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450

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 450
PUBLISH DATE: 2/8/90

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
Phone: 465-3170
Division: Family & Youth Services
Date: 2/13/90

Approved by Commissioner: Myra M. Munson, Commissioner
Date: 2/13/90
Agency: Department of Health and Social Services

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

ANALYSIS:

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

Alaska State Legislature

Senate Judiciary Committee

February 8, 1990

MEMORANDUM

TO: All Senators

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 450 "An Act relating to child abuse and neglect."

Today the Judiciary Committee is introducing Senate Bill 450, which will clarify the current laws relating to the reporting of child abuse or neglect. The need for this legislation became apparent during the recent hearings held by the committee on SB 355, relating to sex offenses by persons in positions of special trust.

AS 47.17 presently requires certain persons, such as school administrators, health professionals, and social workers, to immediately report to DHSS any cause to believe that a child has suffered harm as a result of abuse or neglect.

While the legislative intent behind this statute is clear, the committee has learned that in practice, the specific language has been interpreted in different ways by various school districts and others of whom reporting is required. For example, it has actually been argued in court documents and elsewhere that the law cannot constitutionally require persons to report child abuse; that the requirement for "immediate" notice fails to advise persons how soon they must report abuse; that the terms "sexual abuse" and "maltreatment" are unconstitutionally vague; and that school districts have the right to conduct their own investigation of suspected abuse before deciding whether or not to report it to the trained investigators at DHSS.

SB 450 corrects these interpretations of the current law.

The committee will hold a statewide teleconference on this legislation on Tuesday, February 13, from 1:30 to 3:30 in the Butrovich Room. Senators are welcome to attend.

Post Office Box V • Juneau, Alaska 99811

Alaska State Legislature

Senate Judiciary Committee

March 6, 1990

MEMORANDUM

TO: All Senators

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 450 "An Act relating to child abuse and neglect."

CSSB 450 (Jud) is before the Senate for consideration today. This bill was introduced by the Judiciary Committee to clarify current laws relating to the reporting of child abuse or neglect. The need for this legislation became apparent during the recent hearings held by the committee on SB 355, relating to sex offenses by persons in positions of special trust.

AS 47.17 presently requires certain persons, such as school administrators, health professionals, and social workers, to immediately report to the Department of Health and Social Services (DHSS) any cause to believe that a child has suffered harm as a result of abuse or neglect.

While the legislative intent behind this statute is clear, the committee has learned that in practice, the specific language has been interpreted in different ways by various school districts and others of whom reporting is required. For example, it has been argued in court documents and elsewhere that the law cannot constitutionally require persons to report child abuse; that the requirement for "immediate" notice fails to advise persons how soon they must report abuse; that the terms "sexual abuse" and "maltreatment" are unconstitutionally vague; and that school districts have the right to conduct their own investigation of suspected abuse before deciding whether or not to report it to DHSS or the police.

SB 450 corrects these interpretations of the current law, by bringing the language of the statute in line with the intent of the original drafters. It also adds additional protection for minors, by requiring abuse reports from drug and alcohol

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abuse counselors; by requiring school districts to train employees on the recognition of abuse and neglect; by authorizing DHSS and the police to interview victims of abuse at their school; by requiring abuse committed by teachers to be reported to the Professional Teaching Practices Commission; and by defining "child abuse or neglect" to include mental injury. A sectional analysis discussing these changes in detail is attached.

Passage of CSSB 450 (Jud) is essential if the child abuse reporting system is to work as we intended it would when the law was originally enacted. The protection it provides to our children is vital, and the clarity it provides to the current law will be of great assistance to those who are required to make reports. I urge your support for this legislation.

Sectional Analysis
CSSB 450 (Judiciary)

Section 1: [AS 47.17.010] The amendment conforms the purpose clause to the definition of "child abuse or neglect" set out in section 16. In addition, the amendment clarifies that if there is a reasonable cause to suspect child abuse, a report should be made to the department. At present, some reporters believe that they must conduct an investigation to determine whether child abuse or neglect has occurred before reporting the abuse to the department. In order to make sure that investigations regarding child abuse and neglect are conducted by individuals trained to do investigations, and to avoid subjecting a child to multiple interviews, the standard for reporting is changed in AS 47.17 from "cause to believe" to "reasonable cause to suspect." The change in language is consistent with the Department of Law's interpretation of existing law, and reflects the belief that public policy is better served by DFYS investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred. The "reasonable cause to suspect" standard has been upheld in the face of constitutional vagueness challenges in People v. Cavaiani, 432 N.W.2d 409 (Mich. App. 1988) and State v. Hurd, 400 N.W. 2d 42 (Wis. App. 1986). A definition of "reasonable cause to suspect" is set out in section 19.

Section 2: [AS 47.17.020(a)] As described under section 1, the "cause to believe" language is changed to "reasonable cause to suspect." In addition, section 2 adds paid employees of substance abuse counseling or treatment programs to the list of person required to report child abuse or neglect. These persons were previously excluded from the list because a reporting obligation would conflict with federal confidentiality requirements for substance abuse treatment providers. However, federal law has recently been changed to allow substance abuse treatment providers to report child abuse or neglect. See 42 U.S.C. 290dd-3 and 42 U.S.C. 290ee-3.

Section 3: [AS 47.17.020(b)] As described under section 1, the "cause to believe" language is changed to "reasonable cause to suspect."

Section 4: [AS 47.17.020(c)] For purposes of clarity, the undefined word "immediate" is replaced with "immediately," a term defined in section 19.

Section 5: [AS 47.17.020(e)] Under present law, some reports of child abuse are required to be made to the department and others are required to be made to the nearest law enforcement agency. This has caused confusion for some reporters; others simply make all reports to the department. The amendment conforms

the law to existing practice, and requires all reports of suspected child abuse or neglect to be made to the department. However, since law enforcement agencies will continue to have the responsibility for investigating cases involving abuse by persons not responsible for the welfare of a child, and cases involving possible criminal conduct, the amendment imposes an obligation on the department to immediately report such cases to the nearest law enforcement agency.

Section 6: [AS 47.17.020(f)] In cases where a child has been abused by a teacher or other school employee working in the school in which the child is enrolled as a student, during a school sponsored activity, or on school premises, the amendment requires the investigating agency to report the abuse to the school. If a teacher is the abuser, the district is obligated to report the conduct of the teacher to the Professional Teaching Practices Commission within 10 days.

Section 7: [AS 47.17.022] Under current law, state agencies that employ persons required to report abuse or neglect of children must provide training on the recognition and reporting of child abuse and neglect. The amendment places an identical obligation on school districts (this obligation is consistent with the training requirement set out in 4 AAC 06.045). In addition, the mandatory curriculum for the training is expanded to include training about how DFYS and law enforcement agencies handle reports of child abuse or neglect.

Section 8: [AS 47.17.023] As described under section 1, the "cause to believe" is changed to "reasonable cause to suspect." In addition, for purposes of clarity, the undefined word "promptly" is replaced with "immediately," a term defined in section 19.

Section 9: [AS 47.17.025(a)] As a result of the change in the definition of "child abuse or neglect" described under sections 1 and 16, the amendment makes a technical change to AS 47.17.025.

Section 10: [AS 47.17.027] A new section is added to the statute to allow the department and law enforcement officials to interview a child at school, without prior notification to, or permission from, the person responsible for the child's welfare, if the person responsible for the child's welfare is alleged to have abused or neglected the child. The section also clarifies that a school official may be present during the interview unless the child objects, or the investigating agency determines that the school official is interfering with the investigation.

Section 11: [AS 47.17.040(b)] The Alaska Supreme Court has repeatedly expressed its aversion to the imposition of criminal sanctions in the absence of proof that an offender was aware or

conscious of some wrongdoing. See, e.g., Speidel v. State, 460 P.2d 77, 78 (Alaska 1969); Hentzner v. State, 613 P.2d 821 (Alaska 1980); State v. Rice, 626 P.2d 104 (Alaska 1981); AS 11.81.600. The amendment adds the mental state of "criminal negligence" to the crime of releasing confidential information, and classifies the offense as a class B misdemeanor.

Section 12: [AS 47.17.050(a)] Under current law, persons who make good faith reports of child abuse are immune from any criminal or civil liability as a result of making the report. The amendment clarifies that a person who does not comply with the reporting requirement, for example by delaying making a report of the abuse for many months, is not immune from either civil or criminal liability based on the delay in making the report.

Section 13: [AS 47.17.050(b)] Consistent with the position taken by the court in State v. Howland, 464 A.2d 1076 (New Hampshire 1984), the amendment provides that abusers who report the abuse are not immune from either civil or criminal liability.

Section 14: [AS 47.17.064(a)] As described under section 1, the "cause to believe" language is changed to "reasonable cause to suspect."

Section 15: [AS 47.17.068] The amendment clarifies that criminal penalties may be imposed for failing to comply with the reporting requirements of AS 47.17.020 or 47.17.023 where a person knows of the circumstances giving rise to the need for a report.

Section 16: [AS 47.17.070(2)] In order for the state to continue to receive federal money under the Child Abuse Prevention and Treatment Act, the definition of "child abuse or neglect" must require the reporting of mental injury. The amendment adds this language to the statute. Consistent with the amendment discussed in section 5, the definition of child abuse or neglect has been changed to apply to abuse committed by any person. (Under current law, abuse committed by persons not responsible for a child's welfare must be reported to the police; the effect of the amendment is to require all reports to be made to the department.)

Section 17: [AS 47.17.070(3)] Because foster parents are given reimbursement for their services, rather than compensation, under current law foster parents are arguably not required to report abuse or neglect. The effect of the amendment would be to clarify that all child care providers, including foster parents, must report child abuse or neglect.

Section 18: [AS 47.17.070(9)] Since mental health counselors are in a position to recognize and report the child abuse or neglect, they have been added to the definition of practitioner of the healing arts.

Section 19: [AS 47.17.070] The amendment provides definitions for a number of currently undefined terms in the statute as follows:

AS 47.17.070(11): Under section 11, it is a crime to release confidential information "with criminal negligence." The definition of "criminal negligence" is set out in Title 11, and the amendment cross references this definition.

AS 47.17.070(12): In order to clarify the language of current law, a definition of "immediately" is set out.

AS 47.17.070(13): In order to clarify the language of current law, a definition of "maltreatment" is set out. Under the definition, practitioners of the healing arts would be required to make a report to the department when a child is born with a controlled substance under AS 11.71 in the child's blood or urine.

AS 47.17.070(14): A definition for "mental injury" is set out. The definition limits reportable mental injury to situations where there is an observable and substantial impairment in the child's ability to function. The definition is based on the mandatory requirements of federal law discussed under section 16.

AS 47.17.070(15): A definition of "reasonable cause to suspect" is set out; the definition is based on the rulings in People v. Cavaiani, 432 N.W.2d 409 (Mich. App. 1988) and State v. Hurd, 400 N.W. 2d 42 (Wis. App. 1986).

AS 47.17.070(16): The term "school district" is used in section 7; a definition of the term is set out in this amendment.

AS 47.17.070(17): In order to clarify the language of current law, a definition of "sexual abuse" is set out.

SB 151

STEVE COWPER, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

P.O. BOX N
JUNEAU, ALASKA 99811-1200
PHONE: (907) 465-4356

OFFICE ADDRESS: 450 WHITTIER STREET

January 23, 1990

William Frick, President
Anchorage School Board
2961 Drake Drive
Anchorage, AK 99508

Dear Mr. Frick:

The Council on Domestic Violence and Sexual Assault (Council) has reviewed the Draft Revised Child Abuse and Neglect Reporting Procedures that will go to second reading on February 12, 1990. We have serious concerns about certain provisions of the procedures.

The major concern centers around using a team approach "in cases where an individual is uncertain as to whether or not cause to believe child abuse or neglect has occurred" (IVB. beginning on page 6). We believe that it is in the best interest of the child that investigations regarding child abuse and neglect be conducted by individuals trained to do investigations. Assistant principals, nurses, counselors or psychologists are not in any better positions than classroom teachers to assess for abuse or neglect. It is very difficult for a child to disclose abuse, particularly when the abuser is a parent. If an investigation is not well conducted, it could easily be harmful to the child as well as damaging to the case.

It is also important that the number of interviews in which a child is required to participate is kept to a minimum. The process of disclosure is painful and traumatic to the child. This should not be exacerbated by additional, unnecessary interviews.

We recommend that if there is a suspicion of child abuse and neglect, reports are made <u>immediately</u> and directly to the Department of Health and Social Services, Division of Family and Youth Services (DFYS) or the police. They are the best qualified to determine if child abuse or neglect has occurred.

We are also concerned that the draft policies do not address circumstances when DFYS or the police must interview a child on school district premises. Schools are often the only location DFYS and police can interview a child without undue pressure from parents. Policies should allow DFYS and police to interview a child at school without notifying a parent. Prior notification to a parent could be detrimental to the investigation.

12-L16LH

We think that the process for reporting that you have delineated is excellent, particularly the requirements for written reports. The requirements for training are also excellent.

Thank you for considering our comments. Please contact Barbara Miklos, Executive Director of the Council if you have any questions about our comments.

Sincerely,

By mfp Mary Pete

Mary Pete
Chair

BILL NO: SB 450 DATE: February 12, 1990

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 450
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to child abuse and neglect
Sponsor: Senate Judiciary
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Component: _____

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 Phone: 465-4356
Division: Council on Domestic Violence and Sexual Assault Date: 2/12/90
Approved by Commissioner: Arthur English Date: 2-12-90
Agency: Department of Public Safety

2/12/90

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

SENATE BILL NO. 450

For an Act entitled: "An Act relating to child abuse and neglect."

PROVISIONS OF THE BILL

SB 450 sharpens the child protection reporting law by clarifying the ambiguities that have arisen in the existing law and by adding new provisions that address frequently occurring problems with the implementation of the existing law.

CLARIFICATION OF THE PURPOSE OF REPORTING. New language directs reporters not to investigate whether a report of child abuse or neglect is true or not, but to report when there is "reasonable suspicion of child abuse or neglect." Reporters who conduct investigations may cause a delay in service delivery, may not be skilled as investigators, and may subject the child to multiple interviews. The Department supports this provision.

REQUIRES ALL INCIDENTS OF CHILD ABUSE OR NEGLECT TO BE REPORTED TO ONE CENTRAL AGENCY. Under current law, the Department of Health and Social Services receives reports of harm to children when the harm is caused by someone responsible for the child's welfare. Present law provides for law enforcement agencies to receive reports of harm to children when the harm is caused by someone not responsible for the child's welfare. In practice, however, the Department currently receives many reports of harm to children that could go directly to law enforcement and then refers to a law enforcement agency the same day the report is made.

This bill simplifies the reporting requirement by providing that all reports be made to the Department and requires the Department to use its present practice of informing law enforcement immediately under specified conditions. At this time, no agency consolidates reports of harm to children caused by someone not responsible for the child's welfare. This provision is easier for reporters making a report. The Department supports this provision.

EXPANDS AND CLARIFIES THE LIST OF REQUIRED REPORTERS. This provision clarifies that foster parents, whether compensated

or only reimbursed, are required to report and adds mental health counselors and paid employees of an alcohol or drug abuse counseling center to the list of required reporters. The Department supports this provision.

INCLUDES MENTAL INJURY AND MALTREATMENT AS A TYPE OF HARM. "Mental injury" is added to the definition of child abuse or neglect. This is a federal requirement for the receipt of certain federal funds. Separate pending legislation (HB 175) also addresses this requirement and is in its last committee of referral. The Department already receives these reports, but cannot receive federal money without this statutory language being added.

Reporting maltreatment is a new requirement. The definition of maltreatment is overly broad and fails to focus clearly enough on the impact on the child. The Department supports the intent of this new provision but suggests an amendment:

> "maltreatment" means harm or threat to a child's welfare, and includes the situation in which a controlled substance, as defined in AS 11.71.900, is found in a newborn's blood or urine, with the exception of a controlled substance whose presence in the child is the result of medical treatment administered to the mother or child.

SPECIFIES ON WHAT BASIS ONE REPORTS. The new provision changes the language "cause to believe" as the precursor to reporting a situation involving a child who may have suffered harm as a result of child abuse or neglect. The new phrase, "reasonable cause to suspect," clears up issues that have recently emerged and is consistent with reporters not conducting an investigation. The Department supports this provision.

CLARIFIES AND ADDS DEFINITION ON TIME LIMITS FOR REPORTS. Present law fails to define "immediately." This bill provides a definition of "immediately" and requires reports to be made "as soon as is reasonably possible, and within 24 hours." The Department supports this provision.

REQUIRES NOTIFICATION TO SCHOOLS WHEN THE HARM WAS CAUSED BY A SCHOOL EMPLOYEE, AND NOTIFICATION FROM THE SCHOOL TO THE PROFESSIONAL TEACHING PRACTICES COMMISSION. New language requires the Department or law enforcement to report to the school principal when a child has been abused by a teacher or

other person employed by the school. This provision is unclear about what information is shared with the schools and what constitutes a determination in a case. While the Department supports the intention that schools take affirmative action to protect children, we have serious concerns about the difficulty of administering this provision. New regulatory provisions being adopted may also make this requirement largely unnecessary.

EXPANDS THE DUTIES OF SCHOOL OFFICIALS TO ALLOW FOR THE CHILD TO BE INTERVIEWED AT SCHOOL. New language allows the Department to interview a child who is reported to be a victim of abuse or neglect at the school without notification to the child's parents, if the harm to the child is believed to be the result of the conduct for conditions created by a person responsible for the child's welfare. The Department strongly supports this provision.

DEPARTMENT POSITION

The Department supports the intent of SB 450 and most of its provisions with the amendments that we recommended. Those recommendations included deleting section 6, and amending the definition of maltreatment to focus more on the outcome of harm to the child.

The Department believes that this bill, with the above changes, enhance the state's ability to protect children.

Russell Webb, Director — Date 2/13/90
Division of Family and
Youth Services

Myra M. Munson — Date 2/13/90
Commissioner

MEMORANDUM

STATE OF ALASKA

TO: Jay Livey

DATE: January 12, 1990

THRU: Russ Webb
Director

FILE NO: 189

Martha Holmberg
Field Administrator

SUBJECT: Mental Injury

FROM: Vicki Koehler
Program Coordinator

I contacted Kathy Admire, the Region X specialist for NCAN. She obtained several definitions of mental injury from other states for me, which she will also include in her forthcoming letter to Russ. I suggest that we propose the following three definitions as all acceptable to both the Division and the federal government, and let the sponsor and/or the committee select the one they favor. I have listed them in the order I favor!

1. "mental injury means an observable or substantial impairment in the child's ability to function within the normal range of performance and behavior, with due regard to the child's culture"; (a revision of our current proposed definition)

2. "mental injury to a child shall include only observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child;" (Oregon)

3. "Mental injury means a substantial impairment to the intellectual or psychological ability of a child to function within a normal range of performance and/or behavior." (Idaho)

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM February 21, 1990

SUBJECT: Comments on CSSB 450(Jud)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft of CSSB 450(Jud). I have two comments about the draft.

First, I have narrowed the title of the bill as requested, but it was also necessary to include in the title that the definition of "child abuse or neglect" was being amended. That is because its amendment affects laws outside of AS 47.17 that have nothing to do with reports or training related to child abuse or neglect. There are references to AS 47.17.070's definition in AS 37.14.270(2) (relating to the Alaska Children's Trust Fund) and in AS 47.10.142 (relating to emergency custody of minors). The original general title covered these changes. Converting the title to a more narrowly descriptive title requires that all changes in the bill be covered by the description, so I have included the unrequested phrase of "amending the definition of 'child abuse or neglect'" to cover these other changes.

Second, a requested amendment to the definition of "maltreatment" included an exception for controlled substances authorized under AS 17.30. If the intent was to make an exception for drugs that wind up in the newborn's bloodstream because of legal activity, then personal private use of marijuana has been overlooked.

Please let me know if I can be of further assistance.

TL:gc
G13/098

Enclosure

PERSONS WHO TESTIFIED ON SB 450:

Laurie Otto Department of Law	PRO
Vicki Kochler DHSS	PRO
Theresa Tarrony DHSS	PRO
Barbara Miklos Council on Domestic Violence	PRO
Cindy Smith Alaska Network on Domestic Violence	PRO
Jim McCann Alaska State Troopers	PRO
Bob Weinstein Southeast Island School District	CON
Gladys Pugnowiyi Maniilaq Association	PRO
Beatrice Mills Maniilaq Social Services	PRO
Kathy Garfield Women's Crisis Shelter	PRO
Sherry Goll Alaska Women's Lobby	PRO
Nancy Shave Superintendent, Skagway School District	CON
Bob Griswold Alaska Children's Services	PRO
Anne Newell APD Employees Assoication	PRO
Carrie Longoria Anchorage Task Force on Sexual Assault	PRO
Gertrude Bailey Tundra Women's Coalition	PRO
Barry Gross DFYS social worker	PRO

Constance Griffith League of Women Voters	PRO
Rosy Thompson	PRO
Michael Daugherty Alaska Chiefs of Police Association	PRO

Sectional Analysis
SB 450

Section 1: [AS 47.17.010] The amendment conforms the purpose clause to the definition of "child abuse or neglect" set out in section 16. In addition, the amendment clarifies that if there is a reasonable cause to suspect child abuse, a report should be made to the department. At present, some reporters believe that they must conduct an investigation to determine whether child abuse or neglect has occurred before reporting the abuse to the department. In order to make sure that investigations regarding child abuse and neglect are conducted by individuals trained to do investigations, and to avoid subjecting a child to multiple interviews, the standard for reporting is changed in AS 47.17 from "cause to believe" to "reasonable cause to suspect." This change reflects the belief that public policy is better served by DFYS investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred. The "reasonable cause to suspect" standard has been upheld in the face of constitutional vagueness challenges in People v. Cavaiani, 432 N.W.2d 409 (Mich. App. 1988) and State v. Hurd, 400 N.W. 2d 42 (Wis. App. 1986). A definition of "reasonable cause to suspect" is set out in section 19.

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Section 3: [AS 47.17.020(b)] As described under section 1, the standard for reporting is changed from "cause to believe" to "reasonable cause to suspect."

Section 4: [AS 47.17.020(c)] For purposes of clarity, the undefined word "immediate" is replaced with "immediately," a term defined in section 19.

Section 5: [AS 47.17.020(e)] Under present law, some reports of child abuse are required to be made to the department and others are required to be made to the nearest law enforcement agency. This has caused confusion for some reporters; others simply make all reports to the department. The amendment conforms the law to existing practice, and requires all reports of suspected

child abuse or neglect to be made to the department. However, since law enforcement agencies will continue to have the responsibility for investigating cases involving abuse by persons not responsible for the welfare of a child, and cases involving possible criminal conduct, the amendment imposes an obligation on the department to immediately report such cases to the nearest law enforcement agency.

Section 6: [AS 47.17.020(f)] In cases where a child has been abused by a teacher or other school employee working in the school in which the child is enrolled as a student, the amendment requires the investigating agency to report the abuse to the school. If a teacher is the abuser, the district is obligated to report the conduct of the teacher to the Professional Teaching Practices Commission within 10 days.

Section 7: [AS 47.17.022] Under current law, state agencies that employ persons required to report abuse or neglect of children must provide training on the recognition and reporting of child abuse and neglect. The amendment imposes an identical obligation on school districts.

Section 8: [AS 47.17.023] As described under section 1, the standard for reporting is changed from "cause to believe" to "reasonable cause to suspect." In addition, for purposes of clarity, the undefined word "promptly" is replaced with "immediately," a term defined in section 19.

Section 9: [AS 47.17.025(a)] As a result of the change in the definition of "child abuse or neglect" described under sections 1 and 16, the amendment makes a technical change to AS 47.17.025.

Section 10: [AS 47.17.027] A new section is added to the statute to allow the department and law enforcement officials to interview a child at school, without prior notification to, or permission from, the person responsible for the child's welfare, if the person responsible for the child's welfare is alleged to have abused or neglected the child.

Section 11: [AS 47.17.040(b)] The Alaska Supreme Court has repeatedly expressed its aversion to the imposition of criminal sanctions in the absence of proof that an offender was aware or conscious of some wrongdoing. See, e.g., Speidel v. State, 460 P.2d 77, 78 (Alaska 1969); Hentzner v. State, 613 P.2d 821 (Alaska 1980); State v. Rice, 626 P.2d 104 (Alaska 1981); AS 11.81.600. The amendment adds the mental state of "recklessly" to the crime of releasing confidential information, and classifies the offense as a class B misdemeanor.

Section 12: [AS 47.17.050(a)] Under current law, persons who make good faith reports of child abuse are immune from

any criminal or civil liability as a result of making the report. The amendment clarifies that a person who does not comply with the reporting requirement, for example by delaying making a report of the abuse for many months, is not immune from either civil or criminal liability based on the delay in making the report.

Section 13: [AS 47.17.050(b)] Consistent with the position taken by the court in State v. Howland, 464 A.2d 1076 (New Hampshire 1984), the amendment provides that abusers who report the abuse are not immune from either civil or criminal liability.

Section 14: [AS 47.17.064(a)] As described under section 1, the standard for taking photographs and x-rays is changed from "cause to believe" to "reasonable cause to suspect."

Section 15: [AS 47.17.068] The amendment clarifies that criminal penalties may be imposed for failing to comply with the reporting requirements of AS 47.17.020 or 47.17.023 where a person knows of the circumstances giving rise to the need for a report.

Section 16: [AS 47.17.070(2)] In order for the state to continue to receive federal money under the Child Abuse Prevention and Treatment Act, the definition of "child abuse or neglect" must require the reporting of mental injury. The amendment adds this language to the statute. Consistent with the amendment discussed in section 5, the definition of child abuse or neglect has been changed to apply to abuse committed by any person. (Under current law, abuse committed by persons not responsible for a child's welfare must be reported to the police; the effect of the amendment is to require all reports to be made to the department.)

Section 17: [AS 47.17.070(3)] Because foster parents are given reimbursement for their services, rather than compensation, under current law foster parents are arguably not required to report abuse or neglect. The effect of the amendment would be to clarify that all child care providers, including foster parents, must report child abuse or neglect.

Section 18: [AS 47.17.070(9,] Since mental health counselors are in a position to recognize and report the child abuse or neglect, they have been added to the definition of practitioner of the healing arts.

Section 19: [AS 47.17.070] The amendment provides definitions for a number of currently undefined terms in the statute as follows:

AS 47.17.070(11): In order to clarify the language of current law, a definition of "immediately" is set out.

AS 47.17.070(12): In order to clarify the language of current law, a definition of "maltreatment" is set out. Under

the definition, practitioners of the healing arts would be required to make a report to the department when a child is born with any amount of a controlled substance under AS 11.71 in the child's blood or urine.

AS 47.17.070(13): A definition for "mental injury" is set out. The definition limits reportable mental injury to situations where there is an observable and substantial impairment in the child's ability to function. The definition is based on the mandatory requirements of federal law discussed under section 16.

AS 47.17.070(14): A definition of "reasonable cause to suspect" is set out; the definition is based on the rulings in People v. Cavaiani, 432 N.W.2d 409 (Mich. App. 1988) and State v. Hurd, 400 N.W. 2d 42 (Wis. App. 1986).

AS 47.17.070(15): Under section 11, it is a crime to "recklessly" release confidential information. The definition of "recklessly" is set out in Title 11, and the amendment cross references this definition.

AS 47.17.070(16): The term "school district" is used in section 7; a definition of the term is set out in this amendment.

AS 47.17.070(17): In order to clarify the language of current law, a definition of "sexual abuse" is set out.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

☑ *CRIMINAL DIVISION CENTRAL OFFICE*
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JUNEAU, ALASKA 99811-0310
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☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE, SUITE 318
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PHONE: (907) 279-7424

January 30, 1990

The Honorable Jan Faiks
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Re: Proposed Amendments to Child Abuse Reporting Law (AS 47.17)

Dear Senator Faiks:

You recently requested our assistance in drafting amendments to the child abuse reporting law that clarify the meaning of certain provisions of existing law. A draft of proposed amendments is attached for your review, as well as a sectional analysis that explains the proposed changes. We have coordinated preparation of this draft with the Departments of Health and Social Services and Public Safety, as well as with attorneys in the civil division of the Department of Law.

If you need any additional assistance, please let us know.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: The Honorable Myra Munson, Commissioner
Department of Health and Social Services
The Honorable Gayle Horetski, Deputy Commissioner
Department of Public Safety
Barbara Miklos, Council on Domestic Violence
Bob Evans, Office of the Governor

LHO:me-167

PROPOSED AMENDMENTS TO AS 47.17

January 29, 1990

*Section 1. AS 47.17.010 is amended to read:

Sec. 47.17.010. PURPOSE. In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury [ABUSE] or neglect, mental injury, [OR] sexual abuse, [OR] sexual exploitation, or maltreatment, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the department [APPROPRIATE PUBLIC AUTHORITIES]. It is not the intent of the legislature that investigations be conducted by those who are required to make reports. Rather, reports are required to be made when there is a reasonable suspicion of child abuse or neglect in order to make state investigative and social services available in a wider range of cases at an earlier point in time, to make sure that investigations regarding child abuse and neglect are conducted by trained investigators, and to avoid subjecting a child to multiple interviews about the abuse or neglect. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible.

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

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

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) child care providers;

(7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900;

(8) paid employees of substance abuse treatment or prevention programs.

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

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect [CAUSE TO BELIEVE] is a result of child abuse or

neglect. These reports shall be made to the nearest office of the department.

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

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

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

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

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

(2) is unable to determine

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

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

(3) concludes that the report involves

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

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

*Sec. 6. AS 47.17.020 is amended by adding a new section to read:

(f) If the department or a law enforcement agency determines that a child has been abused or neglected, and that the harm was caused by a teacher employed by the school in which the child is enrolled as a student, the department or law enforcement agency shall, at the earliest possible opportunity, notify the principal of the school in which the teacher is employed. The notification shall set out the factual basis for the department's or law enforcement agency's determination. Within 10 days of receiving notification from the department or law enforcement agency, the principal shall file a report with the Professional Teaching Practices Commission that sets out the name of the teacher and the information received from the department or law enforcement agency under this subsection.

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

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

(b) Each department of the state <u>and school district</u> that employs persons required to report abuse or neglect of children shall provide

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

(2) appropriate in-service training required by this section as determined by the department.

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

(1) laws relating to child abuse and neglect;

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

(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect; and

(4) procedures for required notification of suspected abuse or neglect.

(d) Each department and school district that must comply with (b) of this section shall file a current copy of its training curriculum and materials, with the Council on Domestic Violence and Sexual Assault. A department or school district may seek the technical assistance of the council or the Department of Health and Social Services in the development of its training program.

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

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

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

(a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse by a person responsible for the child's welfare. Upon receipt from any source of a report of harm to a child from abuse by a person responsible for the child's welfare, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

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

Sec. 47.17.027. DUTIES OF SCHOOL OFFICIALS. If the department or a law enforcement agency determines that there is reasonable cause to suspect 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, school officials shall permit the child to be interviewed at school by the department or a law enforcement agency without prior notification of, or permission from, the child's parent, guardian, or custodian.

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

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who knowingly makes public information contained in confidential reports is guilty of a class B misdemeanor.

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

Sec. 47.17.050. IMMUNITY. A person who[, IN GOOD FAITH,] complies with this chapter and makes an immediate good faith [A] report of child abuse or neglect [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

as a result of making the report. A person is not immune from civil or criminal liability who

(1) fails to comply with the reporting provisions of AS 47.17.020 or AS 47.17.023; or

(2) is the person accused of committing child abuse or neglect.

*Sec. 13. AS 47.17.064(a) is amended to read:

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

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

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

*Sec. 14. AS 47.17.068 is amended to read:

Sec. 47.17.068. PENALTY FOR FAILURE TO REPORT. A person who knowingly fails to comply with the provisions of [OR REFUSES TO REPORT AS REQUIRED UNDER] AS 47.17.020 or 47.17.023 is guilty of a class B misdemeanor.

*Sec. 15. AS 47.17.070 is amended to read:

Sec. 47.17.070. DEFINITIONS. In this chapter

(1) "child" means a person under 18 years of age;

(2) "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by any person [A PERSON WHO IS RESPONSIBLE FOR THE CHILD'S WELFARE] under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

(3) "child care provider" means an adult individual, or an employee of an organization, who provides care and supervision to a child for compensation or reimbursement;

(4) "department" means the Department of Health and Social Services;

(5) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(6) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(7) "organization" means a group or entity that provides care and supervision for compensation to a child not related to the caregiver, and includes a child care facility, pre-elementary school, head start center, child foster home, residential child care facility, recreation program, children's camp, and children's club;

(8) "person responsible for the child's welfare" means the child's parent, guardian, foster parent, a person

responsible for the child's care at the time of the alleged child abuse or neglect, or a person responsible for the child's welfare in a public or private residential agency or institution;

(9) "practitioner of the healing arts" includes chiropractors, counselors providing services to children, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, and surgeons;

(10) "sexual exploitation" includes

(A) allowing, permitting, or encouraging a child to engage in prostitution prohibited by AS 11.66.100 - 11.66.150, by a person responsible for the child's welfare;

(B) allowing, permitting, encouraging, or engaging in activity prohibited by AS 11.41.455(a), by a person responsible for the child's welfare;

(11) "immediately" means at the earliest possible opportunity, and no later than 24 hours;

(12) "knowingly" has the meaning given in AS 11.81.900;

(13) "maltreatment" means any ill-treatment that harms or threatens a child's welfare, and includes conduct that

causes a child to be born with any amount of a controlled substance under AS 11.71 in the child's blood or urine;

(14) "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function, with due regard to the child's culture;

(15) "reasonable cause to suspect" means cause, based on all the known facts and circumstances, that would lead a reasonable person to suspect that a child might have been abused or neglected;

(16) "recklessly" has the meaning given in AS 11.81.900;

(17) "sexual abuse" means criminal conduct under AS 11.41.410 -- AS 11.41.455, or any other sexual behavior that harms or threatens a child's health or welfare;

(18) "substance abuse treatment or prevention program" means an agency or business that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol.

Sectional Analysis
Proposed Amendments to AS 47.17

January 29, 1990

Section 1: [AS 47.17.010] The amendment conforms the purpose clause to the definition of "child abuse or neglect" set out in section 15. In addition, the amendment clarifies that if there is a reasonable cause to suspect child abuse, a report should be made to the department. At present, some reporters believe that they must conduct an investigation to determine whether child abuse or neglect has occurred before reporting the abuse to the department. In order to make sure that investigations regarding child abuse and neglect are conducted by individuals trained to do investigations, and to avoid subjecting a child to multiple interviews, the standard for reporting is changed in AS 47.17 from "cause to believe" to "reasonable cause to suspect." This change reflects the belief that public policy is better served by DFYS investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred. The "reasonable cause to suspect" standard has been upheld in the face of constitutional vagueness challenges in People v. Cavaiani, 432 N W.2d 409 (Mich. App. 1988) and State v. Hurd, 400 N.W. 2d 42 (Wis. App. 1986). A definition of "reasonable cause to suspect" is set out in section 15.

Section 2: [AS 47.17.020(a)] As described under section 1, the standard for reporting is changed from "cause to believe" to "reasonable cause to suspect." In addition, section 1 adds paid employees of substance abuse treatment or prevention programs to the list of person required to report child abuse or neglect. These persons were previously excluded from the list because a reporting obligation would conflict with federal confidentiality requirements for substance abuse treatment providers. However, federal law has recently been changed to allow substance abuse treatment providers to report child abuse or neglect. See 42 U.S.C. 290dd-3 and 42 U.S.C. 290ee-3.

Section 3: [AS 47.17.020(b)] As described under section 1, the standard for reporting is changed from "cause to believe" to "reasonable cause to suspect."

Section 4: [AS 47.17.020(c)] For purposes of clarity, the undefined word "immediate" is replaced with "immediately," a term defined in section 15.

Section 5: [AS 47.17.020(e)] Under present law, some reports of child abuse are required to be made to the department and others are required to be made to the nearest law enforcement agency. This has caused confusion for some reporters; others simply make all reports to the department. The amendment conforms

the law to existing practice, and requires all reports of suspected child abuse or neglect to be made to the department. However, since law enforcement agencies will continue to have the responsibility for investigating cases involving abuse by persons not responsible for the welfare of a child, and cases involving possible criminal conduct, the amendment imposes an obligation on the department to immediately report such cases to the nearest law enforcement agency.

Section 6: [AS 47.17.020(f)] In cases where a child has been abused by a public school teacher working in the district in which the child is enrolled as a student, the amendment requires the investigating agency to report the abuse to the school district. The district is then obligated to report the conduct of the teacher to the Professional Teaching Practices Commission within 10 days.

Section 7: [AS 47.17.022] Under current law, state agencies that employ persons required to report abuse or neglect of children must provide training on the recognition and reporting of child abuse and neglect. The amendment imposes an identical obligation on school districts.

Section 8: [AS 47.17.023] As described under section 1, the standard for reporting is changed from "cause to believe" to "reasonable cause to suspect." In addition, for purposes of clarity, the undefined word "promptly" is replaced with "immediately," a term defined in section 15.

Section 9: [AS 47.17.025(a)] As a result of the change in the definition of "child abuse or neglect" described under section 15, the amendment makes a technical change to AS 47.17.025.

Section 10: [AS 47.17.027] A new section is added to the statute to allow the department and law enforcement officials to interview a child at school, without notifying the person responsible for the child's welfare, if the person responsible for the child's welfare is alleged to have abused or neglected the child.

Section 11: [AS 47.17.040(b)] The Alaska Supreme Court has repeatedly expressed its aversion to the imposition of criminal sanctions in the absence of proof that an offender was aware or conscious of some wrongdoing. See, e.g., Speidel v. State, 460 P.2d 77, 78 (Alaska 1969); Hentzner v. State, 613 P.2d 821 (Alaska 1980); State v. Rice, 626 P.2d 104 (Alaska 1981); AS 11.81.600. The amendment adds the mental state of "recklessly" to the crime of releasing confidential information, and classifies the offense as a class B misdemeanor.

Section 12: [AS 47.17.050] Under current law, persons who make good faith reports of child abuse are immune from any

criminal or civil liability as a result of making the report. The amendment clarifies that a person who does not comply with the reporting requirement, such as where a person delays reporting child abuse for many months, is not immune from either civil or criminal liability. In addition, consistent with the position taken by the court in State v. Howland, 464 A.2d 1076 (New Hampshire 1984), the amendment provides that abusers who report the abuse are not immune from either civil or criminal liability.

Section 13: [AS 47.17.064(a)] As described under section 1, the standard for taking photographs and x-rays is changed from "cause to believe" to "reasonable cause to suspect."

Section 14: [AS 47.17.068] The amendment clarifies that criminal penalties may be imposed for knowingly failing to comply with the reporting requirements of AS 47.17.020 or 47.17.023.

Section 15: [AS 47.17.070] The amendment provides definitions for a number of currently undefined terms in the statute, and modifies certain definitions contained in existing law, as follows:

AS 47.17.070(2): In order for the state to continue to receive federal money under the Child Abuse Prevention and Treatment Act, the definition of "child abuse or neglect" must require the reporting of mental injury. The amendment adds this language to the statute. Consistent with the amendment discussed in section 5, the definition of child abuse or neglect has been changed to apply to abuse committed by any person. (Under current law, abuse committed by persons not responsible for a child's welfare must be reported to the police; the effect of the amendment is to require all reports to be made to the department.)

