SB153

SENATE FINANCE COMMITTEE REPORT

DATE: 5/1/92

FURTHER:

DATE TURNED INTO OFFICE: 5/5/92

The Finance Committee considered SENATE BILL NO. 153

"An Act relating to mental health; and amending Rule 3, Alaska Rules of Civil Procedure."

and recommends:

[ ] replace with _____ CS _____ (FINANCE)

or [✓] adopt previous _____ CS SB 153 (Jud.)

[ ] attaches amendment(s)

[■] same title
[✓] new title
[ ] technical title change (HB only)

[ ] adopts _____ Letter of Intent

[ ] further referral to the _____

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

NEW FISCAL NOTES: Dept/Date

[ ] **zero** fiscal notes _____

[ ] fiscal notes _____

[ ] **appropriation**--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date

[✓] **zero** fiscal notes Law 4-14-92

[✓] fiscal notes Court System 7.2 4-23-92

DO PASS:

1. _____
Co-Chair: Signature/Recommendation

OTHER RECOMMENDATIONS:

2. _____
Co-Chair: Signature/Recommendation

STATE OF ALASKA
1992 LEGISLATIVE SESSION

FISCAL NOTE

No. 1

Bill Version: SB 153

(S) Publish Date: 4-15-92

Revision Date:

Title: "An Act relating to mental health..."

Sponsor: Senator Pourchot/By Request

Requestor: Senator Pourchot

Department Affected: Department of Law

BRU: Legal Services

Component: Operations

COMPONENT SERIAL [ ][ ][9][3]

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact:

Changes in CSSB 153 (JUD) have no fiscal impact. This fiscal note is appropriate

4-30-92 date — CLB Comte Aide (initial)

ANALYSIS: (Attach a separate page if necessary.)

For the reasons discussed in the attached letter of April 14, 1992, from Assistant Attorney General Elizabeth Shaw to Senator Pourchot, the Department is submitting a "zero" fiscal note.

Changes in (CSSB153) (HES) have no fiscal impact. This fiscal note is appropriate.

15 APR 92 date — Comte Aide (initial)

Prepared by: Richard I. Pegues, Director — Phon

Division: Administrative Services — Date: April 14, 1992

Approved by Commissioner: Richard I. Pegues (FOR) Charles E. Cole, Attorney General

Agency: Department of Law — Date: April 14, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

No. 2

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bil Bill Version: CSSB 153(JUD

(S) Publish Date: 5-1-92

Revision Date:
Title: An Act relating to mental health
Sponsor: Pourchot
Requestor:

Department Affected: Alaska Court System
BRU: Trial Courts
Components:

COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	7.2	7.2	7.2	7.2	7.2	7.2
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	7.2	7.2	7.2	7.2	7.2	7.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	7.2	7.2	7.2	7.2	7.2	7.2
FEDERAL FUNDS						
OTHER						
TOTAL	7.2	7.2	7.2	7.2	7.2	7.2

POSITIONS:

FULL-TIME						
PART-TIME	2.0	2.0	2.0	2.0	2.0	2.0
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel Phone: 264-8228
Division: Alaska Court System Date: 04/23/92

Approved by: Arthur H. Snowden, II, Administrative Director BY
Agency: Alaska Court System Date: 04/23/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Alaska Court System
Fiscal Analysis
CS SB 153

The fiscal analysis is based on the assumption that this legislation will require an estimated 20 hearings a year. Each hearing is estimated to last 2 to 3 hours. Current court staff can not assume the additional burden of the hearings. The court will have to hire a part-time pro tem superior court judge and in-court clerk to fill in for current judges and staff who will handle the hearings.

Personal Services

Classification	Salary	Benefits	Total
Pro tempore superior court judge, 1 month, PPT, Anchorage (assumes fully vested, retired judge)	$2,013	$1,641	$3,654
In-Court Clerk, range 12B, 1 month, PPT, Anchorage	2,410	1,112	3,522
			$7,176

CS FOR SENATE BILL NO. 153 (JUDICIARY)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 5/1/92
Referred: Finance

Sponsor(s): SENATORS POURCHOT, Collins

A BILL

FOR AN ACT ENTITLED

"An Act relating to mental health."

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

* **Section 1.** AS 44.21.410(a) is amended by adding a new paragraph to read:

(8) provide visitors and guardians ad litem in proceedings under AS 47.30.839.

* **Sec. 2.** AS 47.30.660 is amended by adding a new paragraph to read:

(15) set standards under which each designated treatment facility shall provide programs to meet patients' medical, psychological, social, vocational, educational, and recreational needs.

* **Sec. 3.** AS 47.30.772 is amended to read:

Sec. 47.30.772. MEDICATION AND TREATMENT. <u>An evaluation facility or</u> [A] designated treatment facility may administer medication or other treatment to an involuntarily committed patient <u>only in a manner that is</u> consistent with the provisions of AS 47.30.825 - 47.30.865.

* **Sec. 4.** AS 47.30.800(b) is amended to read:

(b) Upon making the findings specified in (a) of this section, the provisions of AS 47.30.795(c) [AS 47.30.795(b)] relating to notice and AS 47.30.745 relating to hearing apply.

