

S B

450

STATE OF ALASKA THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907.465-3800

LEGISLATIVE AFFAIRS AGENCY LEGISLATIVE REFERENCE LIBRARY

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 450

N. HESS	3/29/90
H. HESS	4/4/90
H HESS	4/18/90
H HESS	4/19/90
H HESS	4/20/90

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 21, 1990
(Removed from Judiciary, HESS added)

FURTHER REFERRALS:

JUDICIARY

Date of Committee Action: 4/20/90

The HESS Committee considered:

CSSB 450(JUD) am

CS SB NO. 450 (Jud) am

CHILD ABUSE REPORTING

"An Act relating to reporting and investigation of child abuse and neglect; relating to training of persons required to report child abuse or neglect; and amending the definition of 'child abuse or neglect'."

RECOMMENDATIONS:

- be replaced with HCS CS SB 450 the same title
- have attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) _____

zero with analysis _____

2 zero fn/analysis 2/23/90 DHSS & DPS

SIGNING DO PASS

SIGNING:

(Check approp. column)

Do Not
PASS
No Rec
Amend

[Signature]
Cheri Davis
Mark Bryan
[Signature]

SIGNING:	Do Not PASS	No Rec	Amend
<u>[Signature]</u>			<input checked="" type="checkbox"/>

[Signature]
Chairman's Signature

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/13/90 ASD/HESS/Law Teleconference)

Page 7, lines 3 - 12:

Delete all material.

Insert a new bill section to read:

"* Sec. 12. AS 47.17.050 is amended to read:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview under AS 47.17.027, or [WHO] participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, except that a person who knowingly makes an untimely report is not immune from civil or criminal liability based on the delay in making the report."

Page 9, lines 8 - 12:

Delete all material.

Insert a new subsection to read:

"(13) "maltreatment" means an act or omission that causes, or could cause, a child to be a child in need of aid under AS 47.10.010(a)(2) if the act were committed by a person responsible for the child's welfare;"

Page 9, lines 22 - 25:

Delete all material.

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/10/90 HESS Committee Work Session)

Page 1, line 21, after "reports":

Insert "before making a report required under this chapter to the department"

Page 3, line 23:

Delete "a new section"

Insert "new subsections"

Page 3, line 26, after "school":

Insert "or school district"

Page 3, line 28, after "school":

Insert "or school district"

Page 4, line 1, after "student":

Insert "or on the premises of a school within the district in which the child is enrolled as a student"

Page 4, lines 1 - 2:

Delete "at the conclusion of its investigation"

Page 4, line 3, after "enrolled":

Insert "immediately after the agency determines that a child has been abused or neglected under the circumstances set out in this section"

Page 4, line 5, after "." through line 11:

Delete all material.

Insert "If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall send a copy of the notification required under this subsection to the Professional Teaching Practices Commission."

Page 4, after line 11:

Insert a new subsection to read:

"(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section."

Page 4, line 24, after "district":

Insert "at least once every five years"

Page 5, line 9, after "(6)":

Insert "a brief description of"

Page 6, line 16, after "custodian":

Insert "if the department or law enforcement agency provides written certification to the school officials that (1) there is reasonable cause to suspect that the child has been abused or neglected by a person responsible for the child's welfare, or as a result of conditions created by a person responsible for the child's welfare; (2) the interview at school is a necessary part of the investigation to determine whether the child has been abused or neglected; and (3) the interview at school is in the best interests of the child"

Page 6, line 17, after "official":

Delete "may"

Insert "shall"

Page 6, line 20, after ".":

Insert "Immediately after conducting an interview authorized under this section, the department or agency shall make every reasonable effort to notify the child's parent, guardian, or custodian that the interview took place."

Page 7, line 16, after "liability":

Insert "for the child abuse or neglect"

Page 8, lines 8 - 9:

Delete "knowing of the circumstances giving"

Insert "and who knows or should have known that the circumstances give"

Page 8, lines 11 - 16:

Delete all material.

Renumber following sections accordingly.

Page 9, line 7, after "and":

Delete "within"

Insert "no later than"

Page 9, lines 13 - 16:

Delete all material.

Renumber following subsections accordingly.

Page 9, line 19, after "to":

Delete "suspect"

Insert "believe"



ANCHORAGE SCHOOL DISTRICT

4800 DeBarr Avenue
P.O. Box 196614
Anchorage, Alaska 99519-6614
AREA CODE (907) 333-9581

April 16, 1990

SCHOOL BOARD

William Frick
President

Sharon Richards
Vice President

Carol Stoops
Clerk

Darryl Jordan
Treasurer

Betty Bruckman

Jean Buchanan
Past President
1983-84, 1986-87

Betsy Davis
Past President
1985-86

SUPERINTENDENT

William Coak, Ph.D.

Representative Johnny Ellis, Chairman
Health, Education & Social Services Committee
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Mr. Ellis:

The Anchorage School District is very appreciative of the opportunity to provide input on Senate Bill 450. The work we accomplished last week through the meeting on April 10 in Juneau, and the subsequent telephone conversations with Commissioner Myra Munson and Ms. Laurie Otto has been very useful in developing suggestions for changes to Senate Bill 450.

While we have not seen the final draft of the entire bill, we are supportive of the proposed amendments agreed to last week by Commissioner Munson, Ms. Otto, and the Anchorage School District. At the same time we realize our efforts are just a portion of the public input in this process.

The District's legal counsel has informed us of continuing legal concerns about the constitutional issues relative to the proposed definition for the term or terms 'Cause to Believe' or 'Reasonable Cause to Suspect'. We also understand the Attorney General's office has researched the issue and believes it is constitutionally sound. We will leave to the legal community the debate on constitutional issues. We are supportive of the proposed revised draft of the legislation because we feel it is beneficial for the welfare and safety of students which is and always has been our primary concern in this matter.

If we can be of further assistance, please let us know. Again, we appreciate the opportunity to be involved in the review and discussion on Senate Bill 450.

Sincerely,

Bob Christal
Assistant Superintendent
of Instruction

Mike Malone
Special Assistant
for Organizational Development

mt

The Alaska School Nurse Association does not support Senate Bill 450 regarding reporting and investigation of child abuse and neglect. This bill does not encourage cooperation between school districts, law enforcement agencies, and social services agencies. Those agencies need to work closely together to benefit and protect students.

Senate Bill 450 does not improve the clarity of definitions and still needs more revision. The following terms need to be defined: immediately, maltreatment, investigations. The social service agency needs school nurses who are trained to identify child abuse and neglect to conduct appropriate and effective investigations to gather the facts to report to the Division of Family and Youth Services. If school nurses were not available to gather this information then DFYS would be even more overwhelmed than they are today. Now school nurses are talking to answering machines because they cannot get an intake screener and sometimes must wait two days to get a call back. Teachers cannot wait for DFYS to call back when they must be in class with 30 students.

Please reconsider better definitions for this important Senate Bill.

that a "high degree of certainty" is a significantly stricter standard than the proposed "substantial certainty," it fails to cite convincing or binding authority for this assertion. Before we can find misdirection of the jury, we must be convinced from the entire record that the trial's result would probably have differed. See *Bohlman v. American Family Mutual Insurance Co.*, 61 Wis.2d 718, 729, 214 N.W.2d 52, 58-59 (1974). Because we determine that the difference, if any, between the two standards would have had no effect on the trial's outcome, we uphold the trial court's version of the intent instruction.

Judgment and order affirmed.



135 Wis.2d 266

STATE of Wisconsin,
Plaintiff-Respondent,

v.

Richard HURD, Defendant-Appellant.

No. 86-0558-CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Aug. 1, 1986.

Opinion Released Nov. 18, 1986.

Opinion Filed Nov. 18, 1986.

Defendant was convicted in the Circuit Court, Trempealeau County, Robert W. Radcliffe, J., of failing to report suspected child abuse, and his motion for postconviction relief was denied. Defendant appealed. The Court of Appeals, Myse, J., held that: (1) statute prohibiting failure to report suspected child abuse is not unconstitutionally vague; (2) failure to instruct jury that State was required to prove that defendant acted wilfully in failing to report suspected child abuse relieved State of portion of its burden of proof, thus denying defendant due process so as to require new

trial; but (3) whether defendant wilfully failed to report suspected child abuse was question for jury.

Reversed and remanded.

1. Constitutional Law ¶48(1)

There is strong presumption favoring constitutionality of statute, and, if possible, reviewing court will interpret statute to preserve it.

2. Constitutional Law ¶258(2)

Due process mandates that criminal statute be sufficiently definite to give person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law ¶13.1(1)

To avoid being impermissibly vague, statute need not define with absolute clarity and precision what is and what is not unlawful.

4. Criminal Law ¶13.1(1)

Statute is not void for vagueness simply because there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease; it is enough if statute alerts person of ordinary intelligence to type of conduct, active or passive, that is proscribed.

5. Infants ¶13

Reasonable cause requirement, under statute requiring person who has reasonable cause to suspect child abuse to report suspected abuse, examines totality of facts and circumstances actually known to, and is viewed from standpoint of, person possessing suspicion; thus, test becomes whether prudent person would have reasonable cause to suspect child abuse if presented with same totality of circumstances as that acquired and viewed by defendant. U.S.C.A. Const. Amends. 5, 14; W.S.A. 48.981.

6. Infants ¶12

Use of reasonableness standard under statute requiring reporting of child abuse

"reasonable cause to suspect" - ok
see pg 95-96

by person having reasonable cause to suspect that child has been abused or neglected does not itself render statute unconstitutionally vague. W.S.A. 48.981.

7. Infants ⇐12

Use of term "suspicion" in statute requiring reporting facts and circumstances contributing to suspicion of child abuse does not itself create unconstitutionally vague statute. W.S.A. 48.981.

8. Infants ⇐12

Phrase "reasonable cause to suspect" in statute requiring reporting of child abuse by person who has reasonable cause to suspect abuse is readily ascertainable and understandable standard involving belief that ordinary person would reach as to existence of abuse, and thus, statute sufficiently alerts person of ordinary intelligence as to what conduct is required so that statute is not unconstitutionally vague. W.S.A. 48.981.

9. Criminal Law ⇐817

Objection to jury instructions is not waived where instructions misstate law.

10. Criminal Law ⇐1038.1(2)

Notwithstanding waiver of objection to instruction, reviewing court in its discretion may consider whether error is so plain or fundamental that it affects defendant's substantial rights and so mandates reversal. W.S.A. 901.03(4).

11. Criminal Law ⇐1165(1)

Reviewing court may find error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that error contributed to conviction.

12. Constitutional Law ⇐266(7)

Due process clause protects against conviction except upon proof beyond reasonable doubt of all elements of charged offense.

13. Infants ⇐20

To convict defendant of failing to report child abuse that defendant had reasonable cause to suspect, State is required to prove beyond reasonable doubt that de-

fendant not only failed to report suspected child abuse, but that defendant did so wilfully. W.S.A. 48.981.

14. Constitutional Law ⇐268(11)

Criminal Law ⇐1038.2

Infants ⇐20

Failure to instruct jury that State was required to prove that defendant acted wilfully in failing to report suspected child abuse relieved State of portion of its burden of proof, allowing jury to convict defendant simply because he failed to report abuse, thus denying defendant due process and affecting substantial right so as to require remand for new trial, even though defendant failed to object to lack of instruction. U.S.C.A. Const.Amends. 5, 14; W.S.A. 48.981.

15. Statutes ⇐176

Interpretation of statutory words is question of law.

16. Statutes ⇐181(1)

Primary goal of statutory interpretation is to ascertain and give effect to legislature's intent.

17. Statutes ⇐208

"Wilfully" must be defined within context of statute in which it was used.

18. Infants ⇐13

"Wilfully" requirement for conviction of failing to report suspected child abuse allows defendant to raise defenses such as mistake, neglect, or misadventure that caused failure to report, but does not allow defense that defendant was unaware of statutory duty to report child abuse. W.S.A. 48.981, 48.981(6), 939.23(3, 5), 939.43.

See publication Words and Phrases for other judicial constructions and definitions.

19. Infants ⇐20

Evidence that counselor at youth ranch told defendant, the administrator at ranch, on several occasions that another employee was making "advances" toward boys and that defendant had previously expressed his low opinion of competency of law en-

forcement and social service agencies raised jury question as to whether defendant wilfully failed to report suspected child abuse. W.S.A. 48.981.

Richard Hurd, Glenn L. Cushing, asst. state public defender, Madison, for defendant-appellant.

LaVerne Michalak, dist. atty., Whitehall, for plaintiff-respondent, State of Wisconsin.

Before CANE, P.J., LaROCQUE and MYSE, JJ.¹

MYSE, Judge.