AS 47.17.070(3): Because foster parents are given reimbursement for their services, rather than compensation, under current law foster parents are arguably not required to report abuse or neglect. The effect of the amendment would be to clarify that all child care providers, including foster parents, must report child abuse or neglect.

AS 47.17.070(9): In many areas of the state, children receive counseling services from persons who do not fall within the category of professionals listed in the current definition of "practitioner of the healing arts." Since counselors providing services to children are in a position to recognize and report the abuse or neglect of the children they counsel, they have been added to the definition.

AS 47.17.070(11): In order to clarify the language of current law, a definition of "immediately" is set out.

AS 47.17.070(12): Under current law and section 14, a person who "knowingly" fails to comply with the reporting law is subject to criminal penalties. The definition of "knowingly" is set out in Title 11, and the amendment cross references this definition.

AS 47.17.070(13): In order to clarify the language of current law, a definition of "maltreatment" is set out. Under the definition, practitioners of the healing arts would be required to make a report to the department when a child is born with any amount of a controlled substance under AS 11.71 in the child's blood or urine.

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AS 47.17.070(15): A definition of "reasonable cause to suspect" is set out; the definition is based on the rulings in People v. Cavaiani, 432 N.W.2d 409 (Mich. App. 1988) and State v. Hurd, 400 N.W. 2d 42 (Wis. App. 1986).

AS 47.17.070(16): Under section 9, it is a crime to "recklessly" release confidential information. The definition of "recklessly" is set out in Title 11, and the amendment cross references this definition.

AS 47.17.070(17): In order to clarify the language of current law, a definition of "sexual abuse" is set out.

AS 47.17.070(18): Under section 1, paid employees of substance abuse treatment or prevention programs are required to report child abuse and neglect. The amendment sets out a definition of "substance abuse treatment or prevention program."

STEVE COWPER, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

P.O. BOX N
JUNEAU, ALASKA 99811-1200
PHONE: (907) 465-4356

OFFICE ADDRESS: 450 WHITTIER STREET

January 23, 1990

William Frick, President
Anchorage School Board
2961 Drake Drive
Anchorage, AK 99508

Dear Mr. Frick:

The Council on Domestic Violence and Sexual Assault (Council) has reviewed the Draft Revised Child Abuse and Neglect Reporting Procedures that will go to second reading on February 12, 1990. We have serious concerns about certain provisions of the procedures.

The major concern centers around using a team approach "in cases where an individual is uncertain as to whether or not cause to believe child abuse or neglect has occurred" (IVB. beginning on page 6). We believe that it is in the best interest of the child that investigations regarding child abuse and neglect be conducted by individuals trained to do investigations. Assistant principals, nurses, counselors or psychologists are not in any better positions than classroom teachers to assess for abuse or neglect. It is very difficult for a child to disclose abuse, particularly when the abuser is a parent. If an investigation is not well conducted, it could easily be harmful to the child as well as damaging to the case.

It is also important that the number of interviews in which a child is required to participate is kept to a minimum. The process of disclosure is painful and traumatic to the child. This should not be exacerbated by additional, unnecessary interviews.

We recommend that if there is a suspicion of child abuse and neglect, reports are made <u>immediately</u> and directly to the Department of Health and Social Services, Division of Family and Youth Services (DFYS) or the police. They are the best qualified to determine if child abuse or neglect has occurred.

We are also concerned that the draft policies do not address circumstances when DFYS or the police must interview a child on school district premises. Schools are often the only location DFYS and police can interview a child without undue pressure from parents. Policies should allow DFYS and police to interview a child at school without notifying a parent. Prior notification to a parent could be detrimental to the investigation.

We think that the process for reporting that you have delineated is excellent, particularly the requirements for written reports. The requirements for training are also excellent.

Thank you for considering our comments. Please contact Barbara Miklos, Executive Director of the Council if you have any questions about our comments.

Sincerely,

BJM for Mary Pete

Mary Pete
Chair

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

MEMORANDUM January 31, 1990

SUBJECT: Reports of Child Abuse and Neglect
(Work Order No. 6-2075)

TO: Senator Jan Faiks
Chair, Senate Judiciary Committee

FROM: Terri Lauterbach TML
Legislative Counsel

Enclosed is a draft responding to your request concerning reports of child abuse and neglect. It is based on the draft you submitted from the Attorney General's Office.

I have closely followed the A.G.'s draft, but I have the following comments:

Sec. 2. At the end of this section, I have incorporated the A.G.'s definition of "substance abuse treatment or prevention program" rather than using the term and defining it later. You may wish to consider tightening up the definition. The current language would seem to me to include employees of Alcoholics Anonymous, employees of diet centers that counsel persons to decrease their ingestion of caffeine and alcohol, and employees of religious groups who counsel abstention from alcohol. Of course, if your intent is to cover these persons, then the definition is probably fine.

Sec. 6. This section relates to abuse by teachers. You may wish to consider expanding this section to include coaches, administrative staff, counselors, etc., employed by the school. You might also consider clarifying its application to private schools. My current understanding is that the Professional Teaching Practices Commission regulates only certificated teachers. The reference to the commission in this section might imply that the entire section applies only to public schools and non-exempt private schools. If you wish for the section to apply also to private schools that do not have certificated teachers, perhaps the section should be clarified.

Sec. 16. The A.G.'s expressed intent for adding the phrase "or reimbursement" was to make sure foster parents are covered by the term "child care provider." Since I do not believe that most persons think of foster parents as child care providers, I have added additional clarification of the definition by referring specifically to foster parents. Is this term also intended to cover minors' guardians and conservators? If so, you may wish to also refer to them specifically.

Sec. 17. The term "counselors providing services to children" is not a very precise term. Considering that criminal penalties attach to failure to report abuse, the definition of who must report should be as clear as possible. I also query why the term is limited to those who provide services to children. Like psychiatrists, don't counselors sometimes get information about child abuse from their adult patients?

Sec. 18. I do not believe that a definition of "knowingly" is required. There are many criminal statutes outside of the criminal code that use the term "knowingly" without definition. I do not understand why the A.G. thinks we should start defining it now. "Recklessly" is a term not used as often as "knowingly" so I do not have the same objection to defining it here.

I have modified the offered definition of "reasonable cause to suspect" because it is not always used in connection with child abuse or neglect. See, for instance, use of the phrase in sec. 8 of the draft.

I have added a definition of "school district."

As noted before, I have not included the definition of "substance abuse prevention and treatment program."

- - - - -

Please let me know if my comments prompt further questions or if I can be of other assistance.

TML:lmb
L9/084

Enclosure

6-2075A
Lauterbach
1/31/90

BY THE JUDICIARY COMMITTEE

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to child abuse and neglect."

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

* Section 1. AS 47.17.010 is amended to read:

Sec. 47.17.010. PURPOSE. In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury [ABUSE] or neglect, mental injury, [OR] sexual abuse, [OR] sexual exploitation, or maltreatment, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the department. It is not the intent of the legislature that investigations of suspected child abuse or neglect be conducted by those who are required to make reports. Reports must be made when there is a reasonable suspicion of child abuse or neglect in order to make state investigative and social services available in a wider range of cases at an earlier point in time, to make sure that investigations regarding child abuse and neglect are conducted by trained investigators, and to avoid subjecting a child to multiple interviews about the abuse or neglect [APPROPRIATE PUBLIC AUTHORITIES]. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible.

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

(a) The following persons who, in the performance of their

occupational duties, have reasonable cause to suspect [CAUSE TO BELIEVE] that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) child care providers;

(7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900;

(8) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol.

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

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect [CAUSE TO BELIEVE] is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

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

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the

person shall make the report to a peace officer. The peace officer shall immediately take [IMMEDIATE] action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

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

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

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

(2) is unable to determine

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

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

(3) concludes that the report involves

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

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

* Sec. 6. AS 47.17.020 is amended by adding a new section to read:

(f) If the department or a law enforcement agency determines that a child has been abused or neglected and that the harm was caused by a teacher employed by the school in which the child is enrolled as a student, the department or law enforcement agency shall, at the earliest possible opportunity, notify the principal of the school in which the teacher is employed. [The notification must set out the factual basis for the department's or law enforcement agency's determination.] Within 10 days after receiving notification from the department or law enforcement agency under this subsection, the principal shall file a report with the Professional Teaching Practices

Commission that sets out the name of the teacher and the information received from the department or law enforcement agency under this subsection.

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

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

(b) Each department of the state and school district that employs persons required to report abuse or neglect of children shall provide

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

(2) appropriate in-service training required by this section as determined by the department.

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

(1) laws relating to child abuse and neglect;

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

(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect; and

(4) procedures for required notification of suspected abuse or neglect.

(d) Each department and school district that must comply with (b) of this section shall file a current copy of its training

curriculum and materials [,] with the Council on Domestic Violence and Sexual Assault. A department or school district may seek the technical assistance of the council or the Department of Health and Social Services in the development of its training program.

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

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

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

(a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse by a person responsible for the child's welfare. Upon receipt from any source of a report of harm to a child from abuse by a person responsible for the child's welfare, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

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

Sec. 47.17.027. DUTIES OF SCHOOL OFFICIALS. If the department or a law enforcement agency determines that there is reasonable cause to suspect 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, school

officials shall permit the child to be interviewed at school by the department or a law enforcement agency before notification of, or receiving permission from, the child's parent, guardian, or custodian.

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

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside the state [ALASKA], in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who recklessly makes public information contained in confidential reports is guilty of a class B misdemeanor.

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

Sec. 47.17.050. IMMUNITY. Except as otherwise provided in this section, a [A] person who complies with this chapter and [, IN GOOD FAITH,] makes an immediate good faith [A] report of child abuse or neglect [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 that [WHICH] might otherwise be incurred or imposed as a result of making the report. A person is not immune from civil or criminal liability if the person

(1) fails to comply with the reporting provisions of AS 47.17.020 or 47.17.023; or

(2) is accused of committing the child abuse or neglect.

* Sec. 13. AS 47.17.064(a) is amended to read:

(a) The department or a practitioner of the healing arts may, without the permission of the parents, guardian, or custodian, take

the following actions with regard to a child who the department or practitioner has reasonable cause to suspect has [BELIEVED TO HAVE] suffered physical harm as a result of child abuse or neglect:

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

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

* Sec. 14. AS 47.17.068 is amended to read:

Sec. 47.17.068. PENALTY FOR FAILURE TO REPORT. A person who knowingly fails to comply with the provisions of [OR REFUSES TO REPORT AS REQUIRED UNDER] AS 47.17.020 or 47.17.023 is guilty of a class B misdemeanor.

* Sec. 15. AS 47.17.070(2) is amended to read:

(2) "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person [WHO IS RESPONSIBLE FOR THE CHILD'S WELFARE] under circumstances that [WHICH] indicate that the child's health or welfare is harmed or threatened thereby;

* Sec. 16. AS 47.17.070(3) is amended to read:

(3) "child care provider" means an adult individual, including a foster parent or an employee of an organization, who provides care and supervision to a child for compensation or reimbursement;

* Sec. 17. AS 47.17.070(9) is amended to read:

(9) "practitioner of the healing arts" includes chiropractors, counselors providing services to children, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths,

naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, and surgeons;

* Sec. 18. AS 47.17.070 is amended by adding new paragraphs to read:

(11) "immediately" means at the earliest possible opportunity, and no later than 24 hours;

(12) "knowingly" has the meaning given in AS 11.81.900;

(13) "maltreatment" means ill-treatment that harms or threatens a child's welfare, and includes conduct that causes a child to be born with a controlled substance, as defined in AS 11.71.900, in the child's blood or urine;

(14) "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function, with due regard to the child's culture;

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

(16) "recklessly" has the meaning given in AS 11.81.900;

(17) "school district" means a city or borough school district or regional educational attendance area;

(18) "sexual abuse" means criminal conduct under AS 11.41.410 - 11.41.455, or any other sexual behavior that harms or threatens a child's health or welfare.

6-2075Ja
Lauterbach

A M E N D M E N T

OFFERED IN THE SENATE BY SEN. FAHRENKAMP

TO: CSSB 450(Judiciary)

Page 7, after line 28:

Insert a new bill section to read:

"* Sec. 15. AS 47.17.064 is amended by adding a new subsection to read:

(c) Notwithstanding the definition of "maltreatment" in AS 47.-17.070, nothing in this chapter requires a practitioner of the healing arts to test a newborn child's blood or urine for the presence of a controlled substance, as defined in AS 11.71.900, unless the practitioner has reasonable cause to suspect that the child has suffered physical harm from a controlled substance and the test is medically indicated."

Renumber the following bill sections accordingly.

3/6/90

CSSB 450(JUD) AMENDMENTS TO SB 450

Page 1, line 6, following "entitled:":

Delete all material.

Insert

"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'."

Page 3, lines 20 - 29, and page 4, lines 1 - 4:

Delete all material.

Insert

"(f) If a law enforcement agency determines that a child has been abused or neglected, and that (1) the harm was caused by a teacher or other person employed by the school in which the child is enrolled as a student, (2) the harm occurred during an activity sponsored by the school in which the child is enrolled as a student; or (3) the harm occurred on the premises of the school in which the child is enrolled as a student, the law enforcement agency shall, at the conclusion of its investigation, notify the chief administrative officer of the school or district in which the child is enrolled. The notification must set out the factual basis for the law enforcement agency's determination. Within 10 days after receiving notification from the law enforcement agency under this subsection about a person in the teaching profession, as defined in AS 14.20.370, the chief administrative officer shall file a report with the Professional Teaching Practices Commission that sets out the name of the person in the teaching profession and the information received from the law enforcement agency under this subsection."

Page 4, line 17, following "department":

Insert "or school district"

Page 4, line 26:

Delete "and"

Page 4, line 28, following "neglect":

Insert

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

(6) 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"

Page 5, line 17, following "abuse":

Insert "committed"

Page 5, line 19, following "abuse":

Insert "committed"

Page 6, line 4, following "custodian.":

Insert

"A school official may be present during an interview at the school unless the child objects or the department or law enforcement agency determines that the presence of the school official will interfere with the investigation."

Page 6, line 14:

Delete "recklessly"

Insert "with criminal negligence"

Page 8, line 11:

Insert "(11) 'criminal negligence' has the meaning given in AS 11.81.900;"

Renumber remaining paragraphs accordingly.

Page 8, lines 13 - 16:

Delete all material.

Insert

"(12) 'maltreatment' means behavior that harms or threatens a child's health or welfare, and includes conduct that results in a controlled substance, as defined in AS 11.71.900, being found in a newborn child's blood or urine unless the administration of the controlled substance to the mother or child was authorized under AS 17.30;"

Page 8, line 20:

Delete ", with due regard to the child's culture."

Page 8, line 24:

Delete all material.

Page 8, line 28, following "behavior":

Insert "intentionally performed in the presence of a child"

PROPOSED AMENDMENT TO CSSB 450 (Judiciary)

Page 9, line 17, following "11.41.455":

Insert "or any other sexual behavior intentionally performed in the presence of a child that harms or threatens the child's health or welfare"

PROPOSED DEFINITION OF "SEXUAL ABUSE"

CSSB 450 (Judiciary)

Page 8, lines 27 - 29:

Delete all material.

Insert

(17) "sexual abuse" means

(A) criminal conduct under AS 11.41.410 - 11.41.455;

(B) intentional masturbation of a person's genitals in the presence of a child;

(C) intentional exposure of a person's genitals in the presence of a child; or

(D) any other sexual behavior intentionally performed in the presence of a child that harms or threatens the child's health or welfare.

PROPOSED AMENDMENTS TO SB 450

Page 1, line 6, following "to":

Insert "the reporting and investigation of"

Page 1, line 6, following "neglect":

Insert "and to training persons required to report child abuse or neglect"

Page 3, lines 20 - 29, and page 4, lines 1 - 4:

Delete all material.

Insert

(f) If a law enforcement agency determines that a child has been abused or neglected, and (1) that the harm was caused by a teacher or other person employed by the school in which the child is enrolled as a student, (2) that the harm occurred on the premises of the school in which the child is enrolled as a student, or (3) that the harm occurred during an activity sponsored by the school in which the child is enrolled as a student, the law enforcement agency shall, at the conclusion of the investigation, notify the chief administrative officer of the school or district in which the child is enrolled. The notification must set out the factual basis for the law enforcement agency's determination. Within 10 days of receiving notification from the law enforcement agency under this subsection about a person in the teaching profession, as defined in AS 14.20.370, the chief administrative officer shall file a report with the Professional Teaching Practices Commission that sets out the name of the teacher and the information received from a law enforcement agency under this subsection.

Page 4, line 17, following "department":

Insert "or school district"

Page 4, line 26:

Delete "and"

Page 4, line 28, following "neglect":

Insert

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

(6) the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies following notification of suspected abuse or neglect"

Page 5, line 17, following "abuse":

Insert "committed"

Page 5, line 19, following "abuse":

Insert "committed"

Page 6, line 4, following "custodian.":

Insert

A school official may be present during the interview unless

(1) the child objects; or

(2) the department or law enforcement agency determines that the presence of the school official will disrupt, or interfere with, the investigation.

Page 8, lines 13 - 16:

Delete all material.

Insert

(12) "maltreatment" means behavior that harms or threatens a child's welfare and includes conduct that results in a controlled substance, as defined in AS 11.71.900, being found in a newborn child's blood or urine, unless the administration of the controlled substance to the mother or child was authorized under AS 17.30.

Page 8, line 20:

Delete ", with due regard to the child's culture."

6-2075H
Lauterbach
2/21/90

Original sponsor(s): Judiciary Committee

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 450 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "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'."

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

* Section 1. AS 47.17.010 is amended to read:

Sec. 47.17.010. PURPOSE. In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical <u>injury</u> [ABUSE] or neglect<u>, mental injury,</u> [OR] sexual abuse<u>,</u> [OR] sexual exploitation, <u>or maltreatment,</u> the legislature requires the reporting of these cases by practitioners of the healing arts and others to the <u>department. It is not the intent of the legislature that investigations of suspected child abuse or neglect be conducted by those who are required to make reports. Reports must be made when there is a reasonable suspicion of child abuse or neglect in order to make state investigative and social services available in a wider range of cases at an earlier point in time, to make sure that investigations regarding child abuse and neglect are conducted by trained investigators, and to avoid subjecting a child to multiple interviews about the abuse or neglect</u> [APPROPRIATE PUBLIC AUTHORITIES]. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the

child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible.

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

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

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) child care providers;

(7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900;

(8) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol.

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

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect [CAUSE TO BELIEVE] is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

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

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

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

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

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

(2) is unable to determine

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

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

(3) concludes that the report involves

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

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

* Sec. 6. AS 47.17.020 is amended by adding a new section to read:

(f) If a law enforcement agency determines that a child has been abused or neglected and that (1) the harm was caused by a teacher or other person employed by the school in which the child is enrolled as a student, (2) the harm occurred during an activity sponsored by the school in which the child is enrolled as a student, or (3) the harm occurred on the premises of the school in which the child is enrolled

as a student, the law enforcement agency shall, at the conclusion of its investigation, notify the chief administrative officer of the school or district in which the child is enrolled. The notification must set out the factual basis for the law enforcement agency's determination. Within 10 days after receiving notification from the law enforcement agency under this subsection about a person in the teaching profession, as defined in AS 14.20.370, the chief administrative officer shall file a report with the Professional Teaching Practices Commission that sets out the name of the person in the teaching profession and the information received from the law enforcement agency under this subsection.

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

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

(b) Each department of the state and school district that employs persons required to report abuse or neglect of children shall provide

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

(2) appropriate in-service training required by this section as determined by the department or school district.

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

(1) laws relating to child abuse and neglect;

(2) techniques for recognition and detection of child abuse

and neglect;

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

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

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

(6) 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.

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

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

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

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

(a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse

committed by a person responsible for the child's welfare. Upon receipt from any source of a report of harm to a child from abuse committed by a person responsible for the child's welfare, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

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

Sec. 47.17.027. DUTIES OF SCHOOL OFFICIALS. If the department or a law enforcement agency determines that there is reasonable cause to suspect 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, school officials shall permit the child to be interviewed at school by the department or a law enforcement agency before notification of, or receiving permission from, the child's parent, guardian, or custodian. A school official may be present during an interview at the school unless the child objects or the department or law enforcement agency determines that the presence of the school official will interfere with the investigation.

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

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside the state [ALASKA], in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department

regulations, who with criminal negligence makes public information contained in confidential reports is guilty of a class B misdemeanor.

* 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 complies with this chapter and [, IN GOOD FAITH,] makes an immediate good faith [A] report of child abuse or neglect [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 that [WHICH] might otherwise be incurred or imposed as a result of making the report, 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.

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

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

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

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

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

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

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

Sec. 47.17.068. PENALTY FOR FAILURE TO REPORT. A person who [KNOWINGLY] fails to comply with the provisions of [OR REFUSES TO REPORT AS REQUIRED UNDER] AS 47.17.020 or 47.17.023, knowing of the circumstances giving rise to the need for a report, is guilty of a class B misdemeanor.

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

(2) "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person [WHO IS RESPONSIBLE FOR THE CHILD'S WELFARE] under circumstances that [WHICH] indicate that the child's health or welfare is harmed or threatened thereby;

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

(3) "child care provider" means an adult individual, including a foster parent or an employee of an organization, who provides care and supervision to a child for compensation or reimbursement;

* Sec. 18. AS 47.17.070(9) is amended to read:

(9) "practitioner of the healing arts" includes chiropractors, mental health counselors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, and surgeons;

* Sec. 19. AS 47.17.070 is amended by adding new paragraphs to read:

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

(12) "immediately" means as soon as is reasonably possible,

and within 24 hours;

(13) "maltreatment" means behavior that harms or threatens a child's health or welfare, and includes conduct that results in a controlled substance, as defined in AS 11.71.900, being found in a newborn child's blood or urine unless administration of the controlled substance to the mother or child was authorized under AS 17.30;

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

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

(16) "school district" means a city or borough school district or regional educational attendance area;

(17) "sexual abuse" means criminal conduct under AS 11.41.-410 - 11.41.455.

PRESS COPY

BY THE JUDICIARY COMMITTEE

IN THE SENATE

SENATE BILL NO. 450

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to child abuse and neglect."

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

* Section 1. AS 47.17.010 is amended to read:

Sec. 47.17.010. PURPOSE. In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury [ABUSE] or neglect, mental injury, [OR] sexual abuse, [OR] sexual exploitation, or maltreatment, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the department. It is not the intent of the legislature that investigations of suspected child abuse or neglect be conducted by those who are required to make reports. Reports must be made when there is a reasonable suspicion of child abuse or neglect in order to make state investigative and social services available in a wider range of cases at an earlier point in time, to make sure that investigations regarding child abuse and neglect are conducted by trained investigators, and to avoid subjecting a child to multiple interviews about the abuse or neglect [APPROPRIATE PUBLIC AUTHORITIES]. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible.

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

(a) The following persons who, in the performance of their

occupational duties, have reasonable cause to suspect [CAUSE TO BELIEVE] that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) child care providers;

(7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900;

(8) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol.

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

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect [CAUSE TO BELIEVE] is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

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

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the

person shall make the report to a peace officer. The peace officer shall <u>immediately</u> take [IMMEDIATE] action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

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

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

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

(2) is unable to determine

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

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

(3) concludes that the report involves

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

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

* Sec. 6. AS 47.17.020 is amended by adding a new section to read:

(f) If the department or a law enforcement agency determines that a child has been abused or neglected and that the harm was caused by a teacher or other person employed by the school in which the child is enrolled as a student, the department or law enforcement agency shall, at the earliest possible opportunity, notify the principal of the school in which the teacher or other person is employed. The notification must set out the factual basis for the department's or law enforcement agency's determination. Within 10 days after receiving notification from the department or law enforcement agency under this subsection about a person in the teaching profession, as defined

in AS 14.20.370, the principal shall file a report with the Professional Teaching Practices Commission that sets out the name of the teacher and the information received from the department or law enforcement agency under this subsection.

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

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

(b) Each department of the state and school district that employs persons required to report abuse or neglect of children shall provide

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

(2) appropriate in-service training required by this section as determined by the department.

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

(1) laws relating to child abuse and neglect;

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

(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect; and

(4) procedures for required notification of suspected abuse or neglect.

(d) Each department and school district that must comply with

(b) of this section shall file a current copy of its training curriculum and materials [,] with the Council on Domestic Violence and Sexual Assault. A department or school district may seek the technical assistance of the council or the Department of Health and Social Services in the development of its training program.

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

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

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

(a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse by a person responsible for the child's welfare. Upon receipt from any source of a report of harm to a child from abuse by a person responsible for the child's welfare, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

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

Sec. 47.17.027. DUTIES OF SCHOOL OFFICIALS. If the department or a law enforcement agency determines that there is reasonable cause to suspect 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, school officials shall permit the child to be interviewed at school by the department or a law enforcement agency before notification of, or receiving permission from, the child's parent, guardian, or custodian.

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

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside the state [ALASKA], in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who recklessly makes public information contained in confidential reports is guilty of a class B misdemeanor.

* 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 complies with this chapter and [, IN GOOD FAITH,] makes an immediate good faith [A] report of child abuse or neglect [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 that [WHICH] might otherwise be incurred or imposed as a result of making the report, 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.

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

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

neglect.

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

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

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

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

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

Sec. 47.17.068. PENALTY FOR FAILURE TO REPORT. A person who [KNOWINGLY] fails to comply with the provisions of [OR REFUSES TO REPORT AS REQUIRED UNDER] AS 47.17.020 or 47.17.023, knowing of the circumstances giving rise to the need for a report, is guilty of a class B misdemeanor.

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

(2) "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person [WHO IS RESPONSIBLE FOR THE CHILD'S WELFARE] under circumstances that [WHICH] indicate that the child's health or welfare is harmed or threatened thereby;

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

(3) "child care provider" means an adult individual, including a foster parent or an employee of an organization, who provides care and supervision to a child for compensation or reimbursement;

* Sec. 18. AS 47.17.070(9) is amended to read:

(9) "practitioner of the healing arts" includes chiropractors, mental health counselors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, and surgeons;

* Sec. 19. AS 47.17.070 is amended by adding new paragraphs to read:

(11) "immediately" means as soon as is reasonably possible, and within 24 hours;

(12) "maltreatment" means ill-treatment that harms or threatens a child's welfare, and includes conduct that causes a child to be born with a controlled substance, as defined in AS 11.71.900, in the child's blood or urine;

(13) "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function, with due regard to the child's culture;

(14) "reasonable cause to suspect" means cause, based on all the facts and circumstances known to the person, that would lead a reasonable person to suspect that something might be the case;

(15) "recklessly" has the meaning given in AS 11.81.900;

(16) "school district" means a city or borough school district or regional educational attendance area;

(17) "sexual abuse" means criminal conduct under AS 11.41.410 - 11.41.455, or any other sexual behavior that harms or threatens a child's health or welfare.

ANCHORAGE SCHOOL DISTRICT
ANCHORAGE, ALASKA

ASD MEMORANDUM #175 (89-90) January 8, 1990

TO: SCHOOL BOARD

FROM: OFFICE OF THE SUPERINTENDENT William Cotts

SUBJECT: CHILD ABUSE AND NEGLECT REPORTING PROCEDURES

PERTINENT FACTS:

The Anchorage School District has established procedures in administrative manuals and the school nurse's handbook for reporting child abuse and neglect. Last year alone District personnel reported 688 cases of suspected child abuse and neglect to the Division of Family and Youth Services, State of Alaska.

In 1986 a change in the state law occurred which required training for all employees of the District who are required to report abuse or neglect of children. (AS 47.17.022). The District complied with this by doing District-wide training in the 1986-87 school year for all employees required to report. The statutes also required training on an on-going basis for new employees within six months of employment. Last spring, in an effort to revise and update our training activities, a review of existing procedures was begun. We had scheduled an in-service for school nurses for October 17, 1989 to review and provide information on the training of new to the District teachers. Because of the concerns raised regarding the recent police department search and investigation of one case which we did report, we decided to have our October 17, 1989 in-service placed on hold. We did a comprehensive review of our updated procedures and asked our legal counsel to review these also. Attached are the DRAFT revised procedures.

We are actively seeking input from a wide range of affected groups. We have disseminated for comment this DRAFT to our employee bargaining groups, school administrators, community agencies such as the Division of Family and Youth Services - State of Alaska (DFYS), the law enforcement agencies and other interested groups such as the Anchorage Council of PTA.

The procedures will be placed on the consent agenda for first reading for School Board action on January 15, 1990 and second reading on February 12, 1990. Through this process the public and members of the school community are invited to present testimony directly to the School Board.

WC/BC/dc

Attachment

DRAFT

ANCHORAGE SCHOOL DISTRICT

PROPOSED

CHILD ABUSE AND NEGLECT

REPORTING PROCEDURES

JANUARY 1990

DRAFT

I. PROVISIONS OF LAW.

A. Introduction.

School teachers, school administrators and administrative staff members, practitioners of the healing arts, and others, are required by law to make reports when they have cause to believe that child abuse or neglect has resulted in harm to a child. This obligation is an individual legal duty. Reports made in good faith in performance of this duty result in absolute immunity for the reporter from being sued civilly or being prosecuted criminally. On the other hand, a knowing failure to report may result in criminal prosecution. The procedures and definitions provided below are designed to assist all school district employees in fulfilling their obligations under this law. In cases where an individual is uncertain as to whether or not cause to believe child abuse or neglect has occurred, a team approach should be utilized. However, this approach does not relieve any individual from the obligation to report once they conclude that there is cause to believe that child abuse or neglect has occurred. See Section IV.B.

Reports must be made by telephone, followed by a written report, to the Division of Family and Youth Services (DFYS) whenever there is cause to believe that a child has suffered abuse or neglect. See Section IV.B. and C. Additionally, a copy of the written report must be forwarded to the police department when

there is cause to believe that the child abuse or neglect was inflicted by a person who is not responsible for the child's welfare or where the identity of the person who is responsible for the child's welfare cannot be determined, or where the identity of the person believed to have committed the abuse is unknown or cannot be determined. See Section IV.D.

It is essential that all school district employees familiarize themselves with the reporting requirements and definitions set forth below. A working knowledge of these definitions and requirements will enable you to comply with your legal duties in fulfilling these challenging obligations.

B. The Reporting Requirement.

Employees of the district are required by law and Board Policy to immediately report to the nearest office of the Department of Health and Social Services, Division of Family and Youth Services (DFYS), instances where, in the performance of their professional duties, they have cause to believe that a child has suffered harm as a result of child abuse or neglect. If an employee making a report of harm cannot reasonably contact the nearest office of DFYS, and immediate action is necessary for the well-being of the child, the employee shall make the report to a peace officer. (AS 47.17.020; Board Policy 474.1)

C. Immunity.

Any employee who, in good faith, reports suspected child abuse or neglect, or who participates in judicial proceedings related to

submission of these reports of child abuse or neglect is immune from any civil or criminal liability which might otherwise be incurred or imposed. (AS 47.17.050, Attachment 1)

D. Failure to Report.

Any employee of the district who wilfully or knowingly fails to make a report of child abuse or neglect required by law and school policy, is subject to criminal prosecution and is further subject to disciplinary action by the district, up to, and including termination of employment for cause. (AS 47.17.068; Board Policy 474)

II. PERSONS REQUIRED TO REPORT (AS 47.17.020).

A. School teachers, which includes any person serving in a teaching or counseling capacity and required to be certificated in order to hold the position. Also included are teacher's aides, substitute teachers, tutors, coaches, instructors and other personnel in the employ of the school district to provide educational or social services to the students of the district.

B. School Administrators and Administrative Staff Members, which includes persons employed by the district in the capacity of administrators, school principals or assistant principals, supervisors, managers, directors, or coordinators.

C. Practitioners of the Healing Arts, which includes persons employed in the capacity of chiropractors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists,

osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists, (licensed under AS 08.11), hearing aid dealers (licensed under AS 08.55), religious healing practitioners, and surgeons.

D. Police Liaison Officers.

E. Others, as identified by Alaska statute.

III. DEFINITIONS.

A. "Child Abuse or Neglect" [AS 47.17.070(2)]. Child abuse or neglect means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby (authority: AS 47.17.070, Attachment 1).

B. "Neglect" [AS 47.17.070)6)] means the failure to provide necessary food, care, clothing shelter or medical attention for a child.

C. "Cause to Believe" exists where, based on the total circumstances, including direct observation, knowledge and information gained from others, and the exercise of 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. Cause to believe is less than a probability, but more than a mere suspicion, conjecture, or

inkling.

D. "Sexual Exploitation" includes

1. allowing, permitting, or encouraging a child under the age of 18 years to engage in prostitution prohibited by AS 11.66.100-11.66.150, by a person responsible for the child's welfare; or

2. allowing, permitting, encouraging, or engaging in activity prohibited by AS 11.41.455(a), by a person responsible for the child's welfare.

E. "Person Responsible for the Child's Welfare" [AS 47.17.070(8)] means the child's parent, guardian, foster parent, a person responsible for the child's care at the time of the alleged child abuse or neglect, or a person responsible for the child's welfare in a public or private residential agency or institution.

IV. REPORTING PROCEDURES.

A. When Cause To Believe Exists.

Any district employee having cause to believe that child abuse or neglect as described in Section I, above, has occurred shall follow these procedures in reporting the abuse or neglect:

1. Inform the building principal/administrative designee of the child abuse or neglect;

2. Make a telephone report to the Division of Family and Youth Services (DFYS), call 276-1450 (for Anchorage reports), or call 694-9546 (for Eagle River reports).

(i) Request an intake case worker or screener. Obtain the name of the case worker, note the time and date the call was made and enter on the written report form.

(ii) Report the injury or circumstances, and any other pertinent information related to the cause, source, frequency or duration of the child abuse or neglect, including a description of the home situation, if known.

(iii) State your name, title and school. You also may indicate whether your name may or may not be used by DFYS during the investigation.

(iv) If there is a problem contacting DFYS, notify the principal/administrative designee. The principal may contact an ASD supervisor to seek additional assistance in contacting a DFYS case worker or supervisor. If immediate action is necessary for the well-being of the child, make a telephone report to the Police Department: 786-8500 (for Anchorage reports) or 694-2715 (for Eagle River reports), or 269-5511 (Alaska State Troopers).

B. When Unsure of Existence of Cause to Believe.

Any district employee uncertain about the existence of cause to believe that child abuse or neglect has occurred or is occurring shall utilize the following team approach:

1. Inform the building principal/administrative designee of the facts or circumstances which give rise to the employee's concerns. The principal/administrative designee may designate an assistant principal, nurse, counselor or psychologist to observe, examine or talk to the child, in order to determine whether there is, or is not cause to believe that the child has suffered harm as the result of child abuse or neglect.

2. The person designated to investigate shall observe or examine the child, and may confer with any other district employees who may be in a position to have information relevant to the inquiry. The investigator may confer with the teacher, or teachers, for the history relating to the child, and gather any other information which may support or refute the need for reporting.

3. The investigator shall report the results of the investigation to the principal/administrative designee and all other district employees involved in the initial report to the principal and/or the subsequent investigation.

The team alternative is designed to develop additional information and to permit consultation among the district employees involved to assist them in determining whether there is cause to believe that child abuse or neglect has occurred in a particular case.

4. When two or more members of the investigative team

reach agreement one may be designated to make the required telephone report to the appropriate agency. The written report shall indicate the names of the individuals who agree that a report is necessary and show their concurrence that the report is being made on their behalf. If the investigative team decides no report is necessary but an individual member of the team believes there is cause to believe that child abuse or neglect has occurred, that individual must make the required report. The duty to report child abuse or neglect described in Section I above, is an individual duty. No district employee shall fail to make a report if that person has cause to believe such a report is required by law or district policy. No person making such a report shall be subject to any sanction by the school district for making the report. The team alternative is designed to develop additional information and permit consultation among the district employees involved to assist them in determining whether there is cause to believe that child abuse/neglect is occurring in a particular case.

5. The duty to report is a continuing one. If additional information creates cause to believe that child abuse or neglect has occurred or is occurring, a report must be made, even though cause as to the same child was previously insufficient.

C. Written Reports Required.

Within 24 hours of making a telephone report of child abuse or neglect, the employee shall prepare a written report. The original copy shall be routed as follows:

1. for Anchorage reports:

Division of Family and Youth Services
550 West 8th Avenue, Suite 201
Anchorage, AK 99501

2. for Eagle River reports:

Division of Family and Youth Services
Parkgate Building
11723 Old Glenn Highway, #113
Eagle River, AK 99577

The report shall be made on an official school district form available at the principal's office or from the central administration building. (phone _____). The report shall include:

1. The names and addresses of the child and the child's parent or guardian.

2. The child's age.

3. A description of the facts, injuries or circumstances giving rise to cause to believe that child abuse or neglect occurred or is occurring.

4. Any information that might assist determining the cause of any injuries and the identity of persons responsible for causing harm to the child.

5. Any statements made by the child, including graphic quotes, if any.

6. The names of any other persons who may have information relevant to the child abuse or neglect.

7. The state or municipal agency to which the telephonic report was made, including the name of the person to whom the report was made, and the date and time of the telephonic report.

A copy of the report shall be routed to the principal. The principal shall sign the report and maintain it in a confidential file labeled "Child Abuse and Neglect Referrals - Confidential." These reports will be maintained at the school for a minimum of seven years. The reports will not be maintained with individual student school records nor will they be forwarded with individual student school records.

If the principal/administrative designee has conducted, or had an investigator conduct an investigation to determine whether cause to report suspected child abuse or neglect exists, the principal/administrative designee shall attach all investigative notes, memoranda, records of interviews photographs and other information collected to the report.

D. Copy of Written Report to Police.

When a telephonic and written report have been made to the Division of Family and Youth Services (DFYS), a copy of the written report shall also be forwarded to the nearest law enforcement agency in those cases where the employee has cause to believe that the harm was caused by

1. a person who is not responsible for the child's welfare;

2. a person whose identity is unknown and cannot be determined; or

3. a person whose responsibility for the child's welfare is unknown and cannot be determined.

The nearest law enforcement agency is as follows:

1. for Anchorage reports:

Chief of Police
Anchorage Police Department
4501 S. Bragaw
Anchorage, Alaska 99507

2. for Eagle River reports:

Chief of Police
Anchorage Police Department
16707 Coronado Street
Eagle River, Alaska 99577

E. Maintaining Confidentiality.

All school district employees are required to protect students' rights to privacy and confidentiality. As such, all information and reports regarding child abuse or neglect shall be treated as confidential and shall be maintained in a safe place. No employee shall make available, or allow access to this information by other students, staff or members of the public, except as required by school rule, Board Policy or law.

The principal shall maintain the confidentiality of all reports of child abuse and neglect received, other than making the

reports available to the appropriate agencies to which the reports were initially made. The principal shall make provisions to protect, and to maintain as confidential, the identity of the employee or employees making the report.