* Sec. 5. AS 47.30.825(b) is amended to read:

(b) **The patient and the following persons, at the request of the patient, are** [A PATIENT, OR THE PATIENT'S COUNSEL, GUARDIAN, OR THE ADULT DESIGNATED IN ACCORDANCE WITH AS 47.30.725 IF THE PATIENT IS MENTALLY INCAPABLE OF PARTICIPATION, IS] entitled to participate in formulating the patient's individualized treatment plan and to participate in the evaluation process as much as possible, at minimum to the extent of requesting specific forms of therapy, inquiring why specific therapies are or are not included in the treatment program, and being informed as to the patient's present medical and psychological condition and prognosis**: (1) the patient's counsel, (2) the patient's guardian, (3) a mental health professional previously engaged in the patient's care outside of the evaluation facility or designated treatment facility, (4) a representative of the patient's choice, and (5) the adult designated under AS 47.30.725**. The **mental health care professionals** [TREATING PHYSICIAN] may not withhold any of **the** [THIS] information **described in this subsection** from the patient **or from others if the patient has signed a waiver of confidentiality**.

* Sec. 6. AS 47.30.825(d) is amended to read:

(d) A locked quiet room, or other form of physical restraint, may not be used, except as provided in this subsection, unless a patient is likely to physically harm self or others unless restrained. The form of restraint used shall be that which is in the patient's best interest and which constitutes the least restrictive alternative available. When practicable, the patient shall be consulted as to the patient's preference among forms of adequate, medically advisable restraints including medication, and that preference shall be **honored** [CONSIDERED]. Nothing in this section is intended to limit the right of staff to use a quiet room at the patient's request or with the patient's knowing concurrence when considered in the best interests of the patient. Patients placed in a quiet room or other physical restraint shall be checked at least every 15 minutes or more often if good medical practice so indicates. Patients in a quiet room must be visited by a staff member at least once every hour and must be given adequate food and drink and access to bathroom facilities. At no time may a patient be kept in a quiet room or other form of physical restraint against the patient's will longer than necessary to accomplish the

purposes set out in this subsection. All uses of a quiet room or other restraint shall be recorded in the patient's medical record, the information including but not limited to the reasons for its use, the duration of use, and the name of the authorizing staff member.

* Sec. 7. AS 47.30.825(c) is repealed and reenacted to read:

(c) A patient who is capable of giving informed consent has the right to give and withhold consent to medication and treatment in all situations that do not involve a crisis or impending crisis as described in AS 47.30.838(a)(1). A facility shall follow the procedures required under AS 47.30.836 - 47.30.839 before administering psychotropic medication.

* Sec. 8. AS 47.30 is amended by adding new sections to read:

Sec. 47.30.836. PSYCHOTROPIC MEDICATION IN NONEMERGENCIES. An evaluation facility or designated treatment facility may not administer psychotropic medication to a patient in a situation that does not involve a crisis under AS 47.30.838(a)(1) unless

(1) the patient has the capacity to give informed consent to the medication, as described in AS 47.30.837, and gives that consent; the facility shall document the consent in the patient's medical chart; or

(2) the patient is determined by a court to lack the capacity to give informed consent to the medication and the court approves use of the medication under AS 47.30.839.

Sec. 47.30.837. INFORMED CONSENT. (a) A patient has the capacity to give informed consent for purposes of AS 47.30.836 if the patient is competent to make mental health or medical treatment decisions and the consent is voluntary and informed.

(b) When seeking a patient's informed consent under this section, the evaluation facility or designated treatment facility shall give the patient information that is necessary for informed consent in a manner that ensures maximum possible comprehension by the patient.

(c) If an evaluation facility or designated treatment facility has provided to the patient the information necessary for the patient's consent to be informed and the patient voluntarily consents, the facility may administer psychotropic medication to the patient unless the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions. If the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions and the facility wishes to administer psychotropic medication to the patient, the facility shall follow the procedures of AS 47.30.839.

(d) In this section,

(1) "competent" means that the patient

(A) has the capacity to assimilate relevant facts and to appreciate and understand the patient's situation with regard to those facts, including the information described in (2) of this subsection;

(B) appreciates that the patient has a mental disorder or impairment, if the evidence so indicates; denial of a significantly disabling disorder or impairment, when faced with substantial evidence of its existence, constitutes evidence that the patient lacks the capability to make mental health treatment decisions;

(C) has the capacity to participate in treatment decisions by means of a rational thought process; and

(D) is able to articulate reasonable objections to using the offered medication;

(2) "informed" means that the evaluation facility or designated treatment facility has given the patient all information that is material to the patient's decision to give or withhold consent, including

(A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;

(B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;

(C) a review of the patient's history, including medication history and previous side effects from medication;

(D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol;

(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment; and

(F) a statement describing the patient's right to give or withhold consent to the administration of psychotropic medications in nonemergency situations, the procedure for withdrawing consent, and notification that a court may override the patient's refusal;

(3) "voluntary" means having genuine freedom of choice; a choice may be encouraged and remain voluntary, but consent obtained by using force, threats, or direct or indirect coercion is not voluntary.