Richard Hurd appeals from a judgment convicting him of failing to report suspected child abuse and from an order denying his motion for postconviction relief. Hurd argues that the charging statute is unconstitutionally vague, that the trial court erred by failing to instruct the jury on an element of the offense, and that there was insufficient evidence to convict. We conclude that the challenged statute is constitutional and that there was sufficient evidence to convict. However, because the trial court's error in failing to instruct on an element of the offense violated Hurd's constitutional right to due process, the judgment and order are reversed and the cause remanded for a new trial.

Richard Hurd is the administrator of the Berean Christian Ranch and the Berean School. In 1984, six boys resided at the youth ranch with ages ranging from seven to nineteen. Also residing at the ranch were two adults, Kenneth Murray, a young counselor, and Tom Chrystal. Chrystal was convicted of sexually assaulting certain boys at the youth ranch. Hurd was

charged with failing to report suspected child abuse contrary to sec. 48.981, Stats.

At Hurd's trial, Murray testified that he had informed Hurd several times that Chrystal was making "advances" toward the boys. Murray stated further that after witnessing an incident in which Chrystal was lying on top of one of the boys with his pants down, he told Hurd that he had personally observed one of the "advances" and that he wanted something done about it. One of the boys also testified that he had informed Hurd of a sexual assault by Chrystal. The jury convicted Hurd of the offense.

Hurd first challenges the constitutionality of the charging statute, sec. 48.981. He claims that the statute's undefined phrase "reasonable cause to suspect" is ambiguous and vague.² As a result, he argues that the statute fails to notify a person of ordinary intelligence of the conduct required by the statute. We disagree.

[1, 2] There is a strong presumption favoring the constitutionality of a statute, and if possible, a reviewing court will interpret a statute to preserve it. *State v. Popanz*, 112 Wis.2d 166, 172, 332 N.W.2d 750, 753 (1983). Nevertheless, due process mandates that a "criminal statute must be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of the conduct required or prohibited." *Id.* at 173, 332 N.W.2d at 754. The proper test for determining whether a statute is impermissibly vague was recently set forth by our supreme court in *Popanz*:

Before a court can invalidate a statute on grounds of vagueness, it must conclude that "some ambiguity or uncertainty in the gross outlines of the duty im-

is distinctly tied to those circumstances in which it is probable a child is threatened with abuse. Section 48.981(2), (3)(a), Stats. Hurd was neither charged nor convicted under this aspect of sec. 48.981. Consequently, this issue need not be addressed. See *State v. Courtney*, 74 Wis.2d 705, 713, 247 N.W.2d 714, 719-20 (1976); see also *State ex rel. Deisinger v. Treffert*, 85 Wis.2d 257, 271, 270 N.W.2d 402, 409 (1978).

1. Upon order of the Chief Judge, this has been issued as a three-judge opinion pursuant to sec. 809.41(3), Stats.

2. Hurd challenges the constitutionality of sec. 48.981 on other grounds. He claims that the statute's undefined phrase "reason to believe" is also vague and fails to notify a person of ordinary intelligence of the conduct required by the statute. The statute's use of "reason to believe"

posed or conduct prohibited" appears in the statutes, "such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule."

Id. (quoting *State v. Courtney*, 74 Wis.2d 705, 711, 247 N.W.2d 714, 719 (1976)).

[3, 4] Section 48.981 states in part:

(2) [A]n ... administrator ... having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with an injury and that abuse of the child will occur shall report as provided in sub. (3)....

(3)(a) Referral of report of suspected child abuse or neglect. Persons required to report ... shall immediately contact, ... and shall inform the agency or department of the fact and circumstances contributing to a suspicion of child abuse or neglect or to a belief that abuse will occur.... [Emphasis added.]

It is true that the statute does not define "reasonable cause to suspect." However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct. *Courtney*, 74 Wis.2d at 710, 247 N.W.2d at 718. A statute is not void for vagueness simply because "there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease." *Id.* at 711, 247 N.W.2d at 719. It is enough if the statute alerts a person of ordinary intelligence to the type of conduct, active or passive, that is proscribed. *Id.* at 713, 247 N.W.2d 719.

Section 48.981's use of the phrase "reasonable cause to suspect" fairly notifies a person of ordinary intelligence that if there is a reasonable basis to suspect that child

abuse has occurred, that person must make a report to the appropriate agency. Whether a person possesses a reasonable suspicion that child abuse has occurred is not subject to misunderstanding. This requirement examines the totality of the facts and circumstances actually known to, and as viewed from the standpoint of, that person.³ See, e.g., *State v. Lossman*, 118 Wis.2d 526, 543, 348 N.W.2d 159, 167 (1984). Thus, the test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. Under this statute, conviction is only permitted when, under the totality of the circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse.

[5] The use of the standard of reasonableness does not in itself render sec. 48.981 unconstitutionally vague. This standard is employed in a number of statutes including disorderly conduct (unreasonably loud), refusing to aid an officer (reasonable excuse), arrest without warrant (reasonable grounds to believe), and the statutory definition of "reasonably believes." See secs. 947.01, 946.40, 800.02(6), and 939.22(32), Stats. Testing information actually possessed by a defendant against the standard of reasonableness is not so ambiguous or vague as to preclude a citizen from conforming his conduct to that required by the law.

[6] Nor does use of the term "suspicion" create an unconstitutionally vague statute. This is a nontechnical term commonly used and understood by the general populace. It is not a term of art that requires legal expertise to comprehend its meaning. Absent statutory definition, the common and approved meaning of a nontechnical word may be ascertained by reference to a recognized dictionary. *State v. Ehlenfeldt*, 9 Wis.2d 347, 350, 288 N.W.2d

3. A similar analysis has been applied in other contexts. See *State v. Wilks*, 117 Wis.2d 493, 501-02, 345 N.W.2d 498, 501 (Ct.App.1984), cert.

denied, 471 U.S. 1067, 105 S.Ct. 2144, 85 L.Ed.2d 501 (1985); *State v. Boggess*, 115 Wis.2d 443, 445-56, 340 N.W.2d 516, 519-21 (1983).

786, 790 (1980); see also sec. 990.01(1), Stats. "Suspicion" is defined as a "belief or opinion based upon facts or circumstances which do not amount to proof." Black's Law Dictionary 1298 (5th ed. 1981); see also *Gordon v. Gordon*, 270 Wis. 332, 343, 71 N.W.2d 386, 392 (1955). It is a concept dealing with the degree of certainty with which one holds a belief or opinion.

[7] The phrase "reasonable cause to suspect" is a readily ascertainable and understandable standard that involves a belief, based on evidence but short of proof, that an ordinary person would reach as to the existence of child abuse. Therefore, sec. 48.981 sufficiently alerts a person of ordinary intelligence as to what conduct is required. See *Courtney*, 74 Wis.2d at 713, 247 N.W.2d at 719.

Next, Hurd argues that the trial court erred by failing to instruct the jury on the element of "wilfully." The penalty provision of sec. 48.981 states:

(6) Penalty. Whoever wilfully violates this section by failure to report as required may be fined not more than \$1,000 or imprisoned not more than 6 months or both. [Emphasis added.]

The state concedes that "wilfully" is an element of the offense of failing to report suspected child abuse under sec. 48.981. However, the state argues that Hurd has waived this error by failing to timely object at trial to the jury instructions as given. See secs. 972.10(3) and 805.13(3), Stats. Alternatively, the state claims that this error was harmless.

[8-11] A trial court has broad discretion in instructing the jury. *State v. Danforth*, 125 Wis.2d 293, 291, 371 N.W.2d 411, 414 (Ct.App.1985). Nevertheless, instructions should fully and fairly state the law that applies to the case. *Id.* It is well established that an objection to jury instructions is not waived where the instructions misstate the law. *State v. Moriarty*, 107 Wis.2d 622, 630, 321 N.W.2d 324, 329 (Ct.App.1982). Moreover, notwithstanding waiver, a reviewing court in its discretion may consider whether an error in instruction is so plain or fundamental that it af-

fects a defendant's substantial rights and so mandates reversal. *Id.*; sec. 901.03(4), Stats. A reviewing court may find an error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 542, 370 N.W.2d 222, 231-32 (1985).

[12-14] The due process clause of the United States Constitution protects against conviction except upon proof beyond a reasonable doubt of all elements of the charged offense. *State v. Ivy*, 119 Wis.2d 591, 608, 350 N.W.2d 622, 631 (1984). Here, the state was required to prove beyond a reasonable doubt that Hurd had not only failed to report suspected child abuse, but that he had done so wilfully. Under the instructions given by the trial court, the state was relieved of the latter burden. See *Moriarty*, 107 Wis.2d at 631, 321 N.W.2d at 329. Thus, the jury was allowed to convict Hurd simply because he had failed to report. This is neither the offense with which he was charged nor the legislature's intent in enacting sec. 48.981 as indicated by the inclusion of "wilfully" within the statute. Hurd was denied an opportunity to present defenses negating the wilfulness element because the jury was not advised that this was an element of the offense. The error in instruction violated Hurd's right to due process and so affected his substantial rights. *Id.*; see also *Morissette v. United States*, 342 U.S. 246, 274-76, 72 S.Ct. 240, 255-56, 96 L.Ed. 288 (1952). Accordingly, we conclude that there is a reasonable possibility that the error in instruction contributed to Hurd's conviction. Hurd is therefore entitled to a new trial.

[15, 16] Having determined that the trial court erred by failing to instruct on the wilful element, this court must next address the meaning of this term within the context of sec. 48.981. The interpretation of statutory words is a question of law. *State ex rel. Brockway v. Milwaukee County Circuit Court*, 105 Wis.2d 341, 344, 313 N.W.2d 845, 847 (Ct.App.1981). The primary goal of statutory interpreta-

tion is to ascertain and give effect to the legislature's intent. *Id.*

Hurd contends that "wilfully" should be construed to mean that a defendant intentionally violated a known legal duty. It is well established that ignorance of the law is no defense to a violation thereof. *State v. Kemp*, 106 Wis.2d 697, 712, 318 N.W.2d 13, 21 (1982); *State v. Brizke*, 108 Wis.2d 675, 683, 324 N.W.2d 289, 292 (Ct.App. 1982). If the legislature had wished to make ignorance of the law a defense to a crime, it would have done so more clearly and less ambiguously than simply using the term "wilfully." Rules of common law are not to be changed by doubtful implication and to give such effect to a statute, the language must be clear and preemptory. *Rose v. Schantz*, 56 Wis.2d 222, 227, 201 N.W.2d 593, 597 (1972); *see also* sec. 939.10, Stats.

[17] "Wilfully" must be defined within the context of the statute in which it is used. *State v. Cissell*, 127 Wis.2d 205, 210-13, 378 N.W.2d 691, 694 (1985), *cert. denied*, — U.S. —, 106 S.Ct. 1651, 90 L.Ed.2d 194 (1986). Section 48.981 creates an offense for certain individuals who fail to report possible child abuse if they have reason to suspect that such child abuse has occurred. By adding the term "wilfully," the legislature made the offense punishable only if such individuals "wilfully violate this section by failure to report as required...." Section 48.981(6), Stats.

[18] "[W]ilfully" as used in sec. 48.981(6) means "intentionally" as defined in sec. 939.23(3).⁴ *See Cissell*, 127 Wis.2d at 210-13, 378 N.W.2d at 694; *see also* Black's Law Dictionary 1434 (5th ed. 1981); Webster's New World Dictionary 1627 (2d ed. 1980). Section 939.23(3) defines "intentionally" as: "[T]he actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result." Thus, a defendant charged under sec. 48.981 may raise defenses such as mistake, neglect, or misadventure that caused the failure to report. *See* sec. 939.43, Stats. It is not a

defense to this offense, however, that the defendant was unaware of the statutory duty to report suspected child abuse. *Id.*; *see also* sec. 939.23(5), Stats.

Such a construction of sec. 48.981 is consistent with the legislature's intent. When created in 1965, sec. 48.981(6) originally stated, "Anyone knowingly and wilfully violating this section by failing to report...." Laws of 1965, ch. 333, sec. 3 at 584. In the statute's 1977 revision, the legislature deleted "knowingly." Laws of 1977, ch. 355, sec. 4 at 1412. Additionally, the legislature stated that sec. 48.981 was intended to "protect the health and welfare of children by encouraging the reporting of suspected child abuse and child neglect...." *Id.*, sec. 1 at 1409. The legislature's deletion of "knowingly" and the stated purpose of sec. 48.981, indicate that the legislature did not intend ignorance of the statute to be a defense. Rather, this demonstrates that the legislature intended to hold accountable those persons who reasonably suspect child abuse and intentionally fail to notify the appropriate agencies.

