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**FILE**

# SENATE FINANCE COMMITTEE REPORT

DATE: 2/15/93

FURTHER:

DATE TURNED INTO OFFICE: 2-26-93

The Finance Committee considered **SENATE BILL NO. 53**

"An Act annulling changes made by certain regulations adopted by the Department of Health and Social Services relating to funding of abortion services under the general relief medical program; and providing for an effective date."

and recommends:

replace with CS 5B 53 (FINANCE)  
 or  at previous CS   
 attach amendment(s)

same title  
 new title  
 technical title change (HB only)

adopts  Letter of Intent  
 further referral to the

- do pass
- do not pass
- no recommendation
- individual recommendations

**NEW FISCAL NOTES**

Department	Date	Zero	Fiscal

**PREVIOUS FISCAL NOTES**

Department	Date	Zero	Fiscal	
DHSS - AFDC	1-27-93		(297.2)	savings
DHSS - Med. Fac.	1-27-93		(454.0)	"
DHSS - Med. Assn	1-27-93		(644.4)	"
DHSS GRM	1-27-93		288.7	
DHSS - Claims	1-27-93		(74.2)	savings

Appropriation No Fiscal Note

**DO PASS:**

George T. Kelly  
Alvin Klein  
J. Keith  
J. [unclear]

**OTHER RECOMMENDATIONS:**

Tim Kelly - Do Not Pass  
Bob [unclear] - Do Not Pass

1. Do Pass  
 2. True [unclear] - Do Pass w/out amendment

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

No. 1  
Bill Version: SB 53  
(S) Publish Date: 1/29/93

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
Title: Annuling changes made by certain regu- BRU: Assistance Payments  
lations...relating to funding of abortion services... Component: AFDC  
Sponsor: Senate HESS Committee  
Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 00220

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	(297.3)	(321.5)	(347.7)	(376.1)	(406.7)	(439.9)
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>(297.3)</b>	<b>(321.5)</b>	<b>(347.7)</b>	<b>(376.1)</b>	<b>(406.7)</b>	<b>(439.9)</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**FUNDING:**

(Thousands of Dollars)

1002 Federal Receipts	(148.7)	(160.8)	(173.9)	(188.0)	(203.4)	(219.9)
1003 GF Match	(148.6)	(160.7)	(173.8)	(188.1)	(203.3)	(220.0)
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>(297.3)</b>	<b>(321.5)</b>	<b>(347.7)</b>	<b>(376.1)</b>	<b>(406.7)</b>	<b>(439.9)</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: 0.0

**ANALYSIS:** (Attach a separate page if necessary)

The fiscal analysis above is based upon the "savings" to the AFDC program resulting from abortions paid for by the General Relief Medical program. Additional information is attached.

This fiscal note is provided to show the estimated cost reduction associated with the proposed legislation. The FY 94 budget, however, does not include adjustments for these cost reductions. No assumption should be made that budget components may be decreased if the legislation passes. The FY 93 impact is shown as 0.0 because there was no consideration of the cost of the regulations addressed by the bill within the FY 93 budget.

Prepared by: Jan Hansen  
Division: Jan Hansen, Director, Division of Public Assistance

Phone: 465-3347  
Date: 1/27/93

Approved by Commissioner: Theodore A. Mala, MD, MPH  
Agency: Department of Health & Social Services

Date: 1/27/93

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## ANALYSIS (Cont.)

## Aid to Families with Dependent Children

This bill will annul regulations intended to reduce the number of pregnancies that would be aborted because of the availability of payment for that procedure under the General Relief Medical program (GRM). Many of the children who would otherwise be born would be eligible for certain state funded public assistance services. Consequently, this fiscal note relates to the number of children that would not be born and the resultant reduction in utilization of certain state funded services those children would likely have used.

It is assumed that 329 births would be avoided as a result of this bill. That number is based on 40% of the total number of abortions performed with medical assistance funding during FY 91. Of the 329, it is assumed that 55%, or 181 would have been eligible for public assistance programs.

Of the 181 eligible for public assistance, it is assumed that 60%, or 109 would receive Aid to Families with Dependent Children (AFDC) for an average of 6 months during a year; 65 of these children would be new additions to existing cases, at a cost of \$118 per month, and 44 would be first children that bring their parent into AFDC as new assistance cases with an average cost of \$952 per case per month. The FY 94 costs associated with these children are as follows:

65 children X \$118 per month X 6 months	= \$ 46,020
44 children X \$952 per month X 6 months	= \$251,328
Total AFDC costs:	\$297,348

## Revenue sources:

50% GF Match:	\$148,674
50% Federal Receipts:	\$148,674

For subsequent years it is assumed that the average annual increase in AFDC caseload will be 5% per year and that there will be an adjustment each year of 3% for increases in the cost of living.

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Bill Version: SB 53

(S) Publish Date: 1/29/93

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Annulling changes made by certain regu- BRU: Medical Assistance  
lations...relating to funding of abortion services... Component: Medicaid Facilities  
 Sponsor: Senate HESS Committee  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 00230

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	(454.0)	(526.7)	(610.9)	(708.7)	(822.1)	(953.6)
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>(454.0)</b>	<b>(526.7)</b>	<b>(610.9)</b>	<b>(708.7)</b>	<b>(822.1)</b>	<b>(953.6)</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**FUNDING:**

(Thousands of Dollars)

1002 Federal Receipts	(227.0)	(263.3)	(305.5)	(354.3)	(411.0)	(476.8)
1003 GF Match	(227.0)	(263.3)	(305.4)	(354.4)	(411.1)	(476.8)
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>(454.0)</b>	<b>(526.7)</b>	<b>(610.9)</b>	<b>(708.7)</b>	<b>(822.1)</b>	<b>(953.6)</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: 0.0

**ANALYSIS:** (Attach a separate page if necessary)

The fiscal analysis above is based upon the "savings" to the Medicaid Facilities component resulting from abortions paid for by the General Relief Medical program. Additional information is attached.

This fiscal note is provided to show the estimated cost reduction associated with the proposed legislation. The FY 94 budget, however, does not include adjustments for these cost reductions. No assumption should be made that any actual "savings" will result from passage of the legislation. The FY 93 impact is shown as 0.0 because there was no consideration of the cost of the regulations addressed by the bill within the FY 93 budget.

Prepared by: K. [Signature]  
 Division: Medical Assistance, DHSS  
 Approved by Commissioner: (R) Theodore A. Mala, MD, MPH  
 Agency: Department of Health & Social Services

Phone: 465-3355  
 Date: 1-26-93  
 Date: 1/27/93

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ANALYSIS (Cont.)  
Medical Assistance  
Medicaid Facility Component

This bill will annul regulations intended to reduce the number of pregnancies that would be aborted because of the availability of payment for that procedure under the General Relief Medical program (GRM). Many of the affected women would otherwise continue full-term pregnancies and would be eligible for certain state funded public assistance services as a result. Consequently, this fiscal note relates to the number of women who would not continue their pregnancies and the resultant reduction in utilization of certain state funded services those women would likely have used. It is assumed that the effect of this bill would be to reduce the number of pregnant women who would otherwise be eligible for medical assistance in proportion to the number of abortions performed.

It is assumed that 329 births would be avoided as a result of this bill. That number is based on 40% of the total number of abortions performed with medical assistance funding during FY 91. Of the 329, it is assumed that 55%, or 181 women would have been eligible for medical assistance programs for the pregnancy.

The cost of providing birthing and related services on an inpatient basis to pregnant women are estimated at \$2,508 per pregnancy. For the estimated 181 eligible births these costs total \$454,000 in FY 94.