V. STUDENT INTERVIEWS.

Student interviews regarding child abuse and neglect must be conducted in accordance with Board Policy 471.4, and the Memorandum of Agreement between the Division of Family and Youth Services and the Anchorage School District. (Attachments 3, 4)

VI. EMERGENCY CUSTODY.

In any case where a representative of the Division of Family and Youth Services informs the district in writing that emergency custody of a student is being asserted pursuant to AS 47.10.142, the district shall immediately relinquish custody of the student to the representative of DFYS. In all such cases it shall be the responsibility of the DFYS to notify the parent/guardian as soon as practicable that the DFYS has assumed custody of the child. (Attachment 4)

VII. CHILD ABUSE AND NEGLECT TRAINING FOR PERSONS REQUIRED TO REPORT.

A. The principal shall ensure that persons required to report child abuse or neglect will receive training in the recognition and reporting of child abuse and neglect during the employee's first six months of employment, and to any employee who

has not received equivalent training. (AS 47.17.022, Attachment 1)

B. Training shall include:

-the laws relating to child abuse and neglect;

-techniques for recognition and detection of child abuse and neglect;

-agencies and organizations within the state that offer aid and shelter to victims and families of victims of child abuse or neglect; and

-procedures for required notification of suspected abuse or neglect.

C. Documentation of child abuse and neglect training shall be sent to the Staff Development Department by January 31 of each school year. (Attachment 4)

Attachments:

1. Child Abuse and Neglect Reporting Law, Alaska Statutes Chapter 17, Sec. 47.010-47.17.070
2. Referral Form to Division of Family and Youth Services (ASD #326)
3. Board Policy 471.4
4. Memorandum of Agreement between the Anchorage School District and State of Alaska, Department of Health and Social Services (Division of Family and Youth Services)
5. Child Abuse and Neglect Training Form
6. Child Abuse and Neglect Report Form
7. Criminal Prostitution Law, Alaska Statute, Chapter 66, Sec. 11.66.100-11.66.150

diction the institution is operated, or whose department or agency is charged with performing the service. (§ 3 ch 88 SLA 1960)

Sec. 47.15.040. Financial arrangements. The compact administrator, subject to the approval of the commissioner of administration, may make or arrange for the payments necessary to discharge the financial obligations imposed upon this state by the compact or by a supplementary agreement made under the compact. (§ 4 ch 88 SLA 1960)

Sec. 47.15.050. Appointment of attorney or guardian. Appointment of an attorney or guardian ad litem under the provisions of this compact shall be made in accordance with AS 25.24.310 or AS 44.21.400 — 44.21.440. (§ 5 ch 88 SLA 1960; am § 55 ch 94 SLA 1980; am § 16 ch 55 SLA 1984)

Cross references. — See Admin. R. 13, Alaska Rules of Court.

Effect of amendments. — The 1984 amendment rewrote this section, which formerly read "A council or guardian ad litem appointed under the provisions of this compact may be paid as provided in the Rules Governing the Administration of all Courts."

Sec. 47.15.060. Enforcement. The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which are within their respective jurisdiction. (§ 6 ch 88 SLA 1960)

Sec. 47.15.070. Additional procedures not precluded. In addition to the procedures provided in articles IV and VI of the compact for the return of a runaway juvenile, the particular states, the juvenile or the juvenile's parents, the courts, or other legal custodian involved may agree upon and adopt any plan or procedure legally authorized under the laws of this state and the other respective party states for the return of the runaway juvenile. (§ 7 ch 88 SLA 1960)

Sec. 47.15.080. Short title. This chapter may be cited as the Uniform Interstate Compact on Juveniles. (§ 8 ch 88 SLA 1960)

Chapter 17. Child Protection.

Sec. 47.17.010. Purpose. In order to protect children whose health and well-being may be adversely affected through the infliction, by

other than accidental means, of harm through physical abuse or neglect or sexual abuse or sexual exploitation, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the appropriate public authorities. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible. (§ 1 ch 100 SLA 1971; am § 3 ch 104 SLA 1982)

Effect of amendments. — The 1982 amendment, in the first sentence, substituted "neglect or sexual abuse or sexual exploitation" for "neglect requiring the attention of a practitioner of the healing arts" and inserted "of the healing arts."

NOTES TO DECISIONS

Use of reports. — The reports of child abuse and neglect required by this section are intended for use in child protection proceedings and are not intended for use in criminal proceedings. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984). See also notes to AS 47.17.060, under catchline "Judicial proceeding."

Collateral references. — 42 Am. Jur. 2d, Infants, §§ 16, 17.

43 C.J.S., Infants, §§ 36 to 39, 70 to 75, 94.

Medical attention, criminal neglect by failure to provide, 12 ALR2d 1047.

Liability of parent for injury to unemancipated child caused by parent's negligence, 41 ALR3d 904.

Validity and construction of penal statute prohibiting child abuse, 1 ALR4th 38.

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their professional duties, have cause to believe that a child has suffered harm as a result of abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) licensed day care providers and paid staff;

(7) licensed foster care providers.

(b) This section does not prohibit the named persons from reporting cases which have come to their attention in their nonprofessional capacities nor does it prohibit any other person from reporting a child's harm which the person has cause to believe is a result of abuse or neglect. These reports shall be made to the nearest office of the department.

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984))

Effect of amendments. — The 1982 amendment, in subsection (a), added "and school administrative staff members" at the end of paragraph (2) and added paragraphs (6) and (7).

The 1984 amendment substituted "Department of Corrections" for "division of corrections" in paragraph (4) of subsection (a).

NOTES TO DECISIONS

Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Collateral references. — Civil liability of physician for failure to diagnose or report battered child syndrome, 97 ALR3d 338.

Sec. 47.17.025. Duties of public authorities. (a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse. Upon receipt from any source of a report of harm to a child from abuse, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

(b) The report of harm to a child from abuse required from the department by this section shall include:

(1) the names and addresses of the child and the child's parent or other persons responsible for the child's care, if known;

(2) the age and sex of the child;

(3) the nature and extent of the harm to the child from abuse;

(4) the name and age and address of the person known or believed to be responsible for the harm to the child from abuse, if known;

(5) information that the department believes may be helpful in establishing the identity of the person believed to have caused the harm to the child from abuse. (§ 6 ch 104 SLA 1982)

NOTES TO DECISIONS

Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.020. Action on reports; termination of parental rights. (a) If a child, concerning whom a report of harm is made, is believed to reside within the boundaries of a local government exercising health functions for the area in which the child is believed to reside, the department may, upon receipt of the report, refer the matter to the appropriate health or social services agency of that local government. For cases not referred to an agency of a local government, the department shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child.

(b) A local government health or social services agency receiving a report of harm shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child. In addition, the agency receiving a report of harm shall forward a copy of its report of the investigation, including information the department requires by regulation, to the department.

(c) Action shall be taken regardless of whether the identity of the person making the report of harm is known.

(d) Before the department or a local government health or social services agency may seek the termination of parental rights, under AS 47.10.080(c)(3), it shall offer protective social services and pursue all other reasonable means of protecting the child.

(e) In all actions taken by the department or a health and social services agency of a local government under this chapter that result in a judicial proceeding, the child shall be represented by a guardian ad litem in that proceeding. Appointment of a guardian ad litem shall be made in accordance with AS 25.24.310. (§ 1 ch 100 SLA 1971; am § 1 ch 222 SLA 1976; am § 17 ch 55 SLA 1984)

Effect of amendments. — The 1984 amendment added the second sentence in subsection (e).

NOTES TO DECISIONS

Effect of subsection (d). — Subsection (d) of this section is clearly intended to prevent further abuse by providing protective services to the child, and it does not place a mandatory duty on the state to provide counseling and other support services to the family prior to seeking termination of parental rights. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Quoted in Granato v. Occhipinti, Sup. Ct. Op. No. 1982 (File No. 3756), 602 P.2d 442 (1979).

Collateral references. — 43 C.J.S., Infants, §§ 71, 72.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 ALR3d 1074.

Validity of state statute providing for termination of parental rights, 22 ALR4th 774.

Sec. 47.17.040. Central registry; confidentiality. (a) The department shall maintain a central registry of all investigation reports but not of the reports of harm.

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who makes public information contained in confidential reports is guilty of a misdemeanor. (§ 1 ch 100 SLA 1971; am § 2 ch 222 SLA 1976)

NOTES TO DECISIONS

Psychotherapist/patient privilege. — Child abuse reports are not open to the public, and are therefore not within A.R.E.R. 504(dX5), which provides that there is no physician or psychotherapist/patient privilege "as to information that the physician or psychotherapist is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection." State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.050. Immunity. A person who, in good faith, 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. (§ 1 ch 100 SLA 1971)

Sec. 47.17.060. Evidence not privileged. Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter. (§ 1 ch 100 SLA 1971)

NOTES TO DECISIONS

For discussion of constitutional problems in interpreting this section to abrogate psychotherapist privilege in criminal proceedings, see State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Applicability to psychologists. — The court assumed but did not decide that this section applies to psychologists who are not physicians. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

"Judicial proceeding". — This section only applies to child protective proceedings instituted under AS 47.10 and not to criminal proceeding for sexual abuse. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Giving the Department of Health and Social Services primary control of the abused child again indicates a legislative intent that the "judicial proceedings" referred to in this section occur through the department in relation to protective services, and are civil rather than criminal. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Since AS 47.17.025 refers to the Department of Law, without reference to the criminal division, AS 47.17.025 does not, standing alone, necessarily resurrect the requirement of former AS 11.67.040 that the district attorney receive child abuse reports; nor does it establish an intent that child abuse reports result in criminal prosecutions; and consequently, the Court of Appeals could not find that a criminal prosecution for child sexual abuse is necessarily "a judicial proceeding related to a report made under this chapter" pursuant to this section. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.064. Photographs and x-rays. The department or a person required under AS 47.17.020(a)(1) to report that a child suffered substantial harm as a result of physical abuse or neglect may without the permission of the parents

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

(2) if medically indicated, have a radiological examination of the child performed. (§ 7 ch 104 SLA 1982)

See Supplement

Sec. 47.17.068. Penalty for failure to report. A person required to file a report of abuse or neglect under AS 47.17.020 who wilfully or knowingly fails or refuses to report the harm required under AS 47.17.020 is guilty of a class B misdemeanor. (§ 7 ch 104 SLA 1982)

See Supplement

Cross references. — For penalties for misdemeanors, see AS 12.55.135.

Sec. 47.17.070. Definitions. In AS 47.17.010 — 47.17.070

(1) "child abuse or neglect" means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

(2) "child" means a person under 18 years of age;

(3) "department" means the Department of Health and Social Services;

See Supplement

(4) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(5) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(6) "practitioner of the healing arts" includes chiropractors, dentists, health aides, nurses, optometrists, osteopaths, physical therapists, physicians, psychiatrists, psychologists, religious healing practitioners, and surgeons;

(7) "sexual exploitation" means

(A) permission or encouragement to a child for prostitution prohibited by AS 11.66.100 — 11.66.150 by a person responsible for the child's welfare;

(B) permission, encouragement, or activity involved in the unlawful exploitation of a minor prohibited by AS 11.41.455 by a person responsible for the minor's welfare. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 3 ch 222 SLA 1976; am §§ 56, 57 ch 94 SLA 1980; am §§ 8, 9 ch 104 SLA 1982)

See Supplement

Effect of amendments. — The 1980 amendment substituted "18" for "eighteen" near the middle of paragraph (1), and substituted "18" for "16" in paragraph (2).

The 1982 amendment inserted "or neglect" and "sexual exploitation" in paragraph (1) and added paragraph (7).

NOTES TO DECISIONS

Where parents refuse permission for blood transfusion because of religious conviction, the state may intercede and make the child a dependent minor by the parents' failure to provide medical attention under paragraph (5) of this section, obtaining custody and thereafter consenting to the operation. In re Lausterer, Superior Court, 3rd Jud. Dist., No. CP2720 (1972).

Chapter 20. Exceptional Children.

Sec. 47.20.005. Purpose. It is the purpose of AS 47.20.005 — 47.20.050 to provide appropriate public education and training for the exceptional children in this state who have not reached the age of three. To the maximum extent possible, the department shall establish a learning program which emphasizes individual needs, is home based, and involves parents in the education and training of their children. (§ 1 ch 77 SLA 1978)

Sec. 47.20.010. Assistance authorized. (a) The department shall provide professional guidance and financial assistance to organized groups of parents, nonprofit corporations, school districts, and regional educational attendance areas according to regulations adopted by the

(1) after being informed of the minor's right to privacy, the minor consents in writing to the disclosure of the records;

(2) the records are relevant to an investigation or proceeding involving child abuse or neglect or a child in need of aid petition; or

(3) disclosure of the records is necessary to protect the life or health of the minor. (§ 4 ch 144 SLA 1988)

Sec. 47.10.350. Immunity from liability. (a) The officers, directors, and employees of a licensed program for runaway minors are not liable for civil damages as a result of an act or omission in admitting a minor to the program.

(b) This section does not preclude liability for civil damages as a result of recklessness or intentional misconduct. (§ 4 ch 144 SLA 1988)

Sec. 47.10.360. Municipal powers. Authority to establish and operate a licensed program for runaway minors is granted to municipalities that do not otherwise have that authority. (§ 4 ch 144 SLA 1988)

Sec. 47.10.390. Definitions. In AS 47.10.300 — 47-10.390

(1) "licensed program for runaway minors" means a residential or nonresidential program licensed by the department under AS 47.10.310;

(2) "runaway minor" means a person under 18 years of age who

(A) is habitually absent from home;

(B) refuses to accept available care;

(C) has no parent, guardian, custodian, or relative able or willing to provide care; or

(D) has been physically abandoned by

(i) both parents;

(ii) the surviving parent; or

(iii) one parent if the other parent's rights and responsibilities have been terminated under AS 25.23.180(c) or AS 47.10.080 or voluntarily relinquished. (§ 4 ch 144 SLA 1988)

Chapter 17. Child Protection.

Sec. 47.17.010. Purpose.

NOTES TO DECISIONS

Cited in Gerlach v. State, Ct. App. Op. No. 468 (File No. A-501), 699 P.2d 358 (1985).

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their occupational duties, have cause to believe that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) child care providers;

(7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900.

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has cause to believe is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

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

(d) This section does not require a religious healing practitioner to report as neglect of a child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(e) A person listed in (a) of this section, who in the performance of the person's occupational duties has cause to believe that a child has suffered harm as a result of abuse, shall promptly report the harm to the nearest law enforcement agency if the person making the report (1) has cause to believe that the harm was caused by a person who is not responsible for the child's welfare; or (2) is unable to determine (A)

who caused the harm to the child; or (B) whether the person who is believed to have caused the harm has responsibility for the child's welfare. If a person making a report under this subsection cannot reasonably contact the nearest law enforcement agency, and immediate action appears necessary for the well-being of the child, the person shall make the report to the nearest office of the department. The department shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest law enforcement agency. In this subsection, "abuse" means the physical injury, sexual abuse, sexual exploitation, or maltreatment of a child by any person under circumstances that indicate that the child's health or welfare is harmed or threatened. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984); am §§ 8 — 10 ch 39 SLA 1985; am § 2 ch 114 SLA 1986)

Effect of amendments. — The 1985 amendment rewrote subsections (a) and (b) and added subsection (d). The 1986 amendment added subsection (e).

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

(b) Each department of the state that employs persons required to report abuse or neglect of children shall provide

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

(2) appropriate in-service training required by this section as determined by the department.

(c) Each department that must comply with (b) of this section shall develop a training curriculum that acquaints its employees with

(1) laws relating to child abuse and neglect;

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

(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect; and

(4) procedures for required notification of suspected abuse or neglect.

(d) Each department that must comply with (b) of this section shall file a current copy of its training curriculum and materials, with the Council on Domestic Violence and Sexual Assault. A department may seek the technical assistance of the council or the Department of Health and Social Services in the development of its training program. (§ 1 ch 1 SLA 1986)

Sec. 47.17.023. Reports regarding child pornography. A person who, in the course of processing or producing visual or printed matter, either privately or commercially, has reason to believe that the matter visually depicts a child engaged in conduct described in AS 11.41.455(a) shall promptly report this to the nearest law enforcement agency, and provide the law enforcement agency with all information known about the nature and origin of the matter. (§ 11 ch 39 SLA 1985)

Sec. 47.17.025. Duties of public authorities.

NOTES TO DECISIONS

Reliance on sexual abuse report for purposes of initiating prosecution is not prohibited by this section. Strehl v. State, Ct. App. Op. No. 638 (File No. A-717), P.2d (1986).

Sec. 47.17.030. Action on reports; termination of parental rights.

NOTES TO DECISIONS

Cited in Gerlach v. State, Ct. App. Op. No. 468 (File No. A-501), 699 P.2d 358 (1985).

Sec. 47.17.040. Central registry; confidentiality.

NOTES TO DECISIONS

Cited in Gerlach v. State, Ct. App. Op. No. 468 (File No. A-501), 699 P.2d 358 (1985).

Sec. 47.17.060. Evidence not privileged.

NOTES TO DECISIONS

"Judicial proceeding". — The phrase "judicial proceeding related to a report made under this chapter" in this section only refers to child protection proceedings under AS 47.10.010 State v. Wetherhorn, Ct. App. Op. No. 375 (File No. 7768), 683 P.2d 269 (1984).

Sec. 47.17.064. Photographs and x-rays. (a) The department or a practitioner of the healing arts may, without the permission of the parents, guardian, or custodian, take the following actions with regard to a child believed to have suffered physical harm as a result of child abuse or neglect:

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

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

(b) The department or a practitioner of the healing arts shall notify the parents, guardian, or custodian of a child as soon as possible after taking action under (a) of this section with regard to the child. (§ 7 ch 104 SLA 1982; am § 12 ch 39 SLA 1985)

Effect of amendments. — The 1985 amendment rewrote this section.

Sec. 47.17.068. Penalty for failure to report. A person who knowingly fails or refuses to report as required under AS 47.17.020 or 47.17.023 is guilty of a class B misdemeanor. (§ 7 ch 104 SLA 1982; am § 13 ch 39 SLA 1985)

Effect of amendments. — The 1985 amendment rewrote this section.

Sec. 47.17.069. Protective injunctions. (a) A court may enjoin or limit a person from contact with a child if the attorney general establishes by a preponderance of the evidence that the person

(1) has sexually abused a child;

(2) has physically abused a child; or

(3) has engaged in conduct that constitutes a clear and present danger to the mental, emotional, or physical welfare of a child.

(b) This section does not limit the authority of the attorney general or the court to act to protect a child. (§ 14 ch 39 SLA 1985)

Sec. 47.17.070. Definitions. In this chapter

(1) "child" means a person under 18 years of age;

(2) "child abuse or neglect" means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

(3) "child care provider" means an adult individual, or an employee of an organization, who provides care and supervision to a child for compensation;

(4) "department" means the Department of Health and Social Services;

(5) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(6) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(7) "organization" means a group or entity that provides care and supervision for compensation to a child not related to the caregiver,

and includes a child care facility, pre-elementary school, head start center, child foster home, residential child care facility, recreation program, children's camp, and children's club;

(8) "person responsible for the child's welfare" means the child's parent, guardian, foster parent, a person responsible for the child's care at the time of the alleged child abuse or neglect, or a person responsible for the child's welfare in a public or private residential agency or institution;

(9) "practitioner of the healing arts" includes chiropractors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, and surgeons;

(10) "sexual exploitation" includes

(A) allowing, permitting, or encouraging a child to engage in prostitution prohibited by AS 11.66.100 — 11.66.150, by a person responsible for the child's welfare;

(B) allowing, permitting, encouraging, or engaging in activity prohibited by AS 11.41.455(a), by a person responsible for the child's welfare. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 3 ch 222 SLA 1976; am §§ 56, 57 ch 94 SLA 1980; am §§ 8, 9 ch 104 SLA 1982; am §§ 15, 16 ch 39 SLA 1985; am § 8 ch 56 SLA 1986; am § 3 ch 114 SLA 1986; am § 14 ch 131 SLA 1986; am § 31 ch 2 FSSLA 1987)

Revisor's notes. — Reorganized in 1985 to alphabetize the defined terms.

Effect of amendments. — The 1985 amendment rewrote paragraph (9) and added paragraphs (3), (7), and (8).

The first 1986 amendment in paragraph (9) inserted "naturopaths."

The second 1986 amendment rewrote paragraph (10).

The third 1986 amendment inserted "audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55," near the end of paragraph (9).

The 1987 amendment, effective January 1, 1988, in paragraph (9) inserted "occupational therapists, occupational therapy assistants" and "physical therapy assistants."

Chapter 23. Child Support Enforcement Agency.

ANCHORAGE SCHOOL DISTRICT
Health Services Department

REFERRAL TO: DIVISION OF FAMILY AND YOUTH SERVICES

550 W. 8th Avenue Suite 201
Anchorage, AK. 99501
Telephone: 276-1450

OR

11723 Old Glenn Hwy. #113
Eagle River, AK. 99577
Telephone: 694-9546

Telephone report made to: _____ on _____
(circle title: intake person, caseworker, supervisor) (date/time)

Name of student referred: _____

Birthdate: _____ Sex _____ Grade in school: _____

Parent names: _____

Home address: _____

Home telephone: _____ Work telephone: _____

Siblings if known: _____

Briefly state reason for the referral:

_____

_____

_____

_____

_____

_____

Circle service requested: home assessment, parent contact, meeting at school, immediate ivestigation

Referral made by: _____ _____
(name and title) (phone number)

Name of Reporter to remain confidential: Yes____ No____ _____
(School)

To be completed by the principal or designee:

A written report was mailed to the Division of Family and Youth Services.

Oral and Written report to Police
Yes____ No____ _____ _____
(Principal/designee signature) (Date/Time)

Distribute copies to:
1. Original to Division of Family and Youth Services
2. Copy to principal's child abuse neglect file
(do not place in student file; do not transfer the report)

ASD Form #326 (Rev. 10/89)

471.2 List of Names of Students

Senior high school principals may prepare a list of the names and addresses of potential graduates each year. This list may be released to organizations, agencies, institutions, or groups who, in the judgment of the Superintendent may offer opportunities or benefits to students. A student who does not wish to have his/her name and/or address on this list may prevent its inclusion as provided by Section 344.34 (h) of this policy manual.

471.3 Supervision of Students After Regular School Hours

No student or group of students shall remain in the school building after dismissal time except when under the supervision of an authorized person.

471.4 Student Interviews

a. Any person who seeks to confer with a student in school or on the school grounds or to take a child from school, or who telephones or leaves directions as to where a student must meet another person, must provide positive identification to the principal before such a request can be granted. In every instance such requests should be referred to the principal or his/her assistant in charge. Principals are responsible for the enforcement of this regulation and for informing clerks, custodians, and teachers concerning the full implications of this rule.

b. Individual students may not be interviewed by any person, except an employee of the District, without the approval of the principal, the permission of the parent/ guardian, if possible, and in the presence of the principal or his/her representative.

c. No principal shall grant such an interview unless he/she deems it essential to the welfare of the student or as may be required by police, official agency, or court officials. When interviews are conducted by police, official agency, or court officials the principal should be present.

d. In cases where a properly identified agency of the Alaska Department of Health and Social Services or other law enforcement agency seeks to interview a student who is believed to be the victim of abandonment, neglect, abuse, or sexual abuse as defined in As 47.10.142(a) or is believed to be a child in need of aid as defined in AS 47.10.010 (a) (2), the principal may permit the student to be interviewed without prior notification to the student's parent or guardian and without the principal being present. Such an interview may be granted pursuant to procedures established by the superintendent.

(Section 471.4 (d) - Approved by School Board on January 10, 1983)

e. Parental custody is limited to officially listed parents or guardians. A child may not be interviewed by a legally estranged parent except in the presence of the principal and with the consent of the legal parent or guardian.

471.5 Student Messengers

Students may not perform errands or act as messengers between buildings during school hours without the approval of the principal and without the permission of the parents/guardians. This permit must be in writing and kept on file in the principal's office. Student messenger service is permitted only for a very specific need such as the transmission of emergency reports, etc., that would take too much time to go through the regular District mail.

(Section 471.6 Deleted by School Board on June 25, 1984 - See Section 451)

472 The School's Responsibility to Needy Children

472.1 Extent of the School's Responsibility

It is the policy of the Board that no child shall be deprived of any of the opportunities or benefits offered by the program of instruction of the public schools because of the financial difficulties of his/her family. Therefore, provisions shall be made for assistance to such students for materials for instruction, extracurricular activity fees, etc.

MEMORANDUM OF AGREEMENT

WHEREAS, the State of Alaska, Department of Health & Social Services, Division of Family and Youth Services has the duty to investigate suspected cases of child abandonment, neglect, abuse, and sexual abuse; and

WHEREAS, various employees of the Anchorage School District are required by statute (AS 47.17.020(a)(2)) and school board policy (School Board Policy Section 474.1) to report cases of suspected abuse or neglect; and

WHEREAS, the District has responsibility to protect students and their parents from unwarrented invasions of privacy or interference with the parent/child relationship; and

WHEREAS, child abuse and neglect (including sexual abuse) are recognized as significant societal problems which are very difficult to detect and investigate; and

WHEREAS, the School District and the Division desire to cooperate to the end of protecting children from abuse and neglect without interfering unnecessarily with the parent/child relationship;

NOW, THEREFORE, the parties agree as follows:

1. Reports Initiated by the School District. In cases where employees of the school district have cause to believe that a child has suffered harm as the result of abuse or neglect, a report shall be made immediately to the Department of Health & Social Services, Division of Family and Youth Services in Anchorage. The District will cooperate with the Division in the Division's investigation. The student who is

believed to have been abused or neglected may be interviewed at school without prior notification to or permission from the student's parent/guardian, where in the opinion of the Division, such an interview appears to be in the best interests of the child. A representative of the District (i.e. the principal or designee) shall be present at any interview unless the Division informs the District in writing of its belief that the presence of the District representative would be detrimental to the interview. Where the interview occurs without the prior knowledge of the student's parent/guardian, it shall be the responsibility of the Division to make a diligent effort to notify the parents of the interview regardless of the conclusions drawn from the interview as soon as feasible after the interview but not later than 10:00 p.m. on the day when the interview occurs.

2. Investications Initiated by Non-District Sources. In cases where the Division has received a report indicating that a student may be the victim of abuse or neglect based upon information and reports not originating with School District employees, the District will permit an interview of the student without permission of the parent/guardian only upon written certification by the Department as to the following:

a. That the Division has received a report indicating that the student may be the victim of abuse or neglect.

b. That the interview is necessary to make a determination as to whether or not abuse or neglect has occurred.

c. That the proposed interview is in the best interest of the child.

d. That the Division will make a diligent effort to notify the parent/guardian that the interview occurred as soon as feasible after the conclusions of the interview but not later that 10:00 p.m. on the day when the interview occurs.

A representative of the School District (i.e. the principal or designee) shall be permitted to be present at any such interview unless the Division informs the District in writing of its belief that the presence of the District representative would be detrimental to the interview.

3. In any case where a representative of the Department informs the District in writing that emergency custody of a student is being asserted pursuant to AS 47.10.142, the District shall immediately relinquish custody of the student to the representative of the Division. In all such cases, it shall be the responsibility of the Division to notify the parent/guardian as soon as practicable that the Division has assumed custody of the child.

4. 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.

5. Nothing in this agreement is intended to limit the Division's authority under AS 47.10.142 to take emergency custody of children who are the victims of abuse or neglect.

6. The State of Alaska agrees to defend and hold the School District, its officers, employees, agents, and insurers, harmless from any claim pertaining to an interview or assumption of custody which

might be asserted by or on behalf of any student who is interviewed or taken into custody at school without the presence of a district representative under Section 1 hereof or who is interviewed or taken into custody at school without the presence of a district representative or without prior parental notification pursuant to Section 2 or 3 hereof.

7. This agreement may be terminated at any time upon written notification by either party to the other party. The agreement may be amended in writing upon mutual agreement of the parties.

DATED at Anchorage, Alaska this 11 day of February, 1983.

STATE OF ALASKA
Department of Health &
Social Services

By: _____
Title: _____

ANCHORAGE SCHOOL DISTRICT

By: _____
E. E. (Gene) Davis
Superintendent of Schools

Approved as to from.

Department of Law

By: _____
Assistant Attorney General

Approved as to form.

Hellen & Partnow, P.C.
Counsel for Anchorage
School District

By: _____
Peter C. Partnow

ANCHORAGE SCHOOL DISTRICT

CHILD ABUSE TRAINING

Child Abuse Training was provided at _____
(Name of School)

on _____ _____ by _____
(Date) (Nurse/Trainer)

for the following individuals:

FIRST NAME LAST NAME

Please return this form to Staff Development

ATTACHMENT 6

(CHILD ABUSE & NEGLECT REPORTING FORM)

- SAMPLE -

Chapter 65. Offenses Against Public Convenience.

Secs. 11.65.010 — 11.65.020. [Renumbered as AS 30.50.020 and 30.50.010.]

Sec. 11.65.030. Tampering with posted notices. [Repealed, § 21 ch 166 SLA 1978.]

Chapter 66. Offenses Against Public Health and Decency.

Article
1. Prostitution and Related Offenses (§§ 11.66.100 — 11.66.150)
2. Gambling Offenses (§§ 11.66.200 — 11.66.280)

Article 1. Prostitution and Related Offenses.

Section
100. Prostitution
110. Promoting prostitution in the first degree
120. Promoting prostitution in the second degree
130. Promoting prostitution in the third degree
140. Corroboration of certain testimony not required
150. Definitions

NOTES TO DECISIONS

Municipal ordinances not prohibited. — The enactment of this article does not prohibit municipal ordinances penalizing the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, 657 P.2d 407 (Alaska Ct. App. 1983).

There is nothing in this article which would support an inference that the legislature sought to encourage men to patronize prostitutes nor is there any indication in this article that the legislature sought statewide uniformity in regulating commercial sexual relations. Municipality of Anchorage v. Afualo, 657 P.2d 407 (Alaska Ct. App. 1983).

Collateral references. — 63A Am. Jur. 2d, Prostitution, § 1 et seq.

27 C.J.S., Disorderly Houses, § 1 et seq.; 73 C.J.S., Prostitution, § 1 et seq.

Constitutionality and construction of pandering acts, 74 ALR 311.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

Sec. 11.66.100. Prostitution. (a) A person commits the crime of prostitution if the person engages in or agrees or offers to engage in sexual conduct in return for a fee.

(b) Prostitution is a class B misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law, whereas fornication and prostitution were not. Eleazar v. United States, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956). (Decided under former AS 11.40.220.)

This section is not irreconcilable with a municipal ordinance prohibiting the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, 657 P.2d 407 (Alaska Ct. App. 1983).

Actual payment of a fee is not required; an act of prostitution is complete when an offer is extended or an agreement made to engage in sexual conduct in return for a fee. Garibay v. State, 658 P.2d 1350 (Alaska Ct. App. 1983).

Proof. — Customer's testimony that he agreed to purchase sexual favors for sum of $200, his testimony that he charged the purchase price using his VISA card, and the VISA charge slip itself, were all highly probative of whether an agreement or offer to engage in sexual conduct in return for a fee was in fact made. Garibay v. State, 658 P.2d 1350 (Alaska Ct. App. 1983).

Collateral references. — Prostitution as vagrancy, 14 ALR 1501.

Entrapment to procure women for immoral purposes, 18 ALR 186; 66 ALR 478; 86 ALR 263.

Sec. 11.66.110. Promoting prostitution in the first degree. (a) A person commits the crime of promoting prostitution in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

(b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person induced or caused to engage in prostitution was 16 years of age or older.

(c) Except as provided in (d) of this section, promoting prostitution in the first degree is a class B felony.

(d) A person convicted under (a)(2) of this section is guilty of a class A felony. (§ 8 ch 166 SLA 1978; am §§ 1, 2 ch 50 SLA 1983)

NOTES TO DECISIONS

Promoting prostitution and managing prostitution enterprise. — Punishment for inducing or causing a person under the age of 16 to engage in prostitution (AS 11.66.110(a)(2)) and for managing, supervising, controlling or owning a prostitution enterprise (AS 11.66.120(a)(1)) did not violate double jeopardy since the offenses proscribed by the two statutes involve different intents and different conducts and differing societal interests are furthered. Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

Precluding mistake of age as defense. — Subsection (b) of this section, which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law. Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

Under the Revised Alaska Criminal Code, it is defendant's intentional pro-

curement of a person under the age of 16 years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

The act of procuring another for purposes of prostitution is malum in se, without regard to the age of the person procured, and thus, in a prosecution for procuring a person under the age of 16 years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, 403 P.2d 673 (Alaska 1965).

For case construing former procurement statute, see Johnson v. State, 501 P.2d 762 (Alaska 1972).

Sentence for procurement upheld. — See Price v. State, 565 P.2d 858 (Alaska 1977).

For case construing former statute concerning necessary evidence for prostitution or seduction, see Johnson v. State, 501 P.2d 762 (Alaska 1972).

Collateral references. — Transporting female for purpose of prostitution, 74 ALR 330.

Woman conniving or consenting to own transportation, 84 ALR 376.

Sec. 11.66.120. Promoting prostitution in the second degree. (a) A person commits the crime of promoting prostitution in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution; or

(2) procures or solicits a patron for a prostitute.

(b) Promoting prostitution in the second degree is a class C felony. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Promoting prostitution and managing prostitution enterprise. — Punishment for inducing or causing a person under the age of 16 to engage in prostitution (AS 11.66.110(a)(2)) and for managing, supervising, controlling or owning a prostitution enterprise (AS 11.66.120(a)(1)) did not violate double jeopardy since the offenses proscribed by the two statutes involve different intents and different conducts and differing societal interests are furthered. Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

For case construing former statute prohibiting soliciting or procuring for purpose of prostitution, see Plas v. State, 598 P.2d 966 (Alaska 1979).

Instruction. — Trial court did not err in refusing to give instruction requiring state to prove that prostitution enterprise involved in case was of an ongoing nature. Garibay v. State, 658 P.2d 1350 (Alaska Ct. App. 1983).

Collateral references. — Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping, 3 ALR4th 1195.

Sec. 11.66.130. Promoting prostitution in the third degree. (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) Promoting prostitution in the third degree is a class A misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.260, 11.40.300, 11.40.330, 11.40.410, and 11.40.420.

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law. Eleazar v. United States, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956).

Lessor may be guilty as keeper. — If a man leases his house to a woman to be kept as a bawdyhouse for purposes of prostitution, and it is kept for such purposes, with his knowledge, he is guilty as keeper. Rosencranz v. United States, 155 F. 38 (9th Cir. 1907).

As well as agent of lessor. — The agent of an owner, who rents a house knowing that it is to be used as a house of prostitution, and that it is so used, may be found guilty as a keeper. Rosencranz v. United States, 155 F. 38 (9th Cir. 1907).

For case construing former statute prohibiting employment in a house of prostitution or living on the earnings of a prostitute, see Johnson v. State, 501 P.2d 762 (Alaska 1972).

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, 403 P.2d 673 (Alaska 1965).

For case construing former statute prohibiting pimping, see Johnson v. United States, 260 F. 783 (9th Cir. 1919).

For case construing former statute prohibiting a male's living with or on the earnings of a prostitute, see Dunn v. State, 426 P.2d 993 (Alaska 1967).

Quoted in Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

Collateral references. — 27 C.J.S., Disorderly Houses, §§ 1 to 18; 73 C.J.S., Prostitution, §§ 6, 7.

Constitutionality of statute conferring on chancery courts power to abate bawdyhouses as nuisances, 5 ALR 1474; 22 ALR 542; 75 ALR 1298.

Number of females who reside in house or resort thereto for immoral purposes as affecting disorderly character thereof, 12 ALR 529.

Entrapment to commit offense as to house of prostitution or as to pandering, 52 ALR2d 1194.

Construction of provision of pandering statute as to placing a female in charge or custody of another, 53 ALR2d 1178.

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under AS 11.66.110 — 11.66.130, it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

For case construing former rule as to corroboration of prostitute's testimony, see Johnson v. State, 501 P.2d 762 (Alaska 1972).

For cases construing former statute providing that common fame was competent evidence in a prosecution for keeping a bawdyhouse, see Botts v. United States, 155 F. 50 (9th Cir. 1907); Hall v. United States, 155 F. 52 (9th Cir. 1907).

Cited in Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

Sec. 11.66.150. Definitions. In AS 11.66.100 — 11.66.150, unless the context requires otherwise,

(1) "place of prostitution" means any place where a person engages in sexual conduct in return for a fee;

(2) "prostitution enterprise" means an arrangement in which two or more persons are organized to render sexual conduct in return for a fee;

(3) "sexual conduct" means genital or anal intercourse, cunnilingus, fellatio, or masturbation of one person by another person. (§ 8 ch 166 SLA 1978)

Cross references. — For definition of terms used in this title, see AS 11.81.900.

NOTES TO DECISIONS

Quoted in Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

Article 2. Gambling Offenses.

Collateral references. — 38 Am. Jur. 2d, Gambling, § 1 et seq.

27 C.J.S., Disorderly Houses, § 1 et seq.; 38 C.J.S., Gaming, § 1 et seq.

Racing as a game within statute, 45 ALR 998.

Constitutionality of statutes forbidding or regulating dissemination of betting

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ANCHORAGE SCHOOL DISTRICT and in its Representative Capacity for Students, Teachers, Parents, Administrators, and its Other Employees, DR. WILLIAM COATS, DR. WILLIAM MELL, III, MRS. ESTHER COX, RICHARD MIZE, LELAND WILSON, and DR. TOM EVERITT,

Plaintiffs,

vs.

ANCHORAGE POLICE DEPARTMENT, a Department of the Municipality of Anchorage, CHIEF OF POLICE, KEVIN O'LEARY, officially and individually, CAPTAIN THOMAS WALKER, officially and individually, INVESTIGATOR PRESTON W. CHAPMAN, officially and individually, STEPHEN BRANCHFLOWER, ASSISTANT DISTRICT ATTORNEY FOR THE STATE OF ALASKA, officially and individually, and DWAYNE McCONNELL, DISTRICT ATTORNEY FOR THE STATE OF ALASKA, officially and individually,

AND

DOES I-XXX, Anchorage Police Officers who Executed the Searches in Violation of Law, in their Official and Individual Capacities.

Defendants.

/ Case No. 3AN-89-08687-Civil

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND/OR DECLARATORY JUDGMENT REGARDING OBLIGATIONS AND DUTIES UNDER THE CHILD PROTECTION ACT (AS 47.17)

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INTRODUCTION

This dispute arises as a result of an ongoing criminal "investigation" of school administrators who made a report under the Child Protection Act. This investigation demonstrates the uncertainty as to the meaning of certain provisions of Title 47, Chapter 17, the child abuse reporting statute. This motion seeks to have the operative statutory terms declared unconstitutional. As an alternative, this court may define the meaning of certain provisions in a manner which excludes plaintiffs' conduct from penal consequences.

Title 47, Chapter 17 concerns "child protection" and sets up a reporting system where danger of harm to children must be immediately or promptly reported to state authorities under AS 47.17.020. The statute allows authorities to intervene and protect the child from further harm. AS 47.17.050 confers immunity from criminal and civil liability if a good faith report is made to state authorities. Conversely, AS 47.17.068 imposes criminal liability in the form of a Class B misdemeanor for "knowingly failing or refusing" to report as required by AS 47.17.020.

At present, the administrators and employees of the Anchorage School District must guess as to the meaning of the statutes in the context of complex and unique factual situations which arise frequently. Under the circumstances, the Anchorage School District and the individual defendants have the right to request court declarations as to the validity and meaning of the statute.