Finally, Hurd argues that the evidence adduced at trial was insufficient to support his conviction. He asserts that the state failed to prove an element of the offense, that is, that he wilfully failed to report suspected child abuse. *See Ivy*, 119 Wis.2d at 607, 350 N.W.2d at 631. This argument rests on Hurd's erroneous definition of "wilfully," as an intentional violation of a known legal duty. Nevertheless, because this argument raises a double jeopardy issue, this court must determine whether under the correct definition of "wilfully," there was sufficient evidence to convict. *Id.*

The test for sufficiency of the evidence is whether a reviewing court can conclude that a reasonable trier of fact could be convinced of a defendant's guilt beyond a reasonable doubt by the evidence that it had a right to believe and accept as true. *State v. Wyss*, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Evidence is to be considered in a light most favorable to the

4. The legislature has recently deleted the term "wilfully" from sec. 48.981(6) and inserted the

term "intentionally." 1985 Wis. Act 29, sec. 926 at 237.

state and the conviction. *Id.* The credibility of the witnesses and the weight of the evidence is exclusively for the trier of fact to determine. *Id.*

[19] The evidence adduced at Hurd's trial was sufficient to prove that he had a reasonable cause to suspect child abuse and that he willfully failed to report this suspicion. At trial, Murray testified that he had told Hurd on several occasions that Chrystal was making "advances" toward the boys. One of the boys testified that he had told Hurd of a sexual assault by Chrystal. Chrystal testified that Hurd had stated that he had heard Chrystal was sexually abusing the boys. Additionally, Murray testified that Hurd had previously expressed his low opinion of the competency of law enforcement and social service agencies. From this testimony, the jury could have reasonably inferred that Hurd had willfully failed to report suspected child abuse.⁵

Judgment and order reversed and cause remanded for a new trial.



135 Wis.2d 280

In re the PATERNITY OF J.S.C.

B.A.C., Petitioner-Respondent,

v.

T.L.G., Respondent-Appellant.

No. 85-2343.

Court of Appeals of Wisconsin.

Argued Oct. 2, 1986.

Opinion Released Nov. 19, 1986.

Opinion Filed Nov. 19, 1986.

Review Denied.

Paternity action was brought. The Circuit Court, Waukesha County, Patrick

5. Hurd also argues that he is entitled to a new trial in the interest of justice pursuant to sec. 752.35, Stats. Because Hurd is entitled to a new trial on other grounds, this court need not address this issue. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

L. Snyder, J.¹, declared alleged father to be father of child whose paternity was in dispute, and alleged father appealed. The Court of Appeals, Nettesheim, J., held that: (1) testimony of mother was sufficient to establish that conceptive period occurring during period of sexual activity between mother and alleged father, even though statutory presumptive period of conception did not apply due to low birth weight of child; (2) statute governing admissibility of expert testimony relating to blood test results in paternity case did not contemplate or require technicians who assisted in blood testing process to be experts in examining genetic markers; and (3) evidence was sufficient to render it improbable that blood test samples were exchanged, contaminated, or tampered with, so expert's testimony and report relating to probability of paternity of alleged father were properly admitted.

Affirmed.

1. Children Out-of-Wedlock ⇄53

Proof of conceptive period of child is essential element of paternity case.

2. Children Out-of-Wedlock ⇄53

If child who is subject of paternity proceeding is not full-term child, conceptive period must be established by competent evidence other than statutory presumption as to conceptive period, but it is not essential that exact date of conception be proven. W.S.A. 891.395.

3. Children Out-of-Wedlock ⇄53

Testimony of mother of child who was subject of paternity proceeding that she experienced her last menstrual period prior to birth of child before she met alleged

1. Judge Snyder presided over all the hearings in this case and his rulings form the basis for the issues raised upon appeal. Judge Marianne Becker, however, signed the judgment.

fath
acts
twee
Nov-
was
stru:
that
any
lege
cient
curr
twee
4. C
pate
lishe
in b
pres
sent
ever
ed t
5. A
tion
dec:
tria
6. S
pea
inte
gur
7. S
qui
tio
str
we
8.
sec
cor
9.
bl
in;
te

ent up to policy limits
Riddering.

believe the trial court
the facts in this case
finding that Ms. Rid-
jury to Ms. Jaarsma;
der the policy should
ly because the facts
the conclusion that
d the act which pre-
ermont Mutual Ins.
.App. 686, 218 N.W.
92 Mich. 803 (1974).

testimony in this
ering intentionally
wheel, there was no
gation that she in-
to the passengers,
eover, the "expect-
exclusionary clause
exception for Pio-
no support on the
t that Ms. Ridder-
go off the road and
s not reasonable to
bbing the steering
ined by Ms. Ridder-
ngers were the nat-
ed and anticipatory
e Fire & Casualty
.App. 462, 467-468,

court did not err in
State's exclusion
not apply to Ms.
e did not support
ies caused by Ms.
tended or expect-

reasonable cause to S.C. p. 20 JK
see pgs. 412-413

PEOPLE v. CAVAIANI

Mich. 409

Cite as 432 N.W.2d 409 (Mich.App. 1988)

172 Mich.App. 706

PEOPLE of the State of Michigan,
Plaintiff-Appellant,

v.

Alfred CAVAIANI, also known as Lam-
bert Cavaiani, Defendant-Appellee.

Docket No. 101942.

Court of Appeals of Michigan.

Submitted June 21, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

A psychologist was charged with fail-
ing to comply with statute requiring him to
report suspected child abuse. The 52nd
District Court refused psychologist's mo-
tion to quash complaint and warrant. The
Oakland Circuit Court, Fred M. Mester, J.,
granted the psychologist leave to appeal
and reversed. After granting the State
leave to appeal, the Court of Appeals,
Kaufman, J., held that: (1) statute requir-
ing reporting of suspected child abuse was
not overbroad or vague; (2) section of
child protection law which abrogated all
privileged communications except attorney
and client communications did not unconsti-
tutionally amend by implication statute cre-
ating psychologist-patient privilege; and (3)
abuse reporting requirement did not violate
any party's Fourth or Fifth Amendment
rights.

Reversed and remanded.

1. Constitutional Law ⇨48(3)

Where a statutory provision would oth-
erwise be unconstitutional, it is court's
duty to give statute narrow construction so
as to render it constitutional if such con-
struction is possible without doing violence
to legislature's interest in enacting statute.

2. Constitutional Law ⇨82(4)

A successful overbreadth challenge al-
lows a person charged with violating a
statute to escape punishment based on
First Amendment right of others impinged
upon by statute, even though under a nar-
rower, properly drawn statute, his own be-

havior could be punished because it is not
so protected. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇨90.1(1)

To support an overbreadth challenge,
overbreadth of statute must not only be
real, but substantial as well, judged in rela-
tion to statute's plainly legitimate sweep
where conduct and not merely speech is
involved. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇨82(10)

Infants ⇨12

Section of statute requiring psycholo-
gists and family therapists to report sus-
pected child abuse was a constitutionally
permissible invasion of a family's First
Amendment right of privacy since a family
did not have a protected First Amendment
right to seek treatment for offender. M.C.
L.A. §§ 722.623, 722.633(2); U.S.C.A.
Const.Amend. 1.

5. Constitutional Law ⇨42.2(1)

A person generally lacks standing to
challenge overbreadth of statute where his
own conduct is clearly within contemplation
of statute, even where some marginal ap-
plication of statute might infringe on First
Amendment activities. U.S.C.A. Const.
Amend. 1.

6. Constitutional Law ⇨42.2(1)

Defendant has standing to raise vague-
ness challenge to statute only if statute is
vague as applied to his conduct. U.S.C.A.
Const.Amend. 14.

7. Constitutional Law ⇨48(4)

Even though statute may be sus-
ceptible to impermissible interpretations, re-
versal is not required if statute can be nar-
rowly construed so as to render it suffi-
ciently definite to avoid vagueness and defen-
dant's conduct falls within that prescribed
by the properly construed statute. U.S.C.
A. Const.Amend. 14.

8. Statutes ⇨47

A statute is not vague when the mean-
ing of the words in controversy can be
fairly ascertained by reference to judicial
determinations, common law, dictionaries,
treatises, or even the words themselves, if
they possess a common and generally ac-

cepted meaning. U.S.C.A. Const.Amend. 14.

9. Infants ⇐12

Words "reasonable cause 'o suspect" in statute requiring psychologists to report suspected child abuse provided psychologist fair notice of conduct expected and, therefore, were not vague, in light of fact that psychologist was told by his patient that her father was fondling her breasts. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 14.

10. Statutes ⇐142

Section of child protection law which abrogated all privileged communications except attorney and client communications did not unconstitutionally amend by implication statute creating psychologist-patient privilege. M.C.L.A. Const. Art. 4, § 25; M.C.L.A. §§ 330.1750, 722.631.

11. Infants ⇐12

Statute requiring psychologist to report suspected child abuse did not violate psychologist's asserted Fourth Amendment right to privacy from unreasonable seizure of oral evidence. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 4.

12. Witnesses ⇐306

Psychologist convicted of violating statute requiring reporting of suspected child abuse had no standing to assert a Fifth Amendment privilege. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const. Amend. 5.

13. Criminal Law ⇐393(1)

Any information a patient chose to divulge to psychologist convicted of violating statute requiring him to report suspected child abuse was not protected by the Fifth Amendment, since psychologist was not agent of government. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 5.

Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., L. Brooks Patterson, Pros. Atty., Robert C. Williams, Chief, Appellate

* NATHAN J. KAUFMAN, former Court of Appeals judge, sitting on the Court of Appeals by

Div., and Paul J. Fischer, Asst. Pros. Atty., for the People.

Mueckenheim & Mueckenheim, P.C., by Robert C. Mueckenheim, Detroit, for defendant-appellee.

James Gregard by Jerold Schrotenboer, Jackson, for amicus curiae Pros. Attys. Ass'n of Michigan.

Tom Downs, Lansing, for amicus curiae Michigan Society for Psychoanalytic Psychology.

Colleen V. Ronayne, Pontiac, amicus curiae Guardian ad Litem.

Before WAHLS, P.J., and HOOD, and KAUFMAN,* J.J.

KAUFMAN, Judge.

We granted the people leave to appeal from the circuit court's order declaring M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2) unconstitutional and dismissing the complaint and warrant charging that defendant failed to report an instance of suspected child abuse, a misdemeanor.

Originally charged in the 52nd District Court with failing to report as required by § 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), defendant moved to quash the complaint and warrant on the grounds that the statute was unconstitutionally vague, overbroad, and that it violated Const.1963, art. 4, § 25. After the district court denied defendant's motion, the Oakland Circuit Court granted defendant leave to appeal and reversed. In turn, this Court granted the people leave to appeal on February 11, 1988, and we reverse the order of the circuit court.

The victim's mother initiated family therapy with defendant after suspecting that her husband had sexually molested their 9-year-old daughter. Defendant, a psychologist and family therapist, rendered therapy and treatment to the victim, the victim's mother and the victim's father.

During individual therapy sessions in early 1986, the victim told defendant about

assignment.

PEOPLE v. CAVAIANI

Mich. 411

Cite as 412 N.W.2d 409 (Mich.App. 1988)

recurring incidents in which her father fondled her breasts. When defendant questioned the victim's father about these allegations at a therapy session, defendant claims that the victim's father made it clear to defendant that if he had touched the victim, such touchings were completely accidental and not done for the purpose of sexual arousal or gratification.

The victim herself later reported her father's conduct to a school counselor, who reported the incident to Protective Services. A petition based on the victim's allegations of sexual abuse was filed in the probate court. Contending that defendant had reasonable cause to suspect that the victim had been molested but had failed to report the suspected child abuse as required by M.C.L. § 722.623; M.S.A. § 25.248(3) of the Child Protection Law, the county prosecuting attorney's office brought the disputed misdemeanor charge of failure to report, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), against defendant.

Section 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), requires that

"(1) A physician, coroner, dentist, medical examiner, nurse, a person licensed to provide emergency medical care, audiologist, psychologist, family therapist, certified social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or duly regulated child care provider who has reasonable cause to suspect child abuse or neglect immediately, by telephone or otherwise, shall make ... [a] report ... of the suspected child abuse or neglect to the department....

"(2) The ... report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age. The report shall contain other information available to the reporting person which might establish the cause of the abuse or neglect and the

manner in which the abuse or neglect occurred.

.

"(4) The ... report required in this section shall be mailed or otherwise transmitted to the county department of social services of the county in which the child suspected of being abused or neglected is found.

"(5) Upon receipt of a ... report of suspected child abuse or neglect, the department may provide copies to the prosecuting attorney and the probate court of the counties where the child suspected of being abused or neglected resides and is found.

"(6) If the report indicates a violation of section ... 750.145c of the Michigan Compiled Laws, and the department believes that the report has basis in fact, the department shall transmit a copy of the ... report to the prosecuting attorney of the counties in which the child resides and is found."

