

S B

3 4 8

SENATE COMMITTEE REPORT

DATE: 4/17/98

FURTHER:

DATE TURNED
IN TO OFFICE: 4-30-98

Judiciary Committee considered

SENATE BILL NO. 348

"An Act relating to rights of conscience protection for persons who directly or indirectly provide or perform health care services."

and recommends:

- be replaced with CS FOR SB 348 (JUD)
- adopt previous CS _____
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

- Senate Bill:
 - same title
 - new title
- House Bill:
 - same title
 - technical title
 - new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>Mike Miller</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
		<i>[Signature]</i>	<input checked="" type="checkbox"/>		
		<i>[Signature]</i>	<input checked="" type="checkbox"/>		
		<i>[Signature]</i>	<input checked="" type="checkbox"/>		
CHAIR:		CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
<i>LAW-CIVIL DIV.</i>	<i>4-17-98</i>	<input checked="" type="checkbox"/>	

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

FISCAL NOTE

**STATE OF ALASKA
1998 LEGISLATIVE SESSION**

BILL NO. CSSB 348 (STA)

Revision Date (Note if correction) _____	Dept. Affected <u>Law</u>
Title <u>An Act relating to rights of conscience protection</u>	<u>BRU</u> <u>Civil Division</u>
for persons w.o. ... provide or perform health care services.	Component <u>Governmental Affairs,</u>
Sponsor <u>Senate State Affairs Committee</u>	<u>Human Svcs, Special Litigation</u>
Requester <u>Senate State Affairs Committee</u>	Component Serial No. <u>2207/08/13</u>

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

CSSB 348 (STA) states as its purpose to establish as a statutory right the right for all persons and institutions to refuse to counsel, advise, pay for, provide, perform, assist, or participate directly or indirectly in providing or performing health services that involve the end of a life or abortion if it would violate the persons' or institution's religious or moral convictions and to prohibit all forms of discrimination, disqualification, coercion, disability, or liability of the persons by reason of their refusals.

Because the legislation will include public facilities in the definition of health care institutions, the state anticipates litigation would arise from passage of the bill. Litigation potentially will take the form of employee challenges to termination or disciplinary actions and claims against health care institutions for injuries alleged based on the failure to provide services. The fiscal impact of this litigation is very speculative and it is difficult to assign any rational cost estimate at this time. The department has not included any fiscal note costs; however, if numerous cases arise a result of the bill's enactment, we would seek to reassess our budget position at that time.

Prepared by Joan M. Kasson *Joan M. Kasson*
 Division Attorney General's Office
 Approved by Commissioner Bruce M. Botelho, Attorney General
 Agency Department of Law

Phone 465-5370
 Date 4/17/98
 Date 4/17/98

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information, call the Governor's Legislative Office

FISCAL NOTE

No. 1
 Bill Version: CS SB 348 (STN)
 (S) Publish Date: 4-17-98

STATE OF ALASKA
 1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____	Dept. Affected <u>BRU</u>	Law <u>Civil Division</u>
Title <u>An Act relating to rights of conscience protection</u>	Component <u>Governmental Affairs,</u>	
for persons who ... <u>provide or perform health care services.</u>	Component Serial No. <u>2207/08/13</u>	
Sponsor <u>Senate State Affairs Committee</u>		
Requester <u>Senate State Affairs Committee</u>		

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personnel Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

SB 348 states as its purpose to establish as a statutory right the right for all persons and institutions to refuse to counsel, advise, pay for, provide, perform, assist, or participate directly or indirectly in providing or performing health services that violate the persons' or institution's religious or moral convictions and to prohibit all forms of discrimination, disqualification, coercion, disability, or liability of the persons by reason of their refusals.

Because the legislation will include public facilities in the definition of health care institutions, the state anticipates litigation would arise from passage of the bill. Litigation potentially will take the form of employee challenges to termination or disciplinary actions and tort claims against health care institutions for injuries alleged based on the failure to provide services. The fiscal impact of this litigation is very speculative and it is difficult to assign any rational cost estimate at this time. The department has not included any fiscal note costs; however, if numerous cases arise a result of the bill's enactment, we would seek to reassess our budget position at that time.

Prepared by <u>Joan M. Kasson</u> <i>Joan M. Kasson</i>	Phone <u>465-5370</u>
Division <u>Attorney General's Office</u>	Date <u>4/3/98</u>
Approved by <u>Commissioner</u> <i>Bruce M. Botelho</i>	Date <u>4/3/98</u>
Agency <u>Department of Law</u>	

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information, call the Governor's Legislative Office

VERSION

H

0-LS1707H
Cook
4/28/98

CS FOR SENATE BILL NO. 348()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to certain rights of conscience protection for persons who
2 directly or indirectly provide or perform health services."

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

4 * Section 1. AS 18 is amended by adding a new chapter to read:

5 Chapter 17. Rights of Conscience Protection.

6 Sec. 18.17.010. Policy. It is the public policy of the state to respect and
7 protect the rights of conscience of all persons who are involved in providing health
8 services. It is the purpose of this chapter to protect as a basic civil right the right of
9 all persons to refuse to counsel, advise, pay for, provide, perform, assist, or participate
10 directly or indirectly in providing or performing certain health services that violate the
11 persons' religious or moral convictions and to prohibit all forms of discrimination,
12 disqualification, coercion, disability, or liability of the persons by reason of their
13 refusals.

14 Sec. 18.17.020. Civil rights of conscience. (a) Subject to AS 18.12.050, a

1 person has the right not to counsel, advise, pay for, provide, perform, assist, or
2 participate directly or indirectly in providing or performing a health service if the
3 service includes a procedure that violates the person's religious or moral convictions
4 and the procedure is intended to end the life of an individual or involves an elective
5 abortion.

6 (b) Subject to AS 18.12.050, a person may not be required to counsel, advise,
7 pay for, provide, perform, assist, or participate directly or indirectly in providing or
8 performing a health service if the service includes a procedure that violates the
9 person's religious or moral convictions and the procedure is intended to end the life
10 of an individual or involves an elective abortion.

11 **Sec. 18.17.030. Individual rights of conscience.** (a) Subject to
12 AS 18.12.050, an individual may not be required to counsel, advise, pay for, provide,
13 perform, assist, or participate directly or indirectly in providing or performing a health
14 service if the service includes a procedure that violates the individual's religious or
15 moral convictions and the procedure is intended to end the life of an individual or
16 involves an elective abortion.

17 (b) An individual is not civilly, criminally, or administratively liable to a
18 person for refusing, upon request or assignment and except as provided under
19 AS 18.12.050, to counsel, advise, pay for, provide, perform, assist, or participate
20 directly or indirectly in providing or performing a health service if the service includes
21 a procedure that violates the individual's religious or moral convictions and the
22 procedure is intended to end the life of an individual or involves an elective abortion,
23 and if

24 (1) before the request or assignment, the individual notified the person
25 making the request or assignment of the individual's refusal to provide or perform that
26 type of health service and, if requested to do so, the individual stated the refusal in
27 writing; or

28 (2) within 24 hours after being asked or assigned to provide or perform
29 the health service, the individual notified the person making the request or assignment
30 of the individual's refusal.