For subsequent years utilization is anticipated to grow at 11% and inflation is calculated as 5%.

# FISCAL NOTE

No. 3

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Bill Version: SB 53

(S) Publish Date: 1/29/93

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Annuling changes made by certain regulations...relating to funding of abortion services... BRU: Medical Assistance  
 Sponsor: Senate HESS Committee Component: Medical Non-Facility  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 00229

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	(694.4)	(805.5)	(934.4)	(1,083.9)	(1,257.3)	(1,458.5)
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>(694.4)</b>	<b>(805.5)</b>	<b>(934.4)</b>	<b>(1,083.9)</b>	<b>(1,257.3)</b>	<b>(1,458.5)</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**FUNDING:**

(Thousands of Dollars)

1002 Federal Receipts	(347.2)	(402.8)	(467.2)	(541.9)	(628.7)	(729.2)
1003 GF Match	(347.2)	(402.7)	(467.2)	(542.0)	(628.6)	(729.3)
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>(694.4)</b>	<b>(805.5)</b>	<b>(934.4)</b>	<b>(1,083.9)</b>	<b>(1,257.3)</b>	<b>(1,458.5)</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: 0.0

**ANALYSIS:** (Attach a separate page if necessary)

The fiscal analysis above is based upon the "savings" to the Medicaid Non-Facilities component resulting from abortions paid for by the General Relief Medical program. Additional information is attached.

This fiscal note is provided to show the estimated cost reduction associated with the proposed legislation. The FY 94 budget, however, does not include adjustments for these cost reductions. No assumption should be made that any actual "savings" will result from passage of the legislation. The FY 93 impact is shown as 0.0 because there was no consideration of the cost of the regulations addressed by the bill within the FY 93 budget.

Prepared by: [Signature]  
 Division: Medical Assistance, DHSS

Phone: 465-3355  
 Date: 1-26-93

Approved by Commissioner: Theodore A. Mala, MD, MPH [Signature]  
 Agency: Department of Health & Social Services

Date: 1/27/93

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ANALYSIS (Cont.)  
Medical Assistance Administration, BRU  
Medicaid Non-Facility Component

This bill will annul regulations intended to reduce the number of pregnancies that would be aborted because of the availability of payment for that procedure under the General Relief Medical program (GRM). Many of the children who would otherwise be born would be eligible for certain state funded public assistance services. Consequently, this fiscal note relates to the number of children that would not be born and the resultant reduction in utilization of certain state funded services those children would likely have used.

It is assumed that 329 births would be avoided as a result of this bill. That number is based on 40% of the total number of abortions performed with medical assistance funding during FY 91. Of the 329, it is assumed that 55%, or 181 would have been eligible for public assistance programs after childbirth as would the pregnant mothers previous to childbirth.

The cost of providing prenatal, postpartum, and other medical service to pregnant women and newborns and their parent are estimated at \$3,836 per pregnancy. For the estimated 181 eligible births these costs total \$694,400 in FY 94.

For subsequent years there is an assumed 11% utilization increase and a 5% inflation cost.

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# FISCAL NOTE

C. 4

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Bill Version: SB 53

(S) Publish Date: 1/29/93

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Annulling changes made by certain regu- BRU: Medical Assistance  
lations...relating to funding of abortion services... Component: General Relief Medical  
 Sponsor: Senate HESS Committee  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 00232

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	288.7	334.9	388.5	450.6	522.7	606.3
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>288.7</b>	<b>334.9</b>	<b>388.5</b>	<b>450.6</b>	<b>522.7</b>	<b>606.3</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**FUNDING:**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	288.7	334.9	388.5	450.6	522.7	606.3
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>288.7</b>	<b>334.9</b>	<b>388.5</b>	<b>450.6</b>	<b>522.7</b>	<b>606.3</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: 0.0

**ANALYSIS:** (Attach a separate page if necessary)

The fiscal analysis above is based upon the "costs" to the General Relief Medical program resulting from abortions paid for through GRM. Additional information is attached.

This fiscal note is provided to show the estimated cost increase associated with the proposed legislation. The FY 94 budget, however, does not include adjustments for these cost increases. No assumption should be made that any actual "new costs" will result from passage of the legislation. The FY 93 impact is shown as 0.0 because there was no

Prepared by: *Kimberly B. Brown*  
 Division: Medical Assistance, DHSS

Phone: 465-3355  
 Date: 1-26-93

Approved by Commissioner: Theodore A. Mala, MD, MPH  
 Agency: Department of Health & Social Services

Date: 1/27/93

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ANALYSIS (Cont.)

Medical Assistance Administration, BRU  
General Relief Medical, Component

This bill will annul regulations intended to reduce the number of pregnancies that would be aborted because of the availability of payment for that procedure under the General Relief Medical program (GRM). Many of the children who would otherwise be born would be eligible for certain state funded public assistance services. Consequently, this fiscal note relates to the number of children that would not be born and the resultant reduction in utilization of certain state funded services those children would likely have used.

It is assumed that 329 births would be avoided as a result of this bill. That number is based on 40% of the total number of abortions performed with medical assistance funding during FY 91. Of the 329, it is assumed that 55%, or 181 would have been eligible for public assistance programs.

The associated costs with each abortion are estimated to be \$380. For the estimated 329 abortions the total cost is estimated to be \$288,700.

For subsequent years there is an assumed 11% utilization increase and a 5% inflation cost.

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# FISCAL NOTE

No. 5

Bill Version: SB 53

(S) Publish Date: 1/29/93

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Annulling changes made by certain regu- BRU: Medical Assistance Administration  
lations...relating to funding of abortion services... Component: Claims Processing  
 Sponsor: Senare HESS Committee  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 00243

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	(74.2)	(86.1)	(99.8)	(115.8)	(134.3)	(155.8)
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>(74.2)</b>	<b>(86.1)</b>	<b>(99.8)</b>	<b>(115.8)</b>	<b>(134.3)</b>	<b>(155.8)</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**FUNDING:**

(Thousands of Dollars)

1002 Federal Receipts	(55.6)	(64.6)	(74.8)	(86.8)	(100.7)	(116.8)
1003 GF Match	(18.6)	(21.5)	(25.0)	(29.0)	(33.6)	(39.0)
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>(74.2)</b>	<b>(86.1)</b>	<b>(99.8)</b>	<b>(115.8)</b>	<b>(134.3)</b>	<b>(155.8)</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: 0.0

**ANALYSIS:** (Attach a separate page if necessary)

The fiscal analysis above is based on avoidance of the projected costs for processing new claims for newborns and mothers who will utilize the Medicaid program should this bill pass. Additional information is attached.

This fiscal note is provided to show the estimated cost reductions associated with the proposed legislation. The FY 94 budget, however, does not include adjustments for these cost reductions. No assumption should be made that any actual "savings" will result from passage of the legislation. The FY 93 impact is shown as 0.0 because there was no consideration of the cost of the regulations addressed by the bill within the FY 93 budget.

Prepared by: K. J. ...  
 Division: Medical Assistance, DHSS

Phone: 465-3355  
 Date: 1-26-93

Approved by Commissioner: Theodore A. Mala, MD, MPH  
 Agency: Department of Health & Social Services

Date: 1/27/93

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ANALYSIS (Cont.)  
Medical Assistance Administration, BRU  
Claims Processing, Component

This bill will annul regulations intended to reduce the number of pregnancies that would be aborted because of the availability of payment for that procedure under the General Relief Medical program (GRM). Many of the children who would otherwise be born would be eligible for certain state funded public assistance services. Consequently, this fiscal note relates to the number of children that would not be born and the resultant reduction in utilization of certain state funded services those children would likely have used.