Section 3 of the Child Protection Law was amended by 1984 P.A. 418, § 1 to require psychologists and family therapists to report. Prior to March 29, 1985, the effective date of this amendment, practitioners such as defendant were under no statutorily imposed duty to report.

Section 13 of the Child Protection Law, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), provides:

"A person required to report an instance of suspected child abuse or neglect who knowingly fails to do so is guilty of a misdemeanor."

Defendant first claims, as he did below, that the Child Protection Law, M.C.L. § 722.621 et seq.; M.S.A. § 25.248(1) et seq., is unconstitutionally overbroad because it violates defendant's First Amendment rights to associate in legal endeavors and invades the privacy of the family and those in association to cure private family problems. Defendant argues that there is no compelling state interest in "suspicious" behavior, whether or not the suspicion is reasonable.

JIMMIE LAW LIBRARY

[1] Legislative enactments are cloaked with a presumption of constitutionality. Where a statutory provision would otherwise be unconstitutional, it is the Court's duty to give the statute a narrow construction so as to render it constitutional if such a construction is possible without doing violence to the Legislature's interest in enacting the statute. *People v. O'Donnell*, 127 Mich.App. 749, 757, 339 N.W.2d 540 (1983).

[2] The doctrine of overbreadth is primarily applied to First Amendment cases where an overbroad statute prohibits constitutionally protected conduct. *People v. McCumby*, 130 Mich.App. 710, 714, 344 N.W.2d 338 (1983), lv. den. 419 Mich. 911 (1984). A successful overbreadth challenge allows a person charged with violating a statute to escape punishment based on the First Amendment right of others impinged upon by the statute although under a narrower, properly drawn statute, his own behavior could be punished because it is not so protected.

[3] However, not every First Amendment right supports an overbreadth challenge. *Woll v. Attorney General*, 409 Mich. 500, 534-535, 297 N.W.2d 578 (1980). The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep where conduct and not merely speech is involved. *Broadrick v. Oklahoma*, 413 U.S. 601, 614-615, 93 S.Ct. 2908, 2917-2918, 37 L.Ed.2d 830 (1973).

[4] While § 3 does not prevent a psychologist or family therapist from treating those of his patients who have engaged in child abuse, there is little doubt that it places such a patient at greater risk that her or his misconduct will be discovered and prosecution will follow. In the context of a family, § 3 invades its privacy to the extent that the family members' collective desire to seek treatment for the offender and risk the continued abuse of the victim rather than initiating criminal proceedings may not be honored. However, we do not believe that this invasion constitutes a constitutionally impermissible violation of a family's First Amendment right of privacy.

A family does not have a protected First Amendment right to undertake a course of action which may do little or nothing to protect the child victim from continued abuse.

The United States Supreme Court has long recognized that a state has an interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might prevent their growth into free and independent well-developed citizens. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). Even assuming that the reporting requirement does invade the protected rights of defendant and his patients, the state has the constitutional power to regulate for the well-being of its children. 390 U.S. at 637-639, 88 S.Ct. at 1279-1280.

We distinguish the cases cited by defendant in support of his overbreadth argument from the issue presented here. Rather, we find this case to be analogous to *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), where physicians and patients challenged the constitutionality of New York statutes requiring that the state be provided with the names and addresses of all persons obtaining certain prescription drugs. The United States Supreme Court found that the statutes did not deprive individuals of their right to seek medical advice from their physician and obtain needed medication. Accordingly, the Court held that the patient-identification requirements did not invade any of the plaintiffs' constitutional rights or liberties.

[5] Further, a person generally lacks standing to challenge overbreadth where his own conduct is clearly within the contemplation of the statute. This is so even where there is some marginal application which might infringe on First Amendment activities. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). In this case, the victim told defendant, and the victim's father did not deny, that the abuse occurred. Therefore, defendant had more than a "reasonable suspicion" of its occurrence. The Legislature intentionally used "reasonable cause to suspect" as the

threshold for requiring a report in the belief that public policy is better served by investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred. Such an interpretation is consistent with the remedial history of the statute, which the Legislature amended to include psychologists and family therapists following the Attorney General's suggestion that these professionals were not covered by the terms of the original statute. See OAG 1979-1980, No 5815, p 1075.

[6,7] Defendant next claims that the Child Protection Law is void for vagueness because it offers no reasonably precise standard to those charged with adhering to or enforcing the law. Defendant contends that the phrase "reasonable cause to suspect" is not clearly defined and does not give him fair notice of what conduct the statute prescribes. A vagueness challenge must be examined in light of the facts at hand. *People v. Harbour*, 76 Mich.App. 552, 558, 257 N.W.2d 165 (1977), lv. den. 402 Mich. 832 (1977). A defendant has standing to raise a vagueness challenge to a statute only if the statute is vague as applied to his conduct. *People v. Mitchell*, 131 Mich.App. 69, 74, 345 N.W.2d 611 (1983). Even though a statute may be susceptible to impermissible interpretations, reversal is not required where the statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and where defendant's conduct falls within that prescribed by the properly construed statute. *Harbour, supra*.

[8] A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *People v. Gilliam*, 108 Mich.App. 695, 699, 310 N.W.2d 843 (1981); *People v. Herron*, 68 Mich. App. 381, 382, 242 N.W.2d 584 (1976). However, a statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words them-

selves, if they possess a common and generally accepted meaning. *McCumby*, 130 Mich.App. at 714, 344 N.W.2d 338.

[9] We find that the words "reasonable cause to suspect" speak for themselves and provide fair notice of the conduct expected in reporting suspected child abuse. Based upon the fact that defendant was told by his patient, the victim, that her father was fondling her breasts, the § 3 reporting provisions are not vague.

In this case, the circuit court suggested that defendant, in the course of exercising professional judgment, might have concluded that the information supplied to him indicating that the victim was being abused was inaccurate or some kind of fantasy. That hardly makes the statute vague or overbroad. Defendant had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded. With respect to defendant's legal obligations under § 3, it was not for him to make this determination, but for the responsible investigative agencies, such as the Department of Social Services, to make. While defendant is free to decide that the victim's allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself the right to foreclose the possibility of a legal investigation by the state. The state has different interests, and its sovereignty is offended by child abuse.

[10] Defendant next contends that § 11 of the Child Protection Law, M.C.L. § 722.631; M.S.A. § 25.248(11), which abrogates all legally recognized privileged communication except that between attorney and client for purposes of reports required to be made, or the admission of evidence in a civil child protection proceeding resulting from such a report, also amends by implication the psychologist-patient privilege, M.C.L. § 330.1750; M.S.A. § 14.800(750), in violation of our Michigan Constitution, Const. 1963, art. 4, § 25. This claim is without merit. Amendment by implication is not constitutionally prohibited in every instance, e.g., where, as here, an act is complete within itself. *People v. Stimer*, 248 Mich. 272, 292-293, 226 N.W. 899 (1929);

LINEAL LAW LIBRARY

Wayne County Prosecutor v. Recorder's Court Judge, 92 Mich.App. 433, 444, 285 N.W.2d 318 (1979), lv. den. 408 Mich 905 (1980).

Defendant's last claim is that the Child Protection Law is unconstitutional because it violates his Fourth Amendment and Fifth Amendment rights, as well as those of his patients.

[11] The first prong of this argument is that defendant and his clients have a Fourth Amendment right to privacy from unreasonable seizure of oral evidence, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). However, this case is readily distinguishable from *Katz*; here, no governmental eavesdropping or intrusion or electronic surveillance was involved.

[12, 13] With regard to the second prong of the argument, we find the defendant has no standing to assert a Fifth Amendment privilege. *United States v. Goldfarb*, 328 F.2d 280, 281-282 (CA 6, 1964), cert. den. 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964); *Paramount Pictures Corp. v. Miskin's*, 418 Mich. 708, 715, 344 N.W.2d 788 (1984); *In re Moser*, 138 Mich. 302, 305, 101 N.W. 588 (1904). Moreover, defendant is not an agent of the government, therefore any information a patient chooses to divulge to him is not protected by the Fifth Amendment.

We are concerned with the difficulty pointed out by the circuit court of child abusers in need of psychological counseling who are dissuaded by the § 3 reporting provisions from obtaining unfettered access to psychiatric services due to the risk of prosecution for any abuse they have perpetrated. However, as noted by the United States Supreme Court in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the difficulty in analyzing this problem under the Fifth Amendment is that this approach fails to recognize the essential link between coercive activity of the state on the one hand and a resulting confession by a defendant on the other hand. In this regard, the *Connelly* Court held that the flaw in this constitutional argument is that it would expand the

previous line of voluntariness cases into a far ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there is no claim that governmental conduct coerced his decision. 479 U.S. at 165, 107 S.Ct. at 521.

We congratulate the parties and amicus curiae on their excellent briefs.

REVERSED and REMANDED.



172 Mich.App. 718

Brian MONTGOMERY and Jill Montgomery Plaintiffs-Appellants,

v.

DEPARTMENT OF NATURAL RESOURCES, Defendant-Appellee,

and

Department of Transportation, Defendant.

Docket No. 102480.

Court of Appeals of Michigan.

Submitted May 4, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

Snowmobile operator who was injured when snowmobile collided with motor vehicle at intersection of snowmobile trail and public roadway brought suit against state Natural Resources Department which provided funds to maintain snowmobile trail. The Court of Claims, John D. Payant, J., granted Department's motion for summary disposition based on defenses of governmental immunity and recreational use act. Driver appealed. The Court of Appeals, Weaver, J., held that: (1) Department was not grossly negligent and did not engage in willful and wanton misconduct, so as to remove it from protection of Recreational Use Act providing that landowner is not

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/13/90 ASD/HESS/Law Teleconference)

Page 7, lines 3 - 12:

Delete all material.

Insert a new bill section to read:

"* Sec. 12. AS 47.17.050 is amended to read:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview under AS 47.17.027, or [WHO] participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, except that a person who knowingly makes an untimely report is not immune from civil or criminal liability based on the delay in making the report."

Page 9, lines 8 - 12:

Delete all material.

Insert a new subsection to read:

"(13) "maltreatment" means an act or omission that causes, or could cause, a child to be a child in need of aid under AS 47.10.010(a)(2) if the act were committed by a person responsible for the child's welfare;"

Page 9, lines 22 - 25:

Delete all material.

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/10/90 HESS Committee Work Session)

Page 1, line 21, after "reports":

Insert "before making a report required under this chapter to the department"

Page 3, line 23:

Delete "a new section"

Insert "new subsections"

Page 3, line 26, after "school":

Insert "or school district"

Page 3, line 28, after "school":

Insert "or school district"

Page 4, line 1, after "student":

Insert "or on the premises of a school within the district in which the child is enrolled as a student"

Page 4, lines 1 - 2:

Delete "at the conclusion of its investigation"

Page 4, line 3, after "enrolled":

Insert "immediately after the agency determines that a child has been abused or neglected under the circumstances set out in this section"

Page 4, line 5, after "." through line 11:

Delete all material.

Insert "If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall send a copy of the notification required under this subsection to the Professional Teaching Practices Commission."

Page 4, after line 11:

Insert a new subsection to read:

"(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section."

Page 4, line 24, after "district":

Insert "at least once every five years"

Page 5, line 9, after "(6)":

Insert "a brief description of"

Page 6, line 16, after "custodian":

Insert "if the department or law enforcement agency provides written certification to the school officials that (1) there is reasonable cause to suspect that the child has been abused or neglected by a person responsible for the child's welfare, or as a result of conditions created by a person responsible for the child's welfare; (2) the interview at school is a necessary part of the investigation to determine whether the child has been abused or neglected; and (3) the interview at school is in the best interests of the child"

Page 6, line 17, after "official":

Delete "may"

Insert "shall"

Page 6, line 20, after ".":

Insert "Immediately after conducting an interview authorized under this section, the department or agency shall make every reasonable effort to notify the child's parent, guardian, or custodian that the interview took place."

Page 7, line 16, after "liability":

Insert "for the child abuse or neglect"

Page 8, lines 8 - 9:

Delete "knowing of the circumstances giving"

Insert "and who knows or should have known that the circumstances give"

Page 8, lines 11 - 16:

Delete all material.

Renumber following sections accordingly.

Page 9, line 7, after "and":

Delete "within"

Insert "no later than"

Page 9, lines 13 - 16:

Delete all material.

Renumber following subsections accordingly.

Page 9, line 19, after "to":

Delete "suspect"

Insert "believe"

TAPE 2
SIDE 1

505

Section 17 takes out "mental injury"
language, it is in SB175

Sec 20.

define

specificity of what conduct, what things
must be repeated

"no later than 24 hrs"

rather than "w"

SIDE 2

Definition of neglect: is it
unconstitutionally vague?

all definitions in Sec 20

"mental injury" section of Sec 20 deleted

Women's lobby groups oppose use of
language re new terms in (15) Sec 20

(15) "reasonable cause to suspect":

line 19: "reasonable person to believe that something might be the case"
~~same "reasonable" from line 19 not agreed~~

ANCHORAGE SCHOOL DISTRICT'S ANALYSIS
AND COMMENTS ON SENATE BILL 450
AND PROPOSED CHANGES TO AS 47.17.010 ET SEQ.