31 (c) A person may not discriminate against, penalize, discipline, or retaliate

1 against an individual in employment; privileges; benefits; remuneration; promotion;
2 termination of employment; eligibility for admission to, renewal or participation in, or
3 graduation from an educational, study, or training program; or a grant, contract, or
4 other program because of the individual's refusal or unwillingness to counsel, advise,
5 pay for, provide, perform, assist, or participate directly or indirectly in providing or
6 performing a health service if the service includes a procedure that violates the
7 individual's religious or moral convictions and the procedure is not required under
8 AS 18.12.050 and is intended to end the life of an individual or the procedure involves
9 an elective abortion.

10 **Sec. 18.17.040. Institutional rights of conscience.** (a) A health care
11 institution may not be required to counsel, advise, pay for, provide, perform, assist, or
12 participate in providing or performing a health service if the service includes a
13 procedure that violates the religious or moral convictions of a majority of the board
14 of directors or other administrative head of the institution or of a majority of its
15 owners or partners and the procedure is intended to end the life of an individual or
16 involves an elective abortion. A health care institution is not required to admit or keep
17 a patient for the purpose of providing to that patient a health service if the service
18 includes a procedure that violates the religious or moral convictions of a majority of
19 the board of directors or other administrative head of the institution or of a majority
20 of its owners or partners and the procedure is intended to end the life of an individual
21 or involves an elective abortion.

22 (b) A health care institution is not civilly, criminally, or administratively liable
23 to a person for refusing to participate directly or indirectly in providing or performing
24 a health service if the service includes a procedure that violates the religious or moral
25 convictions of a majority of the board of directors or other administrative head of the
26 institution or of a majority of its owners or partners and the procedure is intended to
27 end the life of an individual or involves an elective abortion, and if the institution

28 (1) posted notice of its refusal policy in plain sight in the admission
29 area of the institution before the health service is requested; or

30 (2) within 24 hours after receiving the request, notified the person
31 requesting the health service of its refusal and there has been no irreversible change

1 in the circumstances of the patient or person making the request during the time
2 between making the request and the institution's refusal that would make it unjust for
3 the institution to refuse the request.

4 (c) A person may not discriminate or retaliate against a health care institution
5 in a grant, contract, or program because of the institution's refusal to counsel, advise,
6 pay for, provide, perform, assist, or participate directly or indirectly in providing or
7 performing a health service if the service includes a procedure that violates the
8 religious or moral convictions of a majority of the board of directors or other
9 administrative head of the institution or of a majority of its owners or partners and the
10 procedure is intended to end the life of an individual or involves an elective abortion.

11 **Sec. 18.17.050. Exceptions.** (a) This chapter does not relieve a person from
12 liability to pay for a health service, for which the person freely and knowingly
13 contracted to pay, that was performed before a timely conscientious objection was
14 asserted by the person.

15 (b) A health care institution or a department or division of the institution that
16 is established for the sole or primary purpose of providing specific types of health
17 services may exclude an individual who objects to a procedure from employment in
18 a position for which the performance of the services is a necessary and substantial
19 responsibility if the individual's moral or conscience rights cannot be reasonably
20 accommodated by diligent effort. In this paragraph, "procedure" means a medical
21 procedure intended to end the life of an individual or involving an elective abortion.

22 **Sec. 18.17.060. Remedies.** (a) Notwithstanding other provisions of law, a
23 person injured by an act or omission that violates a provision of this chapter may
24 obtain an injunction and is entitled to receive three times the actual damages sustained
25 by the person or \$3,000 for each violation, whichever is greater.

26 (b) Remedies provided for under this section are in addition to other remedies
27 that may be available under federal or state law.

28 **Sec. 18.17.070. Federal requirements not affected.** Nothing in this chapter
29 changes, modifies, or otherwise affects requirements of 42 U.S.C. 1395cc, 42 U.S.C.
30 1395dd, or 42 U.S.C. 1396a (a)(57) or (58).

31 **Sec. 18.17.080. Definitions.** In this chapter,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

(1) "elective abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "elective abortion" does not include the termination of a pregnancy

(A) if done with the intent to save the life or preserve the health of the unborn child;

(B) if done with the intent to deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child;

(C) if done with the intent to remove a dead unborn child;

(D) if done with the intent to save the life of the pregnant woman whose life is endangered by a physical disorder, illness, or injury if no other medical procedure would save the life of the woman;

(E) that is a result of incest; or

(F) that is the result of ~~(a reported act of forcible rape);~~

(2) "health care institution" means a public or private corporation, partnership, association, organization, agency, or other entity that is involved in providing health care; in this paragraph, "entity" includes a hospital, clinic, physician's office, medical school, nursing school, other health care training institution, insurance organization, or financing organization;

(3) "health service" means a phase or type of service performed at a health care institution or by a health professional, paraprofessional, or pharmacist or by an employee of a health professional, paraprofessional, or pharmacist; in this paragraph, "service" includes testing, diagnosis, prognosis, research, counseling, therapy, treatment, family planning, referral, prescription, medication, surgery, the termination of or failure to perform a procedure, and any necessary support services.

* Sec. 2. Under AS 01.10.030, if any provision of AS 18.17.010 - 18.17.080 or the application of AS 18.17.010 - 18.17.080 to any person or circumstance is held invalid, the remainder of AS 18.17.010 - 18.17.080 or the application of those statutes to other persons or circumstances is not affected.

PROPOSED AMENDMENT

Attw: CYNW

1

2029

AMENDMENT

By Senate State Affairs Committee

TO: Work Draft for CSSB 348, version 0-LS1707\H

- 1 Page 5, line 15 after "result of"
- 2 Delete "a reported act of forcible rape;"
- 3 Insert "an act of sexual assault that has been reported to a peace officer;"

Alaska State Legislature

Senator Lyda Green, Chairman
Senator Jerry Ward, Vice Chairman
Senator Jerry Mackie
Senator Mike Miller
Senator Jim Duncan



State Capitol
Room 125
Juneau, Alaska 99801
(907) 465-4522

Senate State Affairs

Sponsor Statement

SB 348

“An Act relating to certain rights of conscience protection for persons who directly or indirectly provide or perform health care services.”

The Alaska Constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry. Increasingly health care providers are finding that pressure to participate in certain health care practices against their consciences is robbing them of these rewards.

In Alaska, we have been careful to articulate the rights of the individual, through both the Alaska Constitution and law. In 1970, when the state legalized abortion, the legislature added AS 18.16.010, which protected hospitals and persons from being required to provide or participate in this procedure. The protection was based on an individual's moral conscience, not religious belief.

In 1972, we added the right of privacy to the Constitution to shield citizens from intrusive government information collecting. A recent court ruling under the right to privacy has removed the protection that health care providers had relied upon under state law. The court ruled that the constitutional right to obtain a certain medical procedure outweighed the statutory right of conscience. The ruling forced a hospital to allow procedures against their policy and gave the individual right of conscientious refusal only to 'direct' participants.

Indirect participants including nurses, orderlies, radiologists, and lab technicians are now particularly vulnerable to pressure because they occupy subordinate positions in the hospital/medical hierarchy and they have no constitutional right to refuse.