It is assumed that 329 births would be avoided as a result of this bill. That number is based on 40% of the total number of abortions performed with medical assistance funding during FY 91. Of the 329, it is assumed that 55%, or 181 would have been eligible for public assistance programs.

The processing costs associated with each claim are estimated to be \$6.23. For the 181 births it is assumed that there will be approximately 65 claims per birth for prenatal care, childbirth, and postpartum care.

For subsequent years there is an assumed 11% utilization increase and a 5% inflation cost.

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Back-up

## *Position Paper - SB 53*



**A.A.U.W.-  
Alaska**

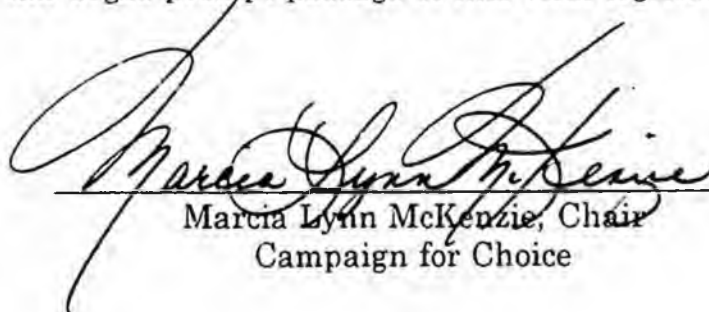
AAUW-Alaska, the statewide arm of the American Association of University Women, supports a woman's right to self-determination in her reproductive life. Therefore, we urge prompt passage of legislation to annul the recent amendments to regulations which determine the availability of General Relief Medical Assistance funding for abortion services.

Abortion services in Alaska are costly due to a lack of general availability and the required travel. Alaska's rate of teen pregnancies remains among the highest in the nation, and the reality of an unwanted child, especially for a young woman, is most often a lifetime of poverty and bitterness. 5% of Alaska's population--20,000 children--are currently being raised by single parents supported by public funding. The cost to the Alaskan public to support these children is far more than that of terminating unwanted pregnancies. There is also a lifetime psychological burden on the both the mother and unwanted child, which cannot be measured in monetary terms.

SB 53 will remove the unwarranted intrusion of government into the most private aspects of those Alaskan women who cannot afford medical care on their own. The amended regulations now in effect stipulate that abortion services will be covered by General Relief Medical Assistance in the cases of rape, incest or when the mother's life is endangered. This provision thus denies our Alaskan constitutional right to privacy for victims of rape and incest who are seeking appropriate medical care in order that they may attempt to resume a normal life and who may not wish to reveal the circumstances surrounding the pregnancy.

The regulations also impose a moral/religious code on a selected segment of our population. Every woman, regardless of her financial situation, has the right to control her own body. We respectfully suggest that SB 53 be amended to specify in statute that payment for both therapeutic and elective abortion procedures shall be covered for those eligible for General Relief Medical Assistance to the extent permitted under federal and state law, notwithstanding administrative regulations.

AAUW-Alaska urges prompt passage of this vital legislation.



---

Marcia Lynn McKenzie, Chair  
Campaign for Choice

SB 53 annuls the changes made by the new regulations but does not amend the Medicaid or General Relief Medical (GRM) statutes. DHSS would be free to adopt new regulations that might have the same effect on abortion funding as the changes that are annulled by the bill.

CSSB 53 annuls the changes made by the new regulations and amends the Medicaid and GRM statutes so that similar regulations could not be adopted in the future.

### **Changes to SB 53 in CS SB 53**

#### **Title Change:**

Adds "relating to payment for abortions under Medicaid and general relief medical assistance"

#### **Section 1:**

(a) Makes it clear that the old statutes allowed state funding for abortions.

(b) Is in SB 53

#### **Sec. 2.**

Changes the Medicaid statutes. Adds a new section to the Medicaid statutes saying the department shall pay for abortions to the extent permitted under federal law and if not permitted under federal law, a person eligible for assistance under this chapter shall be covered under the GRM statutes.

#### **Sec. 3.**

Changes the GRM statutes. Adds a new section to the GRM statutes saying the department shall pay abortion costs for a person who is otherwise eligible for assistance under Medicaid or GRM statutes, with equal priority to other services as ranked in the statutes.

#### **Sec. 4.**

Is in SB 53--annuls the changes to the GRM regulations.

SENATE COMMITTEE REPORT

*Jack*

DATE: 1/29/92

FURTHER: FINANCE

DATE TURNED INTO OFFICE: 2-25-93

JUDICIARY Committee considered SENATE BILL NO. 53

*annulling abortion funding regulation*

"An Act annulling changes made by certain regulations adopted by the Department of Health and Social Services relating to funding of abortion services under the general relief medical program; and providing for an effective date."

and report it back as follows

and recommends:

- replace with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- or  adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

- adopts \_\_\_\_\_ Letter of Intent
- further referral to the \_\_\_\_\_

- do pass
- do not pass
- no recommendation

*59 # FN*

individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal
Health + Social Serv.	1/26	<del>0</del>	
Health + Social Serv.	1/26	<del>0</del>	
HSS	1/26	<del>0</del>	
HSS	1/26	<del>0</del>	
HSS	1/27	<del>0</del>	

Appropriation No Fiscal Note

DO PASS:

- Same title w/ amendments
- Same & Donley w/ amendments
- George JACKO*

OTHER RECOMMENDATIONS:

*Richard Ford do not pass*

*Adrian L. Taylor*  
Chair: Signature and Recommendation

**SENATE COMMITTEE REPORT**  
FIRST COMMITTEE OF REFERRAL

*John*

DATE: 1/22/93

FURTHER: JUDICIARY  
FINANCE

Date of 5-Day Notice: 1-21-93  
(In accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 1/27/93

HES Committee considered SENATE BILL NO. 53

"An Act annulling changes made by certain regulations adopted by the Department of Health and Social Services relating to funding of abortion services/under the general relief medical program; and providing for an effective date."

and recommends:

and a majority of the committee recommends do pass

replace with \_\_\_\_\_ CS \_\_\_\_\_

- same title
- new title
- technical title change (HB only)

attaches amendment(s)

adopts \_\_\_\_\_ Letter of Intent

further referral to the \_\_\_\_\_

do pass

do not pass

no recommendation

individual recommendations

*5 FOL'S attached*

**FISCAL NOTE INFORMATION**

Department	Date	Zero	Fiscal
DHSS-AFDC	1/27		(297.3)
DHSS-Subsidized	1/27		(454.0)
DHSS-Ad-Non-Subsid	1/27		(694.4)
DHSS-ARM	1/27		288.7
DHSS-Claims Process	1/27		(74.2)

Department	Date	Zero	Fiscal

Appropriation No Fiscal Note

Governor's Bill with Previous Fiscal Notes (enter information above)

**DO PASS:**

**OTHER RECOMMENDATIONS:**

*J. Ellis* Ellis  
*J. Duncanson* Duncanson  
*J. E. Salo* Salo

*2) Brown A. Reunan* Do not pass  
*3) Berg Sharp* No Rec

*John Ellis* De Pass  
Chair: Signature and Recommendation

*Miller not here*

Position Paper  
SB NO. 53

SB 53 would annul changes in regulations intended to limit use of government funding to pay for abortions that are not therapeutic. Specifically, the bill annuls changes in the regulations that specify that General Relief Medical is only available to women seeking "therapeutic abortions" and related services, annuls references to "elective abortions" under 7 AAC 47.210 and 7 AAC 47.290 including subsections defining "elective abortions" and "therapeutic abortions".