The recently issued report from the grand jury which has been investigating the issues arising out of the Carlson incident in Anchorage contains two basic conclusions, both of which have been previously and consistently asserted by the Anchorage School District: (1) it is essential that there be inter-agency cooperation between school districts, law enforcement authorities, and social services agencies if the common goal of protecting children from abuse and neglect is to be realized, and (2) that the provisions of AS 47.17.010 et seq. are vague and confusing as presently written.

Unfortunately, Senate Bill 450 frustrates, instead of promotes, inter-agency cooperation. Instead of providing mechanisms which would encourage greater cooperation, the Bill resorts to imposing additional legal duties, pretty much unilaterally upon school districts. Instead of improving the clarity of existing legislation by providing clear definitions, the Bill uses more vague language and adds terms even more confusing than those already contained in the statute. The only clearly discernable intent of the proposals contained in Senate Bill 450 is the desire to increase and make easier the prosecution of persons who make judgment calls concerning when to report suspected abuse and neglect through second-guessing by police and prosecutors. The amendments do nothing to increase protection of children, nothing to facilitate cooperation between agencies, and nothing to assist

the persons required to report to better understand their obligations.

In the remainder of this Memorandum, the Anchorage School District presents its analysis of Senate Bill 450, and proposes, instead, provisions which would facilitate inter-agency cooperation and remove, rather than increase, uncertainty and confusion in the meaning of statutory terms.

SECTION 1 (AMENDMENT TO AS 47.17.010)

The purported expression of intent added to AS 47.17.010 which concerns the distinction between reporting and investigating child abuse and neglect requires further comment.¹ As drafted, the Senate Bill ignores the fact that school districts, as well as social services and law enforcement authorities, have lawful and legitimate needs to investigate suspected child abuse or neglect. In the case of school districts, it is imperative that as an employer, the District to be able to identify, substantiate, and provide a basis for action against any employees who may have committed reportable acts against students. Indeed, the school district's interest is even broader. As in the Carlson case, the District needs to be able to develop information which may appropriately be used to terminate employment status even though it may not constitute a criminal act or be otherwise reportable under Title 47. Teacher tenure statutes and procedures require that the school district, as employer, develop its own independent factual

¹ The inclusion in the purpose section of references to "mental injury" and to "maltreatment," will be addressed in the remarks pertaining to Section 20, below.

basis for taking personnel action. AS 14.20.180. These statutes place a heavy burden on school districts to prove misconduct in terminating a tenured teacher. The District also has an obligation to protect students.

The school district cannot legally rely upon investigations done by other agencies and have any hope of prevailing in contested employment proceedings. Accordingly, the implication in the Senate Bill that social services and law enforcement authorities are the only agencies which should be investigating child abuse or neglect does not accommodate a school district's important interest in removing an abuser from contact with students and terminating the employment relationship. Instead, school districts have vital interest in developing information which will enable them to take effective employment action to protect students. Hopefully, in cases involving criminal wrongdoing, such investigations can be done jointly with appropriate law enforcement agencies.

The suggestion that school districts are incapable of conducting appropriate and effective investigations in this area for purposes of successfully undertaking employment action is contradicted by Section 7 of the Bill which requires school districts to conduct training programs of their employees concerning the laws relating to abuse and neglect, techniques for recognizing and detecting abuse and neglect and other related subjects. Additionally, the school district has counselors, nurses, and administrators who have experience in and responsibility for investigating a range of matters that require

fair and effective interview techniques. In addition to employment matters, school district personnel must investigate student misconduct that might result in serious discipline or suspension.

It is clear that there is a distinction between the right and necessity of investigating on the one hand and the obligation to report on the other. This is the valid point which should be made clear in an Amendment to AS 47.17.010. Accordingly, that section should be amended to read as follows:

[In lieu of the language in Senate Bill No. 450 beginning, "it is not the intent . . .", AS 47.17.010 should be amended to read as follows:

The Legislature recognizes that social service agencies, law enforcement authorities, and school districts, all share the common goal of protecting children and all have different primary purposes whose achievement is designed to promote that common goal. The Legislature further recognizes that in achieving their primary purposes, social service agencies, law enforcement authorities, and school districts must be able to obtain accurate and reliable information concerning child abuse and neglect, and that such information frequently must be obtained from the same source or sources. It is the intent of the Legislature that all social service agencies, law enforcement authorities, and school districts should recognize the legitimacy of each others' functions, accept the commitment of each other to the common goal of protecting children, and do everything possible to facilitate a professional and cooperative working relationship among themselves. It is the intent of the Legislature that persons required to report under this Title shall make such reports after the earliest time at which they develop the basis and belief required by law that abuse or neglect has occurred. Thereafter, whatever investigations are necessary should be undertaken in a cooperative spirit and in the best interest of the children concerned.

SECTION 2 (AMENDMENT TO AS 47.17.020(a))

The "Cause to believe" standard contained in present AS 47.17.020(a) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" standard should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 3 (AMENDMENT TO AS 47.17.020(b))

The "Cause to believe" standard contained in present AS 47.17.020(b) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 4 (AMENDMENT AS 47.17.020(c))

No comment required.

SECTION 5 (REPEAL AND RE-ENACTMENT as 47.17.020(e))

No comment required.

SECTION 6 (AMENDMENT ADDING NEW SECTION (f) TO AS 47.17.020)

There are two major problems with this proposed subsection. First, if a law enforcement agency knows of school-related abuse or neglect of a child, no legislation should suggest that it is appropriate for the agency to wait until the conclusion of its investigation to notify the Chief Administrative Officer of the school or district in which the child is enrolled. Yet, that

is precisely the implication contained in the proposed subsection. This implication flies in the face of the grand jury's recognition of the need for inter-agency cooperation. It also threatens substantial harm to other students in cases where law enforcement agencies are conducting a confidential investigation of school-related abuse or neglect without notifying school authorities so they can take immediate personnel action to suspend, reassign, or remove the cause of the suspected abuse or neglect. Accordingly, the first sentence of proposed subsection (f) should be modified to read as follows:

. . . "The Law Enforcement Agency shall [delete "At the conclusion of its investigation"] notify the Chief Administrative Officer of the school or district in which the child is enrolled at the earliest possible time after the agency determines that a child has been abused or neglected and the circumstances set forth above, and in no event later than 24 hours after having made such a determination."

The second problem with proposed subsection (f) is that it inefficiently places a burden upon the Chief Administrative Officer of the school or district in which the child is enrolled to forward the law enforcement agency's information to Professional Teaching Practices Commission. This is an unnecessary step since the law enforcement agency, or any other person or organization, can and should make a report to PTPC in the event it believes a person involved in the teaching profession has committed an act of child abuse or neglect. Administrators in school districts should, of course, file reports with PTPC when, in their professional judgment, they believe such reports are warranted. If a law enforcement agency, or some other person or agency, feels a report

is warranted, then they should make such a report. But it is unnecessary to obligate one individual to forward the report of another, particularly since the proposed legislation does not take account of circumstances in which the Chief Administrative Officer might have reason to doubt the accuracy or creditability of the "determination" made by some law enforcement officer. Simply put, whoever has a reason to believe their referral to PTPC would be appropriate should make such a referral.

SECTION 7 (AMENDMENTS TO AS 47.17.022)

The Anchorage School District concurs in the amendments to the statute which specifically set forth the obligation of school districts to provide appropriate training in this area. Indeed, the Anchorage School District has been providing such training for years at the direction of the Department of Education.

The only problem with the amendments arises from the addition of new subparagraph (6) which purports to obligate school districts to instruct their employees concerning "the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies after a report of suspected abuse or neglect." The manner of investigation by other agencies is, of course, something known to them and not within the immediate knowledge of school districts. Subsection (d) provides that a department or school district may seek technical assistance from the Department of Health & Social Services in the development of its training program, but does nothing to insure the Department of Health & Social Services will provide assistance when it is requested. Moreover, no such obligation is created with respect to

law enforcement agencies. School districts cannot very will be required to train employees concerning the manner in which DFYS and police investigate without being provided information as to how those agencies conduct their investigations. Accordingly, either AS 47.17.022(c)(6) should be deleted from the amended statute, or AS 47.17.022(d) should be amended to add the following sentences after the language contained in the Senate Bill:

"If a department or school district makes such a request, the Department of Health & Social Services shall respond by providing the necessary or requested technical assistance within 45 days of the filing of the request. Additionally, the department and law enforcement agencies shall prepare and disseminate to the school district in the jurisdictions in which they operate written materials describing the manner in which cases of child abuse or neglect are investigated by them after reports of suspected abuse or neglect have been made. These materials shall be prepared and disseminated to the appropriate school districts within 60 days of the effective date of this legislation, and in the event any modification, amendment, or change occurs with respect to the manner of investigation conducted by the department or law enforcement agencies, they shall provide written notification of the change and of the new current procedures for investigations in such cases to the appropriate school districts within 30 days of the making of any such changes."

SECTION 8 (AMENDMENTS TO AS 47.17.023)

The reason to believe standard should be retained, and the proposed "reasonable cause to suspect" standards should be rejected for the reasons discussed fully in the remarks to Section 20 below. Moreover, use of the term "immediately" should be deleted for the reasons discussed in the remarks to Section 20 below.

SECTION 9 (AMENDMENTS TO AS 47.17.025(a))

No comment required.

SECTION 10 (AMENDMENT BY ADDING NEW SECTION AS 47.17.027)

This new section is another good example of the Bill's failure to promote cooperation in favor of the imposition of legal obligations. If the Legislature elects to proceed in that manner, then it should impose obligations in a fair fashion which take due regard of the interests of all of the agencies with a common stake in the information to be obtained concerning child abuse or neglect and to share in the common goal of protecting children. Instead, this proposed section of the Senate Bill disregards the legitimate interest and the role of school districts, providing social services and law enforcement investigators to use children in the school setting for pursuit of their own purposes without regard for the legitimate interest and functions of the schools. Accordingly, Section 47.17.027 should not be enacted. Instead, social services and law enforcement agencies should work out Memoranda of Understanding with school districts at the local level.

If the legislature is intent upon replacing cooperation with legal requirements, then the proposed Section 47.17.027 should be discarded in favor of the following provisions, derived from a Memorandum of Understanding between the Anchorage School District and the Division of Family and Youth Services of the Department of Health & Social Services:

In cases where the department or a law enforcement agency determines that there is cause to believe that a child has been abused or neglected by a person responsible for the child's welfare, or as a result of conditions created by a person responsible for the

child's welfare, and based upon information and reports which did not originate with school district employees, then school officials shall permit an interview of the student without prior permission having been obtained from a parent/guardian, if the parent/guardian, is the person responsible for the child's welfare who is suspected of committing the abuse or neglect. Before such an interview is authorized, the department or law enforcement agency shall provide written certification to the school official of the following:

- DKS in agreement of imposing this language*
- a. That the department or agency has cause to believe that the student is a victim of abuse or neglect by a person responsible for the child's welfare or as a result of conditions created by a person responsible for the child's welfare;
 - b. That the interview is necessary to determine the existence of the alleged abuse or neglect;
 - c. That the proposed interview is in the best interest of the child;
 - d. That the department or law enforcement agency will make a diligent effort to notify the parent/guardian that the interview occurred as soon as feasible after the conclusion of the interview, but in no event later than 10:00 p.m. on the day on which the interview occurs.

A representative of the school district shall be permitted to be present at any such interview unless the department or law enforcement agency provides case-specific reasons in writing specifically setting forth why the presence of a representative from the school would be detrimental to the interview.

A student who is believed to possess information relative to child abuse or neglect, but who is not believed to be the object of such abuse or neglect may not be interviewed in school relative to such information without a court order or without prior notification to and approval from the student's parent/guardian.

SECTION 11 (AMENDMENT 3 TO AS 47.17.040(b))

The amendment to subsection (b) should be expanded to include the provision of investigative reports and reports of harm to school districts as well as to "governmental agencies with child-protection functions." If the legislature opts to impose legal obligations and limits on the roles to be played by various agencies in the area of child abuse and neglect, then it must make provision for sharing of information between agencies. The grand jury's report specifically recommends that this subsection be amended to permit the sharing of information beyond governmental agencies with the child-protection functions. Accordingly, subsection (b) should be amended to include the following sentence prior to the sentence beginning . . . "a person, not acting . . . :

". . . investigation reports of harm filed under this chapter which involves (1) suspected abuse or neglect caused by a teacher or other employee of the school district, (2) which occurred during an activity sponsored by a school, or (3) which occurred on the premises of a school shall be provided to the Chief Administrative Officer of the school or school district at the earliest possible time after the information or reports are prepared."