Their jobs may now present them with grave moral problems that rob them of the happiness and rewards of their industry. Other social and medical developments such as assisted suicide and infanticide may soon become governmental policy as well.

House Bill 348, in concert with Senate Joint Resolution 35 restores the intent of the Constitution and State law to protect the rights of conscience of health care providers. Everyday people and community institutions should not be compelled by another person's exercise of the right to privacy to act in a manner that violates their convictions of conscience.

Alaska State Legislature

Senator Lyda Green, Chairman
Senator Jerry Ward, Vice Chairman
Senator Jerry Mackie
Senator Mike Miller
Senator Jim Duncan



State Capitol
Room 125
Juneau, Alaska 99801
(907) 465-4522

Senate State Affairs

Sectional Analysis SB 348

"An Act relating to certain rights of conscience protection for persons who directly or indirectly provide or perform health care services."

Section 1 adds a new chapter (Chapter 17) to Title 18 (Health, Safety and Housing):

Sec. 010 (Policy) makes the statement that it is the public policy of the state that the rights of conscience of all persons involved in providing health care are protected; describes what actions are covered; and prohibits all forms of retaliatory action for refusing to participate in an action that violates the person's conscience.

Sec. 020 (Civil rights of conscience) states that a person has a right to refuse to do certain procedures that are intended to end the life of an individual or involves an abortion; subject to AS 18.12.050.

Sec. 030 (Individual rights of conscience) states that an individual may not be required to participate in certain actions that violate the individual's religious or moral convictions and involves a procedure intended to end the life of an individual or involves abortion; that the individual may not be held civilly, criminally, or administratively liable for the individual's refusal, if certain conditions of notice are met and except as provided under AS 18.12.050; and provides a list of retaliatory actions that another person is prohibited from engaging in if an individual refuses to participate in certain actions that violate the individual's religious or moral convictions.

Sec. 040 (Institutional rights of conscience) is essentially the same as the preceding section, except that it applies to the rights of conscience of a majority of an institution's board of directors or an administrative head and the procedure is intended to end the life of an individual or involves abortion. Also allows an

institution not to admit or keep a patient who seeks a medical procedure that is against the religious or moral convictions of a majority of the board or the administrative head.

Sec. 050 (Exceptions) provides exceptions if the patient is in danger of imminent death, the success of the medical procedure requires the participation of the person asserting religious or moral objections, and the procedure would have to be performed before a replacement staff can be obtained. Does not relieve a person from paying for a medical procedure the person freely contracted for, and that was performed before the person asserted a conscientious objection. Also allows a health care institution to refuse to employ a person who objects to the type of health care services primarily or solely performed at the institution, if the person's religious or moral objections cannot be accommodated.

Sec. 060 (Remedies) provides that a person injured by a violation of this chapter may obtain an injunction and is entitled to damages of \$3,000 or three times actual damages for each violation, whichever is greater, in addition to other remedies available under federal or state law.

Sec. 070 (Federal requirements not affected) states that nothing in this chapter changes, modifies, or otherwise affects requirements of 42 U.S.C. 1395cc, 42 U.S.C. 1395dd, or 42 U.S.C. 1396a (a)(57) or (58).

Sec. 080 (Definitions) provides comprehensive definitions for the phrases, "abortion," "health care institution," and "health service."

Section 2 provides a severability clause so that if any part of the above chapter is held invalid, the remainder is not affected.

Sec. 18.16.090. Definitions.

In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

(A) save the life or preserve the health of the unborn child;

(B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or

(C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

(A) entered the armed services of the United States;

(B) become employed and self-subsisting;

(C) been emancipated under AS 09.55.590; or

(D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

Sec. 18.12.050. Transfer of patients.

(a) An attending physician who is unwilling to comply with the requirements of AS 18.12.030 or who is unwilling to comply with the declaration of a qualified patient under AS 18.12.040 shall withdraw as attending physician but the withdrawal is effective only when the services of another attending physician have been obtained.

(b) If the policies of a health care facility preclude compliance with the declaration of a qualified patient under this chapter or a do not resuscitate order issued by an attending physician, or the facility is unwilling to accept DNR identification as evidence of the existence of a declaration or do not resuscitate order, that facility shall take all reasonable steps to notify the patient or, if the patient is not able to make treatment decisions, the patient's guardian, of the facility's policy and shall take all reasonable steps to effect the transfer of the patient to the patient's home or to a facility where the provisions of this chapter can be carried out.

Sec. 18.12.030. Recording determination of terminal condition and contents of declaration. When an attending physician who has been provided a copy of a declaration determines that the declarant is in a terminal condition, the physician shall record that determination and the contents of the declaration in the declarant's medical record.

Sec. 18.12.035. Do not resuscitate orders and protocols.

(a) An attending physician may issue a do not resuscitate order for a patient of the physician. The physician shall document the grounds for the order in the patient's medical file.

(b) The Department of Health and Social Services shall, by regulation, adopt a do not resuscitate protocol that sets out a standardized method of procedure for the withholding of cardiopulmonary resuscitation by physicians and other health care providers. The regulations may not be adopted unless they have been approved by the State Medical Board.

(c) A health care provider other than a physician shall comply with the do not resuscitate protocol adopted under (b) of this section when presented with any of the following: DNR identification, an oral do not resuscitate order issued directly by a physician, or a written do not resuscitate order entered on a form prescribed by the Department of Health and Social Services.

(d) Notwithstanding (c) of this section, if a person has made an anatomical gift of an organ under AS 13.50 or this chapter, and is in a hospital when a do not resuscitate order is to be implemented for the person, the do not resuscitate order may not be implemented until the donated organ can be evaluated to determine if it is suitable for donation.

(e) A physician may not revoke a do not resuscitate order at the request of a person, and a person may not make a do not resuscitate order ineffective, unless the person making the request or proposing to make the order ineffective is the person for whom the order has been issued, or, if the person for whom the order has been issued is not capable of expressing an opinion on the subject,

(1) the parent or guardian of the person for whom the order has been issued if the person for whom the order has been issued is under 18 years of age; or

(2) a person to whom the person for whom the order has been issued has communicated the decision to make the order ineffective.

Sec. 18.12.037. Living will, organ donation, and DNR identification.

The Department of Health and Social Services shall develop standardized designs and symbols for DNR identification cards, forms, necklaces, and bracelets that signify, when carried or worn, that the possessor has executed a declaration under this chapter, that the declaration contains an anatomical gift, or that the possessor is a patient for whom a physician has issued a do not resuscitate order.

Sec. 18.12.040. Treatment of qualified patients.

(a) A qualified patient or a patient for whom a physician has issued a do not resuscitate order has the right to make decisions regarding use of cardiopulmonary resuscitation and other life-sustaining procedures as long as the patient is able to do so. If a qualified patient or patient for whom a physician has issued a do not resuscitate order is not able to make these decisions, the declaration or do not resuscitate protocol governs decisions regarding use of cardiopulmonary resuscitation and other life-sustaining procedures, unless the do not resuscitate order is revoked or made ineffective under AS 18.12.035(e).