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This memorandum initially sets forth, in Section I, the basis for this court's jurisdiction to determine and to declare certain issues in a declaratory judgment action. Section II.A. then briefly summarizes the few relevant facts which are not in dispute and which pertain to this motion. The legislative history of the statute is summarized in Section II.B. Section III identifies numerous due process infirmities in the statute. This section discusses void for vagueness, unconstitutional means, and unexpected construction issues as they relate to the statutory terms "sexual abuse," "maltreatment" and "cause to believe." Finally Section IV. discusses the self-incrimination issues which plague the reporting requirement, and relates these issues to the immunity provisions of the statute. The immunity provisions should play a critical role in the statutory scheme. At present, however, the defendants would ignore or emasculate the immunity provision and compound the inherent uncertainties in the statute for thousands of Alaskans who are governed by its requirements. Accordingly, this court must provide a declaration under the Alaska Declaratory Judgment Act to assist the plaintiffs and thousands of others who are subject to this unusual and uncertain statutory scheme.

SUMMARY OF ARGUMENT

Plaintiffs know of only one reported case where a person who made a report of potential child abuse to state authorities under a child abuse reporting statute was criminally prosecuted for failing to report sooner. See Sheriff, Washoe County v. Sferrazza,

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766 P.2d 896, 897-98 (Nev. 1988). In that case the Supreme Court of Nevada held that the requirement of an "immediate" report was unconstitutionally vague and denied substantive due process.

On September 7, 1989, some of the individual plaintiffs, officials of the Anchorage School District, made a report of possible child abuse or neglect arising from a consensual sexual relationship between a teacher and a former seventeen year old student to the Department of Family and Youth Services, pursuant to AS 47.17.020. The Department advised law enforcement authorities of the report as mandated by the protection statutes. The plaintiffs fully expected that all the circumstances regarding the teacher's conduct would be investigated by law enforcement agencies for purposes of a criminal prosecution. Police and prosecutors then took the report made by school officials and initiated an investigation not only into possible sexual abuse by the teacher, but also in an effort to develop a basis to prosecute the educators/reporters for the criminal offense of failing to report immediately upon having cause to believe the child had been neglected or abused. AS 47.17.068. The privilege against self-incrimination, guaranteed by the Alaska Constitution, absolutely prohibits compelling an individual to make a self-incriminating statement. Legislation, such as that contained in the reporting statute, which purports to compel an individual to make statements or reports which in turn may provide the first, indispensable link in the chain of evidence against him, are facially unconstitutional unless they also provide statutory

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immunity which is co-extensive with the privilege against self-incrimination. The reporting statute fails to provide the constitutionally required immunity. It offers transactional immunity to persons who report, but limits the availability of that immunity to those who report in "good faith." Because the good faith standard is nowhere defined, and because its application may deny immunity to individuals who reasonably believe they are required to report suspicions of possible misconduct by others which they do not personally believe, the statutory immunity is not co-extensive with the privilege against self-incrimination. Accordingly, the section of the statute which purports to impose criminal liability for failing to report as required is invalid and must be severed from the remainder of AS 47.17 in order to avoid having to declare the entire Act unconstitutional. See Section IV., pp. 79-96, infra.

As a separate basis for constitutional infirmity, a construction of the statute which sustains the constitutionality of the good faith limitation and narrowly construes the category of reports which are made in good faith, constitutes an independent violation of due process clause. This alone requires severance of the criminal sanction provided in AS 47.17.068, or a declaration that the entire reporting act is unconstitutional. See Section IV., pp. 79-96, infra.

Self-incrimination problems aside, many provisions of AS 47.17 are unconstitutionally vague. The first area of vagueness problems attaches to the question of what must be reported under

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the Act. Child abuse and neglect is defined, inter alia, to include "sexual abuse." However, no further definition of sexual abuse is provided in Title 47. "Sexual abuse," without further definition, is so vague and broad that persons of reasonable intelligence cannot know what it means. Additionally, it constitutes a broad and vague definition which provides excessive discretion to police and prosecutors in determining how and when to enforce the law. For these reasons, the term "sexual abuse" is unconstitutionally vague unless some more specific meaning is attributed to it. Legislative history, principles of statutory construction, and admissions by the Attorney General all indicate that the "sexual abuse" referred to in Title 47 is meant to be one and the same as the offenses categorized under the sexual abuse of a minor provisions of Title 11. If such a construction is accepted, the vagueness problems are avoided. Accepting such a construction, it becomes apparent that plaintiffs had no obligation to report consensual sexual activity between a teacher and a student over the age of general consent and over the age of compulsory school attendance, because such consensual activity, while unprofessional and reprehensible, is not sexual abuse within the meaning of Title 11. Therefore, it is not sexual abuse which must be reported under Title 47. See Section III.B.1., pp. 31-56, infra. While the teachers career may be ended for such unprofessional conduct, by termination of his employment, as occurred here, the teacher has not engaged in criminal wrongdoing.

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Alternatively, consensual sexual activity between a teacher and a student over the age of consent and over the age of compulsory school attendance is not reportable as "maltreatment" under Title 47. The term "maltreatment" is not further defined in Title 47 or in any other section of the Alaska Statutes. However, the timing and sequence of its inclusion in Title 47 indicates that it was adopted as part of an ongoing effort to maintain substantial conformity between Title 47 and federal law and regulations so that the state could continue to receive federal funding for various programs. "Maltreatment" has a specific definition in the comparable federal statutes, consisting of a failure to provide adequate shelter, clothing, food, or medical treatment. The phrase "maltreatment" without further definition is unconstitutionally vague and denies due process. If given the definition attributed to it by the parallel federal provisions, however, the term is sufficiently specific to provide notice to individuals of what "maltreatment" constitutes abuse or neglect. Significantly for present purposes, that definition can in no way be construed to include otherwise lawful consensual sexual activity. See Section III.B.1, pp. 56-61, infra.

Accordingly, the terms contained in Title 47 which define the sort of child abuse or neglect which must be reported are unconstitutionally vague, or must be construed as having more specific meanings. In turn, those more specific meanings exclude the consensual sexual activity which occurred here from the ambit of the reporting requirement. Accordingly, the court should either

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declare that the statute is unconstitutionally vague or that the terms in question have the specific meanings suggested, and, further, that the plaintiffs had no duty under Title 47 to report consensual sexual conduct between a teacher and a student over the general age of consent and over the age of compulsory school attendance.

The statute also runs afoul of constitutional due process provisions in its efforts to define when reportable conduct must be provided to the authorities. The statutory language requiring "immediate" or "prompt" reports is unconstitutionally vague. In the absence of some time parameters or more specific definition, persons of reasonable intelligence cannot know how fast a report must be in order to be "prompt" or "immediate." The same lack of certainty provides law enforcement officials with too much discretion in investigating and prosecuting the tieliness of a report with the benefit of twenty-twenty hindsight. See Section III.B.2., pp. 61-63, infra.

Additionally, and independently, the "prompt" or "immediate" report must be triggered by the reporter concluding that he or she has "cause to believe" child abuse or neglect has occurred. It is debatable whether or not the plain meaning of "cause to believe" has sufficient content to withstand constitutional scrutiny. However, the Attorney General has taken the position that "cause to believe" is a term of art which departs from its dictionary meaning of having a good or adequate reason to take a fact as true or valid. Instead, the Attorney General

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construes the term to mean any inkling, intimation or bare suspicion based on "something, however nebulous." Plainly reasonable educators, administrators, and other persons required to report have received no fair notice of what quantity or quality of information and justification the statute requires them to have before the immediate or prompt report requirements are triggered. See Section III.B.2., pp. 63-71, infra.

Taking the vagueness of the terms "prompt" and "immediate" together with the contentlessness of an inkling-based-on something-however-dubious standard, it is apparent that the statute is unconstitutionally vague.

An entirely separate constitutional flaw is that the imposition upon reporters of a legal obligation to turn in their fellow citizens on the basis of inklings or based on something, however dubious, which they do not believe to be true, on pain of being prosecuted themselves if they fail to report, violates the reporter's rights to liberty, privacy, and due process under the Alaska Constitution. Given the lack of content in the statutory standard of justification, and the Attorney General's boundless expansion of the plain meaning of that contentless standard, the legislation purports to require thousands of Alaskan citizens to become compelled informers against their colleagues, neighbors, and fellow citizens of virtually any suspicion or suggestion of misconduct involving children. Basically the statute requires reporters to elect between their own liberty and the liberty and privacy of others. However commendable its ultimate goal, the

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statute employs constitutionally intolerable means which are wholly irreconcilable with the premises of a free society. See Section III.B.2., pp. 71-74, infra.

Finally, for many of the same reasons discussed above, the statute compels citizens to violate the privacy rights of fellow citizens. Because of the laxness and contentlessness of the standard which triggers the reporting obligation, thousands of citizens are required to report largely innocent actions by thousands of other citizens to law enforcement authorities or authorities who are required to report to law enforcement. Not only will this occasion massive violations of the privacy of those with respect to whom reports are made, but the reporters may find themselves held liable in civil or criminal courts for making reports which turn out to be false. If the "good faith" limitation on the immunity provision of the reporting act is sustained, reporters could be placed in the intolerable position of having to report claims and intimations which they do not believe, on pain of going to jail for failing to report, only to be sued by the aggrieved persons against whom false reports were lodged, and then to find that they have no statutory immunity because they did not believe the report they were required to make.

The constitutional infirmities of AS 47.17, when employed as a penal statute, are legion. Some of those infirmities can be addressed by narrowing constructions -- such as by providing appropriate definitions for "sexual abuse" and "maltreatment." Other provisions -- such as the purported good faith limitation on

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immunity -- will have to be stricken and severed if any of the statute is to be saved. But some of the most fundamental problems with the statute -- such as the compelled violation of privacy rights of reportees, the substantive due process violation inherent in requiring individuals to inform state investigators of accusations against their fellow citizens which they do not believe, and the contentlessness of the immediate report on cause to believe requirement -- require that, at a minimum, the criminal sanction be deleted from the statute altogether, and, perhaps, that the statute be declared invalid in its entirety.

I.

THE COURT HAS POWER TO PROVIDE DECLARATORY JUDGMENT TO CONSTRUE THE STATUTE AS UNCONSTITUTIONAL OR TO NARROW THE CONSTRUCTION OF THE STATUTE (AS 47.17.010 et seq.).

This motion seeks a declaration of the rights and legal relations of the parties under the reporting requirements of the Child Protection Act (AS 47.17). This court can reach these core issues through declaratory judgment under Civil Rule 57 and AS 22.10.020(g). The Anchorage School District has standing to initiate such an action seeking declaration that the reporting statute is unconstitutional.[1] See, School District of East Grand

[1] In addition the standing of school boards and school board members to seek clarification of their rights and duties has frequently been recognized. See Snider v. Sharpp, 405 A.2d 602 (Penn. 1979); Board of Education of Central School District v. Allen, 20 L.ed.2d 1060 (1968); Regents of the University of Minnesota v. National Collegiate Athletic Association, 560 F.2d 52 (8th Cir. 1977) (allowed the Board of Regents to assert constitutional rights of student athletes while seeking clarification of the Board's duties).

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Rapids, Kent County v. Kent County Tax Allocation Board, 330 N.W.2d 7, 12 (Mich. 1982); School District, City of Independence v. Jones, 653 S.W.2d 178, 184 (Missouri 1983) (standing where School District is challenging the construction of a statute); Seattle School District No. 1 of King County v. State, 585 P.2d 71, (Wa. 1978). "The [School District] and the members of the school board are charged with the responsibility of providing education to the children of [the District] and are tangibly injured if the statutes which guide their hands disenable them from so providing." Washakie County School District No. One v. Herschler, 606 P.2d 310 (Wyo. 1980).

Specifically, the declaratory judgment statute empowers the court "to declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is, or could be, sought".[2/] AS 22.10.020 (emphasis added). The historical antecedents of the Alaska Declaratory Judgment Act

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2/ AS 22.10.020, Jurisdiction of the Superior Court provides in pertinent part:

> (g) In the case of an actual controversy in the states, the Superior Court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

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are discussed in Jefferson v. Asplund, 458 P.2d 995 (Alaska 1969). There can be no dispute that there is a "case in controversy" under AS 22.10.020(g) in this matter. The issues presented here arise from an actual situation and concern a continuing threat of prosecution. The issues are justiciable, not hypothetical or abstract in character. Id. at 998-99. The circumstances show a substantial controversy between parties having adverse legal interests and having sufficient immediacy, uncertainty and reality to warrant issuance of a declaratory judgment. Id. The District must advise its 2,700 administrative, teaching, counseling, and nursing employees what is reportable, when the duty to report arises, and whether reporters are subject to civil and/or criminal consequences. Given defendants threatened prosecution of the individual plaintiffs even though they reported conduct which was not, in all likelihood, within the reporting requirement, the District is unable to give appropriate guidance or establish policies and procedures to comply with the present statute without judicial guidance.

The Colorado Supreme Court has commented on the necessity for declaratory relief where there is anxiety and uncertainty about a criminal statute:

> A person affected by a criminal statute need not, however, necessarily take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. Relief in the nature of a declaratory judgment will be afforded in appropriate circumstances to those persons who claim uncertainty and insecurity with respect to their rights under a penal statute or law.

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Rathke v. MacFarlane, 648 P.2d 648, 653 (Colo. 1982). Specifically with reference to this case, declaratory relief may be sought to determine the validity and construction of statutes and public acts. Jefferson v. Asplund, supra, 458 P.2d, at 999. There are two additional, principal criteria present here which favor declaratory judgment. First, the judgment would serve a useful purpose in clarifying and settling the legal relations between the School District and the Anchorage Police Department. Second, it would afford relief from uncertainty, insecurity and hostility between two branches of local government that must work together based on clearly defined rules. Id. at 998. [3]

II.

THE KEY FACTS TO WHICH THE REPORTING STATUTE IS BEING APPLIED ARE NOT IN DISPUTE.

A. The Report.

There are only a few facts that need to be considered by the court for purposes of this motion, and these facts are not in dispute. These facts are drawn primarily from the affidavits

[3] This very controversy, and other similar incidents now pending, show that guidance and clarification from the Alaska courts is imperative if these controversies are to be resolved and future controversies avoided. Whether or not defendants enjoy some immunity with respect to the recovery of damages, it is well established that the official immunity defense cannot be asserted in an action for injunctive or declaratory relief. State v. Haley, 687 P.2d 305, 322 (Alaska 1984); Liffiton v. Keuker, 850 F.2d 73, 78 (2nd Cir. 1988); Dugan v. Rank, 372 U.S. 609, 621-22, 10 L.Ed. 15 (1963).

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previously filed with the court. These affidavits are incorporated by reference.

S1 and S2 were students at Bartlett High School and T1 was a teacher at that same school during the spring of 1989.[4] T1 and S1 had consensual sexual relations during the period she was a student at the school. S1 was seventeen years of age at the time of the alleged consensual sexual acts. Bartlett school administrators were told by S2 that her friend might be having a relationship with T1 in May 1989. Both T1 and S1 repeatedly denied the rumor at that time. S1 denied ever going to T1's home after school or doing anything inappropriate with him during school or outside of school. S1-s parents heard similar rumors in May and did not believe them either. Before the school year ended, T1 threatened to file a suit for slander. S1's parents invited T1 to their home for dinner to celebrate their daughter's graduation. Bartlett School officials concluded that they did not have the "cause to believe" which necessitated that a report be made in May, 1989.[5]

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[4] S2 identifies the student from whom the rumor of the alleged sexual activity was received. S1 identifies the student allegedly involved.

[5] Discovering consensual sexual activity which the participants want to keep private and will be about to conceal the secret relationship is extremely difficult. Yet the defendants assert the building administrators should have seen through the denials of the relationship made by S1 and T1 even though the parents had not.

S1 graduated from Bartlett High School in May of 1989. In August 1989, the father of S1 contacted district officials about the matter, indicating that he then suspected S1 and T1 had been involved. The district then followed up on the matter. In mid-August, the District succeeded in obtaining a statement from S1, acknowledging that she had sexual relations with T1 during the final semester of her senior year and that her prior denials were false. In August 1989, S1 was attending college in Utah and T1 was in Europe. There was therefore no threat of further sexual contact at that time.

After his return, T1, represented by counsel, agreed to resign on or about August 28, 1989, rather than be fired from his teaching position. A report under AS 47.17.020 concerning the conduct occurring between T1 and S1 was made by the district, in good faith and on the advice of counsel, to the Division of Youth and Family Services (hereinafter "DYFS") on September 7, 1989. The report was made with the full expectation that T1's conduct would be reviewed for possible criminal prosecution. See Affidavits of Mell, Hahn and Cox.

B. Legislative History of the Reporting Act.

The Alaska Child Protection Act (AS 47.17), which mandates reporting, first became law in 1971. See Appendix A. Appendix A includes the basic documents in the legislative history of the Act and summarizes this legislative history for the court. Since 1971, there have been numerous amendments. Many of the changes were made to comply with federal statutes and regulations

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concerning child abuse prevention and treatment. Compliance with federal statutes is necessary for the State of Alaska to remain eligible for federal funding for child abuse assistance and treatment programs. Many of the provisions in the reporting statute were adopted in response to a federal assistance program adopted by Congress in 1974. In order to be eligible for funding, state laws must be in compliance with federal statutes and regulations. 45 CFR 1340.1 et. seq. Since its inception, the purpose of the Child Protection Act has been to protect children from abuse. Of course, this is the purpose of requiring "immediate" or "prompt" reports.

Although mandatory reporting has been part of the statute since 1971, criminal penalties for failure to report did not become part of the statute until 1982. Defendants have seized on this recent provision and focused on the Act as a penal statute. They have threatened prosecution under this section of the top administrators in the Anchorage School District for not reporting a non-reportable incident soon enough. The statute was amended in 1985 to cover abuse outside the home or custodial relationship. While passing these amendments, several legislators expressed concern over the constitutionality of the terms in the Child Protection Act (AS 47.17). One such concern was whether "maltreatment" was sufficiently delineated to withstand constitutional challenges. On the whole, AS 47.17 has been constructed in a piecemeal fashion, which has created a lack of cohesion and glaring inconsistency within the Act. There has yet

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to be a judicial interpretation, consideration, or construction on the application of the criminal penalties under this statute in the Alaska courts.

While there are a host of other facts which relate to the present controversy, these few facts are all that is necessary to resolve the legal issues at the core of this matter. Civil Rule 56 allows for partial disposition of issues in a suit where there are no disputes as to the material underlying facts.

III.

EITHER THE REPORTING STATUTE IS VOID FOR VAGUENESS, DENIES SUBSTANTIVE DUE PROCESS TO REPORTERS, AND VIOLATES REPORTEES' PRIVACY RIGHTS, OR IT MUST BE CONSTRUED IN A WAY WHICH EXCLUDES PLAINTIFFS' CONDUCT FROM PENAL CONSEQUENCES.

A. Principles of Law.

This section of the memorandum sets forth the fundamental constitutional rules of due process which apply to the construction and application of penal statutes. Thereafter, these due process rules are applied to the terms of this statute.

1. Vague Provisions Violate Due Process of Law.

This memorandum will show that the terms "promptly", "immediately", "cause to believe," and "maltreatment" are fatally ambiguous under the statutory scheme and as applied to the report made by School District administrators. Because there is a penal sanction involved, this vagueness violates the due process clause of the Alaska Constitution.

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Analysis of vague criminal statutes under substantive due process principles has a central and profound place in the American system of justice. Citizens must be able to determine if their conduct would be deemed by the state to be illegal before they act. A vague statute frustrates the ability of well-meaning citizens to determine what is prohibited. It also confers too much discretion upon law enforcers, raising the constitutionally unacceptable spectre of arbitrary, selective and/or bad faith prosecution. The due process clause provides a substantive protection for all citizens of our society against these dangers.

It is well-established that 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 -- fair notice of what is illegal. Connally v. General Construction Co., 269 US 85, 391 (1926) as cited in State v. O'Niell Investigations, 609 P.2d 520, 531 (Alaska 1980); Bouie v. City and Columbia, 378 U.S. 347, 351 (1965). Accord, United States v. Harris, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, (1939); McBoyle v. United States, 283 U.S. 25, 22 (1931). In dealing with the due process notice requirement, the Alaska Supreme Court has stated:

> The current approach to defining criminal conduct is that of specifying in objective terms the acts and intent prohibited . . . [W]here the conduct to be prohibited by a criminal statute is capable of objective definition by language descriptive of precise physical acts and events, it simply will not do to use language so ambiguous as to be

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> capable of expansion or contraction at the whim of the reader.

Harris v. State, 457 P.2d 638 (Alaska 1969) (term "crime against nature" were held unconstitutionally vague and standardless), cited in Anderson, 562 P.2d 351, 357 (Alaska 1977) ("lewd and lascivious" upheld because explained within the statute).

A statute is also vague and violates the due process guarantee if its indefinite contours confer unbridled discretion on government officials and thereby raises the possibility of arbitrary, uneven and discriminatory enforcement. Brown v. Municipality of Anchorage, 584 P.2d 35, 37 (Alaska 1978) (loitering for solicitation held void for vagueness); Levshakoff v. State, 565 P.2d 504, 507 (Alaska 1977); Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972).

Where a statute fails to give notice of prohibited conduct or raises the specter of arbitrary enforcement, the court must sever the offending language, strike the provision, or construe the statute narrowly to protect those potential defendants not put on notice. Weaver v. State, 736 P.2d 781, 782 (Alaska App. 1987), citing Summers v. Anchorage, 589 P.2d 863, 866-67 (Alaska 1979) (the court noted that "lewdness" had been removed from the penal ordinance and in dicta noted that "lewdness" must be defined, severed, or narrowly construed); Stock v. State, 526 P.2d 3, 7-9 (Alaska 1974). As the Alaska Supreme Court has explained,

> We cannot allow criminality to depend only upon the moral sentiment or idiosyncrasies of the tribunal before which a defendant is tried. Vague terms in a statute, if permitted to stand, might be used to cover varieties of

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conduct not ordinarily regarded as criminal by vast portions of the public affected by it.

Harris v. State, 457 P.2d 638, 641 (Alaska 1969) (finding statutory language "crime against nature" void for vagueness). These standards of due process will guide the court when it reviews the statute on vagueness grounds in Section III.B.1., 2.a.-c., infra.

The next section of this memorandum discusses the due process infirmities of a broad requirement that citizens report other citizens to the government on pain of incarceration. Such a requirement is an unconstitutional anathema to a free society. This basic problem exacerbate the vague provisions of the statute. The factual issues surrounding on the vagueness problems are discussed at length in the remainder of this memorandum. Regardless, when citizens, prosecutors and policemen do not know what should be reported or prosecuted or when, fundamental problems arise. This controversy is testimony to the dangers of undefined prosecutorial discretion coupled with improper police conduct.[6/]

2. Imposing Criminal Consequences Upon a Person For Failing to Report His Bare Suspicions Concerning Another's Conduct to Law Enforcement Violates Substantive Due Process.

Article I, § 7 of the Alaska Constitution guarantees all persons the right to due process of law prior to deprivation of property or liberty. Substantive due process of law is a

[6/]As to the nature of the police conduct, the court should refer to the factual discussion in the Motion for Preliminary Injunction and the Opposition to the First Motion for Summary Judgment.

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recognized constitutional guarantee of respect for those personal liabilities rooted in the concept of ordered liberty that protects one from arbitrary governmental action. The statutory scheme here imposes criminal sanctions for the failure to report suspicions concerning others to the government. The defendants apparently argue that reports must be made on the first suspicion or rumor, and that if the report is delayed to look into the accusation, then the immunity in the statute is lost. Virtually all of the well-recognized aspects of substantive due process are offended by legislation requiring certain classes of people to report mere suspicions of improper conduct by fellow citizens to state authorities lest they face criminal penalties themselves.

The historical roots of substantive due process were described by Justice William Johnson in 1819 as follows:

> As to the words from the Magna Charter . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this:that they were intended to service the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okley, 4 Wheat. 235, 244 (1819). This concrete restraint on government has been described by the Alaska Supreme Court as follows:

> The term 'due process of law' is not susceptible of precise definition or reduction to a mathematical formula. But in the course of judicial decisions it has come to express a basic concept of justice under law, such as 'our traditional conception of fair play and substantial justice' the 'protection of the individual from arbitrary action',

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> 'fundamental principles of liberty and justice', whether there has been a [denial of] fundamental fairness, shocking to the universal sense of justice', 'that whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct', and a 'respect for those personal immunities which * * * are "so rooted in the traditions and conscience of our people as to be ranked as fundamental", * * * or are "implicit in the concept of ordered liberty."'

Green v. State, 462 P.2d 994, 996-997 (Alaska 1969), citing Northern Supply, Inc. v. Curtis-Wright, 397 P.2d 1013, 1017 (Alaska 1965) (long arm statute); Slochower v. Higher Board of Education of New York, 350 U.S. 551, 559 (1956) (protection of the individual from arbitrary action); In re Grobar, 352 U.S. 330, 334 (1957) (fundamental principles of liberty and justice); Kinsella v. United States, 361 U.S. 234, 264 (1960) (denial of fundamental fairness shocking to the universal sense of justice); Breifthaupt v. Abram, 352 U.S. 432, 436 (1957) (that whole sense of decency and fairness that has been woven by common experience into the fabric of common conduct); Rochin v. California, 342 U.S. 165, 169 (1952) (so rooted in the traditional and conscience of our people as to be rooted fundamental or implicit in the concept of ordered liberty).

In Rochin v. California the United States Supreme Court held that due process limits the means which the state can use in pursuing even legitimate and important ends. Speaking for the majority, Justice Frankfurter stated:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Justice Cardozo twice wrote for the court, are "so rooted in the traditions and conscience of our people as

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> to be ranked as fundamental" . . . "or are implicit in the concept of ordered liberty."

342 U.S. at 169. And in discussing the ambit of the due process, Justice Harlen has stated:

> In my view, the proper constitutional inquiry in this case is whether this Connecticut statute [prohibiting sale of contraceptives to married couples] infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palkco v. Connecticut, 302 U.S. 319, 325, 82 L.Ed. 288, 292 58 S.Ct. 49. For reasons stated at length in my dissenting opinion in Poe v. Ulman, supra, I believe it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Griswold v. Connecticut, 381 U.S. 479, 500 14 L.Ed.2d 510 (1965) (Harlen concurring). In these and other opinions the due process clause of the Fourteenth Amendment -- which is identical to Article I, § 7 -- has been regarded as a source of prohibition for liberty interests not specifically set forth in the Bill of Rights.[1/]

In criminal cases, the flexible concept of due process has developed in a series of consistent doctrinal manifestations.

[1/]The Supreme Court has articulated several other fundamental "liberty" rights which are protected by the Due Process Clause of the Fourteenth Amendment. See, e.g. Meyer v. Nebraska, 262 U.S. 390, 399 (1925) (right to marry, establish a home and bring up children); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1932) (right to direct the upbringing and education of children); Griswold v. Connecticut, 381 U.S. 479, (1965) (privacy of the marital relation); Roe v. Wade, 410 U.S. 113 (1973) (right to choose whether to have children); see also Olmstead v. United States, 277 U.S. 438, 478 (Brandies, dissenting) ("the right to be left alone").

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The Alaska appellate courts have recognized and applied the due process doctrines on numerous occasions in criminal cases. Substantive due process requires that in any criminal prosecution the state must bear the burden of proving all elements of the offense beyond a reasonable doubt. Huitt v. State, 678 P.2d 415, (Alaska App. 1984); Huf v. State, 675 P.2d 268, 271 (Alaska App. 1984). Accord In re Windship, 397 U.S. 358 (1970).

An essential element of virtually every criminal prosecution is a demonstration by the state that the accused acted with a culpable state of mind, known as "mens rea." See Mullaney v. Wilbur, 421 U.S. 684 (1975). The Alaska Supreme Court has repeatedly emphasized the basic requirement under the state Constitution that the imposition of criminal sanctions requires proof beyond a reasonable doubt that the accused acted with criminal intent, sometimes referred to as an awareness or consciousness of wrongdoing. State v. Guest, 583 P.2d 836, 838 (Alaska 1978) ("it would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent"); Jager v. State, 748 P.2d 1172, 1178 (Alaska App. 1988) (Guest "infer[ed] a requirement of criminal intent in order to avoid the imposition of strict criminal liability for an offense not involving the public welfare"); Bell v. State, 668 P.2d 829, 833-35 (Alaska App. 1983) ("Well-recognized rule" criminal intent required and "one charged with criminal conduct must have an awareness or consciousness of wrongdoing"); Andrew v. State, 653 P.2d 1063, 1065 (Alaska App. 1982) ("Alaska

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Supreme Court has been consistent in holding that serious criminal offenses must include a requirement of criminal intent as an essential element of the offense and that the imposition of strict liability in all but a limited category of criminal offenses violates due process"); Hentzner v. State, 613 P.2d 821, 827 (Alaska 1980). Alaska appellate courts have consistently implied intent requirements into criminal statutes and ordinances in order to save them from constitutional challenge under the due process clause. See, e.g., Morris v. Municipality of Anchorage, 652 P.2d 503 (Alaska App. 1982); Smith v. Municipality of Anchorage, 652 P.2d 499 (Alaska App. 1982).

Criminal jurisprudence also contains many examples where the state's pursuit of proper ends by employing improper means were struck down as violations of substantive due process. These cases establish the principle that even the most legitimate ends, such as successfully prosecuting a murder or drug dealing suspect, cannot be accomplished by constitutionally intolerable means. Of course, a leading case is Rochin v. California, supra, where use of a stomach pump was held to be a violation of substantive due process. The use of an accused's coerced or involuntary confession or testimony in a criminal trial is also a violation of due process of law. New Jersey v. Portash, 440 U.S. 450, 459 (1979) (testimony); Mincey v. Arizona, 437 U.S. 385, 398 (1978) (confession). The prosecution may not comment on the silence of the accused after he has been apprised of his Miranda rights. Doyle v. Ohio, 426 U.S. 610 (1976); Stork v. State, 559 P.2d 99,

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103 (Alaska 1977) ("We do note, however, that substantive due process is violated when the prosecution calls attention to the silence of the accused at the time of his arrest").

Due process also prohibits imposition of a criminal consequence in the absence of a criminal act or for innocent conduct. Robinson v. California, 370 U.S. 660, 667 (1962) (status of "addict" cannot be criminalized by statute); Reynolds v. State, 664 P.2d 621, 623-25 (Alaska App. 1983). Justice Douglas has stated, regarding a statute that criminalized the status of being an "addict," "[c]ontrary to my [dissenting] Brother Clark, I think the means must stand constitutional scrutiny, as well as the end achieved." Robinson v. California, 370 U.S. at 677 (Douglas J., concurring).

Finally, substantive due process and the state guarantees against imposition of cruel and unusual punishment are both offended where criminal consequences are imposed wholly out of proportion to the culpability of the actions said to be criminal. Robinson v. California, supra, 370 U.S., at 667 ("Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold"). Accord Dancer v. State, 715 P.2d 1174, 1180-81 (Alaska App. 1986); Faulkner v. State, 445 P.2d 815 (Alaska 1968); Green v. State, 390 P.2d 433, 435 (Alaska 1964).[8/]

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[8/] Similar protections are vouchedsafe by Amendments VIII and XIV of the United States Constitution. See e.g., Solem v. Helm, 463 U.S. 277 (1983); Weems v. United States, 217 U.S. 349, 377 (1910).

This case presents the issue of the state's use of unconstitutional means to attain a salutary goal. Just as it is inconsistent with the concept of ordered liberty to be compelled to provide evidence against yourself in a criminal prosecution, no matter how great the societal interest in conviction, it is also a violation of substantive due process to be compelled on pain of prosecution to report mere suspicions of improper conduct by fellow citizens to the state. If there is anything that is anathema to a free society, it is the compelled reporting to the government of rumor, innuendo or suspicions regarding neighbors under threat of incarceration. Indeed, this is a quintessential trait of a totalitarian society. It is the characteristic of the repressive governments of Eastern Europe, whose people are refusing daily to submit to the continuation of such outrages. It is the "law" of Orwell's 1984, not the law of a land committed to the preservation of individual freedom. Just as a statute which "required" admission of coerced confessions at trials involving charges of sex abuse would be struck down as violative of due process, so too AS 47.17.068 violates the due process clause in Article I, § 7 of the Alaska Constitution. Such a criminal[9/] statute also violates the

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[9/]The Alaska Supreme Court has stated that "liberty" is an "elusive concept, incapable of definitive, comprehensive explanation. Yet at the core of this concept is the notion of total personal immunity from governmental control: 'the right to be left alone.'" Breeze v. Smith, 501 P.2d 159, 168 (Alaska 1972). In Breeze, the court held that the right to determine one's own hair style or personal appearance was a fundamental right contained in the concept of "liberty" in Article I, § 1 of the Alaska Constitution. See also Ravin v. State, 537 P.2d 494, 497-498 (Alaska 1975). The Breeze court cited Stull v. School Board of Western River Jr.-Sr.

(continued...)

reporter's rights to liberty (Article I, § 1) and to privacy (Article I, § 22) under the Alaska Constitution, and must be declared unconstitutional.[10]

3. Principles of Statutory Construction Will Guide This Court In Its Construction and Review of a Penal Statute.

This controversy apparently arises because the defendants are under the erroneous view that the report by the Anchorage School District to DYFS under AS 47.17.020 was not satisfactory.[11]

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[9](...continued)
H.S., 459 F.2d 339, 347 (3rd Cir. 1972) in support of this conclusion. Of course, the Stull court found "the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment." Id.

[10] Not surprisingly, statutes threatening to jail citizens who fail to report their suspicions about other citizens' possible misconduct to the state have found no home in American jurisprudence. The closest, and indeed only, analogue, consists of the offense of misprison of felony. 18 U.S.C. § 4 prescribes punishment for any person having knowledge of the actual commission of a felony who conceals the offense and fails to make it known to an appropriate authority. The cases are uniform in reversing convictions and/or vacating guilty pleas where the evidence in support of the conviction under this section consists solely of the failure to report a felony. Actual concealment, thereby making detection more difficult, has consistently been held to be an indispensable element of the offense. See, e.g., United States v. Goldberg, 862 F.2d 101, 104 (6th Cir. 1988) ("Mere knowledge of the commission of the felony or failure to report the felony, standing alone, is insufficient to support a conviction for misprison of a felony"); United States v. Graves, 720 F.2d 821, 822 n. 2 (5th Cir. 1983) (same).

[11]The State of Alaska has filed what is really a motion for "partial" summary judgment as to certain issues and attached the lengthy Affidavit of defendant McConnell. These documents provide some insight as to the State's most recent position:

> The intent of the mandatory reporting statute is to protect children from harm and maltreatment, by assuring that state agencies with expertise in evaluating and
>
> (continued...)

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As a result, this court will be required to construe a host of terms in the statutes. These terms include "cause to believe", "suffered harm", "sexual abuse", "maltreatment", "child's health or welfare is harmed or threatened", "immediately report", "promptly report", "knowing failure or refusal to report", and "a person who, in good faith, makes a report. . .is immune from any civil or criminal liability". In determining the meaning of these provisions, the court must follow recognized guidelines for statutory interpretation.

The Alaska Supreme Court has rejected the mechanical application of the plain meaning rule for statutory construction,

---

11/(...continued)

> investigatingg child abuse are notified in a timely manner. The plaintiffs cannot deny that a teacher's sexual intercourse with students can be harmful.
>
> Even if they were uncertain of its criminality, the administrators should have been advised to report this as "maltreatment . . . under the circumstances that indicate that the child's health or welfare is harmed or threatened". AS 47.17.020(c) and 070(2). (emphasis added).
>
> Even if the conduct of the teacher is not criminal, it was nonetheless conduct of the type which should have been reported. The goal of the reporting statutes is to enable state authorities to quickly (sic) provide protective services "to prevent further harm to the child". AS 47.17.010. . .Their duty is to pass the information along to responsible authorities "immediately". AS 47.17.020(a). Memorandum in Support of Defendants' Motion for Summary Judgment, pp 16-17.

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and instead has adopted a sliding scale approach. See Alaska Public Engs. v. City of Fairbanks, 753 P.2d 725,727 (Alaska 1988). As the court stated in State v. Alex, 646 P.2d 203, 208-09, n.4 (Alaska 1982) when the sliding scale approach was adopted:

> Part of the problem stems from ambiguity being a relative concept. Words have no intrinsic meaning; what is clear to one person is ambiguous and obscure to another.. . .As one court stated: "we think the statute is plain on its face, but since words are necessarily inexact and ambiguity is a relative concept, we now turn to legislative history, mindful that the plainer the language, the more convincing contrary legislative history must be."

Id. at n. 4, citing Sutherland § 45.02 at 4-5 and United States v. United States Steel Corp., 482 F.2d 439, 444 (7th Cir. 1973), cert. denied 414 U.S. 909, 94 S. Ct. 229, 39 L.Ed. 2nd 147. As such, legislative history must be considered, and the various methods of statutory construction must be employed by the court. Id.

In construing a statute, the court must reconcile the different provisions so as to make them consistent, harmonious and sensible. United States v. Hardcastle, 10 Alaska 254 (Alaska 1942). When one section of the statute deals with a subject in general terms and another deals with a part in a more detailed way, "[i]t is established principle. . .that all sections of an act are to be construed together so that all have meaning and no section conflicts with another". Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978); Hugo v. City of Fairbanks, 658 P.2d 155, (Alaska App. 1983).

Statutory interpretation in this matter is also guided by the fact that AS 47.17.068 is a penal statute. Because this

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subsection imposes criminal liability for a knowing failure or refusal to report, the statute "must be read strictly and construed against the government". See Kinnish v. State, 777 P.2d 1179 (Alaska App. 1989); Hilger v. Municipality of Anchorage, 1989 WL 125647 (Alaska App. 1989); Newsom v. State, 726 P.2d 561 (Alaska App. 1986); Causell v. State, 645 P.2d 219, 222 (Alaska App. 1982); C. Sands, Sutherland Statutory Construction, § 59.04 at 13 (4th ed. 1974) (hereinafter "Sutherland"). Ambiguous penal statutes are to be construed strictly in favor of the accused. See State v. Robertson, 749 P.2d 902, 905 (Alaska App. 1988); Conner v. State, 696 P.2d 680, 682 (Alaska App. 1985).

Finally, statutory construction is also affected by the existence of the numerous and diverse constitutional problems which attend the reporting requirement and its criminal penalty. Courts must reasonably construe statutes, whenever possible, to avoid possible unconstitutionality. See, e.g., State v. Sundberg, 611 P.2d 44, 50 n. 16 (Alaska 1980); Hoffman v. State, 404 P.2d 644, 646 (Alaska 1965). Alaska appellate courts have frequently interpreted statutes, sometimes even reading in provisions, in order to avoid possible due process infirmities. See, e.g., State v. Guest, 583 P.2d 836 (Alaska 1978); Morris v. Municipality of Anchorage, 652 P.2d 503 (Alaska App. 1982); Smith v. Municipality of Anchorage, 652 P.2d 499 (Alaska App. 1982).

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B. Application of Law to the Reporting Requirements of Title 47.

