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STATE OF ALASKA
THE LEGISLATURE

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Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

SB 398

H. HESS

4/5/90

H. HESS

4/24/90

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 12, 1990
(C&RA waived)

FURTHER REFERRALS:

Date of Committee Action: 4/24/90

The HESS Committee considered:

CSSB 398 (FINANCE)

CS FOR SENATE BILL NO. 398 (Finance)

"An Act relating to day care programs and child care grants; and providing for an effective date."

be replaced with HCS CSSB 398 (HESS) the same title
 a new title

have attached amendment(s)

- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact
- zero fiscal note
- zero with analysis

APPROVES PREVIOUS:

fiscal note(s) published:

zero fiscal notes(s) published:

3/1/90 DCRA

SIGNING DO PASS:

[Signature]

[Signature]

MARK BOGGS

[Signature]

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

[Signature]
Chairman's signature

STATE OF ALASKA
THE LEGISLATURE

REC'D MAR 15 1990

FOLIOV STATE CAPITOL
JUNEAU ALASKA 99811
507 483 2620

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 15, 1990

SUBJECT: Day Care Payments to Sectarian Day
Care Centers: Constitutional Issues

TO: Representative Johnny Ellis
Chair, House HESS Committee

FROM: Terri Lauterbach *TL*
Legislative Counsel

You have asked for a short memo discussing whether Alaska's system of day care subsidies under AS 44.47.250 - 44.47.300 raises issues under the federal or state Establishment clauses because parents who are eligible for subsidies may direct that the state payments be made to child care facilities operated by churches. (Because you indicated a need for only a short memo or an oral response at this time, some of my remarks may seem rather conclusory in nature; if you wish a further explication of a point in this memo, please let me know.)

The constitutionality of the day care assistance program is subject to at least some doubt for two reasons: (1) the use of state day care assistance to fund programs that have a religious content clearly implicates the Establishment clauses; and (2) the availability of state day care assistance to fund programs that may be private or religious educational institutions also implicates art. VII, sec. 1, of the state constitution. Some changes in the way the day care assistance program is administered would bolster its chances of surviving a constitutional challenge.

The federal and state Establishment clauses are substantially identical, and the Alaska Supreme Court has consistently construed the state provision by reference to federal cases. Both clauses prohibit laws "respecting an establishment of religion." (First Amendment, U.S. Constitution; art. I, sec. 4, Constitution of the State of Alaska.)

Representative Johnny Ellis

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March 15, 1990

To survive a challenge under the Establishment clause, a governmental program must meet a three-part test: (1) the government program must have a clearly secular purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) the program must not foster excessive governmental entanglement with religion. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

The day care assistance program appears to satisfy the first part of the test. The purpose of the program is clearly secular in that it is intended to make day care more affordable and available for children of parents who work outside the home.

Whether the program meets the other two parts of the test is less clear. While the primary effect of the program as a whole is, arguably, to expand day care services, it is also arguable that the effect of providing day care assistance to church-operated programs is to directly advance religion because there is a definite religious component to many church-operated programs. Government funding of religious inculcation is highly suspect under the second part of the test, and ensuring that a day care program includes no religious inculcation might lead to excessive entanglement with religion, violating the third part of the test.

As you know, the Congress was considering federal legislation in the past year that would have given vouchers to parents who could have used them for day care of their choice. Because this scheme would have been similar to our state program in important respects, I looked for discussions about the constitutionality of the proposed federal program. What I discovered is that national commentators are split on whether that federal scheme would have been constitutional. I have attached three articles from the Harvard Journal on Legislation that illustrate the split of opinion. (26 Harv. Jour. on Leg. 549 - 590.)

As the attached articles explain, one point that continues to be at issue is whether the courts will treat programs relating to children, especially young children, differently than programs relating to post-secondary education when applying the Establishment clause. Will the courts be more concerned about religious inculcation of young children? Is post-secondary education clearly more secular than a pre-school?

Another point that continues to be at issue is whether allowing parental choice insulates the program from charges that the state is supporting religion. Commentators disagree on the meaning of a Minnesota case that upheld a statute that allowed an income tax deduction for tuition paid to parochial schools. Mueller v. Allen, 463 U.S. 388 (1983). Some commentators assert that under Mueller the court will approve any program where the state channels money through the parents; others point out that the payments at issue in Mueller were not made to the schools, but to the parents. This is different, they say, than direct payments to the schools, based on a parent's choice. So, Mueller may or may not validate a parental choice scheme.