(b) This chapter does not prohibit the application of any medical procedure or intervention, including the provision of nutrition and hydration, considered necessary to provide comfort care or alleviation of pain. The declaration may provide that the declarant does not want nutrition or hydration administered intravenously or by gastric tube.

(c) The declaration of a qualified patient known to the attending physician to be pregnant is given no effect as long as it is probable that the fetus could develop to the point of live birth with continued application of life-sustaining procedures.

42 § 1395cc

PUBLIC HEALTH AND WELFARE

(E) to provide (individually or with others) for education for staff and the community on issues concerning advance directives.

Subparagraph (C) shall not be construed as requiring the provision of care which conflicts with an advance directive.

(2) The written information described in paragraph (1)(A) shall be provided to an adult individual—

(A) in the case of a hospital, at the time of the individual's admission as an inpatient.

(B) in the case of a skilled nursing facility, at the time of the individual's admission as a resident.

(C) in the case of a home health agency, in advance of the individual coming under the care of the agency.

(D) in the case of a hospice program, at the time of initial receipt of hospice care by the individual from the program, and

(E) in the case of an eligible organization (as defined in section 1395mm(b) of this title) or an organization provided payments under section 1395(a)(1)(A) of this title or a Medicare + Choice organization, at the time of enrollment of the individual with the organization.

(3) In this subsection, the term "advance directive" means a written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated.

(4) For construction relating to this subsection, see section 14400 of this title (relating to clarification respecting assisted suicide, euthanasia, and mercy killing).

(g) Penalties for improper billing.

Except as permitted under subsection (a)(2) of this section, any person who knowingly and willfully presents, or causes to be presented, a bill or request for payment inconsistent with an arrangement under subsection (a)(1)(B) of this section or in violation of the requirement for such an arrangement, is subject to a civil money penalty of not to exceed \$2,000. The provisions of section 1320a-7n of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(h) Dissatisfaction with determination of Secretary; appeal by institutions or agencies; single notice and hearing

(1) Except as provided in paragraph (2), an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 406(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 406(g) of this title, except that, in so applying such sections and in applying section 406(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

(2) An institution or agency is not entitled to separate notice and opportunity for a hearing under both section 1320a-7 of this title and this section with respect to a determination or determinations based on the same underlying facts and issues.

(i) Intermediate sanctions for psychiatric hospitals

(1) If the Secretary determines that a psychiatric hospital which has an agreement in effect under this section no longer meets the requirements for a psychiatric hospital under this subchapter and further finds that the hospital's deficiencies—

(A) immediately jeopardize the health and safety of its patients, the Secretary shall terminate such agreement; or

(B) do not immediately jeopardize the health and safety of its patients, the Secretary may terminate such agreement, or provide that no payment will be made

PUBLIC HEALTH AND WELFARE

under this subchapter with respect to any individual the effective date of the finding, or both.

(2) If a psychiatric hospital, found to have deficiencies has not complied with the requirements of this subchapter

(A) within 8 months after the date the hospital is with such requirements, the Secretary shall provide under this subchapter with respect to any individual the end of such 8-month period, or

(B) within 0 months after the date the hospital is with such requirements, no payment may be made respect to any individual in the hospital until the Secretary in compliance with the requirements of this subchapter

(Aug. 14, 1983, c. 581, Title XVIII, § 1866, as added July 30, 1983 Stat. 827, and amended Jan. 2, 1988, Pub.L. 90-248, Title I, § 1 851, 852; Oct. 20, 1972, Pub.L. 92-603, Title II, §§ 227(a), 278(a)(17), (b)(18), 231(c), 88 Stat. 1324, 1400, 1409, 1427, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146,

Sec. Sec. Act §1867 EXAMINATION AND TREATMENT FOR EMERGENCY MEDICAL CONDITIONS AND WOMEN IN LABOR

42 U.S.C. §1395dd

Sec. 1867(a) MEDICAL SCREENING REQUIREMENT.—In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this title) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

(b) NECESSARY STABILIZING TREATMENT FOR EMERGENCY MEDICAL CONDITIONS AND LABOR.—

(1) IN GENERAL.—If any individual (whether or not eligible for benefits under this title) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c).

(2) REFUSAL TO CONSENT TO TREATMENT.—A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual's behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) REFUSAL TO CONSENT TO TRANSFER.—A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such transfer, but the individual (or a person acting on the individual's behalf) refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) RESTRICTING TRANSFERS UNTIL INDIVIDUAL STABILIZED.—

(1) RULE.—If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B)), the hospital may not transfer the individual unless—

(A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1861(r)(1)) has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1861(r)(1)), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the risks and benefits upon

which the certification is based.

(2) **APPROPRIATE TRANSFER.**—An appropriate transfer to a medical facility is a transfer—

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility—

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (1)(C)) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) **ENFORCEMENT.**—

(1) **CIVIL MONETARY PENALTIES.**—

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than \$50,000 (or not more than \$25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1128A (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1128A(a).

(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who—

(i) signs a certification under subsection (c)(1)(A) that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks; or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than \$50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this title and State health care programs. The provisions of section 1128A (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1128A(a).

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1866(a)(1)(1)) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not

be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) CIVIL ENFORCEMENT.—

(A) PERSONAL HARM.—Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) FINANCIAL LOSS TO OTHER MEDICAL FACILITY.—Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(C) LIMITATIONS ON ACTIONS.—No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) CONSULTATION WITH PEER REVIEW ORGANIZATIONS.—In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1), the Secretary shall request the appropriate utilization and quality control peer review organization (with a contract under part D of title XI) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting a sanction under paragraph (1) and shall provide a period of at least 60 days for such review.

(e) DEFINITIONS.—In this section:

(1) The term "emergency medical condition" means—

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions—

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means hospital that has entered into a provider agreement under section 1866.

(3)(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(4) The term "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities in the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a critical access hospital (as defined in section 1861(m)(1)).

(D) **PREEMPTION.**—The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) **NONDISCRIMINATION.**—A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) **NO DELAY IN EXAMINATION OR TREATMENT.**—A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) or further medical examination and treatment required under subsection (b) in order to inquire about the individual's method of payment or insurance status.

(I) **WHISTLEBLOWER PROTECTIONS.**—A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

1997 Amendments:

Sec. 4201(c)(1) of the "Balanced Budget Act of 1997," applicable to services furnished on or after October 1, 1997, replaced "rural primary care" with "critical access" in subsection (e)(5).

1990 Amendments:

Section 4008(b)(1) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, substituted "negligently" for "knowingly" in subparagraph (d)(2)(A).

Section 4008(b)(2) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, added "(or not more than \$25,000 in the case of a hospital with less than 100 beds)" after "\$50,000" in subparagraph (d)(2)(A).

Section 4008(b)(3)(A)(i) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, deleted paragraph (d)(1), which read as follows:

"(1) **AS REQUIREMENT OF MEDICARE PROVIDER AGREEMENT.**—If a hospital knowingly and willfully, or negligently, fails to meet the requirements of this section, such hospital is subject to—

"(A) termination of its provider agreement under this title in accordance with section 1866(b), or

"(B) at the option of the Secretary, suspension of such agreement for such period of time as the Secretary determines to be appropriate, upon reasonable notice to the hospital and to the public."