1. AS 47.17.020 Does Not Require That The Allegations Of Consensual Conduct At Issue Be Reported.

A primary term that gives rise to the need for a declaratory judgment is the term "sexual abuse" as that term is used in AS 47.17. Since a report of certain conduct was made, the apparent disagreement is as to when a report should have been made. However, this issue is moot if there is no requirement that the consensual activity here at issue need have been reported at all. In this regard, there must be no misunderstanding that the School District regards consensual sexual relations between a teacher and a seventeen year old student to be unprofessional and reprehensible on the part of the teacher. Such conduct would subject the teacher to termination. However, whether such conduct is also "sexual abuse" as that term is used in AS 47.17.070(1) -- and thus reportable under AS 47.17.020(a) - - is a potentially dispositive threshold issue.[12/]

[12/]AS 47.17.010 et. seq. does not contain a definition of "sexual abuse." In fact, Governor Sheffield's letter to Rep. Grusendorf states "Although the term "sexual abuse" is now used in AS 47, it is not defined." 1985 House Journal at 77. (emphasis added) Instead, AS 47.17.020(a) requires a report of "child abuse or neglect," and AS 47.17.070 defines "child abuse" to include "sexual abuse".

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a. "Sexual abuse" Is Unconstitutionally Vague Or Must Be Given the Same Construction in Title 47 As It Has Been Given in Title 11.

(1) "Sexual Abuse" Without Further Definition Is Unconstitutionally Vague.

Due process requires that penal statutes define criminal offenses with sufficient definiteness so that ordinary people can understand what conduct is prohibited, and so that arbitrary and discriminatory enforcement is precluded. See Section III.A.1., supra. If "sexual abuse" means something for purposes of a criminally enforceable reporting statute other than the specific meanings attributed to it in Title 11 -- which defines sexual offenses -- then it is a concept which is too vague to permit enforcement by criminal sanction.

Just what constitutes "sexual abuse" if it is something other than the sexual abuse offenses for which a perpetrator can be punished? Does it have a necessary physical component? Could suggestive statements or leers constitute "sexual abuse" which would have to be reported by observant officials? Is kissing or holding hands or hugging enough? If there is sexual contact which occurs in the school, but not during school hours and which is otherwise lawful, is that "sexual abuse"? If there is sexual contact between a teacher and a student over the age of consent and over the age of compulsory attendance which occurs not on school property, not during school hours, and not as part of any school, ordained activity, is that reportable "sexual abuse"? Is it sex abuse if the seventeen year old student is not in the teacher's

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class? Does parental knowledge or permission affect the legality of the acts? Persons of fair intelligence cannot know the answers to these questions. Accord Harris v. State, 457 P.2d 638, 647 (Alaska 1969) (term "crime against nature" void for vagueness; term "unnatural carnal copulation by means of the mouth, or otherwise, either with a beast or human being" also likely void for vagueness).

Accordingly, to avoid having to strike the reporting requirement of Title 47 as unconstitutionally vague on its face, the "sexual abuse" which is reportable must be defined as being the same conduct which is prohibited by the substantive "sexual abuse" provisions of Title 11.

Significantly, defendants do not attempt to argue in any of their motions to dismiss or for partial summary judgment that "sexual abuse" means anything more in Title 47 than the specifically defined meanings attributed to it in Title 11.

Moreover, the Alaska Attorney General has previously indicated that the phrase "sexual abuse" for purposes of Title 47 is coextensive with the state's definition of sexual offenses in response to an inquiry from the Commissioner of the Department of Health and Social Services. The Commissioner had requested advice from the Attorney General to determine, inter alia, whether or not the absence of a definition of "sexual abuse" in Title 47 made the state ineligible for funds by virtue of noncompliance with 42 U.S.C. § 5101 et. seq. (the Child Abuse Prevention and Treatment Act of 1974) (hereinafter CAPTA). After reviewing the federal

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definition of "sexual abuse," which included "rape, incest, and sexual molestation as those acts are defined by State law, by a person responsible for the child's welfare," 45 CFR 1340.2(d)(1), the Attorney General advised the Commissioner that the federal definition of "sexual abuse" "can only be construed as an intent by the United States Department of Health and Human Services to allow each state to employ its own definitions of sexual offenses, including, but not limited to, those listed in the regulation . . .". Appendix A, Memorandum from Attorney General Harold M. Brown to John R. Pugh, Commissioner, Department of Health and Social Services, No. 366-186-86, December 5, 1985. Accordingly, it is clear from the Attorney General's Opinion that sexual abuse under Title 47 consists of state's "own definitions of sexual offenses," which are contained in Title 11.

Finally, principles of statutory construction support the conclusion that "sexual abuse" has the same meaning in Titles 11 and 47. A traditional maxim of statutory interpretation is that ". . . whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter, and all should be construed together." Hafling v. Inland Boatman's Union of the Pacific, 585 P.2d 870, 877 (Alaska 1978); see also Sutherland, § § 51.01 at 287-89, 51.02 at 290. The only place that the Alaska Statutes define "sexual abuse" is in Title 11.

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Accordingly, this court must look to the provisions of Title 11 in order to define reportable "sex abuse" under Title 47.[13/]

(2) "Sexual Abuse" As Defined in Title 11 Is Sufficiently Specific.

AS 11.41.434 - 11.41.440 specifically define four degrees of "sexual abuse" of a minor. The statutory definitions are specific in their descriptions, both of the individuals affected and of the conduct proscribed. The terms used therein are either specifically described in that section in the general definitions pertaining to the Criminal Code, or by judicial construction. With the exception of the defendants' tortured reconstruction of the phrase "entrusted to the offender's care by authority of law," AS 11.41.434(a)(2), .436(a)(3)(A), there is little to argue with respect to the meaning of the provisions of the statutory sections. Accordingly, the sections of Title 11 provide specific and extensive definitions of the meaning of the phrase "sexual abuse" with respect to minors.

[13/]Should the court construe "sexual abuse" for purposes of Title 47 as not being limited to the definitions of "sexual abuse" contained in Title 11, an unconstitutional and unexpected construction of Title 47 would occur which would itself constitute a due process violation. Given that Title 11 specifically defines sexual abuse in terms of substantive offenses, and given that Title 47 specifically incorporates the provisions Title 11 with respect to the "sexual exploitation" which must be reported, all reasonable people will turn to title 11 in an effort to understand exactly what "sexual abuse" must be reported pursuant to Title 47. In the event a court, without any precedent, legislative history, or other support would conclude that the phrase "sexual abuse" imposes a broader reporting duty which stretches beyond the "sexual abuse" prohibited in Title 11, then the due process principles discussed in Section III.B.1.b.(9) would preclude prosecution of the first individuals to face that unexpected construction.

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b. The Consensual Sexual Conduct Here At Issue Is Not "Sexual Abuse" Under Title 11 or Title 47.

Under Title 11, the general age for consent to sexual intercourse is 16 years of age. The Alaska Legislature raised the applicable age of consent to certain narrowly defined situations. AS 11.41.434(a) is such a statute. It provides in relevant part:

> An offender commits the crime of sexual abuse of a minor in the first degree if
>
> * * * * * * * * * * * * *
>
> (2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who
>
> (A) is entrusted to the offender's care by authority of law; or
>
> (B) is the offender's son or daughter, including an illegitimate or adopted child or stepchild, . . .

Accord AS 11.41.436(a)(3)(A).

In the following sections, plaintiffs will demonstrate that the structure of Alaska's sexual abuse and related statutes and the legislative history to AS 11.41.434 make clear that the legislature's intent in enacting this statute was to prohibit sexual conduct between adults and individuals over 16 and under 18 years of age only in circumstances where the adult has assumed parental/caretaker responsibilities for the individual, by virtue of the existence of a parent-child type of relationship created by blood, by marriage or by law.

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(1) The Legislative History of AS 11.41.434(a)(2) Establishes That the Statute Applies Only Against An Individual Who Acts In A Parental Caretaking Capacity.

The legislative commentary to the former AS 11.41.410(a)(4)[14] provides in part:

> Subsection (a)(4) provides that the final form of sexual assault in the first degree occurs when a person 18 years or older engages in sexual penetration with a person under 18 who is entrusted to his care by authority of law (i.e., ward) or who is his son or daughter.

See Commentary to the Alaska Revised Criminal Code, 1978 Senate Journal Supplement No. 47, at 23 (emphasis added). The use of the term "ward" in the legislative commentary evidences that the legislature intended the words "authority of law" to encompass a category of persons that includes only parents, step-parents, adoptive parents and other individuals who act as legal guardians, such as court appointed guardians, court ordered foster parents, and juvenile detention authorities acting upon a court order of commitment. See AS 13.26.005(10) (defining "ward" in the context of the probate code as "a person for whom a guardian has been appointed").

Thus, AS 11.41.434 is intended to, and has the effect of, escalating and broadening the traditional prohibition against incest. The Criminal Code still includes an incest statute (AS 11.41.450), but the statute does not address the age of the victim

[14] AS 11.41.410(a)(4) was the predecessor to AS 11.41.434(a)(2). The statutes were re-numbered during the 1983 revisions to the code.

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and it is limited to sexual conduct between individuals who share a blood relationship. The Sexual Abuse of a Minor statute has the effect of escalating the penalty for incest, which is a Class C felony, to an unclassified felony in instances in which the victim is under 18 years of age. It also extends the incest prohibition past the blood relationship, to include any relationship which is characterized by a parental caretaking responsibility, whether imposed by blood, marriage, or law.

This reading of the statute is confirmed by its legislative history. A 1977 tentative draft of the Alaska Criminal Code revision provided in part:

> A person commits the crime of sexual assault in the first degree if. . .being 18 years of age or older, he knowingly engages in sexual penetration with a person under 18 years of age who is related to him, either legitimately or illegitimately, as
>
> (A) his ancestor or descendant of the whole or half blood, or by adoption;
>
> (B) his brother or sister of the whole or half blood;
>
> (C) his uncle, aunt, nephew or niece of the whole or half blood, or by adoption; or
>
> (D) his stepchild, while the marriage creating the relationship exists.

Alaska Criminal Code revision, Tentative Draft, Part I, at 69-70 (1977). The commentary to the tentative draft states that the new provision "expands the coverage of the existing incest statute by recognizing the potential for abuse of adoptive relatives and stepchildren." Id. at 74. The final draft of the Criminal Code

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enacted in 1978, replaced this language with the language now used in AS 11.41.434(a)(2). Chapter 166, § 1, 1978 Session Laws of Alaska. Of the new language, the legislative commentary states: "Subsection (a)(4) provides that the final form of sexual assault in the first degree occurs when a person 18 or older engages in sexual penetration with a person under 18 who is entrusted to his care by authority of law (i.e, ward) or who is his son or daughter." 1978 Senate Journal Supplement No. 47, at 23 (emphasis added).

Thus, the legislative history reflects that the final draft of the Criminal Code revision remained on the course charted by the tentative draft. The legislature intended to expand the incest statute only to prohibit sexual activity by those whose relationship to the child was that of a parent, whether a natural parent, foster parent, adoptive parent, or legal guardian. Nothing in the legislative history remotely suggests that the legislature made an abrupt turn and sought to include teachers in its formulation of the section.

(2) Other Sexual Offense Statutes Similarly Reflect the Legislature's Intent That the Sexual Abuse Statute Apply to Those Exercising A Parental Role.

A comparison of the language used by the legislature in defining sexual abuse with that used by the legislature in defining other sexual offenses further supports the conclusion that the legislature did not intend the relationship between a high school teacher and a seventeen year old student to fall within under the "entrusted. . . by authority of law" classification. In construing

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statutory language, "[i]t is an established principle. . .that all sections of an act are to be construed together so that all have meaning and no section conflicts with another." Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978). Additionally, "in order that effect may be given to every part of an act in accordance with the legislative intent, all of the language of the act must be considered and brought into accord." United States v. Hardcastle, 10 Alaska 254 (1942), quoting 25 R.C.L. § 247, p. 1006.

The legislature used different language to define different classes of individuals for the purpose of determining when sexual conduct constitutes an offense, focusing on the nature of the act, the ages of the participants, and the relationship involved. If the victim is under 16 and the offender is 18 or older, an offense is committed if the victim is merely "residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim, or. . .is temporarily entrusted to the offender's care." See AS 11.41.436(a)(5)(A) and (B). This category is broader than the category defined in AS 11.41.434(a)(2) (applicable where, as here, the victim is over 16 years of age). Subsection (a)(2) requires an actual, parental caretaker relationship (where (a)(5) only requires residence in the same household) and requires a permanent entrustment of care by authority of law (where (a)(5) only requires a temporary entrustment of care, with or without authority of law). The legislature also created an offense entitled Unlawful Exploitation of a Minor "which applies to [a]

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parent, legal guardian, or person having custody or control of a child under 18 years of age." See AS 11.41.455(b) (emphasis added).

Thus, the legislature distinguished in the various sexual offense statutes those individuals who have "custody or control" of a minor, from those to whom a minor is "temporarily entrusted" to care, from those who "reside in the minor's household and (have) a position of authority," from those to whom a minor is "entrusted to . . . care by authority of law."

The rules of statutory construction presume that these various definitions and categories of offenders and relationships, most of which were enacted by the legislature at the same time, have meaning. See Section III.A.3., supra. If the legislature had intended the sexual abuse of a minor statute to apply to sexual conduct between high school teachers and seventeen year old students, the legislature could easily have used the "control" language or the "position of authority" language used in other sections of the same chapter. More specifically, the legislature could explicitly have provided that sexual conduct between persons under 18 and educators, teachers or individuals over the age of 18 who undertake limited supervision of a person under the age of 18 is prohibited. However, the legislature did not elect any of these alternatives. Instead, the legislature elected to use the "entrusted to . . . care by authority of law" language in the sexual abuse statute, and that election cannot be ignored in construing the statute.

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Viewing the "authority of law" language in its proper context, the legislature's use of the different phrases clearly reflects its intent to assign them different meanings and to recognize that they apply to different categories of individuals. Any other interpretation wholly ignores the legislature's efforts to specifically define the groups to whom the conduct prohibitions apply, and assumes that the legislature's use of different terms and definitions was random an unintended. Such a position finds no support in any principle of statutory construction. Moreover, it ignores the extensive legislative consideration accorded these statutes when they were revised in 1983.

The commentary to these statutes explains that the legislature collected "statutes dealing with sexual offenses against children [that] appeared in several different areas of the code and covered many different types of conduct." See Criminal Law Manual, Alaska Department of Law, pp. 3-64 (Alaska 1985). In Chapter 78, SLA 1983, the legislature consolidated these laws into one area of the code -- Title 11. Id. Most of this conduct was labeled "sexual abuse of a minor," and was "divided into four degrees of seriousness." Id.

These classifications manifest a coherent internal logic. The younger the minor, the broader the category of people with whom sexual conduct is prohibited. For example, the "temporary entrustment" and "position of authority" language applies where the victim is under the age of 16. When the minor is between the ages of 16 and 18, the legislature prohibited a much narrower group of

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people from engaging in sexual conduct, limited to natural, adoptive, or step-parents, or those with parental caretaking responsibilities imposed by "authority of law." The legislature created a different category of offense for minors over the age of 16 because it recognized that only certain people hold "position[s] of power such that even older children often find it impossible to thwart their advances." See House Judiciary Committee, Letter of Intent for CSHB 237, P. 2331 (February 2, 1988). The legislature added that "[t]he cut-off of 16 years of age was specifically chosen instead of the 18 year old cut-off in other subsections dealing with person with legal or biological ties to the victim." Id. at 2331. High school teachers are not such persons. See Pennsylvania State Educ. Ass'n. v. Com. Dept. of Pub., 449 A.2d 89, 92 (Penn. 1982) (declaratory judgment that public school teachers are not responsible for a child's welfare as defined by State Child Protective Services law). The structure of these sections and their intent reflect that "authority of law" refers to legal ties which confer the authority and impose the responsibilities of relationships created by "biological ties." Examples of this type of relationship could include a foster parent, legal guardian or juvenile detention authority.

(3) The Department of Law's "Criminal Law Manual" Recognizes That "Entrusted". . .By Authority of Law" Means to A "Parent" or "Guardian".

Provisions in the Department of Law's Criminal Law Manual (1985) confirm the above conclusion. Attachment 2. The Manual discusses AS 11.41.436(a)(3)(A), a provision which is directed to

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sexual contact rather than sexual penetration, but which is otherwise identical to AS 11.41.434(a)(2)(A). Analyzing the "entrusted. . .by authority of law" language, the Manual states that AS 11.41.436(a)(3)(A) makes it a Class B Felony "for a parent or guardian to engage in sexual contact with a child under 18 who is under his care" (emphasis added). See Attachment 2. If such is the intent and meaning of the "entrusted to . . . care by authority of law" language in the sexual contact statute, then a fortiori the language must have the same meaning in the sexual penetration statute.[15/] The intent and meaning of Alaska's sexual abuse statute is, on its face, clear. A penal statute such as this must be narrowly read, construed strictly against the state and interpreted to avoid constitutional vagueness problems. See Section III.A.3.1, supra. Such a construction cannot include teachers in a category otherwise comprised of parents and legal guardians.

(4) Prosecutors Have Explicitly and Publicly Stated That Students Over Age 16 Are Not Entrusted to Their Teacher's Care by Authority of Law.

Given that the Department of Law has memorialized its construction of "entrusted to . . . care by authority of law" as limited to situations involving parents or guardians, it is hardly surprising that the custom and practice of defendants has been to refuse prosecution under the sexual abuse statutes in cases where

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[15/] The Manual itself specifically directs the reader's attention to the Commentary on the sexual contact statute for the meaning of the "entrusted to . . .care by authority of law" subsection of the sexual penetration statute. Manual, at 3-52.

teachers have had sexual relations with students who are over the age of 16. Indeed, defendant Dwayne McConnell, now the district attorney for Anchorage, specifically declined to prosecute a case involving an even younger student in 1986 when he was the district attorney for Palmer, stating that such conduct was not illegal. See Attachment 1. The Palmer case and the present case are distinguishable only in that the student involved here was a year older than the 16 year old out in Palmer. See Affidavit of Rollie Port. Moreover, this interpretation is not simply a matter of local custom and practice. The Department of Law has taken the same position in the Lower Kuskokwim area. See Affidavit of Susan Hare.[16/]

(5) Alaska Courts Recognize That Students Are Not Entrusted to Their Teacher's Care By Authority of Law.

The Alaska courts have addressed the "entrusted to . . .care by authority of law" language in Title 11 on two occasions. These discussions confirm plaintiffs' conclusion that a student over the age of majority is not entrusted to a teacher "by authority of law" within the meaning of the substantive criminal statutes.

In Goulden v. State, 656 P.2d 1218, 1221-22 (Alaska App. 1983), the Court of Appeals indicated that the teacher/student

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16/These interpretations of the statute by the Office of the Attorney General are a relevant and persuasive guide in statutory authoritative interpretation. See Allison v. State, 583 P.2d 813, 816 (Alaska 1978); "Sutherland", § § 49.05, 49.06.

relationship could be considered in aggravating a sentence for a Class C felony because it "approximates" the more serious felony offense of having sexual intercourse with someone who was "entrusted to the offender's care under authority of law." 656 P.2d, at 1222 (emphasis added). Definitionally, conduct which only "approximates" criminal conduct is not itself within such criminal conduct. Additionally, and independently, Goulden involved a complainant who was under the age of legal consent and was also under the age after which school attendance is no longer compelled by law. Goulden was followed in State v. Andrews, 707 P.2d 900, 911 (Alaska App. 1985). Andrews involved a public school teacher convicted of multiple counts of sexual abuse of and sexual assault on elementary school female pupils ranging from 9 to 12 years of age. These cases simply hold that the teacher/student relationship may be considered as a factor in aggravation of a sentence imposed for sexual conduct which is otherwise criminal. Neither Goulden nor Andrews addresses the defendants' novel theory that such an aggravating factor may itself be used as a basis for conviction in the first place.

Goulden establishes that even if a student is under the age of consent and under the age of compulsory school attendance, she is not "entrusted to [a teacher's or school official's] care under authority of law" within the meaning of the substantive criminal provisions of Title 11. Such a student's relationship to teachers and school officials only " pproximates" -- but is not within -- the statutory meaning of entrusted to care. A fortiori,

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a student who is over the age of consent and over the age of compulsory school attendance cannot conceivably be "entrusted to care under authority of law" with respect to teachers or school officials.[17]

Neither the defendant in Goulden nor in Andrews was prosecuted under statutes which asserted that the underage student/complainants were entrusted to their care by authority of law by virtue of their positions as a principal/teacher and teacher, respectively. Additionally, the Goulden court specifically found that the relationship between a teacher and a pupil under the age of consent and under the age of compulsory school attendance only "approximates" those relationships included within the statutory meaning of "entrusted to. . .care by authority of law." Consequently, the reasoning of Goulden and Andrews clearly precludes an assertion that the relationship between a teacher and

17/ The relevant portion of Goulden states as follows:

> It is significant that someone Goulden's age [43] who has consensual sexual relations with someone M.S.'s age [14], who is entrusted to his care under authority of law, is guilty of a Class A felony, AS 11.41.410(a)(4)(A); but only a Class C felony where she is M.S.'s age but otherwise free from the defendant's influence, AS 11.41.440(a)(1). Since Goulden's position as head of the school approximates the more serious conduct governed by AS 11.41.410(a)(4)(A), it was not unreasonable for the trial court to consider him a worst offender, AS 12.55.155(c)(10), and this case a particularly serious example of the conduct proscribed by AS 11.41.440.

Goulden v. State, supra, 656 P.2d, at 1222.

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a student over the age of consent and over the age of compulsory school attendance constitutes entrustment to care by authority of law. The only judicial interpretations of the language now relied upon by the state in its novel, and previously self-contradicted theory of prosecution in this case, conclusively demonstrate that the state's interpretation is erroneous as a matter of law.

(6) Teachers Are Not Entrusted With "Care" Responsibilities by Authority of Law.

Despite the fact that students are under the supervision of their teachers during the school day, teachers have no general responsibility for the "care" of their students as that term is used in the Alaska statutes. The word care refers to providing food, shelter and the like and is used to describe a relationship such as that between parent and child. For example, AS 47.10.230, entitled "Powers and Duties of Department Over Care of Child", provides in part:

> The Department of Health and Social Services shall arrange for the care of every child committed to its custody by placing the child in a foster home or in the care of an agency or institution providing care for children inside and outside the state.

See also AS 47.35.020; AS 25.23.050. Courts, too, have held that the term "care" reflects a relationship akin to physical custody of a child. See Madison v. State, 42 S.W.2d 209, 210 (Tenn. 1983); In Re Adoption of Ellis, 149 N.W.2d 804, 809 (Iowa 1967).

A teacher is not legally responsible for the "care" of his students and, even more critically, Alaska's education statutes, set forth in Title 14, contain no provision which

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"entrusts" students to the care of their teachers "by authority of law", or by any other authority for that matter. There is no statutory grant of authority or entrustment of care to teachers over students. In fact, teachers have no greater authority with respect to the affairs, conduct and treatment of their students than do other adults. They are not empowered to act or make decisions on behalf of their students. They are empowered only to teach.

This distinction between "care" and "education" was acknowledged in a tentative draft of the Model Penal Code, on which many of the revisions to Alaska's criminal code were based. The draft provided:

> A person who causes another to carry out or submit to an act of deviant sexual intercourse. . .commits a misdemeanor if:
>
> > (a) the victim is less than 21 years old and the actor is charged with his care, treatment, protection or education. . .

See American Law Institute, Model Penal Code, Tentative Draft 4, § 207.5 (1955). This formulation, however, was ultimately "deemed too broad in its impact." ALI, Model Penal Code and Commentaries, Part II, Vol I, Sect. 213.3 at 387-88 (1980). In the final draft of the Model Penal Code this language was replaced by a provision prohibiting such conduct by those responsible for the child's "general supervision." Id. In rejecting the tentative draft, the commentary states:

> Doctor-patient and teacher-student relationships, for example, would have been included in the previous formulation, and

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> while one can imagine situations where such cases should be included, it seemed inappropriate to provide for general coverage.

Id. See also Penn. State Ass'n. v. Com Dept. of Pub., 449 P.2d 89, 92 (Penn. 1982) (declaratory judgment)

(7) Alaska's Compulsory Education Law Does Not Constitute Entrustment of A Seventeen Year Old Student.

One looks in vain for a significant legal tie binding the teacher to the student. Although Alaska's compulsory education statute (AS 14.30.010) could arguably be viewed as constituting an implied entrustment to teachers of the education of students who are obliged to attend school, the statute is inapplicable to the relationship between a teacher and a seventeen year old student. The statute is explicitly limited to children between the ages of 7 and 16 years of age. See AS 14.30.010(a). As a result, seventeen year old individuals are not obligated in Alaska to attend school and, therefore, cannot reasonably be said to be entrusted to their teachers by authority of the compulsory education statute. The fact that compulsory education ends at age sixteen serves only to confirm that no "authority of law" creates the relationship between a seventeen year old high school student and the school system for purposes of Title 11.

(8) There is No Common Law Entrustment of A Student to A Teacher's Care.

In light of the specific language used by the legislature in the sexual abuse statutes, it is doubtful that, in the absence of a statutory entrustment to teachers of the care for their

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students, such an entrustment could be founded on common law principles. This is particularly true since there are no common law crimes in Alaska; conduct is now made an offense only by statute or regulation. See AS 11.81.220; AS 01.10.010. See also Perkins, Criminal Law, p. 26 (2nd Ed. 1969). While the courts occasionally rely on common law principles in interpreting statutory offenses, they do not apply such principles where they conflict with the wording of the statute or the structure of the statutory scheme. See Olp v. State, 738 P.2d 1117, 1118 (Alaska App. 1987). In Olp, a step-father was charged with criminal non-support of his step-children under AS 11.51.120. The Court of Appeals considered the common law on the question of whether a person becomes obligated to act where he or she voluntarily and gratuitously assumes a duty to a third person. Although the Alaska Supreme Court has often recognized this doctrine in negligence law, the Court of Appeals declined to import it into the field of criminal law, based on four factors:

> (1) the plain wording of the statute did not appear to apply to someone in Olp's position;
>
> (2) given the lack of adequate definition, the statute would run the risk of becoming void for vagueness if so interpreted;
>
> (3) there were no Alaska Supreme Court cases establishing such a common law civil responsibility; and
>
> (4) as always, penal statutes must be strictly construed against the state.

Olp, 738 P.2d at 1119. Olp establishes that common law definitions may be applied to criminal statutes only in those limited

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situations where they are consistent with other factors. These factors preclude use of any common law definition in construing the Sexual Abuse of a Minor statute.

As noted above, there is nothing in Alaska's statutes which confers such care authority or responsibility on teachers. Still, even if common law principles were applied, there is no case support for the proposition that teachers are entrusted with the type of caretaking responsibilities which are the focus of the legislature's intent in enacting the sexual abuse statute. The character of the student/teacher relationship has been most thoroughly discussed in connection with two legal issues: corporal punishment by teachers and searches directed against students. Neither provides support here for the extension of the sexual abuse statute to teachers.

The power of a teacher to use corporal punishment was long premised on the assumption that the teacher acted in loco parentis; "instead of a parent; charged factitiously with a parent's rights, duties and responsibilities." Black's Law Dictionary (5th Ed. 1979). Indeed, a person who has the authority to act in place of a parent may use reasonable force for discipline and control of a child. W. Keeton, D. Dobbs, R. Keeton and D. Owen, Prosser and Keeton on Torts, Sect. 27 (5th Ed. 1984). But it has been widely recognized that the teacher does not act in the place of the parent. See Ingraham v. Wright, 430 U.S. 651, 662, 51 L.Ed.2d 711, 724 (1977). Instead, the teacher's power to discipline the student arises only from the need to maintain an

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environment conducive to education. Accordingly, the Restatement (2d) of Torts, Sect. 152 provides:

> One who is charged with only the education or some other part of the training of a child has the privilege of using force or confinement to discipline the child only insofar as the privilege is necessary for the education or the other part of the training which is committed or delegated to the actor.

Similarly, the IJA-ABA Joint Commission on Juvenile Justice Standards has promulgated the following standard:

> In the absence of explicit legislative provisions to the contrary, schools should attempt to regulate the conduct or status of students only to the extent that such regulation is reasonably and properly related to educating the students in their charge.

The commentary to this standard further states, "schools are special purpose organizations, all the regulatory activities of which must necessarily be related to the special purpose for which they exist, which purpose is that of educating the students in their charge." See Institute of Judicial Administration, Standards Relating to Schools and Education, Sect. 3.1 (1977).

Recent cases on searches directed at students have likewise emphasized the teacher's role as educator, distinguishing it from broader parental responsibilities. The United States Supreme Court has rejected the in loco parentis doctrine, and has instead justified relaxed constitutional standards for school searches invoking "the need to maintain an environment in which learning can take place." New Jersey v. T.L.O., 469 U.S. 325, 340, 83 L.Ed.2d 720, 733 (1985). Similarly, the Alaska Court of Appeals

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has stated: "We agree ... that the phrase in loco parentis, used by Blackstone to describe the relationship between teachers and students when education was predominantly private and teachers could reasonably be viewed as the agent of the student's parents, has little utility in describing contemporary public education." D.R.C. v. State, 646 P.2d 252, 255 (Alaska 1982).

Far from imposing "care" responsibilities on teachers, case law has recognized the limited authority, power and responsibility of a teacher in a public educational system, moving far from the in loco parentis view of the 19th century. Counsel knows of no authority in any jurisdiction supporting the imposition of criminal culpability for a violation of a statute like AS 11.41.434 based on a theory of common law entrustment to a teacher of the care of a student.

(9) If The Court Now Rules That The Consensual Sexual Conduct Here At Issue Is "Sexual Abuse," Such An Unexpected Construction Cannot Be Applied In A Criminal Prosecution Of Plaintiffs In This Case.

Assuming, purely for purpose of argument, that a court now construed the provisions of Title 11 such that a seventeen year old student is considered to be entrusted to her teacher's care by authority of law, and further assuming that school officials are therefore required immediately to report under Title 47 when there is cause to believe that such a seventeen year old had sexual relations with a teacher, these would be wholly novel and unexpected interpretations of the statutes, for all the reasons detailed in Sections III.B.1.b.(1)-(8), pp. 36-55, supra. The

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Alaska due process guarantee would accordingly preclude criminal prosecution of the persons first subjected to such an unexpected construction of the statute, because such a construction acts like a judicially created ex post facto law. M.O.W. v. State, 645 P.2d 1229, p. 1233, n. 8 (Alaska App. 1982), citing Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1965); Accord Marks v. United States, 430 U.S. 188, 191-92 (1977).

There could be no clearer violation of the most basic due process concept -- deprivation of fair notice that conduct is illegal -- given the same prosecutor's and the Department of Law's previous, explicit, public, and repeated statements that the consensual sexual conduct between a teacher and a student over the age of sixteen is not sexual abuse. The due process problems which confront a prosecution of the teacher multiply geometrically where, as here, prosecutors threaten to prosecute school officials who assertedly did not report soon enough conduct which the same prosecutors have said does not constitute sex abuse, and thus need not have been reported at all. Remembering that the school officials did report after consultation with counsel and in good faith, thus obtaining absolute immunity from prosecution by operation of AS 47.17.050, the outrageousness of the threatened prosecutions can be clearly seen. This is not due process. This is not equal, fair, and just treatment in an executive investigation. This is unconscionable, and the court should put an end to these egregious and unconstitutional abuses.

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c. "Maltreatment" is Unconstitutionally Vague Unless Given the Same Meaning in Title 47 That It Has In 45 C.F.R. 1340.2(d)(2)(i).

(1) "Maltreatment" Without Further Definition is Unconstitutionally Vague.

In their brief in support of the motion for summary judgment, the defendants suggest that even if the S1/T1 incident is not reportable as sexual abuse, it is reportable as "maltreatment." As with sexual abuse, "maltreatment" is not defined in AS 47.17. Nor is it anywhere defined in any other title of the Alaska Statutes.

Dictionary definitions of maltreatment do not provide satisfactory standard for the imposition of criminal sanctions. Maltreatment is a word describing the state of being maltreated. Oxford English Dictionary, 199, Vol. IX, p. 277. To maltreat someone means simply "to treat badly," (Oxford American Dictionary 1980), p. 402), or to "ill-use; to handle roughly or rudely; to ill-treat," (Oxford English Dictionary 1989), Vol. IX, p. 277).

Because criminal sanctions are the result of failing to report "maltreatment," administrators and teachers must be given specific notice of what conduct must be reported. Moreover, the definition must not vest unbridled discretion in the prosecuting agency. If maltreatment means "to treat badly," "to ill-use," "to handle roughly or rudely," or "to ill-treat," then the term is

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unconstitutionally vague.[18] See cases cited in Section III.A.1., supra.

First, the term does not give notice of what conduct is prohibited. Demeaning punishment, reprimanding a child in class, giving extra homework, criticizing in a harsh voice, and sending a child to the principal's office without sufficient cause could all fit within the dictionary definition of "maltreatment." In the present case, some might contend that otherwise lawful consensual sex is an "ill-use" by the teacher of the student, while conceding it is not "rough or rude." Others could argue it is within the zone of constitutionally assured personal privacy and expression. In any event, the actor is left to guess what conduct/incident he must report under the Child Protection Act.

Second, the fact that such a broad range of conduct may potentially fall within "maltreatment" leaves the prosecuting authority discretion that is too broad to withstand a constitutional due process challenge. See Section III.A.1., supra. The court should declare this term void for vagueness and sever it from the statute.[19]

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18/ The definition of maltreatment was discussed briefly during a committee hearing in the House of Representatives. In that regard, Representative Pettyjohn "read the dictionary definition of 'maltreatment' as being 'roughly and rudely,'" Houses HESS meeting 3/13/86, H.B. 471, 1986.

19/See Footnote 23, infra.

(2) "Maltreatment" As Defined In 45 C.F.R. 1340.2(d)(2)(i) is Sufficiently Specific.

On numerous occasions, the Alaska Child Protection Act (AS 47.17) has been amended to come into compliance with the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. 5101 et. seq. (CAPTA), and regulations promulgated thereunder, so that federal funding of various state programs would not be lost. Indeed, there is persuasive evidence that the inclusion of the term "maltreatment" in Title 47 of the Alaska Statutes occurred simply to bring state law into compliance with CAPTA so that funding would not be endangered.

Federal regulations adopted pursuant to CAPTA have consistently included and defined the term "maltreatment." In the 1974 regulations, maltreatment was defined as "failure to provide adequate food, clothing, or shelter." Federal Register, Vol. 39, No. 245, P. 43937, December 19, 1974, Appendix A, Federal Legislation. Currently "maltreatment" also includes the failure to provide adequate medical treatment. 45 CFR 1340.2(d)(2)(i).

The provisions of Title 47 did not include "maltreatment" in the definition of child abuse and neglect prior to or at the time federal regulations first adopted the term. However, within about one year of the promulgation of the federal regulations, Title 47 was amended to include "maltreatment" as part of the definition of child abuse and neglect. See Appendix A, Senate Bill No. 371, Session Laws of Alaska, 1976, Chapter 222.

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Given the absence of any contemporaneous legislative history the term "maltreatment," given the continuing practice of the legislature to amend Title 47 to achieve compliance with federal regulations in order to preserve funding, and given the sequence and timing of events -- the promulgation of federal regulations including and defining maltreatment followed in the next state legislative term by an amendment to include the term in the Alaska Statutes -- it is apparent that the state legislature included the phrase "maltreatment" to maintain compliance with federal law. Accordingly, the legislature can be deemed to have accepted the federal definition along with the term.

If the court chooses to construe "maltreatment" rather than to declare the term vague and strike it from the statute, then the definition should derive from 45 CFR, § 1340.2(d)(2)(i) and its predecessor, 45 CFR, § 1340.1-2(b)(1). "Maltreatment" would then be defined as a "failure to provide adequate food, shelter, clothing or medical care."

(3) <u>The Consensual Sexual Conduct Here At Issue Is Not "Maltreatment" As So Defined</u>.

Obviously, the specific definition of "maltreatment" provided in 45 C.F.R. 1340.2(d)(2)(i) does not include otherwise lawful, consensual sexual activity between a teacher and a seventeen year old student. In no sense does such sexual conduct constitute the failure to provide adequate shelter, food, clothing, or medical treatment.

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If the court chooses to adopt the Code of Federal Regulations definition as the one intended by the Legislature, rather than to sever the defective term from the statute, there is no possible construction of the incident here at issue which would require Anchorage School District personnel to report it as "maltreatment." An otherwise lawful consensual sex act between a teacher and a seventeen year old student is not "maltreatment," if that term is defined with constitutionally required specificity.

(4) If the Court Now Rules That the Consensual Sexual Conduct Here At Issue Is "Maltreatment," This Unexpected Construction Cannot Be Applied in a Criminal Prosecution of Plaintiffs in this Case.

Given the legislative history discussed above, all intelligent people will assume that the inclusion of the phrase "maltreatment" in Title 47 was an adoption of a term from comparable federal legislation with respect to which the state needed to be in substantial conformity in order to continue receiving federal funds. As such, any intelligent person would conclude that the term "maltreatment," which was given no specific meaning or definition by the Alaska Legislature, has the meaning which was attributed to it by the federal regulations pertaining to the comparable federal legislation with which the state sought conformity.

To attribute a much broader meaning to the term -- including not only the failure to provide adequate shelter, food, clothing and medical care, but also otherwise lawful consensual sexual activity -- would constitute a novel and wholly unexpected

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judicial construction of the term. Due process prohibits the application of such an unexpected construction as a basis for prosecution of individuals who lacked fair notice of this meaning. M.O.W. v. State, 645 P.2d 1229, 1233, n. 8 (Alaska App. 1982), citing Accord Marks v. United States, 430 U.S. 188, 191-92 (1977). Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1965).

2. The Provisions of Title 47 Concerning When a Report Must Be Made are Unconstitutional.

a. The "Immediate" and "Prompt" Reporting Requirements Are Unconstitutionally Vague.

AS 47.17.020(a) requires a person within the statute to file a report "immediately" after determining that there is cause to believe that child abuse or neglect has occurred. Similarly, AS 47.17.020(e) requires a person within the statute to file a report "promptly" after determining that there is cause to believe a child has suffered harm as a result of abuse. Since the same infirmity inflicts both,[20/] discussion of these terms will be combined.

The statute provides no definition or qualifying parameters to guide a potential reporter as to what is meant by "immediately" or "promptly." Without a definition or qualifying parameters, these terms necessarily leave men of common

20/"Immediately" and "promptly" are both adverbs, generally meaning to do "without delay." Oxford American Dictionary (1980), pp. 326-27 and 535. The Oxford American Dictionary (1980) is frequently cited by Alaska Courts for terms of common usage. See generally, Velez v. State, 762 P.2d 1297, 1303 (Alaska App. 1988); Walsh v. State, 758 P.2d 124, 127 (Alaska App. 1988); State v. Eluska, 698 P.2d 174, 181 (Alaska App. 1985).

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intelligence guessing as to what conduct will render them liable to criminal sanctions under AS 47.17.068.[21] Sheriff, Washoe County v. Sferrazza, 766 P.2d 896, 897-98 (Nev. 1988).

In the absence of legislative provisions, the decision as to what reports are quick enough to meet the "immediately" or "promptly" standard is left solely to the prosecutors. "This illustrates clearly that the word 'immediately' vests in the prosecuting authorities unbridled discretion to determine whether a report of suspected child abuse was made quickly enough to satisfy the mandate . . ." Sferrazza, supra, 766 P.2d, at 897-98 (two-week delay) (emphasis added).

The dangers of abuse are far from hypothetical. In the present case, School District officials reported to DFYS within three weeks of receiving S1's admission that her prior denials were false and that she had engaged in sex with T1. In the interim, the District had prevented T1 from returning to school and had forced his resignation. The Iditarod School District is currently being investigated for reporting possible abuse eight days after the first report.