A third point about which commentators disagree is whether the Establishment clause requires separation between church and state, or only neutral treatment by the state. The Alaska day care program does not fully separate the churches from the state, but the churches are being treated neutrally, or on the same basis as other day care programs.

Given the above points at issue, I cannot tell you with any degree of certainty how Alaska's day care assistance program would fare if challenged under the federal or state Establishment clause. There are definitely strong arguments on both sides of the issue. The program could be changed to make its constitutionality more sure. For instance, the contract that is signed by the participants could provide that the money will not be used for inculcation of the beliefs of a particular religion. This would not mean that values couldn't be taught, only that they couldn't be taught as values of a particular religion. The program might also be on more firm ground if the payments were reimbursements to the parents rather than direct payments to the facilities. This would make the scheme more like the Minnesota statute that has been upheld.

Besides the Establishment clause issues involved in the program, there is an aspect of the program that implicates art. VII, sec. 1 of the state constitution. That provision prohibits the use of public funds for "the direct benefit of any religious or other private educational institution."

Ordinarily, it can probably be successfully argued that day care centers are not "educational institutions" to which this provision would apply. However, day care assistance money is available for facilities that are licensed under

Representative Johnny Ellis
Page 4
March 15, 1990

AS 47.35 and the associated regulations. One type of facility that can voluntarily seek licensure as a day care facility is a program whose purpose is primarily educational and is certified by the Department of Education. See 7 AAC 50.-145, which allows voluntary licensure, and 7 AAC 50.124(b)(9), which refers to programs that are primarily educational.

As I understand from DHSS, many sectarian day care programs describe themselves as "primarily educational" so that they are not required to be licensed. But if they want to participate in the day care assistance program, they voluntarily get licensed. However, by defining themselves as "primarily educational," they arguably become "educational institutions" to which the proscription of art. VII, sec. 1 should apply. The day care assistance program would be on firmer footing if it excluded from participation the programs that get licensed as primarily educational programs.

I hope you find this discussion and the enclosed materials helpful. Please let me know if I can be of further assistance.

TL:mi
wkmi6/058

Enclosures



**NORTHWEST HEADQUARTERS
OF SEVENTH-DAY ADVENTISTS**

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PUBLIC AFFAIRS AND RELIGIOUS LIBERTY

April 9, 1990

M E M O

To: Members of the Health, Education, and Social Services Committee
of the House of Representatives of the State of Alaska

- The Hon. Johnny Ellis, Chair
- The Hon. Mark Boyer, Vice Chair
- ✓ The Hon. Peter Goll
- The Hon. Max F. Gruenberg, Jr.
- The Hon. George G. Jacko, Jr.
- The Hon. Cheri Davis
- The Hon. Walt Furnace

Fr: Richard Lee Fenn
 President, Religious Liberty Association of the Northwest
 Mike Preas
 State Vice President, Religious Liberty Association
 of the Northwest

Re: Senate Bill 398

Please give careful thought to our position statement attached.

We are not at all opposed to the overall purpose of SB 398.

We are seriously opposed to any plan providing for tax-derived funds flowing to support religious-sponsored child care and day care programs.

Our position has been made known to the news media.

#

Courtesy copies to

- The Hon. Steve Cooper, Governor
- The Hon. Stephen McAlpine, Lieutenant Governor
- The Hon. Myra M. Moulton, Commissioner of Health and Social Services
- The Hon. Douglas B. Bailly, Attorney General
- The Hon. Drue Pearce, Member of the Senate



NORTHWEST HEADQUARTERS
OF SEVENTH-DAY ADVENTISTS

POST OFFICE BOX 18677, 10025 EAST BURNETT

PORTLAND, OREGON 97218

503/255-7300

PUBLIC AFFAIRS AND RELIGIOUS LIBERTY

April 9, 1990

POSITION STATEMENT ON ALASKA SENATE BILL 398

by

Richard Lee Fenn

President
Religious Liberty Association of the Northwest

Director
Department of Public Affairs and Religious Liberty
North Pacific Union Conference of Seventh-day Adventists

Member
National Advisory Council
Americans United for Separation of Church and State

and

Mike Preas

State Vice President
Religious Liberty Association of the Northwest

Government Relations Representative
Department of Public Affairs and Religious Liberty
North Pacific Union Conference of Seventh-day Adventists

Pastor
Juneau Seventh-day Adventist Church

Senate Bill 398, already approved by the Alaska Senate and pending in the House of Representatives, is an act relating to day care programs and child care grants.