The bill does not bar the administration from readopting the same regulations. Similarly, the bill's intent language is not binding. The statement of intent calls for abortions to be eligible for funding under regulations in force in December of 1992.

Position:

The Department of Health and Social Services opposes SB 53. The bill is a needless action which, if adopted, would place abortions in a special, single service category paid for without a determination as to medical necessity. The present regulations reflect extensive hearing testimony reviewed at all levels of government and with considerable public involvement. Existing regulations make Alaska's policy on abortion consistent with the majority of other states.

Recommended by: *Kimberly B. Busch*  
Kimberly B. Busch  
Director  
Div. of Medical Assistance

Date: \_\_\_\_\_

Approved by: *Theodore A. Mala*  
Theodore A. Mala, MD, MPH  
Commissioner

Date: *Jan 27, 1993*



# Alaska State Legislature

Please enter into the record my testimony to the SEN. FINANCE  
 committee name  
 committee on SENATE BILL 53, dated 2-25-93  
 bill/subject

PLEASE, DO NOT ALLOW STATE  
 MONIES TO FUND ABORTIONS,

THANK YOU.

Signed: Dale Bertelson  
 Testifier

Representing (Optional)  
1600 SALMO CIR KENAI AK 99611  
 Address  
283-9214  
 Phone No.

Position Paper  
SB NO. 53

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Recommended by: *Kimberly B. Busch*  
Kimberly B. Busch  
Director  
Div. of Medical Assistance

Date: \_\_\_\_\_

Approved by: *Theodore A. Mala*  
Theodore A. Mala, MD, MPH  
Commissioner

Date: *Jan 27, 1993*

# NEWS RELEASE

STATE OF ALASKA

OFFICE OF THE GOVERNOR  
Post Office Box 110001  
Juneau, Alaska 99811-0001

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Governor

JOSEF P. HOLBERT  
Director of Communications



JOHN MANLY  
Press Secretary

JOHN HENDRICKSON  
Deputy Press Secretary  
Anchorage Office: 561-4228

BRIAN HART  
Assistant Press Secretary

907-465-3500  
FAX: 907-586-8369

FOR RELEASE: January 20, 1993

No. 93-014

## A.G. GIVES ABORTION REGULATIONS LEGAL CLEARANCE

JUNEAU--Attorney General Charles Cole today gave legal approval to regulation changes that will cease state payment for elective, nontherapeutic abortions under Alaska's general relief medical assistance program. Women eligible for the general relief medical program may still obtain state payment for a therapeutic abortion after the regulations are effective.

The regulations were submitted to Lt. Governor Jack Coghill for filing. Coghill signed them this morning.

Cole believes that the regulations would withstand legal challenge under the constitutions of both the United States and the State of Alaska.

"The validity of the regulations under the federal constitution is clear," Cole said. "The United States Supreme Court has repeatedly held that states are not required by the federal constitution to expend public funds for abortions.

"We also believe that the Alaska Supreme Court should conclude that when balancing the conflicting rights and interests, the right of privacy does not require state payment for an elective, nontherapeutic abortion under the general relief medical program."

Cole said he is confident that the regulations would withstand a challenge based on state equal protection guarantees, especially when the state pays for no other elective medical procedures for otherwise healthy persons under the general relief medical program.

- more -

A.G. REVIEW

2-2-2-2

93-014

Jan. 20, 1993

The regulations also contain a technical provision conforming the state Medicaid program to federal Medicaid regulations as required in order to receive federal funding.

The regulations become effective 30 days after filing by the Office of the Lieutenant Governor.

####

# MEMORANDUM

## State of Alaska Department of Law

TO: Hon. Theodore Mala  
Commissioner  
Health and Social Services

DATE: January 20, 1993

FILE: 993-93-0040

TEL.NO: 465-3600

SUBJECT: CHSS regulations re  
abortion payments under  
Medicaid and General  
Relief Medical Programs  
(7 AAC 43; 47)

FROM: *CEC by [signature]*  
Charles E. Cole  
Attorney General

As required by AS 44.62.060, we have reviewed your department's adoption and amendment of regulations that preclude state payment for elective abortions under Alaska's general relief medical assistance program. The regulations also contain a technical provision conforming the state Medicaid program to federal Medicaid regulations as required in order to continue to receive federal participation. The regulations should withstand legal attack under the constitutions of both the United States and the State of Alaska. We approve the changes for filing by the lieutenant governor. A duplicate of this memorandum is being furnished the lieutenant governor, along with the regulations and related documents. In accordance with AS 44.62.125(b)(6), some corrections have been made in the regulations, as shown on the attached copy.

The validity of the regulations under the federal constitution is clear. The United States Supreme Court has repeatedly held that states are not required by the federal constitution to expend public funds for abortions as part of their state medical assistance programs. Harris v. McRae, 448 U.S. 297 (1980); Seal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977).

The result is less clear under the state constitution as to general relief medical amendments, primarily owing to the state constitution's explicit recognition of the right of privacy. However, the Alaska Supreme Court has held that the right of privacy is not absolute. Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 476 (Alaska 1977). In addressing a challenge to regulations based on that constitutional guarantee, the Alaska Supreme Court balances the conflicting rights and interests of the individual and the state. More specifically, the nature and extent of the privacy invasion is balanced against the importance of the state interest. Pratt v. Kirkpatrick, 718 P.2d 962, 969 (Alaska 1968). The more fundamental the privacy right, the greater the state's burden to sustain the state action in light of the right

involved. State v. Erickson, 574 P.2d 1 (Alaska 1978), 22 n.144; Ravin v. State, 537 P.2d 494, 515 (Boochever, J., concurring).

We believe that the Alaska Supreme Court should conclude that when balancing the conflicting rights and interests, the right of privacy does not require state payment for an elective abortion under the general relief medical program. Presently, the majority of states with an expressed state constitutional right of privacy do not pay for elective abortions. Even in those states where the right of privacy is an implied right, more restrictive statutes have been upheld against state constitutional challenges. See Fischer v. Dept. of Pub. Welfare, 502 A.2d 114 (Pa. 1985). While we recognize that the Supreme Court of California has reached a contrary result under its express state constitutional right of privacy, we do not find that court's reasoning as persuasive. See Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981). It does not seem reasonable or intended by Alaska's constitution for the right of privacy to require payment for purely elective abortions under the general relief medical program just because this state chooses to cover pregnancy services for poor women, as the California case appears to reason.

We believe that the regulations should also withstand a challenge based on state equal protection guarantees. The Alaska Supreme Court applies a sliding scale analysis to equal protection challenges using a three-step approach. Erickson, 574 P.2d at 12. First, the court determines the importance of the individual interest impaired by the challenged statute or regulation. See State v. Ensearch Alaska Construction, Inc., 787 P.2d 624, 631 (Alaska 1989). Second, the court examines the importance of the state interest. In this case, the court would review the purpose of the law. Depending on the importance of the individual interest, the state's interest must fall somewhere on a continuum from mere legitimacy to a compelling interest. Id. Finally, the court examines the nexus between the state interest and the state's means of furthering that interest. Id. With respect to the chosen means, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means, depending on the importance of the individual interest. Id.; see also Sonneman v. Knight, 790 P.2d 702, 704 (Alaska 1990).

At least the state court, when faced with a state equal protection analysis, has found that the state may have a legitimate state interest in refusing to fund elective, nontherapeutic abortions that are not performed to protect the life or health of

the mother. Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982).