Section 4008(b)(3)(A)(ii) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, redesignated paragraphs (d)(2) and (d)(3) as paragraphs (d)(1) and (d)(2), respectively.

Section 4008(b)(3)(A)(iii) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, substituted "(d)(1)(C)" for "(d)(2)(C)" in subparagraph (c)(2)(C).

42 § 1896

Note 2

When state voluntarily elects to participate in Medicaid program, it must comply with requirements of the Act and applicable regulations. *Morgan v. Idaho Dept. of Health and Welfare*, Idaho 1991, 818 F.2d 845, 120 Idaho 9.

a. Eligibility

Omnibus Budget Reconciliation Act does not prevent otherwise eligible pregnant women who are not permanently residing in this country under color of law (PRUCOL) from receiving Medicaid sponsored prenatal care where their children, if born in the United States, will become United States citizens. *Lewis v. Grinker*, C.A.2 (N.Y.) 1992, 965 F.2d 1808.

PUBLIC HEALTH AND WELFARE

State and federal regulations arbitrarily and capriciously limited to \$1,500 the automobile exclusion in calculating family resources for purposes of eligibility for Aid to Families with Dependent Children (AFDC) and Medicaid in that reason initially offered for automobile asset limitation, in allowing recipients to retain possession of a car, could no longer provide rational basis for the regulation in light of inflation, even though Congress did not mandate review to adjust for inflation. *Hazard v. Sullivan*, M.D.Tenn.1988, 827 F.Supp. 1848, reversed 44 F.3d 890.

§ 1896a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

- (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;
- (2) provide for financial participation by the State equal to not less than 40 per centum of the non-Federal share of the expenditures under the plan with respect to which payments under section 1896b of this title are authorized by this subchapter; and, effective July 1, 1969, provide for financial participation by the State equal to all of such non-Federal share or provide for distribution of funds from Federal or State sources, for carrying out the State plan, on an equalization or other basis which will assure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan;
- (3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;
- (4) provide (A) such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods, and including provision for utilization of professional medical personnel in the administration and, where administered locally, supervision of administration of the plan) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency, and (C) that each State or local officer or employee who is responsible for the expenditure of substantial amounts of funds under the State plan, each individual who formerly was such an officer or employee, and each partner of such an officer or employee shall be prohibited from committing any act, in relation to any activity under the plan, the commission of which, in connection with any activity concerning the United States Government, by an officer or employee of the United States Government, an individual who was such an officer or employee, or a partner of such an officer or employee is prohibited by section 207 or 208 of Title 18;
- (5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan; or provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan, except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under subchapter I or XVI of this chapter (insofar as it relates to the aged) if the State is eligible to participate in the State plan program established under subchapter XVI of this chapter, or by the agency or agencies administering the supplemental security income program established under subchapter XVI or the State plan approved under part A of subchapter IV of

182

PUBLIC HEALTH AND WELFARE

this chapter if the State is not eligible to participate in the established under subchapter XVI of this chapter;

(6) provide that the State agency will make such reports containing such information, as the Secretary may from time to time require, to assure the correctness and verification of such reports;

(7) provide safeguards which restrict the use or disclosure concerning applicants and recipients to purposes directly connected with the plan;

(8) provide that all individuals wishing to make application under the plan shall have opportunity to do so, and that it be furnished with reasonable promptness to all eligible individuals

(9) provide—

(A) that the State health agency, or other appropriate (whichever is utilized by the Secretary for the purpose of section 1896aa(a) of this title), shall be responsible for maintaining health standards for private or public recipients of medical assistance under the plan may require;

(B) for the establishment or designation of a State agency which shall be responsible for establishing and maintaining those relating to health, for such institutions, and

(C) that any laboratory services paid for under such a laboratory which meets the applicable requirements of this title or paragraphs (13) and (14) of section 1896 of this title or paragraphs (13) and (14) of section 1896 of this title, in the case of a laboratory which is in a rural hospital (1896f(a)(2)(G) of this title;

(10) provide—

(A) for making medical assistance available, including services listed in paragraphs (1) through (6), (17) and (21) of this title, to—

(i) all individuals—

(I) who are receiving aid or assistance under approved under subchapter I, X, XIV, or XVI of this title or part E of subchapter IV of this chapter eligible under this subchapter by reason of age or 678(b) of this title, or considered by the State as authorized under section 682(e)(6) of this title;

(II) with respect to whom supplemental services are being paid under subchapter XVI of this title qualified severely impaired individuals (as defined of this title);

(III) who are qualified pregnant women or section 1896d(n) of this title;

(IV) who are described in subparagraph (A) (i)(1) of this section and whose family income does not exceed the minimum income level the State is required to establish under section 1896a(a)(1) of this title for such a family;

(V) who are qualified family members as defined in section 1896d(m)(1) of this title;

(VI) who are described in subparagraph (C) of this section and whose family income does not exceed the State is required to establish under subchapter XVI of this title for such a family, or

(VII) who are described in subparagraph (D) of this section and whose family income does not exceed the State is required to establish under subchapter XVI of this title for such a family;

(ii) at the option of the State, to any group or individual described in section 1896d(a) of this title (or, in the case of an individual, described in section 1896d(a)(1) of this title, to any individual

183

PUBLIC HEALTH AND WELFARE

PUBLIC HEALTH AND WELFARE

42 § 1396a

or which payment for inpatient hospital services, services in an ambulatory care facility for the mentally retarded, or inpatient mental hospital under the State plan—

or a physician (or, in the case of skilled nursing facility services or a care facility services, a physician, or a nurse practitioner or a specialist who is not an employee of the facility but is working in collaboration with a physician) certifies at the time of admission, or, if later, the attending physician certifies for medical assistance under the State plan (and a physician assistant under the supervision of a physician, or, in the case of skilled nursing facility services or intermediate care facility services, a nurse practitioner or clinical nurse specialist who is not an employee of the facility but is working in collaboration with a physician, where such services are furnished over a period of time, in such case as often as required under section 1396b(g)(6) of this title (or, in the case of services that are services provided in an intermediate care facility for the mentally retarded, every year), and accompanied by such supporting information appropriate to the case involved, as may be provided in regulations of the State, that such services are or were required to be given on an individual basis because the individual needs or needed such services, and that such services were furnished under a plan established and periodically reviewed and evaluated by a physician, or, in the case of skilled nursing facility services or intermediate care facility services, a physician, or a nurse practitioner or clinical nurse specialist who is not an employee of the facility but is working in collaboration with a physician;

or for mandatory assignment of rights of payment for medical support services owed to recipients, in accordance with section 1396k of this title;

or that information is requested and exchanged for purposes of income verification in accordance with a State system which meets the requirements of section 1320b-7 of this title;

or that the State, provide for making ambulatory prenatal care available to pregnant women during a presumptive eligibility period in accordance with section 1396r-1 of this title;

or that the State use a method of making cards evidencing eligibility for medical assistance to an eligible individual who does not reside in a permanent dwelling or has no fixed home or mailing address;