In its present form, SB 398 would authorize the Alaska State Department of Health and Social Services to "contract with other entities to perform duties of the department" . . . [giving] "priority in contracting . . . to municipalities and other entities."

We understand that "other entities" is meant to include religious organizations which provide child care and day care. If SB 398 is passed by the House and signed into law by Governor Cowper,

Alaska will thus have paved the way for the onset of some very big constitutional problems. To state the issue in its simplest terms, the central question is Shall Alaska grant tax funds to religious organizations to assist them in their child care and day care programs?

In a legal memorandum sent to House Health, Education, and Social Services Committee Chair Johnny Ellis, Legislative Counsel Terri Lauterbach has identified two reasons why Senate Bill 398 is constitutionally suspect:

"(1) The use of state day care assistance to fund programs that have a religious content clearly implicates the Establishment clauses [First Amendment to the U. S. Constitution and Article I, Section 4, of the Alaska Constitution]; and (2) the availability of state day care assistance to fund programs that may be private or religious educational institutions also implicates Article VII, Section 1, of the state constitution."

In her memo, Ms. Lauterbach suggested that the program provided in SB 398 might not survive a constitutional challenge in court.

According to Attorney Lauterbach, "It is arguable that the effect of providing day care assistance to church-operated programs is to directly advance religion because there is a definite religious component to many church-operated programs. Government funding of religious inculcation is highly suspect."

Up until last week, the House HESS Committee seemed to be giving some heed to the questions advanced by Ms. Lauterbach and such organizations as the Seventh-day Adventist Church's Department of Public Affairs and Religious Liberty. Then, in a sudden and unexplained reversal, members of the committee said they would not block passage. "We'll let the administration deal with this after we get it through the House," they seemed to be saying.

But, would it help if SB 398 required religious providers of child care and day care services to neutralize their programs-- to take religion out of their otherwise religious programs?

Here is Ms. Lauterbach's answer to that question:

"The program must not foster excessive governmental entanglement with religion. Ensuring that a day care program includes no religious inculcation might lead to excessive entanglement with religion."

Meanwhile, many of Alaska's sectarian day care programs avoid licensure by describing themselves as primarily educational in nature. But to tap into state grants the same religious-sponsored programs voluntarily get licensed as child care or day care facilities. Nevertheless, Ms. Lauterbach's memo suggests, if they really are primarily educational in nature, then the proscriptions of Article VII, Section 1, of the Alaska Constitution should apply.

Neither the Religious Liberty Association of the Northwest, nor the Seventh-day Adventist Church's Department of Public Affairs and Religious Liberty, nor Americans United for Separation of Church and State opposes child care or day care. In today's complex society, this is a very real need. But these organizations hold that state or federal funding of religious child care or day care programs goes to the very heart of the idea of separation of church and state.

Senate Bill 398, so laudable in all its other aspects, misses the mark by a country mile when it comes to religious liberty. It needs to be amended--and our organizations are trying mightily to get it done.

But if it is passed by the house in its present form, Governor Cowper should veto it.

#

=====

LEE BOOTHBY, general counsel, Americans United; nationally-recognized authority on the First Amendment's establishment and free-exercise clauses:

"Because churches are so involved in child day care, there are those who want to pour federal dollars into these church-operated programs. Not only would such a scheme provide tax-derived assistance to religious ministries, but it would also embroil the government in regulation of church activities, thus triggering both establishment and free exercise concerns."

=====

GARY M. ROSS Congressional liason, General Conference of Seventh-day Adventists:

"Child care, once considered custodial, now seems more educational. Given this, can churches--which are the McDonald's of child care providers--really avoid being what they ultimately are, namely, promulgators of the faith? Should they ever minimize this mission so as to get the proffered funds?"