SECTION 12 (AMENDMENTS TO AS 47.17.050)

The proposed amendment to the immunity provision of the statute renders the provision of the criminal penalty for failing to report unconstitutional. The United States Supreme Court has recognized for decades that legislation which requires an individual to make a report which is then used as the first step in prosecuting the individual for a law violation constitutes a clear violation of the privilege against self-incrimination.

Accordingly, such statutes are unconstitutional unless they provide immunity from prosecution which is co-extensive with the privilege. Under the Senate Bill, a teacher could make a good faith report on Friday, believing that she has cause to believe that child abuse or neglect has occurred. DFYS could then forward the report to a law enforcement agency, and if some police officer concluded that the teacher should have had enough information to report on Tuesday, then the report could be deemed "untimely." Assuming a prosecutor agreed with this assessment, the teacher could then be prosecuted for failing to report "immediately" or "promptly" as required by the statute. Of course the prosecution of the teacher would not have occurred but for the teacher's making a good faith report. Essentially, the teacher incriminates herself by making a report in good faith, only to be second-guessed by the police and prosecutors later who, in hindsight, concluded that she had sufficient information to make the report at an earlier point. According to the Senate Bill, this teacher lacks immunity from prosecution, can be hauled into court, prosecuted, convicted of a crime, sentenced to jail, and suffer the ignominy of a criminal record, all because she made a good faith report, the timing of which was second-guessed by others in hindsight. The Alaska and the United States Constitutions will not permit such a result.

The Anchorage School District believes that the purpose of the statute is to encourage people to make reports so that intervention can occur to protect children. This provision in the Senate Bill creates a priority in prosecution of reporters over the

creation of incentives to promote reports to protect children. AS 47.17.050 should be amended to read as follows:

(a) a person who makes a report under this chapter, or who participates in judicial proceedings related to the submission of reports under this chapter, is immune from any civil or criminal liability which might otherwise be incurred or imposed, unless the person makes a report which the person knows to be false at the time the report is made, or unless the person intentionally delays making a report for the purpose of preventing the discovery of child abuse or neglect which the person believes to have occurred.

SECTION 13 (AMENDMENT BY ADDING NEW SUBSECTION TO AS 47.17.050)

No comment required.

SECTION 14 (AMENDMENT TO AS 47.17.064)

No comment required.

SECTION 16 (AMENDMENTS TO AS 47.17.068)

The proposed amendments to the criminal penalty section which applies to failure to report, can only be described as a punitive and misguided overreaction to the Carlson matter. Existing law, undoubtedly in recognition of the fact that the obligation to make a report on such a vague standard as cause to believe or, worse, reason to suspect, purports to impose a criminal penalty for failing to report only when an individual "knowingly" fails to make a required report. The section as amended purports to impose strict liability upon persons who fail to make reports, irrespective of their own good faith and absence of any criminal intent. The proposed amendments further evidence the peculiar agenda underlying many of the proposals contained in Senate Bill 450. Nothing in these modifications will improve the protection of children. However, they will make it infinitely easier for police

and prosecutors to target, investigate, and prosecute health practitioners, educators, and others required to report who, notwithstanding their good faith and best efforts, are determined through the hindsight of police and prosecutors to have miscalculated the moment at which cause to believe or reason to suspect arose. Unfortunately, the Anchorage School District must observe that in the face of a grand jury report calling for inter-agency cooperation, proponents of this section of Senate Bill 450 are apparently set on a course of hardening adversary relationships between law enforcement authorities and potential reporters. It is incomprehensible why the proponents of this section of the Senate Bill conclude that the radical step of imposing strict criminal liability could possibly be an appropriate response to an after-the-fact determination that somebody made a highly discretionary judgment call the wrong way or a little bit too late.

Imagine what the response of law enforcement agencies would be if such a punitive measure were focused on them. Let us suppose that the Legislature proposed a bill which would subject police officers and prosecutors to criminal prosecution if they authorized or made arrests or brought charges without adequate "probable cause." Assume that, like the proposed amendments to the criminal penalty in Title 47 no criminal intent was required. Accordingly, a police officer or prosecutor could successfully be charged and convicted of a crime for making or authorizing an arrest or filing a charge when a court later determined that there had not been probable cause to support the action. Police and prosecutors would flood the Legislature with appeals pointing out

that "probable cause" is a highly discretionary judgment, that it depends entirely upon the individual facts of a particular case, that courts are constantly disagreeing as to when probable cause exists or does not exist, and that it would be wholly unfair to subject dedicated law enforcement professionals to criminal prosecution because somebody, in hindsight, second guessed the accuracy of judgments which they made in good faith but which turned out to be erroneous. Exactly the same situation exists with respect to the proposed amendment to the penalty section of Title 47. The standard existing in the proposed Senate Bill is far lower, more discretionary, and more subject to disagreement than the well established concept of "probable cause" or the standard existing in the present law. If the Legislature would strike the criminal penalty section from Title 47 altogether, it would promote inter-agency cooperation, by having a direct effect on the normative messages concerning how people should perceive each other and their obligation. But if a criminal penalty is to remain in the statute for persons who fail to report under the vague and discretionary standards contained in this legislation, then it certainly should require at least a "knowing" failure to make a report, as exists in the present law.

Finally, adopting the amendment proposed in Senate Bill 450, and imposing strict criminal liability upon individuals who fail to make a report at the precise moment that a hopelessly discretionary standard is supposedly fulfilled will render the proposed penalty section unconstitutional. An attempt to enforce

such a section would plainly violate any accused's rights to due process under the Alaska and United States Constitution.

SECTION 17 (AMENDMENTS TO AS 47.17.070(2))

The inclusion of "mental injury" raises problems which are discussed in Section 20 below.

Additionally, there does not appear to be a rationale for expanding the scope of the reach of the statute beyond abuse or neglect occasioned by those who are responsible for the child's welfare, as provided for in present law.

SECTION 18 (AMENDMENTS TO AS 47.17.070(3))

No comment is required.

SECTION 19 (AMENDMENT TO AS 47.17.070(9))

No comment is required.

SECTION 20 (AMENDMENTS BY ADDING NEW PARAGRAPHS TO AS 47.17.070)

The proposed definition (12) concerning the term "immediately" is self-contradictory, vague, and fails to resolve the main source of uncertainty in the reporting statute. Immediately cannot mean both "as soon as is reasonably possible" and "within 24 hours" as suggested by the definition. Circumstances can be imagined where the report as soon as is reasonably possible could not occur within 24 hours. Additionally, the ability to charge someone with a crime because they reported at 23 hours 30 minutes and were determined by someone else to have been able "reasonably" to have reported sooner indicates that Senate Bill 450 has done nothing to limit the discretion of law enforcement officials, put persons on notice as to their obligations, or otherwise resolve the problems that exist in the

present statute. Most significantly, the concept of an "immediate" or "prompt" report will always be contentless given the highly discretionary standards which trigger this timing mechanism. However precise the definition of what "immediate" or "prompt" mean, the vagueness, uncertainty, lack of guidance, and difficulty which arises from the reporting statute is that the timing mechanism is triggered by the occurrence of "cause to believe" in the present statute or "reasonable cause to suspect" in the Senate Bill. It is the combination of an immediate reporting requirement with such a vague, ad hoc, discretionary standard which makes it virtually impossible to meaningfully inform people as to the obligations which the law imposes upon them. While a sense of the intent can be discerned from the language and from the overall legislative scheme, a requirement "immediately" to report a suspicion or cause to believe can never be defined with sufficient precision to permit the imposition of a criminal penalty for the good faith failure of a person to do so.

New subsection (13) finally offers a definition of "maltreatment," a term which has not previously been specifically defined in Title 47, and which appears nowhere else in the Alaska statutes. Unfortunately, the purported definition contained in Senate Bill 450 is so amorphous that it is virtually without content or definite meaning. The range of "behavior that harms or threatens a child's health or welfare," is potentially so large and all encompassing as to frustrate the ability of reasonable people to understand what would be included and what would not be included. For example, would otherwise lawful and consensual

sexual intercourse between teenage students over the age of consent constitute "maltreatment" in any case? Would it constitute "reportable maltreatment" if one of the parties felt uncomfortable after the fact about having engaged in the intercourse? If a student came to a teacher and said she felt guilty for having had intercourse with another student which was otherwise lawful, would a report have to be made? Moving out of the sexual context, if doctors or teachers see parents yelling at their children, criticizing them with sarcastic remarks, humiliating them in front of others in public, or engaging in other "behavior" which could conceivably "threaten the child's welfare," must a report be made? What is the scope of the term "a child's welfare." This term is unconstitutionally vague if any consequence, particularly a criminal one, can be imposed upon a person who fails to make a report when they supposedly have cause to believe or reason to suspect that such a vague occurrence has happened. It is vague because the concept of "health or welfare" is vague and undefined and also because behavior is supposedly reportable even if it has no actual, observable, or concrete effect on the child, but merely "threatens" health or welfare. No potential reporter can understand what his or her legal obligations are so long as such a definition of this term is included in the statute.

Significantly, the term "maltreatment" was originally included in Title 47 in order to maintain compliance with Child Abuse Prevention Treatment Act of 1974, 42 U.S.C. 5101 et seq., and thus to enable the state to continue to receive federal funds. Federal regulations define "maltreatment" for purposes of the

parallel federal statute as including the "failure to provide adequate food, clothing, shelter, or medical treatment." 45 CFR 1340.2(d)(2)(i). The term "maltreatment" does need to be defined if it is going to remain in Title 47. The appropriate definition is the one provided for in the CFR, which defines the same term in the federal legislation from which Alaska originally borrowed it.

In subparagraph 14, Senate Bill 450 expands the reporting requirement to cover "mental injury."

The Legislature has twice before considered the inclusion of "mental injury" in the reporting requirements of Title 47, Chapter 17. On both occasions, in 1976 and 1985, inclusion of "mental injury" in the reporting requirements was rejected by legislators. In 1985 the proposed amendment specifically defined "mental injury" as:

An injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment to the child's ability to function within a normal range of performance and behavior, with due regard to the child's culture."

See, Minutes of House Health, Education & Social Services Standing Committee, April 9, 1985.

In discussing whether to include "mental injury" in the reporting requirement a number of legislators were insightful in their recognition of the difficulties that the amendment created. The concerns expressed by legislators in 1985 under the working definition of "mental injury" provided above, are equally valid when considering the inclusion of "mental injury" as proposed in the current Senate Bill 450. A few of the concerns expressed in 1985 are as follows: (1) Representative Pettyjohn was concerned

that as defined the term "mental injury" could be very easily interpreted in an overly broad manner which he was not comfortable with; (2) Representative Thompson was concerned with the term "mental injury," specifically referring to the phrase "normal range of performance of range and behavior," used to define mental injury, believing these phrases to be too ambiguous; and (3) Representative Handley stated her concern was that the phrase "mental injury" was too broad as defined.

Each of these comments made concerning the proposed amendment to include "mental injury" in the reporting requirement, from 1985 are equally applicable to the present discussion concerning "mental injury." No potential reporter can understand what his or her legal obligations are so long as the definition of "mental injury" remains as currently drafted. Therefore, "mental injury" as defined should be left out of the reporting statute.

The discretionary standard at which point a report is required has been altered by Senate Bill 450 in proposed subparagraph (15) from "cause to believe" to "reasonable cause to suspect." The definition is meaningless and gives no guidance on the conduct required by one subject to the reporting obligation. According to the Bill, "reasonable cause to suspect" means when a "reasonable person [would] suspect that something might be the case." Obviously, the bill does not define this critical term, but simply repeats it. That is not an explanation of the content of the reporting standard. Yet, according to the bill, if a reporter fails to file a report within 24 hours from the moment at which this undefined standard is satisfied, then he or she is subject to

strict liability in a criminal prosecution. The notion that a standard depending so much on the facts of an individual case, hinging so much on individual professional judgment, and providing for such little direction in its definition could somehow be the basis of a criminal prosecution is a startling rejection of the most basic constitutional guarantees of fair notice, due process, and specificity which lie at the bottom of all criminal legislation.

Additionally, the dilution of the standard from cause to believe to "reasonable cause to suspect" raises further constitutional problems by imposing legal obligations upon citizens to make accusations against other citizens which they do not believe and which they do not believe have a minimally sufficient basis in fact. Such requirements are anathema in a free society, and abridge the state and federal rights of citizens to due process of law and to be free from unreasonable searches and seizures and the specific right to privacy contained in the Alaska Constitution.

