-percent award would have been $15,000.

Senator Ward asked for clarification that an Administrative Appeal is not governed by the same court rules that apply to litigations against individuals.

Ms. Ritchie responded to Senator Ward's next question by explaining that Administrative Appeals are governed by appellate rules that are different from the civil rules, which apply to an original action. She stated that this process is common for other states, as well as with the federal government.

Co-Chair Donley added that one difference is that some cases were considered public interest litigation. He referred to a bill passed by the legislature the previous session, but vetoed by the governor regarding attorney's fees reimbursement for public interest litigation. He spoke of a 1998 case, which set the precedent to no longer pro-rate public interest litigation based on portions of the case in which the plaintiff prevailed. He stated that the plaintiff is now awarded the full cost of attorney fees even if the plaintiff lost 90-percent of the entire case, only prevailing on one or more point.

Ms. Ritchie stated that public interest litigants were involved in both administrative appeals and original cases.

Co-Chair Donley stated that the remaining questions raised in the

previous hearing would be addressed "informally" outside of the meeting, rather than by conducting an executive session.

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ADJOURNMENT

Co-Chair Dave Donley adjourned the meeting at 10:44 AM.