Sec. 47.30.838. PSYCHOTROPIC MEDICATION IN EMERGENCIES. (a) Except as provided in (c) of this section, an evaluation facility or designated treatment facility may administer psychotropic medication to a patient without the patient's informed consent, regardless of whether the patient is capable of giving informed consent, only if

(1) there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person, as determined by a licensed physician or a registered nurse; the behavior or condition of the patient giving rise to a crisis under this paragraph and the staff's response to the behavior or condition must be documented in the patient's medical record; the documentation must include an explanation of alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient; and

(2) the medication is ordered by a licensed physician; the order

(A) may be written or oral and may be received by telephone, facsimile machine, or in person;

(B) may include an initial dosage and may authorize additional, as needed, doses; if additional, as needed, doses are authorized, the order must specify the medication, the quantity of each authorized dose, the method of administering the medication, the maximum frequency of administration, the specific conditions under which the medication may be given, and the maximum amount of medication that may be administered to the patient in a 24-hour period;

(C) is valid for only 24 hours and may be renewed by a physician for a total of 72 hours, including the initial 24 hours, only after a personal assessment of the patient's status and a determination that there is still a crisis situation as described in (1) of this subsection; upon renewal of an order under this subparagraph, the facts supporting the renewal shall be written into the patient's medical record.

(b) When a patient is no longer in the crisis situation that lead to the use of psychotropic medication without consent under (a) of this section, an appropriate health care professional shall discuss the crisis with the patient, including precursors to the crisis, in order to increase the

patient's and the professional's understanding of the episode and to discuss prevention of future crises. The professional shall seek and consider the patient's recommendations for managing potential future crises.

(c) If crisis situations as described in (a)(1) of this section occur repeatedly, or if it appears that they may occur repeatedly, the evaluation facility or designated treatment facility may administer psychotropic medication during no more than three crisis periods without the patient's informed consent only with court approval under AS 47.30.839.

Sec. 47.30.839. COURT-ORDERED ADMINISTRATION OF MEDICATION. (a) An evaluation facility or designated treatment facility may use the procedures described in this section to obtain court approval of administration of psychotropic medication if

(1) there have been, or it appears that there will be, repeated crisis situations as described in AS 47.30.838(a)(1) and the facility wishes to use psychotropic medication in future crisis situations; or

(2) the facility wishes to use psychotropic medication in a noncrisis situation and has reason to believe the patient is incapable of giving informed consent.

(b) An evaluation facility or designated treatment facility may seek court approval for administration of psychotropic medication to a patient by filing a petition with the court, requesting a hearing on the capacity of the person to give informed consent.

(c) A patient who is the subject of a petition under (b) of this section is entitled to an attorney to represent the patient at the hearing. If the patient cannot afford an attorney, the court shall direct the Public Defender Agency to provide an attorney. The court may, upon request of the patient's attorney, direct the office of public advocacy to provide a guardian ad litem for the patient.

(d) Upon the filing of a petition under (b) of this section, the court shall direct the office of public advocacy to provide a visitor to assist the court in investigating the issue of whether the patient has the capacity to give or withhold informed consent to the administration of psychotropic medication. The visitor shall gather pertinent information and present it to the court in written or oral form at the hearing. The information must include documentation of the following:

(1) the patient's responses to a capacity assessment instrument administered at the request of the visitor;

(2) any expressed wishes of the patient regarding medication, including wishes that may have been expressed in a power of attorney, a living will, or oral statements of the patient, including conversations with relatives and friends that are significant persons in the patient's life as those conversations are remembered by the relatives and friends; oral statements of the patient should be accompanied by a description of the circumstances under which the patient made the statements, when possible.

(e) Within 72 hours after the filing of a petition under (b) of this section, the court shall hold a hearing to determine the patient's capacity to give or withhold informed consent as described in AS 47.30.837 and the patient's capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication if previously expressed wishes are documented under (d)(2) of this section. The court shall consider all evidence presented at the hearing, including evidence presented by the guardian ad litem, the petitioner, the visitor, and the patient. The patient's attorney may cross-examine any witness, including the guardian ad litem and the visitor.

(f) If the court determines that the patient is competent to provide informed consent, the court shall order the facility to honor the patient's decision about the use of psychotropic medication.

(g) If the court determines that the patient is not competent to provide informed consent and, by clear and convincing evidence, was not competent to provide informed consent at the time of previously expressed wishes documented under (d)(2) of this section, the court shall approve the facility's proposed use of psychotropic medication. The court's approval under this subsection applies to the patient's initial period of commitment if the decision is made during that time period. If the decision is made during a period for which the initial commitment has been extended, the court's approval under this subsection applies to the period for which commitment is extended.

(h) If an evaluation facility or designated treatment facility wishes to continue the use of psychotropic medication without the patient's consent during a period of commitment that occurs after the period in which the court's approval was obtained, the facility shall file a request to continue the medication when it files the petition to continue the patient's commitment. The court that determines whether commitment shall continue shall also determine whether the patient continues to lack the capacity to give or withhold informed consent by following the procedures

described in (b) - (e) of this section. The reports prepared for a previous hearing under (e) of this section are admissible in the hearing held for purposes of this subsection, except that they must be updated by the visitor and the guardian ad litem.

(i) If a patient for whom a court has approved medication under this section regains competency at any time during the period of the patient's commitment and gives informed consent to the continuation of medication, the evaluation facility or designated treatment facility shall document the patient's consent in the patient's file in writing.