We believe that our court should find, as well, that nonpayment for elective abortions under the general relief medical program does not violate equal protection guarantees, especially when the state pays for no other elective procedures for otherwise healthy persons under the general relief medical program. The importance of the state's express, legitimate interests, including an interest in uniform program administration, outweighs the individual's interest in payment for an elective abortion under the entirely state financed general relief medical program.

The regulations should also survive attack under state guarantees of substantive due process. The Alaska Supreme Court has held that a regulation violates substantive due process when it "has no reasonable relationship to a legitimate governmental purpose." Sonneman v. Kaitera, 790 P.2d at 706, quoting Keves v. Humana Hosp. Alaska, Inc., 750 P.2d 373, 351 (Alaska 1988). The new regulations will allow equal treatment of elective procedures and are necessary for consistent management of the general relief medical program. Since the regulations are reasonably related to a legitimate purpose, the regulations should meet substantive due process guarantees.

The new regulations are consistent with the enabling statutes and are reasonably necessary to administer the general relief medical program. Prior attorney general opinions do not restrict your department's ability to adopt these regulations. At the time those opinions were written, the body of state court decisions was limited. Since those opinions were issued, many of the leading state cases on these issues have been decided. In addition, it appears that those prior attorney general opinions were addressing potential payment limitations substantially different from and more restrictive than those adopted by your department. Therefore, the conclusions reached in those opinions do not affect the validity of these regulations.

The new regulations are also substantially different from the funding restrictions that were placed before the Alaska voters in a 1982 ballot initiative. Therefore, the initiative's defeat does not affect your department's authority to adopt these regulations.

---

The Supreme Court of New Jersey ultimately struck down the New Jersey statute because it prohibited state payment of all abortions "except where it is medically indicated to be necessary to preserve the woman's life" and did not provide abortion services where the health of the mother was at risk. Right to Choose, 450 A.2d at 927. The New Jersey court would have sanctioned the approach taken by your department's regulations.

**THE  
FOLLOWING  
DOCUMENTS  
ARE  
POOR  
ORIGINAL  
COPIES**

In the final analysis, the regulations that your department has adopted provide abortion funding where it is medically necessary to preserve the woman's life and health (including certain psychological conditions) as well as in cases of rape or incest and, therefore, should withstand legal challenge. While few legal conclusions can be made with absolute certainty, we believe that, if the regulations are challenged, the court should find them as constitutional and lawful.<sup>2</sup>

CEC:pml

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<sup>2</sup> We note that over 30 states do not pay for elective abortions under their state medical assistance programs. Alaska would be joining this majority trend when these regulations take effect.



<sup>d</sup> <sub>^</sub> <sup>p</sup> <sub>^</sub> <sup>b</sup> <sub>^</sub> ~~[D]ivision of [P]ublic [H]ealth, a local health department[S], a student health service[S], a private family planning clinic[S], or a private physician[S]. Except as limited under 7 AAC 43.140, drugs [DRUGS], supplies, devices, and medical procedures provided by a physician or under physician supervision will be covered under this chapter. (Eff. 8/18/79, Register 71; am / / , Register )~~

Authority: AS 47.05.010

AS 47.07.040

AS 47.07.050

7 AAC 43.835 is amended to read:

7 AAC 43.835. DEFINITION. In 7 AAC 43.825 <sup>-</sup> <sub>^</sub> 7 AAC 43.835, "family planning services" refers to those services and materials provided with the purpose of postponing, avoiding, or terminating pregnancy, including the dispensing of birth control drugs and devices for males and females, and the performance of vasectomies, sterilizations, and abortions for the purpose of avoiding or terminating pregnancy, except as limited under 7 AAC 43.140. (Eff. 8/18/79, Register 71; am / / , Register )

Authority: AS 47.05.010

AS 47.07.040

AS 47.07.050

7 AAC 47.170(b) is amended to read:

(b) An applicant under 18 years of age may apply on his or her own behalf if the applicant is living apart from parents or guardian and is managing his or her own personal financial affairs. A female [AN] applicant under 18 years of age living at home with her parents or guardian may apply without regard to her parents' or guardian's income if she is [A FEMALE] seeking a therapeutic abortion [PREGNANCY-RELATED SERVICE]. (Eff. 3/23/78, Register 65; am 8/1/86, Register 99; am 11/28/86, Register 100; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 09.65.100            AS 47.25.130  
          AS 47.05.010            AS 47.25.170  
          AS 47.25.120

7 AAC 47.200 is amended to read:

7 AAC 47.200. GENERAL RELIEF MEDICAL COVERAGE. The General Relief Medical program provides payment on behalf of needy persons who are eligible under the provisions of this chapter for any of the following services:

- (1) major medical care as defined in 7 AAC 47.290;
- (2) skilled nursing home care;
- (3) intermediate nursing home care;
- (4) physician services if
  - (A) related to major medical care provided in a hospital on an inpatient basis;
  - (B) provided in a hospital emergency room the same day on which the recipient is admitted for major medical care;
  - (C) provided to a recipient residing in a nursing home;
  - (D) provided in either an outpatient or an inpatient setting to a recipient with a diagnosis described in 7 AAC 47.271(b); [or]
  - (E) provided in determining eligibility for a therapeutic abortion; <sup>or</sup> and physician services [provided for a ~~therapeutic abortion~~ {PREGNANCY-RELATED SERVICES}];  
(F) provided for a therapeutic abortion;
- (5) outpatient laboratory and x-ray services provided in conjunction with a therapeutic abortion [PREGNANCY-RELATED SERVICES] or nursing home care;
- (6) medical transportation related to major medical care, nursing home care, or a therapeutic abortion [PREGNANCY-RELATED SERVICES];
- (7) outpatient surgical center services provided in conjunction with a therapeutic abortion [PREGNANCY-RELATED

SERVICES] or nursing home care;

(8) prescribed drugs and medical supplies for a recipient with a specific diagnosis as described in 7 AAC 47.271(b);

(9) repealed 7/1/87. (Eff. 3/23/78, Register 65; am 5/2/79, Register 70; am 5/17/82, Register 82; am 5/25/82, Register 82; am 9/23/84, Register 91; am 8/1/85, Register 95; am 8/1/86, Register 99; am 11/28/86, Register 100; am 7/1/87, Register 103; am / / , Register )

Authority:	AS 47.05.010	AS 47.25.170
	<u>AS 47.25.120</u>	
	<u>AS 47.25.130</u>	AS 47.25.195

7 AAC 47.210(7) is amended to read:

7 AAC 47.210. EXCLUSIONS FROM GENERAL RELIEF MEDICAL PROGRAM. Notwithstanding any other provisions contained in this chapter or 7 AAC 43, a payment may not be made under the General Relief Medical program for any expense

(7) for an elective procedure, including an elective abortion [OTHER THAN A PREGNANCY-RELATED SERVICE AS DEFINED IN 7 AAC 47.290];

Register

1993

HEALTH AND SOCIAL SERVICES

(Eff. 3/23/78, Register 65; am 5/2/79, Register 70; am 4/15/82, Register 82; am 5/25/82, Register 84; am 8/1/86, Register 99; am 11/28/86, Register 100; am 7/1/87, Register 103; am / / , Register )

Authority: AS 47.05.010 [AS 47.50.010]

AS 47.25.130

AS 47.25.130

AS 47.25.170

7 AAC 47.290(3) is amended to read:

(3) "elective procedure" means a procedure that is subject to the choice or decision of the patient or physician regarding medical services that are advantageous to the patient but not necessary to prevent the death or disability of the patient, and includes an elective abortion;