Such lack of notice and unbridled discretion in the hands of prosecutors, necessarily deny due process, and render the terms void for vagueness.[22] The penalty provisions of AS 47.17.068, which allow imposition of criminal sanctions against persons

21/See text on void for vagueness standard, Section III.A.1., supra, and cases cited therein.

22/Id.

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failing to report "immediately" or "promptly," are unconstitutional as presently enacted.[23/] Sheriff, Washoe Co. v. Sferrazza, supra.

b. The "Cause to Believe" Standard Is Unconstitutionally Vague.

"Immediately" and "promptly" do not fully explain when a report is to be made under the Statute. These terms are not triggered unless and until there is "cause to believe" that some form of child abuse or neglect has occurred. This phrase in and of itself is vague, and creates unconstitutional ambiguity in the reporting statute. "Cause to believe" is nowhere defined in Title 47. No guidelines are given to persons under the compulsion of the reporting statute as to the meaning of "cause to believe."

23/AS 01.10.030 provides that provisions of a statute that are unconstitutional may be severed from provisions that are constitutional in order that the constitutional provision may be enforced. The test for determining severability is twofold:

> A provision will not be deemed severable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand.

Lynden Transport, Inc. v. State, 532 P.2d 700, 713 (Alaska 1985).

The general statutory severability clause creates a presumption in favor of severability. Id. at 712. In Speidel v. State, the Alaska Supreme Court invoked AS 01.10.030 to delete overbroad language from the Statute. 460 P.2d 77 (Alaska 1969); cited favorably in Lynden, 532 P.2d 700. The purpose of a general severability clause is to preserve valid portions of the state legislatures enactments. Lynden, 532 P.2d at 713.

In State v. Lara, the Oregon Appellate Court applied a general severability clause in the Oregon Statutes to remove overbroad or vague phrases from a statute. 682 P.2d 173 (Or. App. 1984).

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Therefore, there is ambiguity in deciding when one has information sufficient to require a report. This vagueness vests a corresponding and impermissible discretion in the prosecuting authority to make ex post facto decisions regarding the reporter's fact-specific judgment calls.[24/]

Just what does the phrase "cause to believe" mean? According to the Attorney General, who rendered his opinion in an effort to demonstrate that Title 47 was comparable to federal law and that the state therefore should not lose federal funding, "cause to believe" means exactly the same thing as "suspect." Appendix A, Memorandum from Attorney General Harold M. Brown to John R. Pugh, Commissioner, Department of Health and Social Services, No. 366-186-86, December 5, 1985, pp. 6-7 (hereinafter "A.G. Memo"). Relying upon dictionary definitions, the Attorney General observed that "suspect" means "to imagine one to be guilty or culpable on slight evidence or without proof . . . have a suspicion, intimation, or inkling. . ." Id., at 6 (emphasis added). This, in turn, was equated with "cause to believe" under AS 47.17. According to the Attorney General's position,

> A person can only suspect that which he or she has some cause or reason to suspect. Something, however nebulous, must trigger a suspicion. A suspicion is not a fantasy.

Id., at 7 (emphasis added). Apparently, therefore, persons required to report under Title 47 are subject to criminal

24/See text and authorities on void for vagueness, Section III.A.1., pp. 17-20, supra.

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prosecution if they fail to inform the state of any "inkling" they may have concerning possible child abuse or neglect based on, "something however, nebulous," other than their own personal fantasies. Id. This is truly an amorphous standard.

However understandable, and perhaps commendable, the Attorney General's desire to insure continued federal funding may be, his interpretation of the "cause to believe" standard does violence to the plain language used by the legislature, and, given the attachment of a criminal penalty for failing to comply, renders the requirement violative of due process. With respect to plain meaning, the Attorney General's own review of the dictionary reveals that "cause" means "a good or adequate reason" and "a ground for legal action . . .". A.G. Memo, at 6. If there is any validity to the theory that language has common meanings for people who understand it, "a good or adequate reason" cannot be construed as being the same as "to imagine one to be guilty . . . without proof" or "an inkling suspicion, intimation or inkling. . .". A good or adequate reason provides substantially more content than "something, however nebulous . . .". Accordingly, the plain language used by the legislature indicates that persons who were required to report, now on pain of prosecution, are to exercise some independent judgment in determining whether there is a "good or adequate reason" to support their belief of possible child abuse or neglect.

Additionally, and contrary to the suggestion of the Attorney General, "suspect" does not mean the same as "believe."

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If one believes a fact, one takes it to be "true, valid, or honest . . ." A.G. Memo, at 7. On the other hand, if one merely "suspects," one is entertaining a hypothesis or, "intimation or inkling," perhaps an intuition, which may, upon further inquiry, prove to be true, false, or whose truth may be unable to be determined. The plain language used by the legislature indicates that persons are not to report their inklings, suspicions, or intimations. Rather, they are to report when they have "a good or adequate reason" to take possible child abuse or neglect as being "true or valid" in a particular situation.

Not only does the Attorney General's attempt to equate cause to believe with suspicion torture the plain meaning of the statutory terms, but it also deprives them of whatever content they might otherwise have had. If "cause to believe" means a suspicion based on <u>something</u>, however nebulous as the Attorney General asserts, then people of ordinary intelligence are wholly unable to understand the limits of the requirement to report. This, in turn, renders the entire statute, not only its criminal sanction, unconstitutionally vague. <u>See</u> text and cases in Section III.A.1.

Reasonably intelligent citizens, concerned not only with the preservation of federal funding but also with the preservation of the basic liberties which are our birthright, would attribute a very different meaning to the phrase "cause to believe." They might well conclude that standard is the same, or more exacting, as tne basis required before the state can directly intrude upon the privacy of its citizens. That standard, at minimum, depends

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upon whether the actor has sufficient articulable facts available to warrant a person of reasonable caution in the belief that abuse has occurred. State v. Grover, 437 N.W.2d 60, 63 (Minn. 1989); State v. Hurd, 400 N.W.2d 42 (Wis. App. 1986). Cf. Terry v. Ohio, 392 U.S. 1, 22 (1968). Cause for such a belief, reasonable people could conclude, requires more than "something, however nebulous," and must rest instead upon "specific and articulable facts" necessitating that a report be made. Allen v. State, ____ P.2d _____, Slip Op. 976 (Alaska App., decided October 25, 1989). Accord Coleman v. State, 553 P.2d 40, 46 (Alaska 1976). Reasonable Alaskans trying to understand the statute might agree with the United States Supreme Court, instead of with the Attorney General, and conclude that requiring reports on less than a reasonable belief supported by specific and articulable facts "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result [the Supreme Court] has consistently refused to sanction." Terry v. Ohio, supra., 392 U.S., at 22. Moreover, given that the primary purpose of the statute, one would hope, is still to protect children and not to prosecute teachers and educators, reasonable people might conclude that "cause to believe" for purposes of the reporting statute includes not only the objective reasonable belief test which is necessary to conform police conduct to constitutional limits, but also a subjective requirement that educators believe the validity of the reports before they are obligated under the statute. Terry v. Ohio, supra, 392 U.S. at 22 (rejecting

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subjective good faith test in order to effectuate deterrent purpose of Fourth Amendment.

The net result of the Attorney General's effort to describe the state standard as comparable to the federal standard has been to radically expand when reports are required in terms so broad and contentless that reasonable people cannot begin to assess their reporting obligations. Reporters, and people who provide legal advice to reporters, who rely upon accepted standards, such as reasonable belief in the search and seizure context, do so at their peril according to the Attorney General's declarations. The questions which are arising daily in the Anchorage School District, and other school districts around the state, require immediate answers. Yet no direction is provided by the very authority which will prosecute teachers and educators if it later determines they have failed to act appropriately. Telling teachers and educators that they must report child abuse or neglect based upon something, however nebulous, provides no meaningful assistance.

"Cause to believe" necessarily requires persons in the listed professions to make a judgment call. "Cause to believe" means that they have a "reason to believe."[25/] If the person compelled to report child abuse does not believe or suspect that child abuse or neglect has occurred, they do not have "cause to believe." Or, will the state claim the educator is judged after-

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25/"Reason" and "cause" in this case are synonymous. The relevant definition for "reason" is the cause of something. Oxford American Dictionary (1980), p. 559. The relevant definition for "cause" is "a reason." Oxford American Dictionary (1980), p. 98.

the-fact under an objective test? The reporter must weigh the facts and circumstances of each particular case to determine if there are sufficient articulable facts to suspect child abuse. He or she must consider the "totality of the circumstances." State v. Grover, 437 N.W.2d 60, 63 (Minn. 1989). There is no requirement that every bruise be reported. Mattingly v. Casey, 509 N.E.2d 1220, 1222 (Mass. 1987). Or is there? Will defendants argue that even a single new bruise is more than a "fantasy" based on "something, however nebulous"? Because the reporting statute gives no guidance concerning what cause/reason is required, it is unconstitutionally vague. That inherent vagueness, in turn, is greatly exacerbated by the Attorney General's musings.

It would be intolerable for the state to require an educator, or any of the named professionals, to make a pure judgment call under such a discretionary standard, and then to punish him criminally if a prosecutor later disagreed with the judgment made. Yet, that is what defendants are threatening to do here.[26/] By contrast, police and prosecutors are constantly, and successfully, arguing to courts that it is unfair to suppress

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26/ The mens rea required for actual conviction is a "knowing" failure or refusal to report, "knowing" one has cause to believe abuse or neglect has occurred. AS 47.17.068. However ,the command of the statute is to report simply upon cause to believe which may be objective, subjective or both. Prospective reporters will make their determinations under the cause standard, not by attempting to predict the sufficiency of potential proof mens rea. Moreover, the mens rea requirement will not protect reporters from improvident prosecutions, as opposed to convictions, since law enforcers will invariably infer the requisite knowledge from the mere making of reports they deem to be deficient.

evidence by second-guessing an officer's or magistrate's probable cause determinations. See, e.g., Illinois v. Gates, 462 U.S. 213, 231-32, 235-36 (1983); United States v. Ventresca, 380 U.S. 102, 108-09 (1965); United States v. Leon, 468 U.S. 897, 914 (1984). The very reasoning which counsels deference to initial police and/or judicial judgment calls as to the sufficiency of probable cause in the totality of circumstances, renders horrific the idea of jailing an educator because a prosecutor concludes that a mistake was made in not reporting sooner.

c. The Combination of These Vague Terms, Used In The Statute to Define When a Report Must Be Made, Exacerbates the Due Process Concerns.

The constitutional infirmities in "immediately" or "promptly" and "cause to believe" are compounded because these terms are used in combination to define the duty of the potential reporter. This is best illustrated by the absurd scenarios that necessarily arise when the standard is "immediately" report once there is "cause to believe" the existence of child abuse or neglect. See AS 47.17.020(a)(e).

A teacher observes a bruise, hears a rumor, notices depression, sees an angry glance between parent and child, observes falling grades, observes loss of weight, observes poor grooming, receives a defensive responses from student to questioning, or observes unsocial behavior. In and of themselves, none of these rises to the level of "cause to believe." Or do they? A number of these observations in conjunction may create "cause to believe." Which are sufficient? No one knows. The nature of the

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teacher/student relationship is that these factors will be observed over a period of time. However, defendants say that the statute does not allow for its reporters to use their own professional judgment. Even though the teacher must weigh these factors over time, he is obligated to report "immediately" when he should know there is "cause to believe." The opportunities for second-guessing, by prosecution, the timeliness of every report are endless.

Unfortunately, if the statute stands as written, the teacher has subjected himself, by reporting, to criminal penalties and stigma for even a minor error in judgment as to when the "cause to believe" arose. If the teacher makes the report after observing the third bruise or hearing the second rumor, and the prosecutor thinks he was too slow, then criminal liability results. Such criminalization of standardless conduct violates due process.

d. Imposition of Penal Consequences Under This Statute Violates Substantive Due Process.

We are not a nation of informers. We are, instead, a free society which has due regard not only for enactment and enforcement of laws, but also for the inviolability of the human spirit, entitlement to privacy, enjoyment of liberty, and the right, with minimal governmental interference, to define one's relations with others. There are societies, real and imagined, where the state imposes a general obligation upon its citizens to be informers and to report the least suspected transgression of fellow citizens to the police agents of the state. Our country is

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founded on premises irreconcilable with such a system. And the Alaska Constitution, as construed by the Alaska Supreme Court, has repeatedly and clearly been interpreted to provide even more protection against government overreaching and interference with the individual than the Uttion itself.

Into this scheme of values drops a statute, which, since 1982, has made it a crime for certain categories of citizens, numbering in the thousands, to fail to report possible child abuse or neglect. According to the Attorney General, these individuals must choose between reporting all inklings, based on "something, however nebulous" that their friends, fellows, or colleagues may have committed acts against children, or face imprisonment themselves. The goal of protecting children is a laudable one. Ironically, no group in our society subscribes to it more strongly than the educators against whom prosecution is now threatened, and the teachers whose files defendants rifled in an unsuccessful effort to find evidence of crime. But however important the goal, the means employed to achieve it must be consistent with those constitutional concepts implicit in our notion of ordered liberty.

If T1 committed a crime under Title 11, successful prosecution of him is of great societal importance. Nonetheless, that prosecution may not include use of confessions coerced from him or evidence otherwise obtained in violation of his constitutional rights. The laudable end does not justify constitutionally unacceptable means. Similarly, the laudable end of child protection cannot justify employment of legislative means

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which force an individual member of a free society to the following choice -- either report every inkling and intimation that a fellow citizen may have abused or neglected a child, irrespective of how nebulous the basis and notwithstanding the fact that you, based on your personal and professional observations, do not believe your fellow has committed such abuse, or subject yourself to criminal prosecution.

It is the irony of the twentieth century that today, as largely peaceful and increasingly successful demands for more human rights from, and for less control over individual lives by, totalitarian regimes are occurring in Eastern Europe and throughout the world, in our country, and in our state, individuals committed to the well-being and education of children are increasingly being threatened with prosecution if they fail to report unreliable, likely false, and baseless inklings or intimations of misconduct by another, to state investigators.

e. <u>The Statute Violates Substantive Due Process Because It Compels Citizens to Violate the Privacy of Other Citizens or Face Criminal Charges</u>.

Additionally, and independently, Alaskan citizens enjoy constitutionally protected liberty, privacy, and substantive due process rights not to be compelled, on pain of possible prosecution, to violate the constitutional and legal rights of others. If the Attorney General's definition of "cause to believe" is accepted, then the reporting statute operates to require citizens, on pain of prosecution, to commit gross violations of the privacy rights of their fellow citizens.

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Courts have repeatedly refused to accept the proposition that constitutional guarantees can be construed in a way which permits the state to intrude into individual lives "based on nothing more substantial than inarticulate hunches . . .". Terry v. Ohio, 392 U.S. 1, 22 (1968). Even the Attorney General acknowledges that "a requirement that the state investigate persons based on nothing but unfounded fantasies might violate such person's rights of privacy. Nowhere in the law is the state free to intrude into the lives of its citizens without some cause or reason." A. G. Memo, supra, at 7, citing Terry v. Ohio, supra. The Attorney General's agreement in principle, however, cannot diminish the fact that he has drawn the line in a constitutionally unacceptable place. By requiring thousands of individuals in the identified categories to report every inkling, intimation, and suspicion based on "something, however nebulous," the legislation fails the minimal standard identified in Terry and Coleman. It launches this state on a course where criminal laws are enforced by requiring citizens to choose between their own liberty and the "obligation" to report everything that is not a fantasy about others to law enforcers.

The magnitude of the invasion of privacy is enormous. The School District alone has some 2,700 individuals who are required reporters under the Act. Reporters in the entire state probably run into the tens of thousands. Obviously, if all of these individuals reported all suspicions based on "something, however nebulous" police and prosecutors would have thousands of

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investigative leads, almost all of which, if fairly investigated, would lead to no child abuse or neglect at all. Nonetheless, the mere fact of an investigation can ruin an individual's life. And, uncomfortable as police and prosecutors are with this fact, it is a basic constitutional premise that police and prosecutors cannot be presumed to avoid arbitrary, unfair, and discriminatory exercise of power. Indeed, the constitutional premise is that they will, thus necessitating articulation and application of constitutional limits on their conduct.

Moreover, there are serious ramifications for those who report every suspicion based on "something, however nebulous," to the authorities. If this standard is interpreted to require application of an objective, reasonable person test, then individuals are required, on pain of prosecution, to make reports which they do not personally believe. For example, a teacher observes new bruises on a child's legs twice over a period of four weeks. The child attributes the bruises to falling down at home. The teacher has no other basis to think that the child is being abused or neglected. Another teacher is told by one student that another student told her that the gym teacher touched her "fanny." The teacher knows that the reporting student has a reputation for lying and for trying to cause trouble for her classmates and teachers. The teacher inquires of the student who was supposedly touched, and the student says the report is false. The teacher has no other information. Assume that the teachers in both cases do not believe the reports which they have received. Under the

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standard as articulated by the Attorney General, it could be argued that both of these teachers must report the possibility of child abuse or neglect because they are in possession of "something, however nebulous" which could intimate that such abuse has occurred. Accordingly, if they do not report they run the risk of being subjected to later prosecution because police and prosecutors conclude, in retrospect, that a reasonable person would have had cause to believe under these circumstances. On the other hand, if the teachers in these situations inform the authorities, they are making reports which they do not believe to be true. Accordingly, they may be civilly liable for damages to the persons who end up being investigated as a result of their reports. The immunity provisions of AS 47.17.050 purportedly apply only to "good faith" reports.

Thus, the statute creates an obligation on individuals to violate the privacy rights of fellow citizens on a wholly insufficient basis, then refuses to immunize them from possible civil or criminal liability. A teacher can be prosecuted for not reporting if no report is made. A teacher can be prosecuted for reporting a report believed to be false. Indeed, teachers who feel obliged to make reports which they do not believe out of concern that they will be prosecuted for failing to meet an objective standard of reporting may also be prosecuted for interfering with the constitutional rights of those they report. AS 11.76.110. A report may very well not confer immunity, hence, as already noted,

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the statute requires that such reports be made in "good faith." AS 47.17.050.

f. Conclusion.

Finally, it is worth considering the kind of society that this sort of statute seeks. Educators who must work together for the good of their students will be chilled in their interaction, for fear some comment may be misinterpreted as "something, however nebulous," which require a colleague to make a report of suspected abuse. Mistaken and false reports will be made with great frequency. Since the standard is so low and so vague, educators will have to turn in any intimations or inklings concerning their fellows or face prosecution themselves. What educator in his or her right mind would meet with a student alone for individual instruction, tutoring, or therapy given the substanceless standard which his or her colleagues must apply in deciding whether to report allegations against them?

And why stop here? Why not add lawyers to the list of those who must report, assuming the information is not gained in attorney-client communications? States have done so. Why stop with professionals? No goal could be more commendable than protection of our children. Why not impose a duty on all members of society to report suspected child abuse and neglect? And to enforce it, add a criminal penalty.

It may be understandable that police officers and prosecutors, in their zeal and self-righteousness, believe that they are the only people capable of addressing problems in our

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society, and that they will have the lack of prospective to believe that the criminal law is the only way to achieve social goals. But our country was born of a revolution, and our state was founded on a Constitution which shows that we know better. Obtaining and preserving liberty is never easy. A statute, such as this, which throws all of these hard won liberties aside in the name of accomplishing a legitimate end, is the most dangerous form of encroachment on fundamental freedoms that we will face. The goal is desirable. The means are constitutionally intolerable. The imposition of a criminal penalty is unconstitutional.

IV.

EITHER AS 47.17.010 ET. SEQ. UNCONSTITUTIONALLY COMPELS PLAINTIFFS TO INCRIMINATE THEMSELVES OR THEIR PROSECUTION UNDER THAT SECTION IS BARRED BY AS 47.17.050.

A. Compelled Self-Incrimination Is Prohibited.

Article I, § 9, of the Alaska Constitution provides in part "No person shall be compelled in any criminal proceeding to be a witness against himself." The language of this section is virtually identical to the language of the Fifth Amendment of the United States Constitution. Biele v. State, 371 P.2d 811 (Alaska 1962). However, the Alaska Supreme Court has construed the state self-incrimination clause to provide much broader protection than its federal counterpart. Scott v. State, 519 P.2d 774 (Alaska 1974). The privilege extends not only to statements which are in and of themselves incriminating, but also to any assertions which might furnish "a link in the chain of evidence" leading to

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prosecution, irrespective of the guilt or innocence of the declarant. McCracken v. Corey, 612 P.2d 990, 993 (Alaska 1980); McConkey v. State, 504 P.2d 823, 826 (Alaska 1972); E.L.L. v. State, 572 P.2d 786, 788 (Alaska 1977).

The significance of the privilege against self-incrimination in the American and Alaskan constitutional law cannot be overstated. As the United States Supreme Court observed with respect to the federal clause,

> The privilege against self-incrimination "registers an important advance in the development of our liberty -- " 'one of the great landmarks in man's struggle to make himself civilized.'" . . . it reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilema of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhuman treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . .; our respect for the inviability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . ; our distrust of self-deprecatory statement; and our realization that the privilege, while sometimes "a shelter for the guilty" is often "a protection for the innocent."

Murphy v. Waterfront Commission of New York, 378 U.S. 52, 55 (1964). This basic privilege applies not only in the secrecy of the police interrogation room, but in the political halls of the state legislature. For almost one hundred years it has been clear

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that "legislation cannot abridge a constitutional privilege, and . . . it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." Councilman v. Hitchcock, 142 U.S. 547, 585 (1892) (invalidating legislation purporting to authorize compelling testimony for exchange for simple use immunity). While it is well-established that individuals can be compelled to provide information and to make statements which may tend to incriminate them, the quid pro quo for the exercise of that executive or legislative power is a grant of immunity which is co-extensive with the scope of the constitutional privilege against self-incrimination. Kastigar v. United States, 406 U.S. 441, 448-49, 458 (1972); Murphy v. Waterfront Commission, supra, 378 U.S. at 54, 78; Albertson v. SACB, 382 U.S. 70 (1965); Marchetti v. United States, 390 U.S. 39 (1968); Leary v. United States, 395 U.S.6 (1969). If a purported grant of immunity is not as comprehensive as the protection afforded by the privilege against self-incrimination, then the legislation which purports to compel statements is constitutionally invalid. Kastigar v. United States, supra, 406 U.S., at 449; McCarthy v. Arndstein, 266 U.S. 34, 42 (1924).

AS 47.17.020 purports to impose a legal obligation upon persons, including educators, to make a report when they have cause to believe that child abuse has occurred. Failure to report may result in prosecution under AS 47.17.068. By reporting, however, the defendants claim that the individual subjects him or herself to possible prosecution if police and/or prosecutors conclude that

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the report was not made soon enough to be "immediate" or "prompt." Accordingly, the statute purports to require individuals to make reports which, in turn, may be used as the first, and often indispensable,[27/] link in a chain of evidence ultimately used to prosecute them for failing to report in what prosecutors decide to be a timely fashion. Thus, a report of suspicion of child abuse also constitutes a self-report by the reporter as to his compliance -- or alleged non-compliance with the requirements of Title 47.

Such required self-reporting, which may have criminal consequences, constitutes compulsory self-incrimination within the meaning of Article I, § 9 of the Alaska Constitution. See, e.g., Leary v. United States, 395 U.S. 6,12-29 (1969) (Marihuana Tax Act); Marchetti v. United States, 390 U.S. 39 (1967) (occupational taxes on wagering); Albertson v. S.A.C.B., 382 U.S. 70 (1965) (communist party registration requirement); Ward v. Coleman, 598 F.2d 1187, 1190 (10th Cir. 1979), reversed on other grounds, United States v. Ward, 448 U.S. 242 (1980) (required self-reporting of oil spills under 33 U.S.C. 1321(b)(5)); United States v. General American Transportation Corp., 367 F.Supp. 1284, 1290 (D.N.J. 1973); United States v. United States Steel, 4 E.R.C. 1641-42 (W.D.Pa. 1972). Another federal reporting statute is misprison of felony. 18 U.S.C. § 4. Under this statute, federal courts have

27/The irony of defendants enforcement plan is that so far they have only threatened to charge individuals who have reported. Presumably, this is because they cannot identify non-reporters, if there are any. Apparently, defendants seek to encourage non-reporting by pursuing those who do report.

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consistently held that a party may not be prosecuted for concealing a crime if the reporting of that crime would implicate them in any criminal activity or furnish a possible link in the chain of evidence that could lead to prosecution. United States v. Graham, 487 F.Supp. 1317, 1318-19 (W.D. Ky. 1980); United States v. Jennings, 603 F.2d 650, 652 (7th Cir. 1979).

The United States Supreme Court has recognized, in interpreting the narrower federal privilege against self-incrimination, that "[t]estimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt." New Jersey v. Portash, 440 U.S. 450, 459 (1979). In the present case, the risk is not a citation for contempt, but a separate criminal prosecution based upon some law enforcement agency's second-guessing the speed with which an individual made a report required by law. In such circumstances, there is no need or justification for "balancing" the rights of the reporter against any other interests. Since the reporting requirements of Title 47 implicate "the constitutional privilege against compulsory self-incrimination in its most pristine form, balancing, therefore, is not simply unnecessary; it is impermissible." New Jersey v. Portash, supra, 440 U.S., at 459.

The foregoing analysis demonstrates that the requirements of AS 47.17.020 render the statute unconstitutional unless it is

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construed to provide immunity for the reporter which is co-extensive with the state constitutional privilege against self-incrimination. Article I, § 9 of the Alaska Constitution requires that individuals be given "transactional immunity" before they may be validly compelled to make a report which could lead to their own prosecution. Where a witness is compelled to report pursuant to a statutory grant of "transactional immunity,"[28/] the witness "may not be prosecuted or subjected to criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, [he] gave answer or produced information." Uniform Rule of Criminal Procedure 732, 10 U.L.A. 340 (1974), adopted as a rule of practice in State v. Serdahely, 635 P.2d 1182 (Alaska 1981) (per curiam).

Such transactional immunity suffices to override any claim to the privilege against self-incrimination under Article I, § 9 of the Alaska Constitution, State v. Serdahely, supra; Surina v. Buckalew, 629 P.2d 969, 980 (Alaska 1981); and under the Fifth Amendment to the United States Constitution. Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896). Conversely, an immunity grant which prohibits no more than the use of the witness's own words against him is constitutionally

28/"Transactional immunity absolutely precludes prosecution of a witness for crimes [referred to in compelled testimony] as long as the testimony is in response to a question rather than unsolicited but intentionally given in an effort to frustrate and prevent prosecution." Surina v. Buckalew, 629 P.2d 969, 971 n. 2 (Alaska 1981).

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deficient, and thus incapable of overriding the privilege. Counselman v. Hitchcock, 142 U.S. 547 (1892).

In the middle of these provisions lies "use/derivative use" immunity.[29/] This immunity protects the witness from any direct use of his statements against him, and further prohibits the use of any other evidence derived directly or indirectly from such

29/ The mandatory report in the present circumstance is the event which triggered the whole investigation, and it cannot be used in any fashion to create or prosecute a criminal case against plaintiffs, even if the less stringent use derivative use immunity were applicable.

Use and derivative use immunity is the minimum immunity required by the United States Constitution. Kastigar, supra, 406 U.S. at 453. Accord, Murphy v. Waterfront Commission of New York, 378 U.S. 52, 79 (1964). Federal use and derivative use immunity not only prevents use of compelled disclosures at trial, but also

> provides a comprehensive safe guard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

Kastigar, supra, 406 U.S. at 460 (footnote omitted).

The government is prohibited from using compelled testimony "in any respect." 406 U.S. at 453 (emphasis in original). This means it may not be used as an "investigatory lead" to help a prosecutor prepare for grand jury, United States v. Dornau, 359 F.Supp. 684, 687 (S.D.N.Y. 1973), in grand jury proceedings, United States v. Gregory, 730 F.2d 692, 697 (11th Cir. 1984), to convince a witness to testify against the immunized witness, United states v. Kurzer, 534 F.2d 511, 517 (2nd Cir. 1976), to impeach the witness at a later criminal trial, New Jersey v. Portash, 440 U.S. 450, 459 (1979) to assist in "focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).

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testimony.[30] This is the type of immunity generally provided for in the federal system. 18 U.S.C. § 6002. In a radical departure from almost uniform prior federal practice, the United States Supreme Court held the use/derivative use immunity statute constitutional in Kastigar v. United States, supra, 406 U.S. at 441 (1972).

Several other states have refused to follow Kastigar, and have interpreted their state constitutional privileges against self-incrimination to require transactional immunity. See, e.g., State v. Soriano, 684 P.2d 1220 (Or. App.), aff'd, 693 P.2d 26 (Or. 1984); Attorney General v. Colleton, 444 N.E.2d 915 (Mass. 1982); State v. Mivasaki, 614 P.2d 915 (Hawaii 1980).

Article I, § 9 of the Alaska Constitution requires that transactional immunity be conferred before testimony may be

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30/It matters not whether the immunized testimony is basically inculpatory or exculpatory. United States v. Cortese, 568 F.Supp. 119, 131-32 (D.C. Pa. 1983). A person cannot be compelled to provide even apparently innocuous links in an inferential chain which may lead to his prosecution. McCracken v. Corey, 612 P.2d 990, 993 (Alaska 1980), and cases cited therein.

compelled.[31] In Scott v. State, 519 P.2d 774 (Alaska 1974), the Alaska Supreme Court specifically held that the scope of the privilege against self-incrimination guaranteed by the Alaska Constitution provided significantly greater protection to an accused defendant from compelled prosecutorial discovery than did the Fifth Amendment. All of the concerns identified in Scott are present, but in even greater force, in the context of compelling an initial self-report. Taken together, the history of the adoption of the Alaska privilege against self-incrimination and the direction provided by the Supreme Court in Surina v. Buckalew, State v. Serdahely, and Scott v. State, demonstrate that the Alaska Constitution, like the state constitutions in Oregon, Hawaii and Massachusetts, requires that transactional immunity be provided before a witness may be compelled to testify. Feldman & Ollanik, supra, n. ____, 3 Alaska Law Review, at 241-67.

31/Additionall and independently, the Alaska Supreme Court has adopted a trans. ional immunity requirement as a rule of practice. State v. Serdahe , 635 P.2d 1182 (Alaska 1981) (per curiam); see also Article I, 15 of the Alaska Constitution; Alaska Rule of Civil Procedure 3. Subsequently, the legislature enacted a use/derivative use immunity procedure. AS 12.50.101. However, the legislature did not follow the procedural prerequisites to a valid legislative override of a rule adopted by the Supreme Court. Accordingly, the transactional immunity provision remains in effect and the deficient statutory effort to authorize use/derivative use immunity is invalid. Feldman & Ollanik, Compelling Testimony in Alaska; The Coming Rejection of Use and Derivative Use Immunity, 3 Alaska Law Review 229, 264-66 (1986).

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B. The Immunity Provided In AS 47.17.050 is Constitutionally Deficient.

AS 47.17.050 provides that "a person who, in good faith, makes a report under this chapter . . . is immune from any civil or criminal liability which might otherwise be incurred or imposed." This immunity provision was included in Title 47 in 1971, some eleven years prior to the addition of subsection 47.17.068, which prescribed criminal penalties for persons who fail or refuse to report as required. Accordingly, it appears that no additional thought was given by the legislature to the self-incrimination ramifications of criminalizing the reporting requirement in 1982.

The immunity provided in AS 47.17.050 provides transactional immunity from "any . . . criminal liability which might otherwise incurred or imposed." Such transactional immunity could validly supplant the privilege against self-incrimination except for the fact that the legislature added a "good faith" proviso to the immunity provision.

Nowhere in the well-established and detailed constitutional doctrine which surrounds the privilege against self-incrimination, either in Alaska or under the Fifth Amendment, does there appear any suggestion that the privilege only applies to compelled, self-incriminating statements which are made "in good faith." The good faith requirement was in all likelihood intended to describe the outer reach of immunity from civil suit which might

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be brought[32/] against persons making reports and to exclude those who knowingly made false reports. As noted above, it was included in the statutory scheme more than a decade before persons were subjected to criminal prosecution for failing to report as required, and thus could not have been intended to address that self-reporting issue. Whether or not the good faith limitation is an acceptable means of circumscribing immunity from civil suit, it would be unprecedented and unconstitutional to graft such a requirement onto legislative immunity which purports to supplant the constitutional privilege against self-incrimination.

Moreover, given the other constitutional problems with this statute, the legislative limitation of immunity to "good faith" reports creates a serious risk of fundamental unfairness. If by "good faith" the legislature means reports which are actually believed by the reporter, then reporters may face an unconstitutional dilemma. On the one hand, if "cause to believe" is interpreted to mean that a report must be made whenever there is any inkling, intimation or suggestion of child abuse based on "something, however nebulous," and if it is further construed to be an objective, as opposed to subjective standard, then Title 47 would require educators and others to make immediate reports of bare suspicions which they did not personally believe. A person making such a report could not claim to be acting in "good faith," and therefore would be unable to avail him or herself of the

32/Cf. Section IV.E., infra.

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statutory immunity. If some prosecutor later decided that the report not only should have been made, but should have been made sooner, then the individual could be subject to prosecution for failing immediately to report. Prosecution could then be brought under the statute. Since the individual did not actually believe his or her own report to be true, the defendants would argue that prosecution is not barred by immunity. Such an absurd result violates constitutional guarantees to be free from compulsory self-incrimination as well as the guarantees of Article I, § 7, to due process and fair and just treatment in executive investigations.

As noted in Section IV.A., supra, if self-incriminating statements are to be compelled by legislative enactment, that compulsion must be accompanied by a legislative grant of immunity which is co-extensive with the constitutional privilege against self-incrimination. A "good faith" limitation is not included within the constitutional scheme. If the legislature were to include such a limit purporting to authorize grants of immunity to compel testimony of witnesses, so long, and only so long, as the testimony was given in "good faith," such statutes would be stricken down before they could even be printed. Yet, this is precisely the effect which has been accomplished by the legislature's adding criminal penalties for failing to report to a statute whose provision of immunity is limited to "good faith" reports.

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If the criminally enforceable reporting requirement is to be saved, the "good faith" limitation on immunity must be stricken and severed from AS 47.17.050. See n. 22, p. 64, supra.

C. Due Process Precludes The Limitation of Immunity To Plaintiffs By Some After-The-Fact Narrowing Of The Term "Good Faith".

A narrow construction of the phrase "good faith," and the accompanying narrowing of the immunity provided by AS 47.17.050, would not only endanger the constitutionality of the statute in light of the privilege against self-incrimination, but would also render the provision inconsistent with the requirements of the state due process clause.

Persons, like plaintiffs, who made reports under the statute, on the advice of counsel, and believing that they were required to do so by the statute, are entitled to the immunity which the statute appears, on its face, to guarantee them. An after-the-fact narrowing of that immunity by a constriction of the class of "good faith" report, would violate due process for two separate reasons. First, such an unexpected construction of the statute would operate like a judicially created ex post facto law in violation of the due process clause. M.O.W. v. State, 645 P.2d 1229, 1233, n. 8 (Alaska App. 1982), citing Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1965). Accord Marks v. United States, 430 U.S. 188, 191-92 (1977). Second, due process precludes the state from inducing reliance by a person upon a certain description of his legal rights and obligations, only later to penalize him for exercising those rights or fulfilling those

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obligations consistent with the way he reasonably understood the state to have explained them. For example, the state cannot advise an accused of his right to remain silent at the time of his arrest, and then turn around at his trial and point to post-arrest silence as an indicia of guilt. Stork v. State, 559 P.2d 99, 103 (Alaska 1977); Doyle v. Ohio, 426 U.S. 610 (1976). Similarly, it is fundamentally unfair to subject persons, such as plaintiffs, to the threat of criminal prosecution if they fail to report, while promising them immunity from civil and criminal consequences if they do indeed report, and then to turn around and deny them the promised immunity on the claim that the report was not soon enough and/or was not within some narrow definition of "good faith."

D. If the Court Concludes that Immunity May Be Constitutionally Limited to Good Faith Reports, Then the Court Should Declare that "Good Faith" Means Any Report Other Than One Which the Reporter Knows to be False.

As indicated above, courts strive to construe statutes in a way that avoids the necessity of declaring them unconstitutional. See, Section III.A.3., supra. This principle has been used by courts in other states to save reporting statutes whose literal terms provided constitutionally insufficient immunity. See, e.g., State v. Durrant, 769 P.2d 1174, 1183 (Kan. 1989) (where reporting statute provided only use immunity, court read constitutionally required use/derivative use immunity into statute).

If the court were to take the unprecedented step of providing that self-incriminatory reports could be compelled from

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individuals whose only immunity was for making a "good faith" report, the constitutionality of such an order would have to depend upon an extremely broad construction of the "good faith" requirement. The only exception which has been recognized in the context of compelling testimony of witnesses on a grant of immunity that is absolute and co-extensive with the constitutional right is that a grant of immunity will not protect a witness from providing perjured testimony. If this very narrow exception were to be expanded by analogy to reporting statutes, one might argue that reports which are made by a person who knows -- as opposed to believes -- them to be false at the time he makes the report are not protected by the immunity clause. Certainly no further exceptions are constitutionally tolerable. All other reports must be considered to be in "good faith" if AS 47.17.050 is to save AS 47.17.068.

E. The Constitutionally Required Procedure For Implementing the Immunity Provision of Title 47 Necessitates that An Adversary Hearing and Judicial Determination As to the Applicability of The Statutory Immunity Occur Prior to Charging Any Individual Who Made a Report.

If the immunity provision of Title 47 is broadly construed in order to save the statute's constitutionality, then there will be virtually no cases in which individuals who have made a report may be constitutionally prosecuted under AS 47.17.068. Given that the statutorily provided immunity is transactional, virtually absolute in its scope, and arises at the moment of the report, that immunity necessarily exists prior to the time that any state agent is contemplating prosecution of the individual who

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reported. Considering the importance of the privilege, the virtual inconceivability of circumstances in which a prosecution could constitutionally be implemented against an individual who has reported, and the state constitutional rights of reporters to freedom from self-incrimination, to due process, and to "fair and just treatment in . . . executive investigations,"[33/] Article I, §§ 7 and 9 necessitate that the judicial branch intervene between the making of a report and the initiation of any contemplated prosecution of the reporter for failing to report as required. Given this balance of interests, procedural due process requires that a reporter be given notice and an opportunity to be heard prior to charges being filed under AS 47.17.068. Cf. Wickersham v. State Commercial Fisheries Entry Com'n., 680 P.2d 1135 (Alaska 1984); Nichols v. Eckert, 1359 (Alaska 1973; Goldberg v. Kelly, 397 U.S. 254 (1970).

The constitutionally required process should consist of a requirement that the prosecuting authority make an application to the court for a determination of the immunity issue prior to the filing of any charges. The application should set forth the basic facts alleged by the prosecution and an explanation as to why in the prosecution's view the reporter is not absolutely immune from prosecution. The application should be served upon the reporter prosecution is contemplated. An adversary hearing should be held on the immunity issue at which the reporter shall enjoy the

33/Article I, § 7, Alaska Constitution.

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rights to counsel, compulsory process, due process, confrontation, and to testify or not to testify as he elects. Prior to the hearing, the reporter should be entitled to receive discovery as he would if already charged under Alaska Criminal Rule 16.