or that the State will provide information and access to certain records respecting sanctions taken against health care practitioners and provider-licensing authorities in accordance with section 1396r-2 of this title;

or that the State, in accordance with subsection (q) of this section, for a monthly cash allowance for certain institutionalized individuals and couples; and the requirements of section 1396r-5 of this title (relating to protection of spouses);

or that the State, in accordance with the requirements of section 1396r-8 of this title (relating to extension of medical assistance);

or that the State—

or for notifying in a timely manner all individuals in the State who are eligible to be eligible for medical assistance and who are pregnant women, preterm or postpartum women (as defined in section 1786 of this title), or children below the age of 5, of the availability of benefits furnished by the supplemental nutrition program under such section, and for referring any such individual to the State agency responsible for administering such program;

or that the State, in the case of a State plan that provides medical assistance for covered drugs (as defined in section 1396r-8(k) of this title), comply with the requirements of section 1396r-8 of this title;

or that the State, provide for receipt and initial processing of applications of individuals for medical assistance under subsection (n)(10)(A)(IV), (n)(10)(A)(V), (n)(10)(A)(VI), (n)(10)(A)(VII), or (n)(10)(A)(IX) of this section—

or that the State, at locations which are other than those used for the receipt and processing of applications for aid under part A of subchapter IV of this chapter

146

and which include facilities defined as disproportionate share hospitals under section 1396r-4(a)(1)(A) of this title and Federally-qualified health centers described in section 1396d(l)(2)(B) of this title, and

(B) using applications which are other than those used for applications for aid under such part;

(56) provide, in accordance with subsection (a) of this section, for adjusted payments for certain inpatient hospital services;

(57) provide that each hospital, nursing facility, provider of home health care or personal care services, hospice program, or health maintenance organization (as defined in section 1396b(m)(1)(A) of this title) receiving funds under the plan shall comply with the requirements of subsection (w) of this section;

(58) provide that the State, acting through a State agency, association, or other private nonprofit entity, develop a written description of the law of the State (whether statutory or as recognized by the courts of the State) concerning advance directives that would be distributed by providers or organizations under the requirements of subsection (w) of this section;

(59) maintain a list (updated not less often than monthly, and containing each physician's unique identifier provided under the system established under subsection (x) of this section) of all physicians who are certified to participate under the State plan;

(60) provide that the State agency shall provide assurances satisfactory to the Secretary that the State has in effect the laws relating to medical child support required under section 1396g of this title;

(61) provide that the State must demonstrate that it operates a medical fraud and abuse control unit described in section 1396b(q) of this title that effectively carries out the functions and requirements described in such section, as determined in accordance with standards established by the Secretary, unless the State demonstrates to the satisfaction of the Secretary that the effective operation of such a unit in the State would not be cost-effective because minimal fraud exists in connection with the provision of covered services to eligible individuals under the State plan, and that beneficiaries under the plan will be protected from abuse and neglect in connection with the provision of medical assistance under the plan without the existence of such a unit; and

(62) provide for a program for the distribution of pediatric vaccines to program-registered providers for the immunization of vaccine-eligible children in accordance with section 1396u of this title.

Notwithstanding paragraph (5), if on January 1, 1965, and on the date on which a State submits its plan for approval under this subchapter, the State agency which administered or supervised the administration of the plan of such State approved under subchapter X of this chapter (or subchapter XVI of this chapter, insofar as it relates to the blind) was different from the State agency which administered or supervised the administration of the State plan approved under subchapter I of this chapter (or subchapter XVI of this chapter, insofar as it relates to the aged), the State agency which administered or supervised the administration of such plan approved under subchapter X of this chapter (or subchapter XVI of this chapter, insofar as it relates to the blind) may be designated to administer or supervise the administration of the portion of the State plan for medical assistance which relates to blind individuals and a different State agency may be established or designated to administer or supervise the administration of the rest of the State plan for medical assistance; and in such case the part of the plan which each such agency administers, or the administration of which each such agency supervises, shall be regarded as a separate plan for purposes of this subchapter (except for purposes of paragraph (10)). The provisions of paragraphs (9)(A), (81), and (83) of section 1396i(1)(4) of this title shall not apply to a Christian Science sanatorium operated, or listed and certified, by The Commission for Accreditation of Christian Science Nursing Organizations/Facilities, Inc.¹

For purposes of paragraph (10) any individual who, for the month of August 1972, was eligible for or receiving aid or assistance under a State plan approved under subchapter I, X, XIV, or XVI of this chapter, or part A of subchapter IV of this chapter and who for such month was entitled to monthly insurance benefits under subchapter II of this chapter shall for purposes of this subchapter only be deemed to be eligible for financial aid or assistance for any month thereafter if such individual would have been eligible for financial aid or assistance for such month had the increase in monthly insurance benefits

147

available to individuals whom it finds to be blind or disabled and who are determined otherwise eligible for such assistance during the period of time prior to which a final determination of disability or blindness is made by the Social Security Administration with respect to such an individual. In making such determinations, the State must use the definitions of disability and blindness found in section 1882c(a) of this title.

w) Maintenance of written policies and procedures respecting advance directives

(1) For purposes of subsection (a)(57) of this section and sections 1896b(m)(1)(A) and 190r(e)(3)(E) of this title, the requirement of this subsection is that a provider or organization (as the case may be) maintain written policies and procedures with respect to all adult individuals receiving medical care by or through the provider or organization—

(A) to provide written information to each such individual concerning—

(i) an individual's rights under State law (whether statutory or as recognized by the courts of the State) to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives (as defined in paragraph (3)), and

(ii) the provider's or organization's written policies respecting the implementation of such rights;

(B) to document in the individual's medical record whether or not the individual has executed an advance directive;

(C) not to condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive;

(D) to ensure compliance with requirements of State law (whether statutory or as recognized by the courts of the State) respecting advance directives; and

(E) to provide (individually or with others) for education for staff and the community on issues concerning advance directives.

Subparagraph (C) shall not be construed as requiring the provision of care which conflicts with an advance directive.

(2) The written information described in paragraph (1)(A) shall be provided to an adult individual—

(A) in the case of a hospital, at the time of the individual's admission as an inpatient;

(B) in the case of a nursing facility, at the time of the individual's admission as a resident;

(C) in the case of a provider of home health care or personal care services, in advance of the individual coming under the care of the provider;

(D) in the case of a hospice program, at the time of initial receipt of hospice care by the individual from the program; and

(E) in the case of a health maintenance organization, at the time of enrollment of the individual with the organization.

(3) Nothing in this section shall be construed to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which as a matter of conscience cannot implement an advance directive.

(4) In this subsection, the term "advance directive" means a written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated.

x) Physician identifier system; establishment

The Secretary shall establish a system, for implementation by not later than July 1, 1991, which provides for a unique identifier for each physician who furnishes services for which payment may be made under a State plan approved under this subchapter.

y) Intermediate sanctions for psychiatric hospitals

(1) In addition to any other authority under State law, where a State determines that a psychiatric hospital which is certified for participation under its plan no longer meets

the requirements for a psychiatric hospital (referred to in section 1899 and further finds that the hospital's deficiencies—

(A) immediately jeopardizes the health and safety of its patient terminate the hospital's participation under the State plan; or

(B) do not immediately jeopardize the health and safety of its patient may terminate the hospital's participation under the State plan, no payment will be made under the State plan with respect to any inpatient in such hospital after the effective date of the finding, or both.