* **Sec. 9.** AS 47.30.840(a) is amended to read:

(a) A person undergoing evaluation or treatment under AS 47.30.660 - 47.30.915

(1) may not be photographed without the person's consent and that of the person's guardian if a minor, except that the person may be photographed upon admission to a facility for identification and for administrative purposes of the facility; all photographs shall be confidential and may only be released by the facility to the patient or the patient's designee unless a court orders otherwise;

(2) at the time of admission to an evaluation or treatment facility, shall have reasonable precautions taken by the staff to inventory and safeguard the patient's personal property; a copy of the inventory signed by the staff member making it shall be given to the patient and made available to the patient's attorney and any other person authorized by the patient to inspect the document;

(3) shall have access to an individual storage space for the patient's private use while undergoing evaluation or treatment;

(4) shall be permitted to wear personal clothing, to keep and use personal possessions including toilet articles if they are not considered unsafe for the patient or other patients who might have access to them, and to keep and be allowed to spend a reasonable sum of the patient's own money for the patient's needs and comfort;

(5) shall be allowed to have visitors at reasonable times;

(6) shall have ready access to letter writing materials, including stamps, and have the right to send and receive unopened mail;

(7) shall have reasonable access to a telephone, both to make and receive confidential calls;

(8) has the right to be free of corporal punishment;

(9) has the right to **reasonable opportunity for indoor and outdoor** exercise and recreation;

(10) has the right, at any time, to have a telephone conversation with or be visited by an attorney;

(11) may not be retaliated against or subjected to any adverse change of conditions or treatment solely because of assertion of rights under this section.

* **Sec. 10.** AS 47.30 is amended by adding a new section to read:

Sec. 47.30.847. PATIENTS' GRIEVANCE PROCEDURES. (a) A patient has the right to bring grievances about the patient's treatment, care, or rights to an impartial body within an evaluation facility or designated treatment facility.

(b) An evaluation facility and a designated treatment facility shall have a formal grievance procedure for patient grievances brought under (a) of this section. The facility shall inform each patient of the existence and contents of the grievance procedure.

(c) An evaluation facility and a designated treatment facility shall have a designated staff member who is trained in mental health consumer advocacy who will serve as an advocate, upon a patient's request, to assist the patient in bringing grievances or pursuing other redress for complaints concerning care, treatment, and rights.

* **Sec. 11.** AS 47.30.850 is amended to read:

Sec. 47.30.850. **EXPUNGING OR SEALING** [EXPUNGEMENT OF] RECORDS. Following the discharge of a respondent from a treatment facility or the issuance of a court order denying a petition for commitment, the respondent may at any time move to have all court records pertaining to the proceedings expunged on condition that the respondent file a full release of all claims of whatever nature arising out of the proceedings and the statements and actions of persons and facilities in connection with the proceedings. **Upon the filing of the motion and full release, the court shall order the court records either expunged or sealed, whichever the court considers appropriate under the circumstances.**

* **Sec. 12.** AS 47.30.825(e) is repealed.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-2101

MEMORANDUM April 21, 1992

SUBJECT: Sectional Summary for CSSB 153 (HES)

TO: Senator Rick Halford
Attn: Jeff

FROM: Terri Lauterbach
Legislative Counsel

You have asked for a sectional analysis for CSSB 153 (HES). In the absence of specific questions, this memo provides a summary of the bill. If you have questions not addressed by this memo, please let me know.

Section 1. Requires the office of public advocacy to provide visitors (investigators) in proceedings described in sec. 8 of the CS, which relates to administration of psychotropic medication to patients in mental treatment facilities.

Sec. 2. Requires the Department of Health and Social Services to set programmatic standards for treatment facilities.

Sec. 3. In conjunction with other changes in the CS, clarifies the conditions under which a treatment facility or evaluation facility may administer medication or other treatment to an involuntarily committed patient.

Sec. 4. Corrects a reference.

Sec. 5. Describes who must be involved in treatment decisions if requested by the patient.

Sec. 6. Strengthens patients' rights to have their treatment preferences honored.

Sec. 7. In conjunction with other changes in the CS, clarifies the conditions under which a facility may administer medication or other treatment to a patient.

Sec. 8. Enacts four new sections of law relating to the administration of psychotropic medication.

Sec. 47.30.836. Relates to nonemergency medication. Requires informed consent or a court order. A court order can only be issued if the patient lacks the capacity to consent.

Sec. 47.30.837. Describes the elements of informed consent.

Sec. 47.30.838. Relates to emergency situations. Limits the use of medication in an emergency before court approval is needed.

Sec. 47.30.839. Describes court procedures to be used when a patient seems to lack the capacity to consent to medication. In contrast to sec. 47.30.836, (a)(2) of this section indicates that a competent patient's refusal of medication could be overturned by a court. Sec. 47.30.836 indicates that a court gets involved only if the patient lacks capacity for informed consent. **This apparent inconsistency should be clarified in the bill.**

Sec. 9. Clarifies a patient's right to exercise and recreation.

Sec. 10. Establishes a patient's right to the availability of grievance procedures.

Sec. 11. Clarifies the duty of a court to order expungement of patients' records under certain conditions.

Sec. 12. Repeals a subsection about medication that is made superfluous by other changes in the CS.