In determining the existence of an immunity bar, the "heavy burden" of demonstrating that immunity does not apply must remain upon the prosecution. Kastigar v. United States, supra, 406 U.S., at 461-62. Since the right implicated is the state constitutional privilege against self-incrimination, which is given a broader meaning under the Alaska Constitution than under its federal counterpart, the burden should be upon the state to prove beyond a reasonable doubt that immunity does not bar prosecution. If the court rules that the state has not met its burden, it must enter an order declaring that prosecution is absolutely barred by AS 47.17.050 and by Article I, §§ 7 and 9 of the Alaska Constitution. If the court concludes that the prosecution has somehow proven that immunity does not bar prosecution, it must also enter specific findings of fact and conclusions of law in a written order. Prior to the initiation of any charges, the reporter must have the right to seek appellate review of this decision.

V.

CONCLUSION

For the reasons stated above, plaintiffs ask the Court to grant appropriate relief by declaration and/or summary judgment. Proposed orders are attached.

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DATED this 27th day of November, 1989, at Anchorage, Alaska.

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4 AAC 06.025. STANDARDS FOR SECONDARY EDUCATION PROGRAM LEVELS. Repealed 9/20/74.

4 AAC 06.027. ESTABLISHMENT OF ATTENDANCE AREAS. (a) The board may establish attendance areas without respect to district lines.

(b) Pupils may be required to attend schools in other districts, subject to the provisions of 4 AAC 05, when, in the judgment of the commissioner, the best interests of the state will be served. Either the district of residence or the district named as the attendance area may appeal the commissioner's decision to the state board. The decision of the state board will be final.

(c) An attendance area directive shall include grade levels and any specific agreements pertaining to educational programs offered by the involved schools.

(d) Repealed 12/13/87.

(Eff. 7/9/72, Register 42; am 9/3/76, Register 59; am 1/15/87, Register 101; am 12/13/87, Register 104)

Authority: AS 14.07.020 AS 14.14.110
AS 14.07.060 AS 14.17.200

4 AAC 06.030. SCHOOL CONSTRUCTION. Repealed 3/1/78.

4 AAC 06.040. PHYSICAL EXAMINATION OF SCHOOL CHILDREN. Repealed 9/2/82.

4 AAC 06.045. TRAINING REQUIRED. (a) Within one year after August 29, 1985, a school district shall provide its employees with training to detect and report child abuse and neglect, and sexual abuse of children.

(b) After the one-year period, described in (a) of this section, a school district must provide the training required by (a) of this section to a new employee of the district within 45 days after the first day the employee begins to work.

(c) The training required by this section must be provided to the persons required by AS 47.17.020 to report child abuse or neglect, and to other persons as determined by the district. (Eff. 8/29/85, Register 95)

Authority: AS 14.07.020(a)
AS 14.07.060

4 AAC 06.050. PHYSICAL EXAMINATIONS OF SCHOOL EMPLOYEES. (a) Physical examinations shall be required for all regularly employed teachers, other employees, custodians, and clerical personnel, except those whose work does not bring them into close

20 AAC 10.020(b) is amended by adding a new paragraph to read:

(8) shall not engage in physical abuse of a student or sexual conduct with a student and shall report knowledge of such an act by an educator to the Commission. (Eff. / / ; Register)

Authority: AS 14.20.460(1)

20 AAC 10 is amended by adding a new section to read:

20 AAC 10.400 DEFINITIONS. As used in this chapter

(1) "sexual conduct" includes "sexual penetration" and "sexual contact" as those terms are defined in AS 11.81.900. (Eff. / / ; Register)

(2) "physical abuse" is an action beyond reasonable discipline that results in an adverse physical effect upon a student. (Eff. / / ; Register)

Authority: AS 14.20.460(1)

diction the institution is operated, or whose department or agency is charged with performing the service. (§ 3 ch 88 SLA 1960)

Sec. 47.15.040. Financial arrangements. The compact administrator, subject to the approval of the commissioner of administration, may make or arrange for the payments necessary to discharge the financial obligations imposed upon this state by the compact or by a supplementary agreement made under the compact. (§ 4 ch 88 SLA 1960)

Sec. 47.15.050. Appointment of attorney or guardian. Appointment of an attorney or guardian ad litem under the provisions of this compact shall be made in accordance with AS 25.24.310 or AS 44.21.400 — 44.21.440. (§ 5 ch 88 SLA 1960; am § 55 ch 94 SLA 1980; am § 16 ch 55 SLA 1984)

Cross references. — See Admin. R. 13, Alaska Rules of Court.

Effect of amendments. — The 1984 amendment rewrote this section, which formerly read "A council or guardian ad litem appointed under the provisions of this compact may be paid as provided in the Rules Governing the Administration of all Courts."

Sec. 47.15.060. Enforcement. The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which are within their respective jurisdiction. (§ 6 ch 88 SLA 1960)

Sec. 47.15.070. Additional procedures not precluded. In addition to the procedures provided in articles IV and VI of the compact for the return of a runaway juvenile, the particular states, the juvenile or the juvenile's parents, the courts, or other legal custodian involved may agree upon and adopt any plan or procedure legally authorized under the laws of this state and the other respective party states for the return of the runaway juvenile. (§ 7 ch 88 SLA 1960)

Sec. 47.15.080. Short title. This chapter may be cited as the Uniform Interstate Compact on Juveniles. (§ 8 ch 88 SLA 1960)

Chapter 17. Child Protection.

Sec. 47.17.010. Purpose. In order to protect children whose health and well-being may be adversely affected through the infliction, by

other than accidental means, of harm through physical abuse or neglect or sexual abuse or sexual exploitation, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the appropriate public authorities. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible. (§ 1 ch 100 SLA 1971; am § 3 ch 104 SLA 1982)

Effect of amendments. — The 1982 amendment, in the first sentence, substituted "neglect or sexual abuse or sexual exploitation" for "neglect requiring the attention of a practitioner of the healing arts" and inserted "of the healing arts."

NOTES TO DECISIONS

Use of reports. — The reports of child abuse and neglect required by this section are intended for use in child protection proceedings and are not intended for use in criminal proceedings. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984). See also notes to AS 47.17.060, under catchline "Judicial proceeding."

Collateral references. — 42 Am. Jur. 2d, Infants, §§ 16, 17.

43 C.J.S., Infants, §§ 36 to 39, 70 to 75, 94.

Medical attention, criminal neglect by failure to provide, 12 ALR2d 1047.

Liability of parent for injury to unemancipated child caused by parent's negligence, 41 ALR3d 904.

Validity and construction of penal statute prohibiting child abuse, 1 ALR4th 38.

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their professional duties, have cause to believe that a child has suffered harm as a result of abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) licensed day care providers and paid staff;

(7) licensed foster care providers.

(b) This section does not prohibit the named persons from reporting cases which have come to their attention in their nonprofessional capacities nor does it prohibit any other person from reporting a child's harm which the person has cause to believe is a result of abuse or neglect. These reports shall be made to the nearest office of the department.

Sec. 47.17.010. Purpose.

NOTES TO DECISIONS

Cited in Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their occupational duties, have cause to believe that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) social workers;

(4) peace officers, and officers of the Department of Corrections;

(5) administrative officers of institutions;

(6) child care providers;

(7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900.

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has cause to believe is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

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

(d) This section does not require a religious healing practitioner to report as neglect of a child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(e) A person listed in (a) of this section, who in the performance of the person's occupational duties has cause to believe that a child has suffered harm as a result of abuse, shall promptly report the harm to the nearest law enforcement agency if the person making the report (1) has cause to believe that the harm was caused by a person who is not responsible for the child's welfare; or (2) is unable to determine (A) who caused the harm to the child; or (B) whether the person who is

believed to have caused the harm has responsibility for the child's welfare. If a person making a report under this subsection cannot reasonably contact the nearest law enforcement agency, and immediate action appears necessary for the well-being of the child, the person shall make the report to the nearest office of the department. The department shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest law enforcement agency. In this subsection, "abuse" means the physical injury, sexual abuse, sexual exploitation, or maltreatment of a child by any person under circumstances that indicate that the child's health or welfare is harmed or threatened. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984); am §§ 8 — 10 ch 39 SLA 1985; am § 2 ch 114 SLA 1986)

Effect of amendments. — The 1985 amendment rewrote subsections (a) and (b) and added subsection (d). The 1986 amendment added subsection (c).

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

(b) Each department of the state that employs persons required to report abuse or neglect of children shall provide

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

(2) appropriate in-service training required by this section as determined by the department.

(c) Each department that must comply with (b) of this section shall develop a training curriculum that acquaints its employees with

(1) laws relating to child abuse and neglect;

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

(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect; and

(4) procedures for required notification of suspected abuse or neglect.

(d) Each department that must comply with (b) of this section shall file a current copy of its training curriculum and materials, with the Council on Domestic Violence and Sexual Assault. A department may seek the technical assistance of the council or the Department of Health and Social Services in the development of its training program. (§ 1 ch 1 SLA 1986)

Sec. 47.17.023. Reports regarding child pornography. A person who, in the course of processing or producing visual or printed matter, either privately or commercially, has reason to believe that the matter visually depicts a child engaged in conduct described in AS 11.41.455(a) shall promptly report this to the nearest law enforcement agency, and provide the law enforcement agency with all information known about the nature and origin of the matter. (§ 11 ch 39 SLA 1985)

Sec. 47.17.025. Duties of public authorities.

NOTES TO DECISIONS

Reliance on sexual abuse report for purposes of initiating prosecution is not prohibited by this section. Strehl v. State, 722 P.2d 226 (Alaska Ct. App. 1986).

Summary judgment for failure to state a claim was properly granted where the only allegation that was directed at the intake officers of the Division of Family and Youth Services was that they participated in reporting an anonymous "hot line" tip of sexual abuse, as such reporting of all tips is mandated by this section. Bauman v. State, 768 P.2d 1097 (Alaska 1989).

Sec. 47.17.030. Action on reports; termination of parental rights.

NOTES TO DECISIONS

Cited in Gerlach v. State, 699 P.2d 368 (Alaska Ct. App. 1985).

Sec. 47.17.040. Central registry; confidentiality.

NOTES TO DECISIONS

Cited in Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Sec. 47.17.060. Evidence not privileged.

NOTES TO DECISIONS

"Judicial proceeding". The phrase "judicial proceeding related to a report made under this chapter" in this section only refers to child protection proceedings under AS 47.10.010. State v. Wetherhorn, 683 P.2d 269 (Alaska Ct. App. 1984).

Sec. 47.17.064. Photographs and x-rays. (a) The department or a practitioner of the healing arts may, without the permission of the parents, guardian, or custodian, take the following actions with regard to a child believed to have suffered physical harm as a result of child abuse or neglect:

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984))

Effect of amendments. — The 1982 amendment, in subsection (a), added "and school administrative staff members" at the end of paragraph (2) and added paragraphs (6) and (7).

The 1984 amendment substituted "Department of Corrections" for "division of corrections" in paragraph (4) of subsection (a).

NOTES TO DECISIONS

Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Collateral references. — Civil liability of physician for failure to diagnose or report battered child syndrome, 97 ALR3d 338.

Sec. 47.17.025. Duties of public authorities. (a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse. Upon receipt from any source of a report of harm to a child from abuse, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

(b) The report of harm to a child from abuse required from the department by this section shall include:

(1) the names and addresses of the child and the child's parent or other persons responsible for the child's care, if known;

(2) the age and sex of the child;

(3) the nature and extent of the harm to the child from abuse;

(4) the name and age and address of the person known or believed to be responsible for the harm to the child from abuse, if known;

(5) information that the department believes may be helpful in establishing the identity of the person believed to have caused the harm to the child from abuse. (§ 6 ch 104 SLA 1982)

NOTES TO DECISIONS

Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.030. Action on reports; termination of parental rights. (a) If a child, concerning whom a report of harm is made, is believed to reside within the boundaries of a local government exercising health functions for the area in which the child is believed to reside, the department may, upon receipt of the report, refer the matter to the appropriate health or social services agency of that local government. For cases not referred to an agency of a local government, the department shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child.

(b) A local government health or social services agency receiving a report of harm shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child. In addition, the agency receiving a report of harm shall forward a copy of its report of the investigation, including information the department requires by regulation, to the department.

(c) Action shall be taken regardless of whether the identity of the person making the report of harm is known.

(d) Before the department or a local government health or social services agency may seek the termination of parental rights, under AS 47.10.080(c)(3), it shall offer protective social services and pursue all other reasonable means of protecting the child.

(e) In all actions taken by the department or a health and social services agency of a local government under this chapter that result in a judicial proceeding, the child shall be represented by a guardian ad litem in that proceeding. Appointment of a guardian ad litem shall be made in accordance with AS 25.24.310. (§ 1 ch 100 SLA 1971; am § 1 ch 222 SLA 1976; am § 17 ch 55 SLA 1984)

Effect of amendments. — The 1984 amendment added the second sentence in subsection (e).

NOTES TO DECISIONS

Effect of subsection (d). — Subsection (d) of this section is clearly intended to prevent further abuse by providing protective services to the child, and it does not place a mandatory duty on the state to provide counseling and other support services to the family prior to seeking termination of parental rights. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Quoted in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Collateral references. — 43 C.J.S., Infants, §§ 71, 72.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 ALR3d 1074.

Validity of state statute providing for termination of parental rights, 22 ALR4th 774.

Sec. 47.17.040. Central registry; confidentiality. (a) The department shall maintain a central registry of all investigation reports but not of the reports of harm.

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who makes public information contained in confidential reports is guilty of a misdemeanor. (§ 1 ch 100 SLA 1971; am § 2 ch 222 SLA 1976)

NOTES TO DECISIONS

Psychotherapist/patient privilege. — Child abuse reports are not open to the public, and are therefore not within A.R.E.R. 504(d)(5), which provides that there is no physician or psychotherapist/patient privilege "as to information that the physician or psychotherapist is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection." State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.050. Immunity. A person who, in good faith, 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. (§ 1 ch 100 SLA 1971)

Sec. 47.17.060. Evidence not privileged. Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter. (§ 1 ch 100 SLA 1971)

Sec. 47.17.023. Reports regarding child pornography. A person who, in the course of processing or producing visual or printed matter, either privately or commercially, has reason to believe that the matter visually depicts a child engaged in conduct described in AS 11.41.455(a) shall promptly report this to the nearest law enforcement agency, and provide the law enforcement agency with all information known about the nature and origin of the matter. (§ 11 ch 39 SLA 1985)

Sec. 47.17.025. Duties of public authorities.

NOTES TO DECISIONS

Reliance on sexual abuse report for purposes of initiating prosecution is not prohibited by this section. Streh v. State, 722 P.2d 226 (Alaska Ct. App. 1986).

Summary judgment for failure to state a claim was properly granted where the only allegation that was directed at the intake officers of the Division of Family and Youth Services was that they participated in reporting an anonymous "hot line" tip of sexual abuse, as such reporting of all tips is mandated by this section. Bauman v. State, 768 P.2d 1097 (Alaska 1989).

Sec. 47.17.030. Action on reports; termination of parental rights.

NOTES TO DECISIONS

Cited in Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Sec. 47.17.040. Central registry; confidentiality.

NOTES TO DECISIONS

Cited in Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Sec. 47.17.060. Evidence not privileged.

NOTES TO DECISIONS

"Judicial proceeding". The phrase "judicial proceeding related to a report made under this chapter" in this section only refers to child protection proceedings under AS 47.10.010. State v. Wetherhorn, 683 P.2d 269 (Alaska Ct. App. 1984).

Sec. 47.17.064. Photographs and x-rays. (a) The department or a practitioner of the healing arts may, without the permission of the parents, guardian, or custodian, take the following actions with regard to a child believed to have suffered physical harm as a result of child abuse or neglect:

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

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

(b) The department or a practitioner of the healing arts shall notify the parents, guardian, or custodian of a child as soon as possible after taking action under (a) of this section with regard to the child. (§ 7 ch 104 SLA 1982; am § 12 ch 39 SLA 1985)

Effect of amendments. — The 1985 amendment rewrote this section.

Sec. 47.17.068. Penalty for failure to report. A person who knowingly fails or refuses to report as required under AS 47.17.020 or 47.17.023 is guilty of a class B misdemeanor. (§ 7 ch 104 SLA 1982; am § 13 ch 39 SLA 1985)

Effect of amendments. — The 1985 amendment rewrote this section.

Sec. 47.17.069. Protective injunctions. (a) A court may enjoin or limit a person from contact with a child if the attorney general establishes by a preponderance of the evidence that the person

(1) has sexually abused a child;

(2) has physically abused a child; or

(3) has engaged in conduct that constitutes a clear and present danger to the mental, emotional, or physical welfare of a child.

(b) This section does not limit the authority of the attorney general or the court to act to protect a child. (§ 14 ch 39 SLA 1985)

Sec. 47.17.070. Definitions. In this chapter

(1) "child" means a person under 18 years of age;

(2) "child abuse or neglect" means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

(3) "child care provider" means an adult individual, or an employee of an organization, who provides care and supervision to a child for compensation;

(4) "department" means the Department of Health and Social Services;

(5) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(6) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(7) "organization" means a group or entity that provides care and supervision for compensation to a child not related to the caregiver, and includes a child care facility, pre-elementary school, head start center, child foster home, residential child care facility, recreation program, children's camp, and children's club;

(8) "person responsible for the child's welfare" means the child's parent, guardian, foster parent, a person responsible for the child's care at the time of the alleged child abuse or neglect, or a person responsible for the child's welfare in a public or private residential agency or institution;

(9) "practitioner of the healing arts" includes chiropractors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, and surgeons;

(10) "sexual exploitation" includes

(A) allowing, permitting, or encouraging a child to engage in prostitution prohibited by AS 11.66.100 — 11.66.150, by a person responsible for the child's welfare;

(B) allowing, permitting, encouraging, or engaging in activity prohibited by AS 11.41.455(a), by a person responsible for the child's welfare. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 3 ch 222 SLA 1976; am §§ 56, 57 ch 94 SLA 1980; am §§ 8, 9 ch 104 SLA 1982; am §§ 15, 16 ch 39 SLA 1985; am § 8 ch 56 SLA 1986; am § 3 ch 114 SLA 1986; am § 14 ch 131 SLA 1986; am § 31 ch 2 FSSLA 1987)

Revisor's notes. — Reorganized in 1985 to alphabetize the defined terms.

Effect of amendments. — The 1985 amendment rewrote paragraph (9) and added paragraphs (3), (7), and (8).

The first 1986 amendment in paragraph (9) inserted "naturopaths."

The second 1986 amendment rewrote paragraph (10).

The third 1986 amendment inserted "audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55," near the end of paragraph (9).

The 1987 amendment, effective January 1, 1988, in paragraph (9) inserted "occupational therapists, occupational therapy assistants" and "physical therapy assistants."

:e to chapter 6, w ..h deals with sibling incest. Few clinicians can match pertise of Dr. A. Nicholas Groth, who is well known for his work with offenders and has made another valuable contribution in chapter 8, which with the incest offender. Natalie T. Dana, also a former child-protective- :s worker, has contributed her treatment experience with mothers of sex- .bused children to chapter 7. An overview of family treatment is presented pter 9. Connie E. Naitove, a leading proponent of the arts therapies, has a very special contribution in chapter 10, which describes the work of lo Stember, a pioneer in using art therapy to help sexually abused children. chapter 11, Lieutenant Patricia A. Graves has contributed the law en- ıent perspective on child sexual abuse—another essential element in in- tion. Chapter 12 presents my own perspective on multidisciplinary team based on five years of child-protection team experience. In chapter 13, ıren W. Bander, Edith Fein, and Gerrie Bishop discuss program evaluation esent data collected from the child-sexual-abuse intervention program in most of us participated. The "how to" of starting a community child- -abuse program and recommendations for staffing are covered in chapter

o reiterate, professional readers of this book must judge for themselves edibility of the expertise contained herein. No one is likely to read a ıl handbook on child sexual abuse unless he or she is genuinely concerned the problem and wishes to expand his or her knowledge base in the st of helping clients. Undoubtedly, the state of the art will change and s must recognize this fact. In any event, it is the responsibility of all sionals to make a critical assessment of profferred information and advice dapt what is learned to their own case experience. I salute you for your st, concern, and critical appraisal. Keep them active as knowledge and advance in the years to come!

1 A Conceptual Framework for Child Sexual Abuse

Suzanne M. Sgroi,
Linda Canfield Blick,
and *Frances Samacki Porter*

Clinical intervention in child sexual abuse requires a basic understanding of the phenomenon—what it is, how it happens, when it is likely to occur and why, what circumstances determine disclosure of the activity, how participants may be expected to react, and so forth.

Effective investigation, validation, child-protection assessment, crisis intervention, planned intervention, and treatment all depend on a working knowledge of the mechanics and dynamics. This chapter will present a basic conceptual framework for child sexual abuse.

Definitions

What Is Child Sexual Abuse?

Child sexual abuse is a sexual act imposed on a child who lacks emotional, maturational, and cognitive development. The ability to lure a child into a sexual relationship is based upon the all-powerful and dominant position of the adult or older adolescent perpetrator, which is in sharp contrast to the child's age, dependency, and subordinate position. Authority and power enable the perpetrator, implicitly or directly, to coerce the child into sexual compliance.

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Frances Sarnacki Porter, A.C.S.W., presently does program planning and policy development for the Connecticut Department of Children and Youth Services and from 1977–1979 was a staff member in its Sexual Trauma Treatment Program, working predominantly with sexually victimized children and adolescents, and serving as coleader of an adolescent-therapy group. Mrs. Porter provides training and consultation for child-sexual-abuse workers and treats adult and child victims in a private clinical practice.

What Is Inc. Incest.

Defined from a psychosocial perspective, incestuous child sexual abuse encompasses any form of sexual activity between a child and a parent or stepparent or extended family member (for example, grandparent, aunt, or uncle) or surrogate parent figure (for example, common-law spouse or foster parent). Incest is variously defined by statute as specific sexual acts (usually involving some type of intercourse) performed between persons who are prohibited to marry. In general, persons are not permitted to marry their parents, grandparents, aunts, uncles, siblings, or steprelatives. The crucial psychosocial dynamic is the *familial* relationship between the incest participants. This is especially important when the incestuous sexual relationship involves a child. The presence or absence of a blood relationship between incest participants is of far less significance than the kinship roles they occupy.

Mechanics

A Spectrum of Sexually Abusive Behaviors

Sexual activity between an adult and a child may range from exhibitionism to intercourse, often progressing through the following spectrum of behavior:

1. *Nudity:* The adult parades nude around the house in front of all or some of the family members.

   Stepfather paraded around the house nude in front of his 16-year-old stepdaughter despite protests from her mother that his behavior was provocative and seductive. He claimed that the mother had a "dirty mind," but later on the child revealed the secret of a 3-year sexual relationship with the stepfather.
2. *Disrobing:* The adult disrobes in front of the child. This generally occurs when the child and the adult are alone.

   Twice a week, while viewing television, father allowed his bathrobe to slip open, which exposed his naked body to his preadolescent daughter while her mother was attending a regularly scheduled meeting out of the home.
3. *Genital Exposure:* The adult exposes his or her genitals to the child. Here the perpetrator directs the child's attention to the genitals.

   Father came into his 11-year-old daughter's bedroom where he opened the front of his pants. He exposed his penis to her and requested that she "rub it."
4. *Observation of the Child:* The adult surreptitiously or overtly watches the child undress, bathe, excrete, urinate.

   Several times a week over a period of 8 to 10 years, the parents of an adolescent son and daughter gave their children enemas and then watched them excrete.
5. *Kissing:* The adult kisses the child in a lingering and intimate way. This type of kissing should be reserved for adults. Even very young children sense the inappropriateness of this behavior and may experience discomfort about it.

   During the interview, the adolescent reported to the clinician, "my father tried to French kiss me."
6. *Fondling:* The adult fondles the child's breasts, abdomen, genital area, inner thighs, or buttocks. The child may similarly fondle the adult at his or her request.

   "When I was eight years old, I was sleeping in my bedroom and woke up because my father was rubbing me all over."
7. *Masturbation:* The adult masturbates while the child observes; the adult observes the child masturbating; the adult and child observe each other while masturbating themselves; or the adult and child masturbate each other (mutual masturbation).

   A 16-year-old adolescent discussed her 9-year history of sexual abuse. Several times a week she masturbated her stepfather to ejaculation. Although he attempted mutual masturbation, she refused.
8. *Fellatio:* The adult has the child fellate him or the adult will fellate the child. This type of oral-genital contact requires the child to take a male perpetrator's penis into his or her mouth or the adult to take the male child's penis into his or her mouth.

   Nine-year old Jimmy told his mother, "Uncle Mark made me suck on his thing" [penis] and then he ". . . suck on mine."
9. *Cunnilingus:* This type of oral-genital contact requires the child to place mouth and tongue on the vulva or in the vaginal area of an adult female or the adult will place his or her mouth on the vulva or in the vaginal area of the female child.

   The police officer asked 6-year old Tommy to draw a picture of his mother and place X's where she made him kiss her. The child marked X's on the stomach, chest, and "pussy" (child's own word), making the largest X in the genital area.
10. *Digital (finger) Penetration of the Anus or Rectal Opening:* This involves penetration of the anus or rectal opening by a finger. Perpetrators may thrust inanimate objects such as crayons or pencils inside as well. Preadolescent children often report a fear about "things being inside them" and

"broke

Christopher, a small child, revealed to his therapist that his mother had put her fingers into his rectum. He drew a picture describing this.

11. *Penile Penetration of the Anus or Rectal Opening:* This involves penetration of the anus or rectal opening by a male perpetrator's penis. A child can often be rectally penetrated without injury due to the flexibility of child's rectal opening.

    Fourteen-year old Steve was sexually abused by his father on numerous occasions. This included the father penetrating Steve's rectum with his penis.

12. *Digital (finger) Penetration of the Vagina:* This involves penetration of the vagina by a finger. Inanimate objects may also be inserted.

    When questioned by the clinician, four-year-old Barbara said that mother's boyfriend put ". . . a pen in my pookie." (vagina)

13. *Penile Penetration of the Vagina:* This involves penetration of the vagina by a male perpetrator's penis.

    Thirteen-year-old Jennifer was taken to a doctor by her mother for an examination due to several missed menstrual cycles. Upon examination it was discovered that Jennifer was five months pregnant. She then disclosed that father had "been having sex with me."

14. *"Dry Intercourse":* This is a slang term describing an interaction in which the adult rubs his penis against the child's genital-rectal area or inner thighs or buttocks.

    Sally's mother told the clinician that her husband was "dry screwing" her daughter. He rubbed his penis against her buttocks but did not penetrate.

    The typical scenario is a progression from less intimate types of sexual activity (such as exposure and self-masturbation) to actual body contact (such as fondling), and then to some form of penetration. Oral penetration may be expected to occur early in this progression, which is often followed by digital penetration of the anus or vagina. Ejaculation by a male perpetrator, sometimes against the child's body can occur at any time in this progression.

Dynamics

The dynamics of sexual encounters between adults and children usually fall within a predictable pattern. This is particularly true of those cases of intrafamily child sexual abuse that come to light and are reported. The activity usually occurs in five separate phases: the engagement phase; the sexual interaction phase; the secrecy phase; the disclosure phase; and often a suppression phase following disclosure.

Engagement Phase

Access and Opportunity. Child sexual abuse is not a capricious, unplanned, unpredictable phenomenon. For the most part, the perpetrator is someone who is known to the child and who has ready access to the child. Opportunity to engage in sexual activity is essential and can usually be equated with privacy. The perpetrator and the child need to be alone with each other—in a room, in a house, or in some secluded place out of doors. Although these circumstances of access and opportunity may be accidental on their first encounter, the perpetrator can be expected to watch for, or to create, opportunities for private interaction with the child thereafter.

Relationship of Participants. Who is the perpetrator likely to be? Almost always it is someone in the child's own family who has access and opportunity by residing in the home or family circle. If not a relative, the perpetrator may be someone given access to the child by the parents or guardian—again someone within the child's daily sphere of activities. Where do we allow little children to be? And with whom? We let them be at home or in the homes of relatives, friends, and neighbors. We also let them go to school and permit them to engage in age-appropriate group activity—boy scouts, girl scouts, clubs, church-related activity, and so forth. Children outside their own homes are usually under the authority of adults who temporarily occupy caretaking or guardianship roles. Thus the dynamics of child sexual abuse most often involve a known adult who is in a legitimate power position over a child and who exploits accepted societal patterns of dominance and authority to engage the child in sexual activity. It is impossible to overemphasize the significance of the exploitation and misuse of accepted power relationships when assessing the impact of sexual abuse on the child.

Inducements. How does the perpetrator engage the child? How does he or she get the child to participate in some type of sexual behavior? Usually in a low-key nonforcible fashion, possibly by presenting the activity as a game or something that is "special" and fun. This always entails misrepresentation of moral standards, either verbally or implicitly (Burgess and Holmstrom, 1975). The power and authority of adulthood conveys to the child that the proposed behavior is acceptable and sanctioned. The perpetrator usually knows something about what children like and how to get children to fall in with some activity. Perhaps rewards or bribes will be offered. More often than not, the opportunity to engage in activity with a known and favored adult is sufficient incentive for the child to participate.

The successful perpetrator will manage to be coercive in a subtle fashion. The more adept the perpetrator, the less likelihood that threats will be used to induce compliance. Although physical force is rarely used to engage a child in

the intrafamily situation, it is important, nevertheless, to assess the context of the overall family dynamics in which the sexual abuse occurs. In many of these families, force or threat of use of force are the most common mode of interaction between family members. When sexual abuse of a child occurs within the context of the violent family, implied force or threat of use of force if the child fails to comply may be an important aspect of the engagement process.

Sexual Interaction Phase

A list of sexually abusive behaviors has already been presented. The perpetrator exposed himself or herself, wholly or in part. The perpetrator then persuades the child to undress partially or completely and to expose his or her genitals. Then they look at each other. What comes next? On the first encounter, perhaps nothing. They may look at each other and stop there.

After exposure, what comes next? The activity may progress to autostimulation or masturbation. The perpetrator masturbates himself or herself and encourages the child to imitate the behavior. They may masturbate themselves at the same time or at different times in each other's presence. They may still never touch each other.

The activity may, however, progress to fondling. The perpetrator may fondle the child, touching him or her in a gentle stroking fashion. The fondling initially may involve the entire body but eventually focuses on body parts with erotic significance—breasts, buttocks, genitals, lower abdomen, inner thighs. The perpetrator may persuade the child to mimic this activity and fondle him or her.

Fondling is often accompanied by kissing. This can be generalized or limited to kissing on the mouth. The perpetrator may introduce the child to so-called French kissing, exploration of the other person's open mouth with the tongue.

The activity may also progress to penetration of the child's body in a variety of ways. Oral penetration occurs frequently since a child's mouth is the opening most amenable to penetration. A male perpetrator will persuade the child to take the perpetrator's penis into the child's mouth. Often the child will be invited to lick or suck the penis. This activity is termed fellatio. Alternately, a male or female perpetrator may fellate a male child, taking the child's penis into the perpetrator's mouth.

If another area of the child's body is to be penetrated, the next most likely opening is the anal or rectal opening. Penetration of the anal or rectal opening usually begins with finger penetration. It may progress to penile penetration if the perpetrator is a male. Or there may be penetration of the anal or rectal opening by an object. The essential elements are the size of the child, his or her previous sexual experience, and the degree of force used. If the child is carefully prepared and not hurt, an extensive level of anal or rectal penetration can occur without residual signs of trauma or abnormal dilation.

Vaginal penetration is, of course, limited to female children. All of the previous sexual behaviors could occur equally as readily with male or female victims. The perpetrator usually penetrates the vulvo-vaginal opening with a finger tip. A thin membrane of tissue, the hymen, extends over the vaginal opening. This usually is a ring of tissue with a central opening. Over time, the opening in the hymenal ring will enlarge until an adult's finger can be inserted entirely. Progressive dilatation will permit penile penetration by the male perpetrator. Penetration of the vulvo-vaginal region by the perpetrator's lips and tongue is called cunnilingus. Again, the extent of penetration will depend on the degree of dilatation. If the dilatation is gentle and occurs over time, it is unlikely to be painful or result in trauma. The only physical evidence that is likely to result is absence of the hymenal ring and a degree of vaginal dilation that is inappropriate for the age of the child.

Sometimes the male perpetrator will not attempt vulvo-vaginal penetration but instead will rub his penis against the genito-rectal region of the female child. This behavior is sometimes called "dry intercourse." Girls who are sexually inexperienced are likely to confuse dry intercourse with penile penetration of the vagina. These girls will sometimes tell investigators that vaginal penetration has occurred when, in fact, it did not. The child's mistake may later undermine her credibility if a physical examination fails to elicit signs of vaginal penetration.

Any of these sexual behaviors may be accompanied by ejaculation, sometimes into a body opening.

Although no one should expect a slavish adherence to this list of sexual behaviors in the exact order described, the engagement phase does encompass a progression of sexual activity. The progression of exposure to fondling to some form of penetration is very predictable. The interviewer can expect to elicit a similar progression of sexual activity in most intrafamily cases.

Secrecy Phase

After engaging the child in some form of sexual behavior, the activity then enters a secrecy phase (Burgess and Holmstrom, 1975). The primary task for the perpetrator after the sexual behavior has taken place is to impose secrecy. Why? Secrecy eliminates accountability—the perpetrator is unlikly to wish to be caught and held responsible for the sexual abuse. Secrecy also enables repetition of the behavior. The perpetrator, in all likelihood, is sexually abusing the child in order to meet nonsexual needs (Groth and Burgess, 1977). Desiring to feel important, powerful, dominant, knowledgeable, admired, wanted—all of these needs are likely to be recurrent. If the perpetrator can satisfy these

needs easily . . . a readily accessible child who is unlikely to be very demanding and without the necessity of addressing the mutuality required by an adult relationship, he or she may be powerfully motivated to continue the behavior. Thus secrecy is essential. The perpetrator must persuade or pressure the child to keep their activity a secret over time.

The child usually *does* keep the secret. Some children never tell anyone. Others keep the secret throughout their childhood and only disclose the sexual behavior many years later. Why? Rewards have probably been offered and given. More important, the child may keep the secret because he or she enjoyed the activity and wants the behavior to continue. This premature introduction to sexuality by a known and valued perpetrator, a person who is a "significant other" for the child, may feel good on several levels—pleasurable sexual stimulation, enhancement of self-esteem, feeling important to another person in a special grown-up fashion, and so forth. Although not especially pleasing to contemplate, to deny that the pleasurable aspects of the sexual behavior may be self-reinforcing for the child, is to ignore the obvious and to neglect to consider one of the most important dynamics.

Threats may have been used to reinforce secrecy—in general, the less adept the perpetrator, the more likely he or she is to threaten the child. If threats were used, they should be carefully assessed for the degree of physical violence proposed, if any. Of course, many compelling threats made to a child do not include physical violence. For example, the threat of anger by a third party ("If you tell mommy, she'll be awfully mad!"). Separation is a potent threat, especially for a young child. A perpetrator might say to the child, "If you tell anyone, mommy may divorce me or I may be sent to jail." A threat of personal separation for the child may be particularly anxiety-provoking: for example, "If you tell anyone, they'll send *you* away." Or the threat may involve self-harm by the perpetrator ("If you tell anybody, I'll kill myself."). A variation might involve threat of harm to someone else ("If you tell anybody, I'll hurt your sister."). Finally the threat may entail violence against the child, ("If you tell anybody, I'll hurt you or kill you."). In assessing these threats, two elements deserve particular attention: the degree of physical violence involved and the extent to which any part of the threat was carried out.

The issue of implied threat by virtue of the overall context of family dynamics again deserves mention. Is this a family whose members routinely interact by use of physical force or threat of use of force against each other? If so, threat of forcible reprisal if the child fails to comply with the request (or order) for secrecy may well be implied without ever being verbalized. For some children, the sexual activity may be virtually the only interaction they ever have with an adult family member in the absence of overt physical force or threat of use of force. This sexual attention is frequently the only form of affectionate physical intimacy experienced by the child in the home. Although the mother may provide the child with discipline and physical necessities, there is often an

absence of affection and emotional bonding between them. This void may be partially filled by the perpetrator by kissing, fondling, and other sexual activity.

For some combination of the foregoing reasons, the secrecy phase often lasts for months and years, especially in intrafamily child sexual abuse. The sexual behavior progresses over time, usually in the direction of greater intimacy. As the child grows older there may be a parallel increase in the frequency of incestuous sexual activity. It is helpful to think of child sexual abuse on a continuum over time. The chances are very great that the incident of sexual behavior that occurred at the time a case came to attention is unlikely to be the first incident of sexual activity for that child. Many situations of child sexual abuse remain secret forever. By definition, for the case to be reported, someone or something must interrupt the secrecy phase.

Disclosure Phase

There are two types of disclosure of child sexual abuse: accidental and purposeful. Each type of disclosure will be described.

Accidental Disclosure. In this type of disclosure, the secret was revealed accidentally, because of external circumstances. The key factor here is that none of the participants decided to tell the secret. Instead the secret was revealed in one of the following ways.

1. Observation by a third party. Someone else observes the participants and tells someone else.

Betty walked into her parents' bedroom looking for her sister. As she entered, Betty saw her father fondling her sister's buttocks. Betty quickly reported this to her mother.

2. Physical injury to the child. When this occurs it is usually not intentional. However, the signs of the injury then draw outside atention to the sexual behavior.

Five-year-old Carmen was taken to the hospital emergency room because her mother noticed vaginal bleeding. The examination revealed vaginal tearing due to trauma. When questioned, Carmen said, "My daddy did it."

3. Sexually transmitted disease in the pediatric age group. Sometimes sexual abuse is discovered because the child acquired a symptomatic infection.

Four-year-old Joey developed a pus-like discharge from his penis. Cultures revealed a gonorrhea infection of the urethra and throat. During a play interview, Joey said, "Sammy played with my pee-pee and I played with his and I sucked him." Sammy, Joey's 14-year-old cousin, had been babysitting for the younger boy after school.

4. Pregnancy. Sometimes the child becomes impregnated accidentally because the perpetrator did not take appropriate precautions or thought the girl

was too young to be impregnated. Occasionally, a perpetrator may withhold contraceptives to "punish" the child.

Marilyn, age 12 years, was brought to a clinic for recurrent stomach ache. On examination, she was found to be eight weeks pregnant. Although she did not understand the connection between vaginal intercourse and pregnancy, Marilyn named her stepfather when she was asked with whom she had vaginal intercourse.

5. Precocious sexual activity initiated by the child. This most often is seen when young children display precocious knowledge of sexual behavior with peers and/or adults.

Three-year old Tommy's mother became alarmed when her son began to fondle her breasts and try to suckle her, although he had never been breast fed. He also crawled on top of her while she was lying on the couch and began posturing and mimicking mounting behavior. Investigation revealed that Tommy's babysitter, an emotionally disturbed adolescent girl, had introduced him to this behavior.

Crisis Intervention. Accidental disclosure of child sexual abuse also means that none of the participants are prepared for the secret to be revealed. Since most professional people are equally unprepared to cope with sexual abuse on an emergency basis, the accidental disclosure most often precipitates a crisis. The first task of the clinician will frequently be crisis intervention. He or she can be most helpful by immediately going to the scene as soon as the referral is received.