(2) Except as provided in paragraph (8), if a psychiatric hospital paragraph (1)(B) has not complied with the requirements for a psychiatric hospital under this subchapter—

(A) within 3 months after the date the hospital is found to be in non-compliance with such requirements, the State shall provide that no payment will be made under the State plan with respect to any individual admitted to such hospital during such 3-month period; or

(B) within 6 months after the date the hospital is found to be in non-compliance with such requirements, no Federal financial participation shall be made under section 1899b(a) of this title with respect to further services provided until the State finds that the hospital is in compliance with the requirements of this subchapter.

(3) The Secretary may continue payments, over a period of not longer than 12 months from the date the hospital is found to be out of compliance with such requirements—

(A) if the State finds that it is more appropriate to take alternative measures to ensure compliance of the hospital with the requirements than to terminate the hospital;

(B) if the State has submitted a plan and timetable for correction to the Secretary for approval and the Secretary approves the plan of correction;

(C) if the State agrees to repay to the Federal Government the amount of such payments under this paragraph if the corrective action is not taken in accordance with the approved plan and timetable.

z) Optional coverage of TB-related services

(1) Individuals described in this paragraph are individuals not described in section 1899(a)(10)(A)(i) of this section—

(A) who are infected with tuberculosis;

(B) whose income (as determined under the State plan under this section with respect to disabled individuals) does not exceed the maximum income a disabled individual described in subsection (a)(10)(A)(i) of this section may have and obtain medical assistance under the plan; and

(C) whose resources (as determined under the State plan under this section with respect to disabled individuals) do not exceed the maximum resources a disabled individual described in subsection (a)(10)(A)(i) of this section may have and obtain medical assistance under the plan.

(2) For purposes of subsection (a)(10) of this section, the term "TB-related services" means each of the following services relating to treatment of infection—

(A) Proscribed drugs.

(B) Physicians' services and services described in section 1899d.

(C) Laboratory and X-ray services (including services to confirm infection).

(D) Clinic services and Federally-qualified health center services.

(E) Case management services (as defined in section 1899n(g)(2)).

(F) Services (other than room and board) designed to encourage adherence to regimens of prescribed drugs by out-patients, including services to monitor the intake of prescribed drugs.

(Aug. 14, 1985, c. 531, Title XIX, § 1902, as added July 30, 1965, Pub.L. 89-97, § 2 Stat. 344, and amended Jan. 2, 1968, Pub.L. 90-248, Title II, §§ 210(a)(6), 223(a), 228(a), 231, 234(a), 235(a), 236(a), 237, 238, 241(f)(1) to (4), Title III, § 302(c) to 300, 308, 311, 317, 319; Aug. 9, 1969, Pub.L. 91-56, § 2(c), (d), 83 Stat. 99; Dec. 22, 1972, § 4(b), 86 Stat. 603; Oct. 30, 1972, Pub.L. 92-503, Title II, § 203(a), 86 Stat. 2282)

A rebuttal to the 'myths' of Valley Hospital theory

1. The hospital is ordered to allow abortions:

"It is therefore ordered, adjudged, and decreed that Valley Hospital, its Operating board, medical staff members, officers, agents, servants, and employees, any of their successors, and all persons acting in concert, participation, or cooperation with them, or at their direction, or under their control, are hereby permanently restrained and enjoined as follows:

1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure which is not based on accepted, established medical practices or requirements with respect to such procedures." (page 2 of Superior Court Final Judgment).

2. Personnel are required to participate in the procedure. Only the direct participants may refuse on the basis of conscience. No more protection, as we once had, for the nurses, orderlies, radiologists, lab technicians, and others involved:

"Nothing in the permanent injunction granted as part of this Final Judgment shall require any member of the medical staff of Valley Hospital, to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so." (Final Judgment).

(Note: nothing in this bill exempts those who must participate indirectly and who object by reason of conscience or belief. There is no definition of 'direct' participant

Nurses, radiologists, lab technicians and other health care workers are particularly vulnerable to pressure because they occupy subordinate positions in the hospital/medical hierarchy.

3. There is not much chance on a religious basis exemption for other hospitals. The Supreme Court says that nothing in the decision

"should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state

interest. Recognizing such a policy as 'compelling' could violate the Establishment Clause of the First Amendment to the United States Constitution." (Valley Hospital, Supreme Court decision page 19).

4. And there is no reliance on being a private hospital. There probably are no hospitals in Alaska which do not accept State or Federal money. And, further, as the decision reads:

"We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the Superior Court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public'". (Page 17, Alaska Supreme Court decision).

Alaskan health care providers do need the option of a Right of Conscience so that everyday people and community institutions are no longer compelled by another person's exercise of the right to privacy to act in a manner that violates their convictions of conscience.

Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

VALLEY HOSPITAL ASSOCIATION,)
INC., and JAMES G. WALSH,)
Valley Hospital Executive)
Director,)

Supreme Court No. S-7417

Superior Court No.
3PA-92-01207 CI

Appellants,)

v.)

O P I N I O N

MAT-SU COALITION FOR)
CHOICE, DR. SUSAN LEMAGIE,)
and JANE DOES I-X,)

[No. 4906 - November 21, 1997]

Appellees.)

Appeal from the Superior Court of the State of
Alaska, Third Judicial District, Palmer,
Dana Fabe, Judge.

Appearances: Brian J. Brundin, Brundin, Inc., Anchorage, and James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellants. Stephan H. Williams, Cooperating Attorney for the Alaska Civil Liberties Union, Anchorage, and Janet L. Crepps and Kathryn Kolbert, Center for Reproductive Law & Policy, New York, New York, for Appellees. Susan Wright Mason, Atkinson, Conway & Gagnon, Anchorage, for Amicus Curiae Alaska State Hospital and Nursing Home Association. Paul Benjamin Linton, Americans United for Life, Chicago, Illinois, and Kenneth P. Jacobus, Kenneth P. Jacobus, P.C., Anchorage, for Amici Curiae Members of the Alaska Legislature. Jeffrey M. Feldman and Susan Orlansky, Young, Sanders & Feldman, Anchorage, for Amici Curiae American College of Obstetricians and Gynecologists and American Medical Women's Association, Inc.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Fabe, Justice, not participating.]

COMPTON, Chief Justice.

I. INTRODUCTION

Valley Hospital Association (VHA) seeks to reverse the superior court's summary judgment declaring unenforceable and permanently enjoining enforcement of its policy limiting abortion. We affirm the superior court. We hold that (1) Article I, section 22 of the Alaska Constitution encompasses reproductive rights, including abortion; (2) VHA is a quasi-public institution subject to the Alaska Constitution; (3) VHA's abortion policy is an unconstitutional restriction on the right to abortion; (4) AS 18.16.010(b) is unconstitutional to the extent it applies to quasi-public institutions; and (5) the superior court's award of attorney's fees was not an abuse of discretion.