=====

Alaska State Legislature

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During Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-4993

Senator Drue Pearce
District G

MEMORANDUM

TO: Representative Max F. Gruenberg, Jr.
House Health, Education & Social Services Committee

FROM: Drue Pearce *Drue Pearce*

RE: SB 398

DATE: April 6, 1990

I understand that constitutional free exercise/establishment clause issues were raised in connection with SB 398 during the April 5, 1990 House Health, Education and Social Services committee meeting.

If there is an issue here it is the constitutionality of the day care assistance program itself not SB 398, which is primarily administrative in nature. I do recognize the constitutional problems implicit in a program which provides for the use of State monies to fund programs sponsored by a religious institution or having a religious content or nature. Perhaps it would be appropriate to have Legal Services explore the federal and state constitutional issues raised by the existing system of day care subsidies as an interim project.

The results of such a project would certainly be of use to us in the future.

DP:pc

cc: Johnny Ellis, Chairman
Mark Boyer
Peter Goll
George Jacko, Jr.
Walt Furnace
Cheri Davis

H. H. H. H.

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act .day care programs and child care grants."
 Sponsor: Serators Pearce, Duncan, etc.
 Requestor: _____

Agency Affected: Community & Regional Affairs
 BRU: Child Assistance

Components: Child Care

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

There is no fiscal effect for FY 90.

Prepared by: Brenda Knapp, Deputy Director
 Division: Rural Development Division

Phone: 465-4890
 Date: 2/28/90

Approved by Commissioner: [Signature]
 Agency: Department of Community & Regional Affairs

Date: 2-28-90

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

THE FOLLOWING DOCUMENT HAS
NOT BEEN FILMED BUT IS
AVAILABLE IN THE ORIGINAL
FILE

Special Review
Day Care Assistance Program
Child Care Grant Program
August 28, 1989 through February 23, 1990

Prepared by
The State of Alaska
Department of Community and Regional Affairs
Division of Administrative Services

March 23, 1990



Steve Cowper, Governor

David G. Hoffmar, Commissioner

Remond Henderson, Director

Original sponsor(s): SEN. PEARCE, Duncan, Kelly, Sturgulewski, Zharoff,
Jones

1 IN THE SENATE

BY THE HESS COMMITTEE

2 HOUSE CS FOR CS FOR SENATE BILL NO. 398 (HESS)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to day care programs and child care
7 grants; and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 44.47.250(b) is amended to read:

10 (b) The department may

11 (1) adopt regulations necessary for the performance of its
12 duties under AS 44.47.250 - 44.47.310;

13 (2) contract with other entities [MUNICIPALITIES, OR, IF
14 NECESSARY, WITH DAY CARE FACILITIES,] to perform duties of the depart-
15 ment under AS 44.47.250 - 44.47.310 within an area specified by the
16 department; within an area, the department shall give higher priority
17 to contracting with municipalities than with other organizations [THAT
18 MUNICIPALITY; WITH THE APPROVAL OF THE DEPARTMENT, THE MUNICIPALITY
19 MAY SUBCONTRACT WITH ANOTHER ORGANIZATION IN THE COMMUNITY TO PERFORM
20 ADMINISTRATIVE DUTIES, OR, IF NECESSARY, THE DEPARTMENT MAY CONTRACT
21 WITH ANOTHER ORGANIZATION TO PERFORM ADMINISTRATIVE DUTIES;

22 (3) REPEALED;

23 (4) CONTRACT WITH DAY CARE FACILITIES OUTSIDE OF MUNICIPAL-
24 ITIES; TO PROVIDE MORE EFFECTIVE ADMINISTRATION OF PROGRAMS IN THE
25 UNORGANIZED BOROUGH, THE DEPARTMENT MAY CONTRACT WITH ANOTHER ORGANI-
26 ZATION IN THE COMMUNITY OR WITH AN ORGANIZATION SERVING THE REGION IN
27 WHICH THE COMMUNITY IS LOCATED TO PERFORM ADMINISTRATIVE DUTIES].

28 * Sec. 2. AS 44.47.260 is amended to read:

29 Sec. 44.47.260. PAYMENTS TO MUNICIPALITY OR ORGANIZATION. When

1 a contract is made under AS 44.47.250(b)(2) [OR (b)(4)] between the
2 department and a municipality or an organization, the department shall
3 pay to that municipality or organization the greater of

4 (1) an amount equal to 10 percent of the total annual day
5 care benefits paid to day care facilities in the geographic area
6 administered by that municipality or organization under the contract;
7 or

8 (2) \$1,000 per year.