TML:pl:gc
92-275.plm

MEMORANDUM

State of Alaska
Department of Law

TO: Margaret Lowe, Director
Division of Mental Health and
Developmental Disabilities

DATE: April 1, 1992

FILE NO.:

TEL. NO.: 465-3603

SUBJECT: SB 153

FROM: Elizabeth L. Shaw
Assistant Attorney General
Human Services-Juneau

Here are my comments on the March 25, 1992 work draft of CS for SB 153( ). I am sending a copy of this memorandum to Senator Pourchot as well. I have not discussed these comments or my prior comments with the "working group" named by Senator Pourchot. I hope that the Department of Health and Social Services, Division of Mental Health and Developmental Disabilities has reviewed the proposed legislation and has made any comments you feel are appropriate.

Section 2: The addition of "an evaluation facility" raises questions. Does this provision apply to an evaluation facility holding a patient who has been committed for 30 days and is awaiting transfer to a designated treatment facility? Does it apply to a person in the process of being evaluated but not yet committed for 30 days?

Section 8: Proposed AS 47.30.839(e). The requirements that the court consider all evidence presented by the guardian ad litem, the visitor and the patient is both over broad and too limiting. The court will consider all admissible evidence. The court will also have to give equal consideration tc admissible evidence presented by the persons seeking the medication order. The petitioner should be able to cross examine the visitor et al. The current wording could be used to argue that the petitioner has no part in the process after filing the petition and that only the visitor and the patient will present evidence.

ELS/bap

cc: Honorable Pat Pourchot ✓

ALASKA STATE LEGISLATURE

SENATE FINANCE COMMITTEE,
CO-CHAIR

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Senator Pat Pourchot

MEMORANDUM

TO: Senator Arliss Sturgulewski, Chair
Health, Education and Social Services Committee.

FROM: Senator Pat Pourchot.

DATE: April 7, 1992

SUBJECT: SB 153, An Act relating to mental health.

I respectfully request a hearing at the earliest possible date for SB 153, An Act relating to mental health. The purpose of the legislation is to clearly establish procedures for the protection of patient's rights in evaluation and treatment facilities.

Recently, we have been working closely with mental health advocates, the Alaska Mental Health Board, the Department of Law and the Department of Health and Social Services to make revisions to the original bill introduced last session. The most important additions have been in the area of safeguards and oversight on psychotropic medications.

You may recall that the State of Alaska has been involved in litigation over the issue of forced medication at API. The changes to this legislation incorporate the recommendations of the Involuntary Medication Task Force and should settle the legal issues raised in Branson v. State of Alaska.

My staff is preparing back up materials for committee members and the public. Please contact Dan Austin at 465-3879 if you have any questions.

TUESDAY, April 14, 1992

Drugged patient wins jury ruling

API to pay $225,000 in 1987 case

By SHELA TOOMEY
Daily News reporter

A mentally ill woman, injured [illegible] against her will with a potent psychiatric drug that left her permanently disfigured, has won a $225,000 jury verdict against the Alaska Psychiatric Institute.

The verdict, returned Friday in Anchorage Superior Court, comes as the legislature considers new rules governing forced medication of involuntarily committed patients, particularly the use of powerful anti-psychotic drugs, which can have serious side-effects.

In general, Alaska doctors have a legal right to force-medicate patients who have been involuntarily committed.

Barbara Novelli, a 44-year-old Anchorage woman, suffers from bipolar disease, which is characterized by alternating cycles of depression and extreme mania. She has been treated for years with lithium carbonate, a mood "leveler" routinely used in such cases.

Lithium is not an antipsychotic drug and does not generally produce extreme side-effects.

But periodically, Novelli

Please see Page B-3, API

API: Woman wins lawsuit against state hospital

Continued from Page B-1

would stop taking her lithium and deteriorate into an acute psychotic state, according to court records. The 1987 incident that the jury examined occurred during her sixth admission to API. At the time, API staff knew that the drug they gave her, an antipsychotic called Navane, caused her to have muscle spasms, including facial twitching and involuntary limb and trunk movements.

At issue was whether API ever tried to persuade Novelli to voluntarily resume her lithium doses or, instead, caused permanent injury by forcibly injecting her with a drug that she had good reason to refuse.

API Director Dr. Norwood Knight-Richardson said Monday that he was not surprised by the verdict.

"A lot of the issues around this (forced medication) are very, very difficult to understand," Knight-Richardson said.

The choice facing his staff, he said, was to leave Novelli in a deteriorating psychotic state, which, according to the court record included writhing on the floor and inappropriate sexual touching of other patients, or to bring her out of the psychosis and risk what they believed would be temporary side effects.

API staff claimed Novelli was offered lithium first and refused it, but there was no note to that effect in any hospital record, Knight-Richardson agreed.

Laurel Peterson, Novelli's attorney, said no such effort was made.

The hospital did not ask Novelli's family or friends to help persuade her to resume taking her lithium, he said, and they ignored specific warnings from her private psychiatrist not to use an anti-psychotic.

API staff rushed to use an anti-psychotic, Peterson said, because it's the easiest way "to control a patient going through a psychotic episode." Such drugs "knock you on your butt .. make you mute and catatonic," he said.

Five years after being force-medicated, Novelli's twitching symptoms remain, and she needs six pain-killers a day, he said.

Jurors awarded her $25,000 for medical expenses and $200,000 for suffering and disfigurement. Novelli's illness makes her largely unemployable, so jurors did not compensate her for lost wages.