7 AAC 47.290(5) is repealed:

(5) repealed \_\_/\_\_/\_\_;

7 AAC 47.290 is amended by adding new paragraphs to read:

(7) "elective abortion" means a procedure, other than a therapeutic abortion, to terminate a pregnancy;

(8) "therapeutic abortion" means the termination of a pregnancy

(A) certified by a physician as medically necessary

(i) to prevent the death or disability of the woman, or (ii) to ameliorate a condition harmful to the woman's physical or psychological health; or

(B) that resulted from actions that would constitute a crime of sexual assault under AS 11.41.410 -- 11.41.425, a crime of sexual abuse of a minor under AS 11.41.434 -- 11.41.440, or the crime of incest under AS 11.41.450. (Eff. 3/1/85, Register 95; am 12/4/85, Register 96; am 8/1/86, Register 99; am 11/26/86, Register 100; am / / , Register )

Authority:

AS 47.05.010

AS 47.25.130

AS 47.25.120

AS 47.25.170

# Alaska State Legislature

Senator Steve Rieger, Chair  
Senator Bert Sharp, Vice Chair  
Senator Loren Leman  
Senator Mike Miller  
Senator Jim Duncan  
Senator Johnny Ellis  
Senator Judith Salo



State Capitol  
Room 516  
Juneau, Alaska 99801  
(907) 465-3762

## Senate Committee on Health, Education and Social Services

The following changes would occur with the passage of SB 53:

**7 AAC 47.170(b)** An applicant under 18 years of age may apply on his or her own behalf if the applicant is living apart from parents or guardian and is managing his or her own personal financial affairs. [A female] **An** applicant under 18 years of age living at home with her parents or guardian may apply without regard to her parents' or guardian's income if she is **a female** seeking a [therapeutic abortion] **pregnancy-related service**.

**7 AAC 47.200 GENERAL RELIEF MEDICAL COVERAGE.** The General Relief Medical program provides payment on behalf of needy persons who are eligible under the provisions of this chapter for any of the following services:

---

(4) physician services if

(A) related to major medical care provided in a hospital on an inpatient basis;

(B) provided in a hospital emergency room the same day on which the recipient is admitted for major medical care;

(C) provided to a recipient residing in a nursing home;

(D) provided in either an outpatient or an inpatient setting to a recipient with a diagnosis described in 7 AAC 47.271(b); **or**

(E) [provided in determining eligibility for a therapeutic abortion; or] **provided for pregnancy-related services;**

[(F) provided for a therapeutic abortion;]

(5) outpatient laboratory and x-ray services provided in conjunction with [a therapeutic abortion] **pregnancy-related services** or nursing home care;

(6) medical transportation related to major medical care, nursing home care, or [a therapeutic abortion] **pregnancy-related services;**

**SPONSOR STATEMENT**

(7) outpatient surgical center services provided in conjunction with [a therapeutic abortion] pregnancy-related services or nursing home care;

---  
**7 AAC 47.210. EXCLUSIONS FROM GENERAL RELIEF MEDICAL PROGRAM.**

Notwithstanding any other provisions contained in this chapter or 7 AAC 43, a payment may not be made under the General Relief Medical program for any expense

---  
(7) for an elective procedure [,including an elective abortion] other than a pregnancy-related service as defined in 7 AAC 47.290;

**7 AAC 47.290. DEFINITIONS.** In 7 AAC 47.010 -- 7 AAC 47.290

---  
(3) "elective procedure" means a procedure that is subject to the choice or decision of the patient or physician regarding medical services that are advantageous to the patient but not necessary to prevent the death or disability of the patient; [,and includes an elective abortion;]

(5) [is repealed:] "pregnancy-related service" or "pregnancy-related services" means a service or services reasonably necessary for an abortion;

7 AAC 47.290(7) and (8) are added definitions which would be annulled.

Released 7/24/92

**DIVISION OF LEGAL SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

**COPY**

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

**MEMORANDUM**

July 22, 1992

**SUBJECT:** DHSS Abortion Funding Regulations (Work Order No. 8-LS0049)

**TO:** Senator Arliss Sturgulewski

**FROM:** Terri Lauterbach  
Legislative Counsel

You have asked us to review the legality of the Medicaid and General Relief Medical (GRM) abortion funding regulations proposed by the Department of Health and Social Services on July 8, 1992.

There are a number of areas where the proposed regulations are not clear. However, in our opinion, a court probably would find that the proposed changes to the Medicaid regulations are legally valid and consistent with legislative intent because they reflect federal Medicaid requirements, a result intended by the legislature. But, a court is less likely to find the proposed changes to the GRM regulations to be consistent with legislative intent because the court may view them as arbitrary changes and because they probably result in unconstitutional administration of the state's medical assistance programs.

A finding of arbitrariness could be made because the proposed regulations change a longstanding DHSS interpretation of the GRM statutes without any intervening legislative directive to do so and without any demonstrable change in the medical needs of Alaskan women. A finding of unconstitutionality could be made because the proposed regulations infringe privacy rights and the right to equal protection of the laws by treating indigent pregnant women who choose to continue their pregnancies differently from indigent pregnant women who choose not to.

In order to answer your question, this memorandum will discuss the following topics:

- (1) Content of the proposed regulations.
- (2) Effect of the proposed regulations.
- (3) Consistency of the proposed regulations with legislative intent.
- (4) Constitutionality of the proposed regulations - privacy.
- (5) Constitutionality of the proposed regulations - equal protection.

**LEGAL SERVICES SUMMARY**

(2) where termination of a pregnancy is certified by a physician as medically necessary "to prevent the death or disability of the woman"; and (3) where termination of a pregnancy is certified by a physician as medically necessary "to ameliorate a condition harmful to the woman's physical or psychological health." See proposed 7 AAC 47.290(8).<sup>4/</sup>

"Elective abortion" is defined to mean a procedure, other than a therapeutic abortion, to terminate a pregnancy.<sup>5/</sup> See proposed 7 AAC 47.290(7).

(2) Effect of the proposed regulations.

The effect of the proposed changes in the Medicaid regulations would be to bring the state program into compliance with current federal abortion funding restrictions.<sup>6/</sup>

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<sup>3/</sup>(...continued)

In cases alleging incest or sexual abuse of a minor, will DHSS simply accept the pregnant woman's statement of the occurrence, or will DHSS somehow investigate or require corroboration of the age and identity of the alleged perpetrator?

7 AAC 47.290(8)(B) should be clarified on this point. In its present form, it invites arbitrary action and leaves open the possibility of extreme invasion of privacy.

<sup>4/</sup> 7 AAC 47.290(8) does not distinguish between previability and postviability abortions.

<sup>5/</sup> "Elective procedure" is also defined in the proposed regulations as

a procedure that is subject to the choice or decision of the patient or physician regarding medical services that are advantageous to the patient but **not necessary to prevent the death or disability of the patient, and includes an elective abortion.** (See 7 AAC 47.290(3).) (Underlined language is proposed as new language in the regulation. Bold face indicates emphasis added for the purposes of this memo.)

As with 7 AAC 140(a) and 7 AAC 47.290(8)(B), discussed in preceding footnotes, this proposed regulation needs clarifying.

It is obvious from the definition of "therapeutic abortion" and "elective abortion" that GRM funding will be provided for an abortion that is "not necessary to prevent the death or disability of the patient." Therefore, the definition of "elective procedure" should be rewritten to be consistent with the definition of "elective abortion." One way to achieve consistency would be to move the new language currently proposed to be appended at the end of 7 AAC 47.290(3) to the beginning of that definition instead so that it would read as follows:

"Elective procedure" means (A) an elective abortion or (B) a procedure that is subject to the choice of the patient, but not necessary to prevent the death or disability of the patient.