In this situation, the clinician will have little prior information about the sexual abuse or the family. Depending upon the skills and attitudes of the individuals involved, a state of chaos, high anxiety, feelings of professional inadequacy, hostility, and even fear may predominate. The immediate tasks of the clinician skilled in child-sexual-abuse intervention are to diffuse the anxiety, reinforce the reality that sexual abuse *does* exist, participate in fact-finding, direct the validation process, and assist in initial intervention planning. The following case example demonstrates how a clinician responded during the crisis stage of an accidental disclosure of child sexual abuse.

> Eleven-year-old Tricia was in the emergency room of a community hospital for evaluation of abdominal pain when the case was reported. Upon arrival at the hospital, the clinician was greeted by the medical staff and a police officer. They explained that the child's mother had just been sedated for a hysterical reaction upon learning that Tricia's discomfort was due to suspected pregnancy by her stepfather.
>
> It was necessary for the clinician to offer some guidance, as no one knew how to handle the child's information. To minimize repetition of the story, a nurse, police officer, and the clinician were all present while Tricia explained the details of her sexual relationship with her stepfather. The police officer, although very supportive, kept using terms that Tricia did not understand (for example, intercourse). The clinician's sensitivity to this situation enabled her to clarify the meaning of several words for Tricia and to explain the child's level of understanding to the police officer.
>
> This team approach under the clinician's direction during the crisis resulted in the immediate arrest of the stepfather, emergency-shelter placement of mother and all her children and much support for the family members. An initially chaotic situation, with proper direction, resulted in coordination of all the essential services: medical, law enforcement, child protective, and therapeutic.

In spite of the confusion and anxiety, several advantages may be derived from the crisis situation. First, it may enable the clinician quickly to establish a relationship with the child by presenting the concrete services of a skilled supportive advocate. Second, the clinician's entry at this stage reduces the number of times that the child must recite the story of sexual abuse. Finally, the clinician's skills may serve as role-modeling tools and teaching aids for the other professionals involved.

Purposeful Disclosure. In this type of disclosure, a participant consciously decides to tell an outsider about sexual abuse. In the cases that come to the attention of helping professionals, it is most often the child who decides to reveal the secret. Why might a child decide to disclose the secret? A young child may tell the secret to share it. The activity was so exciting or so stimulating that it simply must be shared with someone. An older child usually tells the secret for very different reasons. Often he or she is trying to escape or modify some family pressure situation. For example, in father-daughter incest, the sexual behavior usually begins early and extends into adolescence. The youngster who used to regard father as a warm, loving, and giving person may view him very differently when she reaches adolescence; now she sees him as a narcissistic, controlling individual. In earlier years she could be totally preoccupied by his attentions. Now she is more interested in peer and group relationships outside the family circle. She wants to have friends, to participate in social activities, to date, to stay out late. Her father, however, limits her peer and social activities and pressures her to continue to stay within the family circle and meet *his* needs. Now she feels imprisoned by, and angry at, her father for these restrictions; she senses that his restrictions are aimed at keeping her for himself.

As her frustration mounts, she may finally reveal the secret of their incestuous relationship. The aim of the disclosure may not be primarily toward stopping the incest, but rather toward attaining more freedom. This adolescent may be willing to continue the incestuous relationship with her father as a trade-

off for being permitted to form peer relationships, to date, to socialize outside the family circle, and so forth. After the disclosure, the child may initially experience a sense of relief in discharging the burden of a long-kept secret. However, she may also experience guilt for having enjoyed the sexual relationship and perhaps feelings of disloyalty for betraying her father.

Darlene's story emphasizes these dynamics as she reveals the progressive nature of her relationship with her father and her final ambivalent feelings toward him:

> At age 14, Darlene described herself as being close to her father for as long as she could remember. She never felt she could turn to her mother who had not hugged or kissed her since before she was age 5. Father was always physically affectionate with her. She had especially enjoyed their tickling and wrestling matches which started at age 8 and occurred until she was age 11. Even though mother disapproved of her frequent sitting in father's lap, he felt it was appropriate and accused mother of having a "dirty mind." Shortly after her 11th birthday, father would go into the bathroom whenever Darlene was bathing. By the time she was age 12, he would go into her bedroom late at night to fondle her breasts and genitals. Although she initially enjoyed the attention, by the time she was 13 and started to menstruate, she began to worry that father would press her further. Indeed he did and when she resisted he would physically abuse her into compliance. A year later, after an intense argument with father, she disclosed the incestuous secret. During a session with her clinician two weeks later, an emotionally distraught and very tearful Darlene said, "I feel like I lost my best friend. I miss him. . . . What am I going to do?"

Children sometimes decide to reveal the sexual abuse for other reasons. One girl finally told a school counselor about her incestuous relationship with her father because, at age 14 years, she was fearful of becoming pregnant. Although she had shared these fears with her father, he minimized the risk and refused to use any protection, saying "Don't worry honey, I'll take care of you if you do." Another girl revealed the secret to protect her younger sister.

> Lucy and Ann, sisters, were involved in a sexual relationship with their stepfather for approximately six years. Lucy age 17 years, learned her retarded sister Ann, age 15 years, was pregnant. Both girls had known about the other's sexual relationship with their stepfather, but had been afraid to seek help or even to discuss it with each other. When Lucy learned of her sister's pregnancy, she immediately reported the sexual abuse to the police. The pregnancy helped Lucy decide to risk the consequences of disclosure to protect Ann.

The clinician must determine the reason underlying a child's purposeful disclosure of sexual abuse. Failure to do so can be disastrous. The child who discloses sexual abuse may have completely unrealistic expectations of the person who received the information. He or she is frequently looking for a magical solution to the problem at home. The child usually wants the situation

to change without confrontation, without outside interference, frequently without separation. Unless the clinician takes the time to find out why the child told and attempt to modify the youngster's expectations if they are indeed unrealistic, in all likelihood, the child will recant the story as soon as the threat of outside interference is indentified. Whenever possible, it helps enormously if even a small request can be granted for the child.

Planned Intervention. Purposeful disclosure of sexual abuse by a child, fortunately, often permits the case to be handled by planned intervention. When the child decides to share the secret with a professional person or supportive adult, a report should then be transmitted to the statutory child protection agency. If that agency utilizes clinicians who are knowledgeable about child sexual abuse, an opportunity exists to capitalize on the child's conscious decision to seek help from a trusted person. Instead of precipitating an immediate crisis, the clinician can meet with the child and the reporter in a calm, relaxed atmosphere and proceed with fact-finding and validation. This gives the child an opportunity to express his or her concerns, and together they may explore alternatives which are of the least detriment to the entire family system.

Planned intervention as a result of purposeful disclosure may occur in the following manner:

> Jodi, a bright girl who had done well academically, was age 15 years when she was referred to the school guidance counselor because her grades were declining. Her parents were divorced three years earlier, and for the last year she had been living with her father and three brothers. After a while, Jodi formed a trusting relationship with the guidance counselor who filled the void left by her absent mother. Several months went by before Jodi told her guidance counselor about her father's sexual molestation of her and her desire to have him stop.
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> The guidance counselor contacted Child Protective Services immediately. The assigned social worker, who was skilled in child-sexual-abuse intervention, had a joint meeting with Jodi and the guidance counselor at Jodi's request. Because of this interview and a second one which transpired several days later, the social worker was able to validate that sexual abuse had occurred. During this process, the social worker encouraged Jodi to express her fears and concerns about the situation. A plan was then made with Jodi regarding how and when the incestuous relationship would be revealed to the family.
>
> In this case, the purposeful disclosure to her guidance counselor provided the victim with an opportunity to express her anxieties, as well as to prepare her emotionally for the anticipated familial disruption. It also allowed her to discuss with the social worker the circumstances by which her family would be told about the sexual abuse. And finally, this process enabled her to determine with whom she could live if she needed protection from her father and her mother was not available as an ally. Planned intervention rather than crisis intervention was thus possible in this case.

Family Reactions to Disclosure. Clinicians should anticipate a wide range of

family reactions when sexual abuse of a child residing within the family circle is disclosed. What is happening? What are the reactions to disclosure? What are some of the motivations for the behavior that follows?

Perpetrators are likely to react to disclosure with alarm. Child sexual abuse is a crime and criminal penalties could ensue if the case finds its way into the legal justice system. Societal attitudes make exposure and publicity very threatening as well. The perpetrator must also fear loss of social status in the community and possibly loss of job, especially if he or she works in a field involving some type of care or supervision of children. Accordingly, he or she can be expected to react defensively to disclosure with self-protection as the primary goal. At the same time, the perpetrator can be expected to react with hostility toward the child and anyone else inside or outside the family who is supporting the child and acting as a child advocate. After disclosure, the perpetrator can be expected to exploit his or her power position to the fullest to control the child and other family members while undermining the credibility of the allegation and or neutralize negative effects or consequences that may ensue. The intrafamily perpetrator will, of course, be able to control the child far more effectively because of the likelihood of ongoing access to the child.

Parents of a child who has been sexually abused by someone other than a parent are likely to react in a more protective fashion toward the victim. The degree of protectiveness toward the child will depend in part on the identity of the perpetrator. If he or she was a family member (grandparent, uncle, aunt, older sibling or cousin), there may be conflicting loyalties involved as well. This issue has been thoroughly addressed by Burgess and Holmstrom (1979). In extrafamily child sexual abuse, there may be no conflicting loyalties involved. Nevertheless, the parents may fear the possibly negative consequences of publicity and exposure. They may also feel guilty about their own failure to protect the child and wish to deny or cover up their own culpability. Parents may also be exceedingly reluctant to address the issues of the child's premature introduction to sexuality and the negative impact of the sexual abuse upon him or her. Many parents prefer to handle these problems with denial. For all of these reasons, parents may refuse to cooperate with child protective services or the police. Instead, they may assert that they need no assistance in protecting the child from future sexual abuse and in dealing with the consequences to the victim. Also, parents often refuse to assist the legal justice system to deal with perpetrators, both in intrafamily and extrafamily cases, for many of the same self-protective reasons.

Mothers of victims of intrafamily child sexual abuse may initially react to disclosure by expressing many concerns for the child. They may cooperate fully in processes aimed toward child protection and helping the victim to recover from the effects of the sexual abuse. Clinicians should not, however, expect that all mothers will react in this way, nor should they expect that mothers whose initial reaction is protective will be able to sustain a posture of protection

and concern without much support and encouragement from others. Self-interest and self-protection are powerful human responses that must be acknowledged. Some mothers may already be aware of the sexual abuse and may even have encouraged the activity or participated in it. Other mothers may have been previously told about the sexual abuse but failed to believe the child or to move effectively to stop the activity. If they fit within either of these categories, mothers may also react to disclosure with guilt and a desire to protect themselves. Even if there was no direct culpability, mothers of victims of intrafamily child sexual abuse must face the consequences of siding with the child, sooner or later. Often they must choose between protecting the child or protecting the perpetrator. If the perpetrator provides the mother with economic support, social status or emotional support, this choice may be painful indeed. If the perpetrator has been violent or abusive toward the mother in the past, she must fear physical retribution as well as loss of all the previously mentioned supports. If the perpetrator reacts to disclosure by exerting pressure on the child's mother, her reaction will also be affected by the type of pressure exerted. It is not at all unusual for mothers to collapse under these combined pressures, abandon responsibility, avoid decision making and withdraw as much as possible from the activities following disclosure, thereby affording more opportunity for the perpetrator to exert control over the family's response.

Siblings of victims may react protectively and with concern but they may also react defensively. Children fear disruption of family life, even if that has been traumatic and problematic for them. For children, especially, fear of the unknown and fear of separation usually outweigh their negative responses to a known situation. In extrafamily child sexual abuse, siblings of the victim may be angry at the perpetrator but may also be resentful of the disruption of family life, exposure, and publicity resulting from disclosure. In intrafamily child sexual abuse, siblings may also be forced to choose between siding with the perpetrator or siding with the victim. In either situation, the sibling who reacts with concern for the victim and anger at the perpetrator may still feel stigmatized or with reduced self-esteem or social status because at least one family member has been victimized and perhaps another family member has been revealed to be an abuser. Clinicians should remember that in some cases siblings of the victims may have previously been victimized themselves or may even have participated in the abuse or "set up" the victim. The following case example illustrates this point:

> Shirley, age 15 years, was being examined for child sexual abuse. Her mother had reported her father to the police 48 hours earlier, for sexual abuse of a sister, Angela, age 13 years. Shirley was sullen and hostile when interviewed. She reluctantly admitted that she also had been fondled by her father and had vaginal intercourse with him beginning when she was 11 years old. When she was 13 years old, Shirley volunteered to trade bedrooms with Angela, thereby placing Angela in a bedroom by herself while Shirley assumed Angela's bed

in the same room with their younger sister. Shirley further admitted that she switched bedrooms with Angela after telling her mother about the father's sexual advances and receiving a hostile response from her mother. At the time of the examination, Shirley expressed only anger about the events following disclosure. She had been forced, along with her mother and sisters to move into an emergency shelter and was missing school and the junior prom because the father's arrest had been reported in the newspapers and she was ashamed to face her friends. Shirley said of her sister Angela, "Why did she have to go and say something? If she had kept her mouth shut a little longer, there was always Susie."

In this case, the eldest daughter had extricated herself from the incestuous sexual abuse by her father by "setting up" her sister in the bedroom by herself. She was angry at her mother for failing to respond to her appeal for help but for responding positively to her younger sister's appeal. She was also angered by the disruption to *her* life that ensued after disclosure. She had fully expected that her sister Angela would extricate herself from the sexual abuse by substituting their younger sister instead.

Other extended family members may be expected to have the same combination of reactions to disclosure with protection and concern for the child vying with self-protective and defensive reactions. In-laws, brothers, sisters, and grandparents may also place pressure on the target family to react with denial and fail to cooperate with child-protective services and law-enforcement authorities. Such reactions are seen in both intrafamily and extrafamily child sexual abuse cases.

In summary, all family members can be expected to react to disclosure of child sexual abuse within the framework of a response to the question, "How will this affect me?" Only those who have great ego strength and security can be expected to sustain a posture of protection and concern toward the victim. All others will require enormous support and some pressure to maintain a victim-oriented response. In some cases, family members will not be able to react with support or concern for the victim, regardless of the circumstances.

Suppression Phase

Following disclosure, either accidental or purposeful, the dynamics of most child-sexual-abuse cases tend to enter a suppression phase. Even when the perpetrator is outside the family circle, the child's immediate and extended family are likely to react by trying to suppress publicity, information, and intervention. Sometimes this suppression may extend to denial of the significance of disturbances suffered by the child victim as a result of the sexual abuse in order to discourage further intervention by outsiders. The following case example illustrates such suppression in a case of extrafamily sexual abuse.

Ronnie, a 6-year-old boy, was lured into a vacant building by two adolescent boys and forced into sexual activity. Ronnie was forced to fellate one of his abusers while the other boy performed forced rectal penetration upon him. After repeated slapping and many threats, the older boys let Ronnie go. The child's physical injuries quickly drew attention to the sexual abuse and both the abusers were arrested. Although initially grateful for assistance from child protective servicer in the first 48 hours, Ronnie's parents withdrew and became hostile after medical attention had been rendered and depositions to the police were finished. Ronnie had a severe reaction to the incident—he had nightmares every night, developed a school phobia, and refused to go outside the house unless accompanied by his mother. Nevertheless, his parents refused to permit access to the child for individual and art therapy. When his obviously negative reaction to the sexual abuse was pointed out, his parents replied, "It's nothing to worry about—he'll forget about it soon."

A clue to the motivation for Ronnie's parents to suppress the sexual abuse incident can be found in their expressed determination that the child will "forget" about the sexual abuse. One interpretation of their behavior is that it is the parents themselves who wish to forget about the incident—perhaps in part because they feel guilty for real or imagined culpability in the sexual abuse of their child by outsiders. Their denial of their son's obviously disturbed behavior is a manifestation of their desire to forget or suppress the incident. Another possible explanation is that these people were themselves under pressure from neighbors or perhaps from relatives of the adolescent perpetrators to withdraw the sexual assault charges.

When the sexual abuse has occurred within the family circle, suppression is likely to be intense. The perpetrator can be expected further to exploit his or her power position by pressuring the child and any other family members who appear to be cooperating with outside authority figures. Sometimes the suppression is limited to verbal pressure calculated to induce feelings of guilt in the child for his or her part in the disclosure. Other family members may join in this process and "gang up" on the child. Feeling isolated and perhaps even ostracized, the child may give in and withdraw the complaint or simply stop cooperating with those who are trying to assist him or her.

Grace, age 13 years, told her mother that her grandfather had masturbated and fondled her on numerous occasions when she had stayed with him on summer vacations. On their last encounter, he had attempted vaginal penetration but failed. The mother initially reacted with concern for her daughter and with anger toward her own father for his behavior. After the mother realized, however, that addressing the impact on Grace would inevitably lead to examination of her own role in "setting up" the sexual abuse, she quickly lost interest in therapy for her daughter. The girl missed several sessions because her mother failed to provide transportation at the last minute. After the child declined to read several letters sent by the grandfather which explained the allegation of sexual abuse by describing Grace as "insane," mother then permitted a telephone confrontation to take place between the girl and her

grandfather. When Grace asked her mother if she still believed that the sexual abuse had occurred, the mother replied that she "refused to take sides." Finally Grace told her therapist that she "didn't need" any more therapy and declined to return.

In the foregoing example, the behavior of Grace's mother suggests that her own needs were not being met after the disclosure when intervenors focused concern on the child. She at first attempted to sabotage her daughter's treatment program by last-minute failures to give her a ride. When this failed, she joined forces with the grandfather in suppressing Grace's allegation by reinforcing his attacks on the girl and withdrawing her support.

Sometimes the suppression phase is characterized by verbal pressure that is abusive or threatening. Threats may be similar to those described in the secrecy phase, variously invoking anger from a third party, separation, physical harm to the perpetrator, to a third party, or to the child. Again, the aim of the verbal abuse or threats is to pressure the child to recant or to stop complying with the intervention process. In some cases, children and compliant family members may be subjected to physical abuse as part of the suppression phase.

Jolene, age 16 years, made a complaint to the police in which she stated that her father had fondled her breasts and genitals. At the hearing for probable cause, she refused to speak, remaining silent in response to all questions. Charges against her father were dropped. Jolene later revealed that her mother, brothers, and sister all told her that they would refuse to live in the same house with her if she persisted in her complaint.

Regardless of the type of pressure employed, the primary aim of the perpetrator during the suppression phase is to undermine the credibility of the child and the allegation of sexual abuse. One obvious result may be for the child to withdraw the complaint or falsely declare that the complaint was a lie.

Eleven-year-old Tricia told investigators that she had been impregnated by her stepfather. When the case came to trial, the girl perjured herself on the witness stand by telling the judge that she had lied and that she had really been impregnated by her 15-year-old stepbrother. Later she revealed to peers in a support group that she had perjured herself because of repeated physical assaults by her stepfather during the period of time prior to the trial.

Sometimes the child stubbornly withstands pressure to withdraw the complaint. The suppression phase may also be characterized by various attempts to undermine the child's credibility. The child may be described by other family members as a pathological liar or as mentally disturbed or "crazy." Previous school problems or difficulties in interpersonal relationships may be cited as evidence that the child is untrustworthy or disturbed. If an adolescent victim has ever run away from home, skipped school, stayed out too late, or engaged

in peer sexual activity, these behaviors may be cited to support the family's contention that the child's allegation of sexual abuse is untrue.

A Profile of Participants

Perpetrators. Psychological motivations of perpetrators of child sexual abuse are discussed in detail in chapter 8, "The Incest Offender." In general, perpetrators are likely to be "me-first" individuals who satisfy many nonsexual needs when they engage a child in sexual behavior. For a variety of reasons, the sexual relationship with a child feels safer, less threatening, less demanding, less problematic than a relationship with an adult. Gratification may be enhanced by the child's accessibility, naiveté, trust, affection, and compliance. Although some perpetrators enjoy being in control to the extent of being gratified by overpowering a resistant victim, most are content to persuade or entice the child into sexual behavior with their own position of power and dominance remaining implicit rather than directly expressed. A few perpetrators enjoy the process of forcibly overpowering the victim, terrifying him or her, and inflicting pain. Fortunately, the last group are in the minority.

Incest perpetrators tend to perceive the outside world as hostile and convey this perception to the child as both a reason and an excuse for the incestuous sexual behavior. The child is encouraged to trust only family members; interpersonal relationships with outsiders are discouraged and often severely limited. Incestuous families, at the behest of the perpetrator, are frequently very isolated. Family members tend to have few friends and few peer activities. The perpetrator often sets the style of family interaction by encouraging or even requiring all family members to meet their social needs within the family circle. This may even extend to use of the telephone. In one incestuous family, the father refused to permit any family member to place or receive telephone calls while he was at home. When the telephone rang in his presence, he answered it. If the call was for some other family member he immediately hung up. Consequently most telephone calls were for him. The perpetrator often dominates all family decision making and is the sole authority on where the family lives, how much is spent for clothing, food and household needs, vacation planning, part-time jobs for family members, contributions to charity, participation of the children in school activities, and so forth. Although physical force is rarely used to engage the child in sexual activity, force or threat of use of force may be used to maintain the perpetrator's authority over everyone else.

Although rarely psychotic, perpetrators frequently exhibit personality disorders. Alcohol abuse is common although few are frank alcoholics. Perpetrators are likely to appear to outsiders as quiet, unassertive, emotionally colorless individuals. An underlying core of rigid and dysfunctional behavior patterns can usually be discerned. However, since perpetrators tend to be hostile, mistrustful,

and suspicious of outside authority, there is little chance that any clinician will have taken a good look.

Mothers. The incest victim's mother is usually in a subordinate position to the perpetrator since incest perpetrators in known cases are most frequently male power figures (for example, father, stepfather, uncle, grandfather, mother's boyfriend) in the home. A rare incest case will involve a mother as the sole sexual abuser of her own children or perhaps as a coperpetrator of child sexual abuse (usually with a male coperpetrator). In the coperpetrator situation, the mother nonetheless is still usually cast in a subordinate role.

Mothers can perhaps be most generally described as failing to protect the child victim. Assessment of Connecticut's Sexual Trauma Treatment Program (see chapter 13, "Evaluation of Child Sexual Abuse Program") showed that the extrafamily cases almost always involved single-parent families headed by mothers who failed to protect by exercising poor supervision or directly or indirectly exposed the victim to sexual risk. Mothers of incest victims fail to protect on several levels. Sometimes the mother is physically absent on a regular and predictable basis, thereby affording the opportunity for incest to occur. The classic example of this situation involves a mother who works a night or evening shift. Sometimes mother is psychologically absent, often ignoring overt seductive behavior between the incest participants that she should be curbing and redirecting and setting limits on at a very early stage. Some mothers fail to protect in a very direct fashion by deliberately setting up situations in which the incest participants are encouraged to engage in sexual behavior.

> Nancy, a 35-year-old mother of four girls, regularly encouraged her husband to go to her daughters' bedrooms late at night and "cover them up." One night when Nancy knew Cindy, her 14-year old daughter was sleeping in the nude, she nevertheless sent her husband into Cindy's bedroom, "to be sure she doesn't get cold."

The above case example illustrates a mother's intentional maneuver to encourage sexual behavior between her husband and daughter.

Although it is tempting to think of all mothers of incest victims as women who deliberately encourage their spouses to turn to their children for sexual gratification, this pattern probably occurs less often than we believe. Most mothers of incest victims are married to men who have unrealistic expectations of them. The "dependent husband" wants his wife to prop him up on every level; the "dominant husband" wants his wife to be so dependent that his own needs for power and control are continuously satisfied (see chapter 8, "The Incest Offender"). Wives who stay with such husbands may accept either the dependent or dominant role that is assigned to them. The likelihood that these women will seek relief from duress or boredom or frustration and meet their own needs elsewhere (by becoming psychologically absent or physically absent

or both) is very great. In both patterns of husband-wife interaction, the wife frequently eschews a true maternal role with her children. She may often view the children as competitors and rivals while simultaneously meeting some of her own social needs by interacting with the children on a peer level.

Often mother escapes responsibility by being ill or by complaining that she does not "feel good." Indeed she does not feel good and one can anticipate a high level of functional physical complaints, often with no organic basis, from these mothers. Depression, either overt or masked, is also very common. Many of these women have poorly developed social skills, few friends or outside interests and in general, little aptitude for developing and maintaining a relationship. More often than not, they lack everyday living skills as well and cannot drive, handle money, balance a checkbook, interact with the retail business world as consumers, and so forth.

Most mothers of incest victims are aware, consciously or unconsciously, that the incest exists. Many of the mothers have been told by the children that the incestuous sexual behavior is occurring. Some of the mothers respond to this revelation with immediate hostility and disbelief and warn the child never to mention the matter again. Some make no response and discourage the child from pursuing the issue by their silence. Some mothers respond by initially believing the child, promising to intervene and protect the youngster, and then neglect to do so. Still others sincerely try to prevent further sexual abuse by "running interference" and attempting never to permit an opportunity for the perpetrator to be alone with the child again. This method is rarely successful, especially if the perpetrator is a dominant figure in the home. A few mothers respond to the child's complaint by taking immediate action, notifying outside authorities, separating from the perpetrator if necessary and preventing further sexual exploitation of the child either by prolonged separation or by setting limits and forcing the perpetrator to adhere to them. Few mothers have the strength or resources to accomplish this by themselves. Many mothers fear change, shrink from separation, dread retribution by the perpetrator, and shirk or feel inadequate to perform the tasks and fulfill the responsibilities required to stop the incest.

Child Victim. To refer to the child who is the subject of sexual attentions by an adult or "bigger person" as a victim reflects our view that children are always victimized by sexual abuse, even when they are willing and enthusiastic participants in the sexual behavior. Children lack the emotional, maturational, and cognitive development to assimilate or withstand premature introduction to sexuality by an adult. Although frequently described by the perpetrators as seductive ("She kept trying to turn me on, your Honor; I just couldn't help myself"), children who become incest victims have usually displayed no more than the ususal degree of age appropriate exploratory or acting out behavior.

Infants explore their own bodies and quickly discover their genitals. Tod-

dlers have usualy discovered self-stimulation and masturbate freely unless limited by their caretakers. By ages two-and-one-half to three years, children begin to appreciate differences between males and females and be curious about their sex and genitalia. Their ever-expanding perceptions about the world around them (mostly stimulated by observing their own home life and viewing the television set) include an increasing awareness of sexuality tied to male-female roles. Slightly older children may see and mimic behavior that has sexual overtones, especially posturing and touching, in a diconcertingly accurate fashion. Although these actions may be aimed toward attracting attention and favor, it is unlikely that the young child conceptualizes their sexual connotations. By the same token, the child is unlikely to appreciate any relationship between affectionate or affection-seeking behavior and sexuality.

Despite society's tendency to blame the victim, even when the victim is a young child, it is not appropriate to hold a child responsible for exploratory behavior that stimulates an adult.[1] The appropriate adult response is to acknowledge stimulation, deal with his or her own reactions on a personal level, and respond to the child by setting limits on or redirecting the child's behavior. It is never appropriate for adults to respond by engaging the child in a sexual relationship, even when the child appears willing and eager for the behavior to progress. The grossly seductive child who overwhelms the helpless adult with a degree of sensuality that cannot be ignored or denied and thereby stimulates a compulsive response from the adult that inevitably ends in a sexual relationship is a myth existing only in the minds of perpetrators and some defense attorneys. In fact, most victims do not behave in a seductive fashion. The attraction for the perpetrator is much more likely to be some combination of qualities that can best be termed childlike: immaturity; inexperience; defencelessness; and affectionate, trusting, confiding, playful behavior.[2]

If the sexual abuse does not frighten or injure the victim, he or she will probably willingly engage in a progression of sexual behavior, repeatedly over time. As the child grows older and more experienced, he or she may perceive that the sexual behavior meets the perpetrator's needs at some level. The child may come to occupy a favored position vis-à-vis the perpetrator. If not intimidated, he or she may even attempt to manipulate that position of favor and limited power to some degree by withholding or avoiding participation in the sexual behavior or threatening to disclose the secret to outsiders. If other family members are involved in the sexual activity, the child may variously be intimidated by them or angry at them or regard them as fellow conspirators or perhaps even be contemptuous of them. An older child will probably eventually see the perpetrator as a narcissistic individual who exploited him or her. If the older child victim is being limited in peer activities or forced to remain within the family circle rather than develop and enjoy outside relationships and activities, he or she may be very resentful and frustrated indeed. The child victim who disclosed the sexual abuse secret to someone in authority (for example, mother)

and received an inappropriate response can be expected to feel betrayed by that person.

Adolescent girls who are incest victims are frequently described as "pseudomature." Physically they may be fully developed by age twelve or thirteen years. These girls often assume much responsibility for management of domestic tasks: preparing meals, caring for younger children, and so forth. They often have special responsibilities to their fathers which are acknowledged by everyone else: bringing in his beer while he watches television, straightening his tools, preparing dad's favorite dessert, and so forth. In many ways, these girls function in quasimaternal, quasispousal roles at home. Nevertheless the girls are expected to eschew independent and "grownup" activities at school and outside the home.

The adolescent male victim of incest is a shadowy figure who has rarely been described. We have seen adolescent males, who were themselves previous victims of sexual abuse by a male perpetrator, engaging their sisters and younger children, both male and female, in sexual behavior. Much of this sexual behavior appeared to be in the service of a need to control or dominate another person, rather than to satisfy a sexual need. Much of this type of sexual behavior was abusive in fact as well as in name; force or intimidation was used with agemates as well as with younger children and trauma to the victim would often result. (See chapter 6, "Sibling Incest"). On the other hand, little information exists about adolescent males, who are being or have been victimized by women, especially in the mother-son incest situation. How do they appear to the clinician? It has been suggested that the impact of mother-son incest is the most pathological of all types of incest. We can neither confirm nor challenge this impression.

Other Family Members. With the social decline of large extended families living under one roof, pertinent other family members are usually children other than the child victim of incest. Frequently they also are aware of the incestuous sexual behavior. Sometimes other children are or were themselves victims of sexual abuse. By definition, such multiple incest victims will be siblings or stepsiblings. When more than one child is a victim, any of several patterns may emerge. First, the victims may be unaware that the incestuous behavior has involved another child in the family. Or they may be aware of other victims but be unwilling or afraid to discuss the situation with them. Or multiple victims may discuss their situations with each other and give mutual support or assistance. Sometimes, one child victim will "set up" or deliberately arrange the sexual victimization of another child in the family, usually with the aim of extricating himself or herself from the incestuous sexual relationship.

Even when they are not aware of the incestuous sexual behavior, other children in the family may discern a special or favored position of the child victim. This special position or privileges may serve to attract resentment from siblings toward the victim. Much sibling rivalry may be present.

Family Interaction. The incestuous family very closely resembles the pathological family described by Beavers (1976). It is a closed and generally pathological system, constantly draining more and more energy from the individuals who comprise the family and offering little that is positive in return. At the same time the individual family member's dependence on this pathological system is enormous and the difficulty in extricating himself or herself and maintaining a healthy independent existence is equally great. These families and their members develop few skills for coping with the outside world that are effective or adequate to meet the complex demands of daily living. The outside world is perceived as hostile; individuals outside the family are "out to get you" and not to be trusted. Any attempt by outsiders to interact with family members is viewed as intrusion that is threatening to everyone at home. Such attempts are greeted with hostility, suspicion, and fear. Family members who overcome their own hesitation and anxiety and attempt to interact with outsiders are greeted with hostility, scorn, and reprisals from those within.

Although power is often exerted within incestuous families in a predictable fashion as described above, it is also exerted capriciously at times. Powerful individuals within incestuous families are variously so ambivalent about their feelings and so unlikely to be able to move effectively to satisfy a conflicted need that they may rigidly demand a certain type of behavior on one day only to abandon that expectation and substitute another (usually without prior notice) on the next. Power is generally exercised by physical force or by intimidation. Children learn that power is all-important in human relationships and that powerful people can make their own rules and change them without warning. Instead of observing the legitimate use of power in conjunction with responsibility and the benevolent exercise of power for the common good, children in incestuous families tend to see power exercised irresponsibly and solely to meet the needs of the person who is in power. They tend to role model this behavior, especially with each other and often with mother acting as a peer participant in family battle.

In incestuous families when a father figure is the perpetrator, he may stand aside and observe the other family members as they act out with each other and maneuver for power. Sometimes the father may even initiate or "set up" such a battle and then withdraw to the sidelines. Eventually, he will take command of the situation, by out-shouting or out-punching all the other participants or perhaps by engaging in behavior that startles the others into quiescence or submission (for example, brandishing or firing a gun, breaking a window or a piece of furniture, or the like). With a fraction of the unbearable tension released, the family may then settle temporarily into a deceptively tranquil routine. Sooner or later, however, the tension can be expected to erupt again.

Sometimes power is exercised by withdrawal. The powerful individual ignores or refuses to speak to one or all family members.

> George, an incestuous father, punished his wife and attempted to prevent her from participating in therapy by giving her the "silent treatment." On the night she would return from her group therapy session, he would refuse to acknowledge her return in any way or even speak to her. He would, however, sit across from her in the living room and openly masturbate himself for hours. Although they slept in the same bed he would continue to ignore her. The "silent treatment" would continue for several days and then he would begin to speak to her again. By the end of the week, their interactions were "normal" but as soon as she went to the next therapy session, the silent treatment would resume.

Power may also be exercised by belittling others and their efforts, often by previously setting up a situation in which the person would be likely to fail.

> Jack had incestuous relationships with his two older daughters, ages 16 and 14 years. Angry with his 16-year-old daughter, he sent her on an errand in the family car when he knew the gas tank was nearly empty and with little money. When he finally "rescued" her he criticized her for calling him for help, saying "If you are old enough to drive, you should be able to take care of yourself."

Another way in which the perpetrator may keep family members in line is to react unexpectedly, catching the other person off balance.

> Patricia stayed married to a man who had sexually molested her daughter for many years. Before the disclosure of incest occurred, Patricia decided to surprise her husband with a fancy dinner on the occasion of their wedding anniversary. She made other arrangements to feed the children and was alone in the house when her husband came home, table elegantly set, candles lit, and a roast beef dinner (his favorite meal) ready to be served. Her husband responded by slamming his fist on the table and yelling, "How dare you behave like a whore with me?" He refused to eat any of the dinner and prepared himself a hot dog instead.

Any permutation of the exercise of power can be seen within the incestuous family. The overriding theme, however, for the person in power is to meet his or her own needs first and to maintain control within a closed family system.

Denial is overused as a defense mechanism in incestuous families and frequently is the only coping skill available to family members. An enormous degree of denial is required, for example, for mothers to overlook the incestuous sexual behavior and the "special" positions occupied by the participants in relation to each other. Denial may actually be an extension of the secrecy phase of sexual abuse and even an expression of the secrecy. In other words, the sexual abuse is so secret that the participants deny its existence even to themselves. Father may think of the activity as "sex education"; the victim may call it "helping dad." Family members routinely deny their real feelings, especially when feeling angry or hurt or disappointed or frustrated. Projection of these feelings on others is very common. They tend to be concrete in the extreme,

especially on a verbal level. Much denial is also used to maintain the false image that the incestuous home is a blissful haven of security and freedom in comparison to the hostile outside world.

Incestuous families are sometimes described as having no role boundaries. Because family members behave in a manner that is not in keeping with their traditional roles of father, mother, and child, and because they may temporarily exchange roles, the boundaries separating them are said to be blurred. Actually, the blurring of boundaries and lack of limits is likely to pervade every aspect of family life. Individuals are not often permitted to set limits on other family members with respect to their bodies, belongings, or personal space. People wander into bedrooms or bathrooms, opening closed doors, and walking in on others while they bathe, go to the toilet, and undress. Bedrooms, beds, closets, drawers, and clothing tend to be used interchangeably by everyone. In particular, parents have little respect for the privacy of the children or siblings for each others' privacy. Powerful family members have, in effect, no limits on observing less powerful individuals, or on touching their bodies or their belongings. Children and less powerful individuals usually have the benefit only of those limits that they can enforce themselves.

Recent papers have described the incestuous family as the multiproblem family or character-disordered family. This description certainly fits for the majority of incestuous families that we have seen. Despite internal tensions and flawed familial interpersonal relationships, these individuals seem to exhibit an array of dysfunctional behavior and methods of coping with stress that causes them to be viewed as a unit or entity. The multiplicity of problems and acting out behavior makes it tempting for the clinician to view the incestuous behavior as "only a symptom" and as one of a variety of problems that compete for attention. In reality, the incestuous family is most often a "nonfamily" in the cultural sense: a group of individuals of varying ages and sexes live under one roof, have a biological relationship with each other, and may even call each other by familial role labels (mother, father, daughter, son, sister, brother). However the real ties between them at the time of disclosure are the sharing of interdependent dysfunctional behavior patterns rather than traditional or functional intrafamily relationships. The existence of the abusive incestuous behavior is a reflection of their nonfamily status and usually serves as the sole leverage point for bringing about changes in the direction of healthier and more effective coping patterns.

Impact on the Child

In discussing the impact of sexual abuse upon the target child, it is necessary to make the distinction between known cases and cases in which the secret was never disclosed. It is possible that there are children who are not adversely affected by sexual abuse. Indeed, the absence of adverse effects upon the child may be related to the frequency of disclosure: that is, perhaps situations involving little or no psychological or physical trauma to the child are less likely to be disclosed to anyone else. Although cases are now being disclosed or identified with greater frequency, we cannot know the outcome unless someone reveals the secret or discloses the sexual abuse accidentally.

Ultimately, people who make judgments about the impact of sexual abuse upon the child must do so based upon their own clinical experience with known cases. We believe sexual abuse is nearly always a profoundly disruptive, disorienting, and destructive experience for the child with a degree of stimulation that is far beyond his or her capacity to encompass and assimilate. Consequently, there is interference with the accomplishment of normal developmental tasks. The progression of mastery of one's self, environment, and relationship with others is significantly disrupted by the child's permanently altered awareness and new role vis-à-vis the perpetrator.

Child sexual abuse is disorienting because profound blurring of boundaries inevitably follows when someone in a power position exploits the child by making him or her a sexual partner. These children cannot avoid questioning limits set for them and for others. They must be confused about the appropriate uses of power and authority. Their very identities are at issue as they ask: "Who am I, that I am both a child and a sexual partner of someone who is supposed to be parenting or nurturing or protecting me?"

Destructive effects of sexual abuse are readily identifiable. Most of the children we encountered seemed to have a very poor self-image. Strikingly attractive youngsters would describe themselves as ugly and express great doubt that they could appear attractive or appealing to others. Although some of the children displayed much pseudomaturity, they frequently possessed very poor social skills. Seductiveness was often displayed inappropriately and as a substitute for other social skills that were lacking. Victims tended to be isolated socially with poor peer relationships as well as unsatisfying social relationships. Many were hostile or depressed, and some were even suicidal. They commonly expressed reluctance or inability to trust any other human being.

Data on long-term impact of child sexual abuse are sadly lacking. Some individuals disclose the secret years later after reaching adulthood. We have not encountered anyone who has reported that a sexual abuse experience in childhood [illegible] effect upon their lives. On the contrary, many [illegible] difficulty in attaining a satisfactory level of [illegible]idence as adults. Nearly all attribute a poor [illegible].to their childhood victimization. Some are p[illegible]chosomatic problems often resulting in