Although the School District does not believe that "reasonable cause to suspect" or "cause to believe" can be defined with sufficient precision to justify the imposition of criminal sanctions for miscalculating when that cause exists, it is apparent that if there is going to be such a standard and a criminal penalty, the standard must be defined. Accordingly, at a minimum, "reasonable cause to suspect" or "cause to believe" should be defined as existing; --

where, based on the total circumstances, including direct observation, knowledge and information gained from others, and the exercise through professional judgment, a

person has a good or adequate reason, supported by specific and identifiable facts, to believe that child abuse or neglect has occurred or is occurring. "Reasonable cause to suspect" or "cause to believe" is less than a probability, but more than a mere suspicion, conjecture, or inkling.

Finally, the proposal to define "sexual abuse" contained in subparagraph (17) is desirable, but the definition should end with the incorporation of the criminal provisions provided in AS 11.41.410-11.41.455. The purported definition contained in Senate Bill 450 becomes unconstitutionally vague when it extends to include "any other sexual behavior intentionally performed in the presence of a child that harms or threatens the child's health or welfare." "Sexual behavior" which is not contained within the criminal provision of Title 11 is nowhere defined. Nor is any definition given to the circumstances under which touch, otherwise lawful behavior, would be considered to harm or threaten a child's "health or welfare." By introducing such vague language, the Senate Bill virtually guarantees its rejection by courts of law. Perhaps the proponents of the legislation can explain or give examples of when sexual behavior intentionally performed in the presence of a child does not harm or threaten the child's health or welfare. Such vagueness in terms invites court challenges, but more seriously prevents the thousands of persons subject to the reporting requirements of Title 47 from reasonably being able to understand when they have an obligation to file a report under its provisions. Undefined "sexual behavior" which "threatens a child's welfare" contains if anything, less content than the phrase "crime against nature" which has been held unconstitutionally vague by the

Alaska Supreme Court. Harris v. State, 457 P2d 638, 647 (Alaska 1969).

CONCLUSION

Constructive amendments can and should be made to Title 47. The amendment should encourage inter-agency cooperation, not facilitate the prosecution of persons who may in good faith fail to make reports or make reports in a manner which, after the fact, someone else determines should have been made sooner. New provisions should be more specific, increase the clarity of definitions, and provide guidance so that the thousands of dedicated professionals subject to the law's provisions and who try their best to comply with them, be given some direction in making the judgment calls required of them. Senate Bill 450 not only fails to encourage cooperation and increase clarity, but represents a major step backwards.

AMENDMENTS TO SB 450
Proposed by the Department of Law
March 27, 1990

AMENDMENT #1

Reason for amendment: The proposed amendment was recommended in "Part I of Grand Jury Investigation Concerning Reporting of Sexual Abuse of School Children" in Section (B)(1)(e) on pages 8 - 9 of the grand jury report.

Page 3, line 23, following "adding":

Delete "a new section"

Insert "new subsections"

Page 4, following line 11:

Insert

(g) A person required to report child abuse or neglect under (a) of this section is not relieved of the obligation to make a report to the department by reporting the abuse or neglect to a job supervisor, or other individual working for the agency or organization that employs the person required to make a report of child abuse or neglect.

AMENDMENT #2

Reason for Amendment: The proposed amendment was recommended in "Part I of Grand Jury Investigation Concerning Reporting of Sexual Abuse of School Children" in Section (B)(2) on pages 11 - 12 of the grand jury report.

Page 4, line 5, following "mination." - line 11:

Delete all material.

Insert:

"If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall provide a copy of the notification required under this section to the Professional Teaching Practices Commission."

AMENDMENT #3

Reason for amendment: The amendment was requested by several school districts because the current wording of SB 450 limits the obligation of law enforcement agencies to report only those incidents of child abuse or neglect having a connection to the school in which the child is enrolled. The districts point out that harm to a student can occur in connection with activities conducted at district facilities other than the one the child attends, or by employees other than those employed at the particular school a child attends, and suggest expanding the scope of the section as set out in Amendment #3.

Page 3, line 26, following "school":

Insert "or district"

Page 3, line 28, following "school":

Insert "or district"

Page 4, line 1, following "student":

Insert "or on the premises of a school within the district in which the child is enrolled as a student"

AMENDMENT #4

Reason for Amendment: The proposed amendment was requested by several school districts in order to provide immunity for school officials who permit a child to be interviewed on school property without obtaining parental consent. In addition, the proposed amendment clears up several ambiguities in the immunity section that were identified by the school districts.

Page 7, lines 4 - 12:

Delete all material.

Insert:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview pursuant to AS 47.17.027. or who

participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, except that a person who makes an untimely report is not immune from civil or criminal liability based on the delay in making the report.

Page 7, line 16, following "liability":

Insert "for the child abuse or neglect"

A M E N D M E N T #1

OFFERED IN THE HOUSE

TO: CSSB 450 (Judiciary) am

Page 3, line 23:

Delete "a new section"

Insert "new subsections"

Page 4, after line 11:

Insert a new subsection to read:

"(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section."

A M E N D M E N T #2

OFFERED IN THE HOUSE

TO: CSSB 450 (Judiciary) am

Page 4, line 5, after "." through line 11:

Delete all material.

Insert "If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall send a copy of the notification required under this subsection to the Professional Teaching Practices Commission."

A M E N D M E N T #3

OFFERED IN THE HOUSE

TO: CSSB 450 (Judiciary) am

Page 3, line 26, after "school":

Insert "or school district"

Page 3, line 28, after "school":

Insert "or school district"

Page 4, line 1, after "student":

Insert "or on the premises of a school within the district in which
the child is enrolled as a student"

A M E N D M E N T #4

OFFERED IN THE HOUSE

TO: CSSB 450 (Judiciary) am

Page 7, lines 3 - 12:

Delete all material.

Insert a new bill section to read:

"* Sec. 12. AS 47.17.050 is amended to read:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview under AS 47.17.027, or [WHO] participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, except that a person who makes an untimely report is not immune from civil or criminal liability based on the delay in making the report."

Page 7, line 16, after "liability":

Insert "for the child abuse or neglect"

A M E N D M E N T #5

OFFERED IN THE HOUSE

TO: CSSB 450 (Judiciary) am

Page 7, line 29, through page 8, line 4:

Delete all material.

Renumber the following bill sections accordingly.

Page 9, line 9, after "welfare", through page 9, line 12:

Delete all material.

Insert ";

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

March 28, 1990

The Honorable Johnny Ellis
Alaska State Representative
P.O. Box V
Juneau, Alaska 99811

Re: Proposed Amendments to SB 450

Dear Representative Ellis:

As you know, SB 450 was drafted by the Department of Law to address a number of perceived ambiguities in the child abuse reporting statute that were brought to light as a result of the well-publicized controversy between the Anchorage School District, the Anchorage Police Department, and the Department of Law. After SB 450 passed the Senate, a grand jury investigating the Anchorage controversy issued a report making a number of recommendations for amendments to the child abuse reporting statute.

Although most of the amendments recommended by the grand jury are already included in SB 450, an additional two amendments are necessary to fully comply with the grand jury recommendations. In addition, as a result of discussing the bill with representatives of several school districts, we recommend that an additional two amendments be made to SB 450.

We look forward to working with you on SB 450, and are hopeful that the House will act expeditiously on this important piece of legislation.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 

Laurie H. Otto
Assistant Attorney General

Attachment

LHO:me-191

DEPARTMENT OF
PUBLIC SAFETY

BILL NO: SB 450

DATE: February 12, 1997

TITLE: An Act relating to child
abuse and neglect

CONTACT: Barbara Miklos
465-4356

The Council on Domestic Violence and Sexual Assault supports SB 450, which clarifies and strengthens the child abuse reporting statute. We believe that this legislation will be instrumental in protecting children in Alaska.

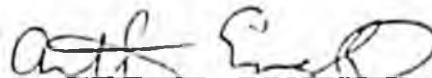
Among the provisions which the Council particularly supports is clarification that persons who report are not intended to conduct investigations prior to making reports; rather, reports are required when there is a reasonable suspicion of child abuse or neglect. This is clarified in the purpose section, as well as by changing "reasonable cause to believe" to "reasonable cause to suspect".

The Council supports adding paid employees of substance abuse treatment or prevention programs and mental health counselors to the list of mandatory reporters. There is a high correlation between substance abuse and family violence; therefore, employees of substance abuse programs are likely to have cause to suspect child abuse or neglect. Now that federal confidentiality requirements for substance abuse treatment providers have been changed to allow the reporting of child abuse or neglect, the barrier to adding them to the list of reporters has been removed.

The Council supports making all reports to the Department of Health and Social Services, and requiring the Department to refer to law enforcement agencies cases that do not involve family members, where criminal conduct is involved, or where abuse or neglect results in the need for medical treatment of the child. We know that the previous requirement that some reports be made to law enforcement officials was confusing for some people. This section also clarifies the cases that the Department of Health and Social Services must refer to law enforcement agencies for their investigation.

Another important provision of this bill is the proposed new section, "Duties of School Officials" (proposed AS 47.17.027) which requires school officials to permit the child to be interviewed at school without prior notification of, or permission from, the child's parent, guardian or custodian. We know that the lack of such authority has impeded the investigation of reports, and caused unnecessary friction between school officials and investigators.

In summary, the Council believes the proposed amendments to the Child Abuse Reporting Law strengthen and improve protections for children. We urge the passage of this bill.



Arthur English
Commissioner

FISCAL NOTE

REQUEST:

Revision Date: 2/8/90
 Title: An Act Relating to Child Abuse and Neglect
 Sponsor: Judiciary
 Requestor: _____

Agency Affected: DHSS, DFYS
 BRU: Social Service

Components: _____

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	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

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	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary) FY 90 fiscal impact is "0".
 The Division receives over 10,000 reports of harm to children each year. Many of these reports concern harm caused by persons who are not responsible for the welfare of the child victim. These are forwarded to law enforcement agencies. The precise number of these cannot be estimated nor is it possible to estimate the increased number which will result from passage of SB450. It

Prepared by: Russell Webb *Russell Webb* Phone: 465-3170
 Division: Family & Youth Services Date: 2/13/90

Approved by Commissioner: Myra M. Munson, Commissioner *Myra M. Munson* Date: 2/12/90
 Agency: Department of Health and Social Services

Distribution (by preparer):

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

Changes in CS SB 450 (JUN) have no fiscal impact. This fiscal note is appropriate.

FISCAL NOTE

ANALYSIS:

is expected that the increase will be small and can be absorbed with existing resources.

272

Original sponsor(s): Judiciary Committee

1 IN THE SENATE

BY THE HESS COMMITTEE

2 HOUSE CS FOR CS FOR SENATE BILL NO. 450 (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 reporting and investigation of
7 child abuse and neglect; relating to training of
8 persons required to report child abuse or neglect;
9 and amending the definition of 'child abuse or ne-
10 glect'."

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

12 * Section 1. AS 47.17.010 is amended to read:

13 Sec. 47.17.010. PURPOSE. In order to protect children whose
14 health and well-being may be adversely affected through the inflic-
15 tion, by other than accidental means, of harm through physical injury
16 [ABUSE] or neglect, mental injury, [OR] sexual abuse, [OR] sexual
17 exploitation, or maltreatment, the legislature requires the reporting
18 of these cases by practitioners of the healing arts and others to the
19 department. It is not the intent of the legislature that persons
20 required to report suspected child abuse or neglect under this chapter
21 investigate the suspected child abuse or neglect before they make the
22 required report to the department. Reports must be made when there is
23 a reasonable suspicion of child abuse or neglect in order to make
24 state investigative and social services available in a wider range of
25 cases at an earlier point in time, to make sure that investigations
26 regarding child abuse and neglect are conducted by trained investiga-
27 tors, and to avoid subjecting a child to multiple interviews about the
28 abuse or neglect [APPROPRIATE PUBLIC AUTHORITIES]. It is the intent
29 of the legislature that, as a result of these reports, protective

1 8services will be made available in an effort to prevent further harm
2 to the child, to safeguard and enhance the general well-being of the
3 children in this state, and to reserve family life whenever possible.

4 * Sec. 2. AS 47.17.020(a) is amended to read:

5 (a) The following persons who, in the performance of their
6 occupational duties, have reasonable cause to suspect [CAUSE TO BE-
7 LIEVE] that a child has suffered harm as a result of child abuse or
8 neglect shall immediately report the harm to the nearest office of the
9 department:

- 10 (1) practitioners of the healing arts;
11 (2) school teachers and school administrative staff members
12 of public and private schools;
13 (3) social workers;
14 (4) peace officers, and officers of the Department of
15 Corrections;
16 (5) administrative officers of institutions;
17 (6) child care providers;
18 (7) paid employees of domestic violence and sexual assault
19 programs, and crisis intervention and prevention programs as defined
20 in AS 18.66.900;
21 (8) paid employees of an organization that provides coun-
22 seling or treatment to individuals seeking to control their use of
23 drugs or alcohol.