<sup>6/</sup> Medicaid is a joint federal-state program. The state cannot use Medicaid money for a purpose prohibited by federal law or regulation.

who, with their indigent mothers, will be eligible for public medical and financial benefits.<sup>10/</sup>

(3) Consistency of the proposed regulations with legislative intent.

Given the content and the assumed effect<sup>11/</sup> of the proposed regulations, one aspect of our analysis is whether DHSS's decision to distinguish among types of abortions, funding some and not others, is consistent with legislative intent.

According to Alaska case law, the intention of the legislature must be determined from the words used in the statute being implemented by the agency, construed with reference to the purpose of the program of which the statute is a part.<sup>12/</sup> If an administrative regulation is consistent with a statute's purposes and reasonably necessary to carry them out, the Alaska Supreme Court will not overturn it, provided it is reasonable and not arbitrary.<sup>13/</sup> Since a regulation is presumptively valid, the burden of proving the invalidity of a regulation is on the party challenging it.<sup>14/</sup> Furthermore, since these proposed regulations involve policy-making and the particularized expertise and experience of administrative personnel, a court will be inclined to defer to the administrative decision expressed in the regulation, and will inquire only whether it has a reasonable basis.<sup>15/</sup>

In light of these standards that the court has developed for its review of administrative regulations, it is clear that the proposed changes to the Medicaid regulations would be upheld if challenged. It is much less clear whether the proposed changes to the GRM regulations would be upheld.

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<sup>10/</sup> It is not clear exactly what percentage of abortions currently funded will be considered "elective" (and unfunded) under the new regulations. However, the fiscal note is substantial, indicating that DHSS believes a significant percentage of abortions will no longer qualify for public funding and will not be covered by nonpublic funds either. An "educated guess," based on the fiscal note, would be that 35 - 40 percent of abortions currently funded under Medicaid and GRM will no longer be funded under those programs nor by private means.

<sup>11/</sup> For a discussion of the "assumed effect" see the preceding three paragraphs of this memorandum.

<sup>12/</sup> State v. City of Anchorage, 513 P.2d 1104 (Alaska 1973).

<sup>13/</sup> Kalmakoff v. State, Commercial Fisheries Entry Com'n., 693 P.2d 844 (Alaska 1985).

<sup>14/</sup> State v. Alaska Pipeline Service Co., 723 P.2d 76 (Alaska 1986).

<sup>15/</sup> Hood v. State, 574 P.2d 811 (Alaska 1978). However, this deference may be more applicable to new regulations than to changes in old regulations.

**Sec. 47.25.130. AMOUNT AND TYPE OF ASSISTANCE.** (a) The amount of assistance for a needy person shall be determined by the department with regard to the resources and needs of the person and the conditions existing in each case. Where possible, assistance shall be sufficient to provide the applicant with reasonable subsistence according to standards of assistance established by the department. However, the amount of assistance for subsistence needs may not exceed \$120 a person a calendar month. (Emphasis added.)

**Sec. 47.25.300. DEFINITIONS.** In AS 47.25.120 - 47.25.300

(1) "assistance" means financial assistance to or on behalf of a needy person, including subsistence (food, shelter, fuel, clothing, and utilities) and transportation, medical needs (including, but not limited to, hospitalization, nursing, and convalescent care), burial, and other determined needs;

These statutes give broad discretion to DHSS. After a person is determined to be "eligible under regulations of the department," the amount of assistance must be "determined by the department" with regard to the "needs" of the person and "the conditions existing in each case." Assistance must be reasonable "according to standards of assistance established by the department." While assistance is supposed to include "medical needs," the legislature has not defined that term except to say that it includes a minimum of "hospitalization, nursing, and convalescent care." In essence, the proposed regulations are an exercise of DHSS's authority to interpret the term "medical needs."

As a general matter, we think that the GRM statutes give very wide discretion to DHSS to interpret the term "medical needs." "Need" is an ambiguous term according to the dictionary, meaning both "necessary or required" and "useful or desired."<sup>18/</sup> Considering the legislature's limitation of general relief financial assistance to \$120 a month, we doubt that a court would have considered it unreasonable for DHSS to limit general relief medical assistance to procedures necessary to prevent the death or disability of the patient when initially implementing the GRM program. This would have restricted the medical aspect of the program to a very basic level of assistance like the legislature restricted the financial aspect of the program.

However, the proposed regulations are not the initial regulations to implement the GRM program. Rather, the proposed regulations would change implementation of a program that is almost 40 years old<sup>19/</sup> and that has probably covered all abor-

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<sup>18/</sup> Webster's New World Dictionary.

<sup>19/</sup> The general relief program was enacted by ch. 110. SLA 1953.

providing for the coverage of abortion expenses the agency implicitly made a finding that there is a general need for that type of medical treatment, i.e., that abortions are "medical needs" under the terms of the statute. It could be argued that before the regulations could be amended to exclude elective abortions, there would have to be a finding that conditions within Alaska had changed to such an extent that there is no longer a need for that type of medical treatment. Without such a finding, the change [in the regulations] might be considered an arbitrary agency action. It should also be noted that the legislature has not taken action to change the original agency determination.

Such a finding would be most difficult to make in this case. Neither the Hyde Amendment nor the United States Supreme Court decision in Harris alter[s] "medical needs." Nor has any other event occurred in the state which suggests a change in medical needs. Absent changed circumstances, we believe a court might not permit the deletion of elective abortions from the list of medical needs covered by the General Relief Medical Assistance program.<sup>23/</sup>

We agree with Attorney General Condon's opinion that changes in the GRM regulations without a change in either the underlying statute or in the medical circumstances of indigent women in the state would likely be viewed as unlawful arbitrary action by the agency. Such arbitrariness would be inconsistent with legislative intent. In addition, the regulations would be inconsistent with legislative intent if they resulted in unconstitutional administration of the state's medical assistance programs. This memo will now discuss the constitutional issues raised by the proposed regulations.

(4) Constitutionality of the proposed regulations - privacy.

Given the content and the assumed effect<sup>24/</sup> of the proposed regulations, it is clear that the privacy clause of the state's constitution<sup>25/</sup> could be the basis of a challenge to the constitutionality of the regulations.<sup>26/</sup>

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<sup>23/</sup> Op. Att'y Gen., January 12, 1981, File No. J-66-413-81, at pages 5 - 6.

<sup>24/</sup> For a discussion of the "assumed effect" see footnotes 6 - 10 and accompanying text.

<sup>25/</sup> Article 1, sec. 22, Constitution of the State of Alaska.

<sup>26/</sup> It cannot reasonably be argued that a woman's decision about whether to continue a pregnancy fails to involve a privacy right.

is a legitimate governmental goal, the court could point out that it is not a compelling interest until viability. And, since a compelling interest is needed to override a fundamental privacy right, the court could strike down the regulations with respect to abortions performed before viability.

We believe it is more likely that the Alaska Supreme Court will adopt the challengers' view of reality and the applicable law rather than the defenders' view. We doubt that the court will find the regulations to be neutral, in reality, on the issue of reproductive choice when it is faced with the fiscal note and the acknowledged antipathy of the Administration toward abortion, as exemplified in the Governor's press release. More likely, the court will see a reality where an indigent woman has no real choice concerning her pregnancy if her eligibility for medical care is conditioned on the result desired by the state - childbirth.<sup>33/</sup> As to the applicable case law to form the legal underpinnings of its decision, the Alaska court need only point to the explicit (and stronger) privacy right granted under the state constitution and the lack of a compelling governmental interest to override that right before viability.