The state is currently the defendant in another lawsuit over forced medication, a class action brought by Advocacy Services of Alaska on behalf of all such patients. Jeff Jesse, an attorney for the agency, said the suit is on hold while a task force tries to deal with the issue through legislation. A hearing is scheduled today at 8:30 a.m.

Proposed reforms would require that the magistrate who normally holds commitment hearings at API decide if forcing a patient to take a drug is in the patient's best interest. The real purpose of the reforms is to force API to spend more time trying to get patients "to buy into their treatment," Jesse said. "We don't want to burden the system with unnecessary hoop jumping."

The judge will almost always uphold the institution, he predicted, but doctors who know they might have to explain their decision to an impartial outsider will make more considered judgments. "They act too quickly if there aren't rules making them more accountable for what happens."

SB 153, "An Act relating to mental health."

Senator Pat Pourchot

The legislation was introduced in the first session of the Seventeenth Legislature at the request of mental health services consumers and advocates. The purpose of this Act is to guarantee that patients will have appropriate representation in decisions pertaining to their treatment.

In 1987, a patient at the Alaska Psychiatric Institution brought suit against the state for not providing an opportunity to withhold informed consent to the administration of psychoactive medication. A state task force consisting of mental health professionals, advocates and attorneys met for a year and a half to respond to legal issues raised in Branson v. State of Alaska.

The draft CS presented to the Senate Health, Education and Social Services Committee is a revision of SB 153 incorporating the recommedations of the task force.

SECTIONAL SUMMARY

Sec. 1 The Department of Health and Social Services shall set standards under which each designated treatment facility will provide for the psychological, social, vocational, educational and recreational needs of the patient.

Sec. 2 Requires all evaluation and designated treatment facilities to administer treatment and medication only in a manner consistent with the statutes.

Sec. 3 A patient ordered to receive involuntary outpatient treatment may be required to undergo inpatient treatment when the provider of treatment determines that an appropriate facility will accept the patient and that the patient is mentally ill and likely to cause serious harm to themselves or others.

In that case, the following statutes relating to notice and hearing apply:

AS 47.30.795 Involuntary outpatient care for commited persons

> **(c) If during the commitment period the provider of outpatient care determines that the respondent can no longer be treated on an outpatient basis because the respondent is likely to cause harm to self or others or is gravely disabled, the provider shall give the respondent oral and written notice that the respondent must return to the treatment facility within 24 hours, with copies to the respondent's attorney and guardian, if any, the court, and the inpatient treatment facility. If the respondent fails to arrive at the treatment facility within 24 hours after receiving the notice, the professional person in charge may contact the appropriate peace officers who shall take the respondent into custody and transport the respondent to the facility. If it is determined by the professional person in charge to be necessary, a member of the treatment facility staff shall accompany the peace officers when they take the respondent into custody.**

Sec. 47.30.745. 90-day commitment hearing rights. (a) A respondent subject to a petition for 90-day commitment has, in addition to the rights specified elsewhere in this chapter, or otherwise applicable, the rights enumerated in this section. Written notice of these rights shall be served on the respondent and the respondent's attorney and guardian, if any, and may be served on an adult designated by the respondent at the time the petition for 90-day commitment is served. An attempt shall be made by oral explanation to ensure that the respondent understands the rights enumerated in the notice. If the respondent does not understand English, the explanation shall be given in a language the respondent understands.

(b) Unless the respondent is released or is admitted voluntarily following the filing of a petition and before the hearing, the respondent is entitled to a judicial hearing within five judicial days of the filing of the petition as set out in AS 47.30.740(b) to determine if the respondent is mentally ill and as a result is likely to cause harm to self or others, or if the respondent is gravely disabled. If the respondent is admitted voluntarily following the filing of the petition, the voluntary admission constitutes a waiver of any hearing rights under AS 47.30.740 or under AS 47.30.685. If at any time during the respondent's voluntary admission under this subsection, the respondent submits to the facility a written request to leave, the professional person in charge may file with the court a petition for a 180-day commitment of the respondent under AS 47.30.770. The 180-day commitment hearing shall be scheduled for a date not later than 90 days after the respondent's voluntary admission.

(c) The respondent is entitled to a jury trial upon request filed with the court if the request is made at least two judicial days before the hearing. If the respondent requests a jury trial, the hearing may be continued for no more than 10 calendar days. The jury shall consist of six persons.

(d) If a jury trial is not requested, the court may still continue the hearing at the respondent's request for no more than 10 calendar days.

(e) The respondent has a right to retain an independent licensed physician or other mental health professional to examine the respondent and to testify on the respondent's behalf. Upon request by an indigent respondent, the court shall appoint an independent licensed physician or other mental health professional to examine the respondent and testify on the respondent's behalf. The court shall consider an indigent respondent's request for a specific physician or mental health professional. A motion for the appointment may be filed in court at any reasonable time before the hearing and shall be acted upon promptly. Reasonable fees and expenses for expert examiners shall be determined by the rules of court.

(f) The proceeding shall in all respects be in accord with constitutional guarantees of due process and, except as otherwise specifically provided in AS 47.30.700 — 47.30.915, the rules of evidence and procedure in civil proceedings.