9 * Sec. 3. AS 44.47.300(b) is amended to read:

10 (b) Benefits shall be paid by the department directly to the
11 municipality or organization contracting with the day care facility
12 [OR, OUTSIDE OF A MUNICIPALITY, TO THE FACILITY UPON RECEIPT OF A
13 BILLING FROM A MUNICIPALITY OR FACILITY].

14 * Sec. 4. AS 44.47.305(f) is amended to read:

15 (f) A grant under (a) of this section shall be made monthly or
16 quarterly and shall be based on the monthly average daily full-time
17 equivalent enrollment in the child care facility. If the method of
18 payment for the grant is other than monthly, it shall be at the re-
19 quest of the child care facility with the approval of the department.
20 Based on criteria established by the department, the department may
21 make quarterly advance payments [DURING THE CALENDAR MONTH PRECEDING
22 THE DATE ON WHICH APPLICATION FOR A GRANT IS MADE].

23 * Sec. 5. AS 44.47.305(g) is amended to read:

24 (g) Each child care facility receiving a grant under (a) or (d)
25 of this section shall assure that at least 15 percent or one of its
26 child care spaces receiving subsidy under this section, whichever is
27 greater, will be made [A SPECIFIED NUMBER OF CHILD CARE POSITIONS ARE]
28 available, if requested, to children eligible for day care assistance
29 under AS 44.47.250 - 44.47.310, whose parents or guardians wish to pay

1 for care based on attendance only [THE NUMBER OF FULL-TIME EQUIVALENT
2 DAYS THE CHILD ATTENDS THE FACILITY. ALL CHILD CARE POSITIONS NOT
3 MADE AVAILABLE UNDER A PAYMENT SCHEDULE BASED ON ENROLLMENT SHALL BE
4 MADE AVAILABLE UNDER A PAYMENT SCHEDULE BASED ON ATTENDANCE AND AT
5 LEAST ONE FULL-TIME EQUIVALENT POSITION SHALL BE MADE AVAILABLE BASED
6 ON ATTENDANCE RATHER THAN ENROLLMENT. THE MAXIMUM NUMBER OF CHILD
7 CARE POSITIONS IN EACH FACILITY THAT MAY BE MADE AVAILABLE UNDER A
8 PAYMENT SCHEDULE BASED ON ENROLLMENT SHALL BE DETERMINED EACH MONTH
9 UNDER THE FOLLOWING FORMULA:

10 $M = (T+E) - (A+B)$ WHERE

11 M = MAXIMUM NUMBER OF POSITIONS AVAILABLE UNDER AN ENROLL-
12 MENT-BASED FEE SCHEDULE;

13 T = THE TOTAL NUMBER OF FULL-TIME EQUIVALENT CHILD CARE
14 POSITIONS IN THE FACILITY;

15 E = NUMBER OF FULL-TIME EQUIVALENT POSITIONS DURING THE
16 MONTH BEFORE COMPUTATION WITH AN ENROLLMENT-BASED FEE SCHEDULE;

17 A = AVERAGE DAILY FULL-TIME EQUIVALENT ATTENDANCE DURING THE
18 MONTH BEFORE COMPUTATION IN POSITIONS WITH AN ENROLLMENT-BASED
19 FEE SCHEDULE;

20 B = MAXIMUM DAILY FULL-TIME EQUIVALENT ATTENDANCE DURING THE
21 MONTH BEFORE COMPUTATION IN POSITIONS WITH AN ATTENDANCE-BASED
22 FEE SCHEDULE].

23 * Sec. 6. AS 44.47.310(1) is amended to read:

24 (1) "child" means a person below 13 [11] years of age, or a
25 minor who has a developmental disability;

26 * Sec. 7. AS 44.47.310(6) is repealed and reenacted to read:

27 (6) "developmental disability" means a disability under
28 which a person is incapable of self-care, as verified by a physician
29 or licensed or certified psychologist who has examined the person;

* Sec. 8. This Act takes effect July 1, 1990.

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