(5) Constitutionality of the proposed regulations - equal protection.

The proposed regulations also implicate the equal protection clause of the state constitution<sup>34/</sup> because the regulations treat some indigent pregnant women differently from other indigent pregnant women. Otherwise eligible pregnant women who choose childbirth will receive state assistance with medical procedures while some otherwise eligible pregnant women who choose abortion will not.

Whether the different treatment of pregnant women under the regulations is constitutional under the state's equal protection clause will be determined by the following test: the court will assess the legitimacy of the state purpose purportedly furthered by the different treatment and the extent to which the relationship between the asserted purpose and the different treatment is fair and substantial; then the court will determine the nature and the extent of the infringement of individual rights allegedly caused by the disparate treatment.<sup>35/</sup> Depending on the importance of

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<sup>33/</sup> The court will probably make clear that its decision would be the same if the state were seeking to encourage population control by funding abortions and not childbirth. The constitutional question before the court will not involve the weighing of the value of abortion as against childbirth, but instead will concern the protection of either procreative choice from discriminatory governmental treatment. See, Doe v. Director of the Michigan Dept. of Social Services, 468 N.W.2d 862 (Cl.App. Mich. 1991), appeal granted at 472 N.W.2d 638 (MI 1991).

<sup>34/</sup> Article I, sec. 1, Constitution of the State of Alaska.

<sup>35/</sup> Williams v. Zobel, 619 P.2d 448 (Alaska 1980), rev'd on other grounds, 457 U.S. 55 (1982).

the individual interest involved, a greater or lesser burden will be placed on the state to show this fair and substantial relationship.<sup>36/</sup>

In light of this equal protection test, challengers of the regulations would probably contend, first of all, that the individual interest being affected by the disparate treatment is a fundamental interest, the right of reproductive choice.<sup>37/</sup> Secondly, given the importance of the individual right affected, the challengers would probably contend that the state's purpose in treating the classes of pregnant women differently (based on whether they choose childbirth or abortion) needs to be not only legitimate but must approach being a compelling interest that is virtually unachievable by means that would have less impact on the affected right. The challengers would no doubt point out that the state's interest in potential life is not compelling until viability, and argue that the effect of the regulations on reproductive choice before viability cannot be justified.

Defenders of the regulations would probably counter that the regulations will result not in disparate treatment, but in equal treatment. Instead of funding some "elective" procedures (i.e., "elective" abortions) under the GRM program and not other elective procedures, as was the past practice, the state will be treating all "elective" procedures the same. Alternatively, the regulations' defenders may argue that equal protection analysis should not apply because women who need a "therapeutic abortion" are not similarly situated to those who merely want an "elective abortion." Therefore, the regulations can validly treat them differently. Defenders would probably also contend that the right to reproductive choice remains with the woman because she can seek an abortion without state funds. Therefore, according to potential defenders, since there is no fundamental right being affected, the government's purpose in treating the women differently need only be legitimate, not compelling. And that legitimate right is the right to protect potential life.

As with the arguments based on the state constitution's privacy clause, a state court's resolution of the differing arguments about equal protection will depend as much on the strength of the record before it and the court's view of reality as on case law. The court could uphold the GRM regulations as validly treating "elective abortions" differently from "therapeutic abortions." Alternatively, the court could strike down the GRM regulations because they work in conjunction with the Medicaid regulations to treat pregnant women differently based on whether they choose to exercise their

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<sup>36/</sup> Wilson v. Municipality of Anchorage, 669 P.2d 569 (Alaska 1983).

<sup>37/</sup> Since the fundamental nature of the interest rests, at least in part, on the state constitution's privacy clause, the privacy right arguments described in the previous section of this memo and the equal protection arguments described in this section stem from some of the same reasoning. However, the legal analysis is a bit different, and either or both could be used by an Alaska court to strike down the regulations, so this memo treats them separately.

Senator Arliss Sturgulewski  
July 22, 1992  
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In our opinion, the issue of the regulations' arbitrariness is a toss-up, but we think the Alaska Supreme Court is likely to be convinced that the regulations are not neutral with regard to privacy (in either their effect or purpose), do impermissibly treat the choice of childbearing differently from the choice of not bearing a child, and are not justified by a sufficient governmental interest with respect to previability abortions. Therefore, we think there is a substantial probability that the court will find the regulations to be unconstitutional with regard to previability abortions, but constitutional with regard to postviability abortions.<sup>39/</sup>

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<sup>39/</sup> We are not alone in our view that Alaska courts will probably take a different view than the federal courts have on the constitutionality of restricting public funding of abortions for indigent women. Opinions and memoranda from the Alaska Attorney General's Office under three different Administrations over the last 14 years have consistently indicated that the Alaska Supreme Court is likely to share the view of the dissenters in the federal cases that have upheld restrictions on public funding of abortions. See Op. Att'y Gen., March 31, 1978, Op. No. 15, pages 2 - 3; Op. Att'y Gen., Jan. 12, 1981, File No. J-66-413-81, pages 6 - 7; Op. Atty Gen., April 17, 1981, page 6; and Memorandum of Assistant Attorney General Elizabeth Shaw to Representative Mark Boyer, January 19, 1990, page 1.

Moreover, state courts in at least six other states have refused to follow federal precedent in this area and have struck down various abortion funding restrictions under their state constitutions, citing state privacy clauses, state due process clauses, or state equal protection clauses. See, Moe v. Secretary of Administration and Finance, 417 N.E.2d 387 (Mass. 1981); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (CA 1981); Right to Choose v. Byrne, 450 A.2d 925 (NJ 1982); Planned Parenthood Association v. Department of Human Resources of the State of Oregon, 663 P.2d 1247 (Or. App. 1983), affirmed at 687 P.2d 785 (OR 1984); Doe v. Maher, 515 A.2d 134 (Conn. Super. 1986); and Hope v. Perales, 571 N.Y.S.2d 972 (Sup. 1991).

For a more complete discussion of these A.G. opinions and other states' cases, refer to our memorandum to you dated July 7, 1992.



# Alaska State Legislature

Please enter into the record my testimony to the Senate  
Finance  
 committee name  
 committee on SB53, dated 2/24/93  
 bill/subject

If a gunman appeared, firing mercilessly, in your chambers, would you allow him to continue?

If a killer entered your home, dragged away your son or daughter and tore him, limb by limb, apart, would you say nothing?

Please... we cannot and must not be silent on this. SB53 is a tool being used **as** an excuse... and it should be considered an illegal weapon.

There are those who can and will do as they choose... but let's not assist them. Let's not fund their whims over the lives of Alaska's future generation. Please vote no to SB 53. Besides, I wasn't aware of lots of extra money to be had

Signed: Debra J. Davis (Debra J. Davis)  
 Testifier

Representing (Optional)  
P.O. Box 1285, Delta Jct.  
 Address  
895-4190  
 Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the Senate Finance committee name

committee on SB 53, dated 2/26/93  
bill/subject

Please vote NO on SB 53, The testimony against this bill on 2/23 (Judiciary) was overwhelmingly against it.

Listen to the people whom you are representing. Abortion is wrong. Abortion is murder. The convenience of one person does not justify the murder of another. If you vote yes, you will be no less guilty of murder than the abortionist.

Stop making taxpayers fund this billion dollar industry.

Signed: Daniel Ennis  
Testifier

Representing (Optional)

P.O. Box 1285 Delta Jet

Address

895-4190

Phone No.