(g) Until the court issues a final decision, the respondent shall continue to be treated at the treatment facility unless the petition for 90-day commitment is withdrawn. If a decision has not been made within 20 days of filing of the petition, not including extensions of time due to jury trial or other requests by the respondent, the respondent shall be released. (§ 1 ch 84 SLA 1981; am § 14 ch 142 SLA 1984)

Sec. 4 Expands, at the request of the patient, those persons who may participate in formulating the patient's individualized treatment plan. In addition to the patient's counsel, guardian or designated adult, representatives may now include a mental health professional previously engaged in the patient's care outside of the evaluation or treatment facility and another representative of the patient's choice.

This section also stipulates that the mental health care professionals may not withhold any of the evaluation or treatment information from the patient or others if the the patient has signed a waiver of confidentiality.

Sec. 5 Amends one sentence in AS 47.30.825(d) to read: "When practicable, the patient shall be consulted as to the patient's preference among forms of adequate, medically advisable restraints including medication, and that preference shall be **honored** (CONSIDERED)."

Sec. 6 AS 47.30.825(c) is reenacted to provide that a patient capable of giving informed consent has the right to give or withhold that consent to medication and treatment when it is not a crisis or impending crisis situation as described in AS 47.30.838(a)(1):

Sec. 47.30.838. PSYCHOTROPIC MEDICATION IN EMERGENCIES. (a) Except as provided in (c) of this section, an evaluation facility or designated treatment facility may administer psychotropic medication to a patient without the patient's informed consent, regardless of whether the patient is capable of giving informed consent, only if

(1) there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person, as determined by a licensed physician or a registered nurse; the behavior or condition of the patient giving rise to a crisis under this paragraph and the staff's response to the behavior or condition must be documented in the patient's medical record; the documentation must include an explanation of alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient; and

Sec. 7 Adds four (AS 47.30.836-.839) new sections pertaining to PSYCHOTROPIC MEDICATIONS IN NON-EMERGENCIES, INFORMED CONSENT, PSYCHOTROPIC MEDICATIONS IN EMERGENCIES and COURT-ORDERED ADMINISTRATION OF MEDICATION.

AS 47.30.836 PSYCHOTROPIC MEDICATION IN NON-EMERGENCIES: Facilities may not administer psychotropic medication in a situation that does not involve a crisis without the patient's informed consent unless the court

determines that the patient lacks the capacity to give informed consent and the court approves use of the medication.

AS 47.30.837 INFORMED CONSENT: Defines informed consent for the purposes of the section and describes the facility's responsibility to provide necessary information for the patient's decision. "Competent," "voluntary," and "informed" are defined in detail.

AS 47.30.838 PSYCHOTROPIC MEDICATION IN EMERGENCIES: Describes "crisis" situation, who determines, and requires documentation and consideration of alternatives. Limits "crisis" period to 24 hours, requires that conditions, medication, dose and method of administration be specified. May extend to 3 "crisis" periods for a total of 72 hours. Requires post-"crisis" consultation and discussion with patient. Without court approval, psychotropic medications may not be administered without the patient's informed consent for more than 3 "crisis" periods.

AS 47,30.839 COURT-ORDERED ADMINISTRATION OF MEDICATION: Allows a facility to obtain court approval for the administration of psychotropic medication under specific circumstances and in a specified manner. The court must appoint a court visitor to help determine if the patient is capable of informed consent. Describes documentation the visitor must include in the report to the court. Requires hearing within 72 hours. The court determines the competency of the patient to give informed consent. If the court rules that the patient is incapable of informed consent, the court shall approve the proposed medication. This applies to the initial commitment period and is reconsidered if the facility files a petition to extend or continue commitment. If the patient becomes competent and gives informed consent, it shall be documented in writing in the patient's file.

Sec. 8 AS 47.30.840(a)(9) is amended to read: "A person undergoing evaluation or treatment under AS 47.30.660-47.30.915 has the right to **reasonable opportunity for indoor and outdoor** exercise and recreation;

Sec. 9 New section AS 47.30.847 PATIENT'S GRIEVANCE PROCEDURES: Establishes a patient's grievance procedure and requires each facility to designate a staff member trained in mental health consumer advocacy to serve as the patient's advocate, upon patient's request, in bringing grievances and pursuing redress.

Sec. 10 Adds a final sentence to AS 47.30.850 EXPUNGEMENT OF RECORDS: **Upon the filing of the motion and full release, the court shall order the court records expunged.**

Sec. 11 Repeals AS 47.30.825(e): "A patient has the right to be free from unnecessary or excessive medication. Psychotropic medication may be administered only on the order of a licensed physician when the physician determines that this medication is in the best interest of the patient or will prevent serious harm to others." Previous sections supercede.

SB 153, An Act relating to mental health

Senator Pat Pourchot

Persons subject to evaluation and treatment for mental illness have a right to withhold their informed consent to treatment and medication in non-crisis situations if they are determined to have the capacity to give such consent.

Before a facility can administer psychotropic medication in a non-crisis or non-emergency against the patient's will, The facility must request a court hearing on the capacity of the person to give informed consent. The court must: 1. rule that the patient lacks the capacity to give informed consent, and 2. approve the medication.

The administration of psychotropic medications in emergency situations, without the patient's consent, is limited to three 24 hour periods or a total of 72 hours in the absence of court approval.