24 * Sec. 3. AS 47.17.020(b) is amended to read:

25 (b) This section does not prohibit the named persons from re-
26 porting cases that have come to their attention in their nonoccupa-
27 tional capacities, nor does it prohibit any other person from report-
28 ing a child's harm that the person has reasonable cause to suspect
29 [CAUSE TO BELIEVE] is a result of child abuse or neglect. These

1 reports shall be made to the nearest office of the department.

2 * Sec. 4. AS 47.17.020(c) is amended to read:

3 (c) If the person making a report of harm under this section
4 cannot reasonably contact the nearest office of the department and
5 immediate action is necessary for the well-being of the child, the
6 person shall make the report to a peace officer. The peace officer
7 shall immediately take [IMMEDIATE] action to protect the child and
8 shall, at the earliest opportunity, notify the nearest office of the
9 department.

10 * Sec. 5. AS 47.17.020(e) is repealed and reenacted to read:

11 (e) The department shall immediately notify the nearest law
12 enforcement agency if the department

13 (1) concludes that the harm was caused by a person who is
14 not responsible for the child's welfare;

15 (2) is unable to determine

16 (A) who caused the harm to the child; or

17 (B) whether the person who is believed to have caused
18 the harm has responsibility for the child's welfare; or

19 (3) concludes that the report involves

20 (A) possible criminal conduct under AS 11.41.410 -
21 11.41.455; or

22 (B) abuse or neglect that results in the need for
23 medical treatment of the child.

24 * Sec. 6. AS 47.17.020 is amended by adding new subsections to read:

25 (f) If a law enforcement agency determines that a child has been
26 abused or neglected and that (1) the harm was caused by a teacher or
27 other person employed by the school or school district in which the
28 child is enrolled as a student, (2) the harm occurred during an activ-
29 ity sponsored by the school or school district in which the child is

1 enrolled as a student, or (3) the harm occurred on the premises of the
2 school in which the child is enrolled as a student or on the premises
3 of a school within the district in which the child is enrolled as a
4 student, the law enforcement agency shall notify the chief administra-
5 tive officer of the school or district in which the child is enrolled
6 immediately after the agency determines that a child has been abused
7 or neglected under the circumstances set out in this section, except
8 that if the person about whom the report has been made is the chief
9 administrative officer or a member of the chief administrative offi-
10 cer's immediate family, the law enforcement agency shall notify the
11 commissioner of education that the child has been abused or neglected
12 under the circumstances set out in this section. The notification
13 must set out the factual basis for the law enforcement agency's deter-
14 mination. If the notification involves a person in the teaching
15 profession, as defined in AS 14.20.370, the law enforcement agency
16 shall send a copy of the notification to the Professional Teaching
17 Practices Commission.

18 (g) A person required to report child abuse or neglect under (a)
19 of this section who makes the report to the person's job supervisor or
20 to another individual working for the entity that employs the person
21 is not relieved of the obligation to make the report to the department
22 as required under (a) of this section.

23 * Sec. 7. AS 47.17.022 is amended to read:

24 Sec. 47.17.022. TRAINING. (a) A person employed by the state
25 or a school district who is required under this chapter to report
26 abuse or neglect of children shall receive training on the recognition
27 and reporting of child abuse and neglect.

28 (b) Each department of the state and school district that em-
29 ploys persons required to report abuse or neglect of children shall

1 provide

2 (1) initial training required by this section to each new
3 employee during the employee's first six months of employment, and to
4 any existing employee who has not received equivalent training; and

5 (2) at least once every five years, appropriate in-service
6 training required by this section as determined by the department or
7 school district.

8 (c) Each department and school district that must comply with
9 (b) of this section shall develop a training curriculum that acquaints
10 its employees with

11 (1) laws relating to child abuse and neglect;

12 (2) techniques for recognition and detection of child abuse
13 and neglect;

14 (3) agencies and organizations within the state that offer
15 aid or shelter to victims and the families of victims of child abuse
16 or neglect; [AND]

17 (4) procedures for required notification of suspected abuse
18 or neglect;

19 (5) the role of a person required to report child abuse or
20 neglect and their employing agency after the report has been made; and

21 (6) a brief description of the manner in which cases of
22 child abuse or neglect are investigated by the department and law
23 enforcement agencies after a report of suspected abuse or neglect.

24 (d) Each department and school district that must comply with
25 (b) of this section shall file a current copy of its training curricu-
26 lum and materials [,] with the Council on Domestic Violence and Sexual
27 Assault. A department or school district may seek the technical
28 assistance of the council or the Department of Health and Social
29 Services in the development of its training program.

1 * Sec. 8. AS 47.17.023 is amended to read:

2 Sec. 47.17.023. REPORTS REGARDING CHILD PORNOGRAPHY. A person
3 who, in the course of processing or producing visual or printed mat-
4 ter, either privately or commercially, has reasonable cause to suspect
5 [REASON TO BELIEVE] that the matter visually depicts a child engaged
6 in conduct described in AS 11.41.455(a) shall immediately [PROMPTLY]
7 report this to the nearest law enforcement agency, and provide the law
8 enforcement agency with all information known about the nature and
9 origin of the matter.

10 * Sec. 9. AS 47.17.025(a) is amended to read:

11 (a) A law enforcement agency shall immediately notify the de-
12 partment of the receipt of a report of harm to a child from abuse
13 committed by a person responsible for the child's welfare. Upon
14 receipt from any source of a report of harm to a child from abuse
15 committed by a person responsible for the child's welfare, the depart-
16 ment shall notify the Department of Law and investigate the report
17 and, within 72 hours of the receipt of the report, shall provide a
18 written report of its investigation of the harm to a child from abuse
19 to the Department of Law for review.

20 * Sec. 10. AS 47.17 is amended by adding a new section to read:

21 Sec. 47.17.027. DUTIES OF SCHOOL OFFICIALS. If the department
22 or a law enforcement agency provides written certification to the
23 child's school officials that (1) there is reasonable cause to suspect
24 that the child has been abused or neglected by a person responsible
25 for the child's welfare or as a result of conditions created by a
26 person responsible for the child's welfare; (2) an interview at school
27 is a necessary part of an investigation to determine whether the child
28 has been abused or neglected; and (3) the interview at school is in
29 the best interests of the child, school officials shall permit the

1 child to be interviewed at school by the department or a law enforce-
2 ment agency before notification of, or receiving permission from, the
3 child's parent, guardian, or custodian. A school official shall be
4 present during an interview at the school unless the child objects or
5 the department or law enforcement agency determines that the presence
6 of the school official will interfere with the investigation. Immedi-
7 ately after conducting an interview authorized under this section, the
8 department or agency shall make every reasonable effort to notify the
9 child's parent, guardian, or custodian that the interview occurred
10 unless it appears to the department or agency that notifying the
11 child's parent, guardian, or custodian would endanger the child.

12 * Sec. 11. AS 47.17.040(b) is amended to read:

13 (b) Investigation reports and reports of harm filed under this
14 chapter are considered confidential and are not subject to public
15 inspection and copying under AS 09.25.110 and 09.25.120. However, in
16 accordance with department regulations, investigation reports may be
17 used by appropriate governmental agencies with child-protection func-
18 tions, inside and outside the state [ALASKA], in connection with
19 investigations or judicial proceedings involving child abuse, neglect,
20 or custody. A person, not acting in accordance with department regu-
21 lations, who with criminal negligence makes public information con-
22 tained in confidential reports is guilty of a class B misdemeanor.

23 * Sec. 12. AS 47.17.050 is amended to read:

24 Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this
25 section, a [A] person who, in good faith, makes a report under this
26 chapter, permits an interview under AS 47.17.027, or [WHO] partici-
27 pates in judicial proceedings related to the submission of reports
28 under this chapter, is immune from [ANY] civil or criminal liability
29 that [WHICH] might otherwise be incurred or imposed, except that a

1 person who knowingly makes an untimely report is not immune from civil
2 or criminal liability based on the delay in making the report.

3 * Sec. 13. AS 47.17.050 is amended by adding a new subsection to read:

4 (b) Notwithstanding (a) of this section, a person accused of
5 committing the child abuse or neglect is not immune from civil or
6 criminal liability for the child abuse or neglect as a result of
7 reporting the child abuse or neglect.

8 * Sec. 14. AS 47.17.064(a) is amended to read:

9 (a) The department or a practitioner of the healing arts may,
10 without the permission of the parents, guardian, or custodian, take
11 the following actions with regard to a child who the department or
12 practitioner has reasonable cause to suspect has [BELIEVED TO HAVE]
13 suffered physical harm as a result of child abuse or neglect:

14 (1) take or have taken photographs of the areas of trauma
15 visible on the child; and

16 (2) if medically indicated, have a radiological examination
17 of the child performed by a person who is licensed to administer a
18 radiological examination.

19 * Sec. 15. AS 47.17.068 is amended to read:

20 Sec. 47.17.068. PENALTY FOR FAILURE TO REPORT. A person who
21 [KNOWINGLY] fails to comply with the provisions of [OR REFUSES TO
22 REPORT AS REQUIRED UNDER] AS 47.17.020 or 47.17.023 and who knew or
23 should have known that the circumstances gave rise to the need for a
24 report, is guilty of a class B misdemeanor.

25 * Sec. 16. AS 47.17.070(2) is amended to read:

26 (2) "child abuse or neglect" means the physical injury or
27 neglect, mental injury, sexual abuse, sexual exploitation, or mal-
28 treatment of a child under the age of 18 by a person [WHO IS RESPONSI-
29 BLE FOR THE CHILD'S WELFARE] under circumstances that [WHICH] indicate

1 that the child's health or welfare is harmed or threatened thereby;

2 * Sec. 17. AS 47.17.070(3) is amended to read:

3 (3) "child care provider" means an adult individual, in-
4 cluding a fo er parent or an employee of an organization, who pro-
5 vides care and supervision to a child for compensation or reimburse-
6 ment;

7 * Sec. 18. AS 47.17.070(6) is amended to read:

8 (6) "neglect" means the failure by a person responsible for
9 the child's welfare to provide necessary food, care, clothing, shel-
10 ter, or medical attention for a child;

11 * Sec. 19. AS 47.17.070(9) is amended to read:

12 (9) "practitioner of the healing arts" includes chiroprac-
13 tors, mental health counselors, dental hygienists, dentists, health
14 aides, nurses, nurse practitioners, occupational therapists, occupa-
15 tional therapy assistants, optometrists, osteopaths, naturopaths,
16 physical therapists, physical therapy assistants, physicians, physi-
17 cian's assistants, psychiatrists, psychologists, psychological associ-
18 ates, audiologists licensed under AS 08.11, hearing aid dealers li-
19 censed under AS 08.55, religious healing practitioners, and surgeons;

20 * Sec. 20. AS 47.17.070 is amended by adding new paragraphs to read:

21 (11) "criminal negligence" has the meaning given in AS 11.-
22 81.900;

23 (12) "immediately" means as soon as is reasonably possible,
24 and no later than 24 hours;

25 (13) "maltreatment" means an act or omission that results in
26 circumstances in which a child appears to be a child in need of aid,
27 as described in AS 47.10.010(a)(2), except that, for purposes of this
28 chapter, the act or omission need not have been committed by the
29 child's parent, custodian, or guardian;

1 (14) "mental injury" means an injury to the emotional well-
2 being, or intellectual or psychological capacity of a child, as evi-
3 denced by an observable and substantial impairment in the child's
4 ability to function;

5 (15) "reasonable cause to suspect" means cause, based on all
6 the facts and circumstances know to the person, that would lead a
7 reasonable person to believe that something might be the case;

8 (16) "school district" means a city or borough school dis-
9 trict or regional educational attendance area.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Public Safety
 Title: An Act relating to child abuse and neglect BRU: Council on Domestic Violence and Sexual Assault
 Sponsor: Senate Judiciary Component: _____
 Requestor: Senate Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

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	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
---------	-------	-------	-------	-------	-------	-------

REVENUE	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
---------	-------	-------	-------	-------	-------	-------

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

SB 450 requires that school districts file copies of their training curricula with the Council on Domestic Violence and Sexual Assault and may seek technical assistance of the Council. The Council would be pleased to provide assistance but, without additional funding, it will have to be by mail or phone.

Prepared by: Barbara Miklos, Executive Director
 Division: Council on Domestic Violence and Sexual Assault
 Approved by Commissioner: Arthur English
 Agency: Department of Public Safety

Phone: 465-4356
 Date: 2/12/90
 Date: 2-12-90
 Page 1 of 1

changes in CS SB 450 (J40) have no fiscal impact. This fiscal note is appropriate.

Handwritten initials and date: 2/12/90