Patient's rights to third party representation, and access to recreational, vocational, educational and social opportunities are clearly established. Patients have the right to bring grievances before an impartial body within the facility. Facilities will designate a staff member to act as the patient's advocate in the grievance procedure.

The legislation was drafted at the request of the State Task Force on Involuntary Medication, comprised of public and private attorneys, mental health advocates and representatives of state and private institutions. The bill specifically addresses the legal issues raised in Branson v. State of Alaska (3AN 87-9988 CIV.) and is intended to protect the state from expensive future litigation and to ensure the rights of persons undergoing treatment for mental illness.

I'd like to draw the committee's attention to the news article in the packet from the Anchorage Daily News, April 14--A woman awarded $225,000. for damages as a result of involuntary medication administered at API. This is exactly the type of liability and litigation this bill proposes to prevent.

HESS COMMITTEE AMENDMENTS

Senate HESS Committee adopted two amendments offered by the sponsor:

1. Amended AS 44.21.410(a) to make it clear that "visitor" as described in the bill and appointed by the court, is the court visitor provided by the Office of Public Advocacy in the Dept. of Administration.

2. Amended Sec. 8 (page 7, ln. 9) to clarify that all evidence including that offered by the facility shall be considered at the court hearing to determine capacity to give informed consent.

SENATE JUDICIARY AMENDMENTS

1. Per request of the task force, page 7, ln. 9 and ln.16 are amended to indicate that previously expressed wishes of the patient (found in living will, power of attny, etc.) are followed **unless** there is "clear and convincing evidence" that the patient was not competent at the time they expressed their wishes.

2. Per Leg. Legal Services memo of 4/21, page 6, ln. 13-15 amended by deleting (2). It is now clear that court procedures can not be used to override wishes of patient with capacity to give informed consent. Amendment, Leg. Legal Sectional and memo attached.

3. Two changes requested by Alaska Court System to further clarify that **guardians ad litem** and **attorneys** appointed by the court are provided by the Office of Public Advocacy and the Public Defender respectively.

4. Incorporated in the Judiciary Committee CS, changes to Sec. 11 amend AS 47.30.850 to allow expungement or **sealing** of court records pertaining to commitment proceedings. The court has the discretion of whether to fully expunge or seal. This confirms current court practice.

ALASKA MENTAL HEALTH BOARD

Walter J. Hickel, Governor
State of Alaska

431 N. Franklin Street
Juneau,Alaska 99801
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April 22, 1992

Senator Rick Halford, Chair
Senate Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Senator Halford,

I am unfortunately unable to attend the hearing on CSSB 153 scheduled for April 23, 1992.

The Alaska Mental Health Board has worked with Advocacy Services of Alaska, with consumers of mental health services and with the Division of Mental Health and Developmental Disabilities in revising SB 153.

The Alaska Mental Health Board met and discussed this legislation and has taken a formal position in support of the Committee Substitute for SB 153. The Board feels that the legislation is necessary to protect patient rights in evaluation and treatment institutions, to insure good treatment and the right to refuse treatment .

I appreciate the opportunity to convey to you and your committee the Alaska Mental Health Board's support for CS SB 153.

Sincerely,

Deborah Smith/mw

Deborah Smith,
Executive Director

SB 153, An Act relating to mental health.

TESTIMONY

Scheduled for May 4, 1992

JEFF JESSE, ADVOCACY ALASKA, will testify in favor of SB 153.

MARGARET LOWE, Director, H&SS Division of Mental Health and Developmental Disabilities. Dr. Lowe is out of town at the Russian and Alaskan Joint Conference on Native Health. Dr. Lowe testified strongly in favor of SB 153 in Senate HESS Committee on April 14, 1992. A representative of the Department will be available.

DEBRA SMITH, Executive Director, Alaska Mental Health Board. Ms. Smith will testify in favor of SB 153. Attached is a letter of support from Ms. Smith, dated April 22, 1992.

ELIZABETH SHAW, Department of Law. Ms. Shaw, a member of the Task Force on Involuntary Medication, is on annual leave. In her absence, the Department does not have an alternative witness. Attached is a memo from Ms. Shaw relating to SB 153, dated April 1.

The 4/1 memo lists 2 concerns: 1. The question of including "evaluation facilities." For the purposes of SB 153, which is to provide a legal procedure for the determination of a patient's capacity to give informed consent to treatment and medication, it is important to include evaluation facilities. Evaluation facilities can hold a patient for 30 days or longer. In emergency or crisis situations, the patient's informed consent or court approval is not required for a period totaling 72 hours. After that time the court must approve the administration of psychotropic medications.

2. Ms. Shaw's concerns in Sec. 8 were addressed in the HESS Committee Substitute by amending the section to make it clear that all evidence, including that offered by the facility or petitioner shall be considered (page 7., ln. 11).

On April 30, Ms. Shaw testified for the Department of Law on SB 153, then being heard in the Senate Judiciary Committee. She spoke to additional revisions made to the bill at the suggestion of the Committee Chairman. Section 11, Expungement of Records, has been revised to provide for the alternative of sealing the records, at the discretion of the court. Ms. Shaw testifed that the Department of Law sees no particular legal problems with the bill and takes no official position on the legislation. The Department provided a zero fiscal note on April 14 (in committee packet with cover memo).