II. FACTS AND PROCEEDINGS

VHA is a nonprofit corporation organized under Alaska law. It owns and operates a thirty-six-bed hospital in Palmer. The hospital is licensed by the State of Alaska (State); it is the only hospital in the Matanuska-Susitna (Mat-Su) Valley. The hospital facility currently in use was rebuilt and expanded in the early 1980s, using \$10.7 million in State funds and five acres of land donated by the City of Palmer. VHA is not affiliated with or operated by any religious organization. The corporation "is organized to serve public interests."

VHA's Board of Directors is divided into two boards, the Association Board and the Operating Board. The Association Board raises money and acquires property for the hospital and elects the Operating Board. The Operating Board has all the other powers and

7

functions of the Board of Directors, including establishing hospital policy.

VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated "general members," annually elect the Association Board.

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law.¹ VHA permitted lawful abortion procedures at its facility from 1970 until 1992.² In 1992 abortion opponents organized a campaign to

¹ AS 18.16.010 provides:

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

² In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman
(continued...)

enlarge the membership of VHA. In April 1992 a larger-than-usual membership elected the Association Board, which then elected the Operating Board. In September 1992 the Operating Board enacted a new policy on abortion. The policy prohibits abortions at the hospital unless (1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest. All VHA Operating Board members supported this new policy.

The Mat-Su Coalition for Choice, Dr. Susan Lemagie, and ten unnamed women (Coalition) filed suit against VHA and its executive director, seeking declaratory and injunctive relief. The Coalition then filed a motion for a preliminary injunction against VHA's abortion policy. The superior court granted the motion.³ Its order temporarily enjoined enforcement of VHA's new abortion policy and restored the status quo existing before the policy was enacted. The court then granted the Coalition's motion for summary

²(...continued)
can have a second trimester elective abortion.

³ In its order granting the Coalition a preliminary injunction, the superior court determined that the Coalition had shown a clear probability of success in establishing the following propositions: (1) Valley Hospital is a quasi-public hospital; (2) the Alaska Constitution provides greater protection for individual rights than the United States Constitution; (3) the right to choose an abortion is a fundamental right guaranteed by article I, section 22 of the Alaska Constitution; (4) there is no compelling state interest in Valley Hospital's ban on abortions; and (5) AS 18.16.010(b) does not immunize Valley Hospital from violating Alaskans' constitutional right to reproductive choice, including abortions.

judgment⁴ and permanently enjoined VHA

1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure at Valley Hospital which is not based on accepted, established medical practices or requirements with respect to such procedures.

The superior court noted that nothing in the permanent injunction required anyone affiliated with the hospital "to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so."

The superior court granted full reasonable attorney's fees in the amount of \$110,000 to the Coalition in a separate order. VHA appeals the injunction, the summary judgment, and the award of attorney's fees to the Coalition.

⁴ The superior court's order granting summary judgment was

based on the reasons articulated in the Court's earlier decision granting a preliminary injunction, the protections of the right to . . . privacy contained in Article I, § 22 of the Alaska Constitution, and the fact that Valley Hospital is a non-sectarian, non-profit, quasi-public hospital.

(Citation omitted.)

III. DISCUSSION

A. Standard of Review

We apply our independent judgment in reviewing the questions of law presented in this appeal, adopting rules of law which are most persuasive in light of precedent, reason, and policy. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979). We review the award of attorney's fees for abuse of discretion. Bronley v. Mitchell, 902 P.2d 797, 804 (Alaska 1995). An abuse of discretion is established only where the court's determination is manifestly unreasonable. Id.

B. The Alaska Constitution Protects Reproductive Autonomy, Including the Right to Abortion, More Broadly Than Does the United States Constitution.

1. The United States Constitution

The Supreme Court's articulation of the United States Constitution's protection of reproductive rights establishes the minimum protection provided to women in Alaska.⁵ This protection includes the right to an abortion. Under Roe v. Wade, 410 U.S. 113, 155 (1973), this right could be limited only where required by a compelling state interest. Id. States could regulate abortions performed before a fetus became viable only when such regulation was necessary to ensure the life and health of the mother. Id. at 163.

The compelling state interest test no longer accurately reflects federal constitutional law. Arguably, the prevailing

⁵ See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Roe v. Wade, 410 U.S. 113 (1973).

federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 833, 875 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The O'Connor plurality substituted the undue burden test for the compelling state interest test in recognition of the view that there "is a substantial state interest in potential life throughout pregnancy." Id. at 876. The following paragraphs from the joint opinion in Casey suggest the current state of federal constitutional law concerning reproductive rights:

(a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a

substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65.

505 U.S. at 878-79.

2. The Alaska Constitution

We sometimes have taken a broad view of our role in defining state constitutional rights:

[W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (extending the constitutional right to a jury trial).⁶ Thus, our

⁶ VHA interprets this language as a two-prong test which must be met before we may find a constitutional right. We did not interpret this language from Baker as VHA now urges us to do when we decided either Breese v. Smith, 501 P.2d 159 (Alaska 1972) (holding that governmental control of personal appearance is antithetical to the concept of personal liberty), or Ravin v. State, 537 P.2d 494 (Alaska 1975) (holding that privacy in the home (continued...))

articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. Id. at 401 ("[This court is] at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court.").⁷

Article I, section 22 of the Alaska Constitution provides:

The right of the people to privacy is recognized and shall not be infringed.

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy

⁶(...continued)
is a fundamental right), although we found a right to exist under the Alaska Constitution in each of those cases.

⁷ Other states have interpreted their constitutions to protect reproductive rights more extensively than does the federal constitution. Committee to Defend Reprod. Rights v. Mvers, 625 P.2d 779 (Cal. 1981) (striking down legislation restricting public funding of abortions as unconstitutional under the state's constitutional privacy guarantee); American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Cal. App. 1989) (upholding an injunction preventing implementation of restrictions on abortion rights of minors, requiring a compelling state interest before invasion of minors' privacy rights); In re T.W., 551 So. 2d 1186 (Fla. 1989) (reaffirming the right to choose to terminate a pregnancy as a fundamental state constitutional right and striking down legislation restricting abortion rights); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991) (applying a strict scrutiny standard for fundamental rights and determining that state failure to fund medically necessary abortions violated state constitution); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (extending state constitutional right to privacy beyond federal right in a custody dispute over divorced couple's frozen embryos).

and free speech with the need for an informed electorate); Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring) ("Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.").

A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is "necessary for . . . civilized life and ordered liberty." Baker, 471 P.2d at 401-02. Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language. "[D]ecisions whether to accomplish or prevent conception are among the most private and sensitive." Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 479 n.42 (Alaska 1977) (holding that a physician who specialized in contraception and abortion could not be required to disclose the names of his patients); see also Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981) (holding that abortion clinic protests cause patients to "suffer emotional distress as a result of appellants' invasion of their privacy during a particularly sensitive period"); Ravin, 537 P.2d at 502 (holding that decisions about contraception involve "significantly personal areas").

We stated in Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972), that "few things [are] more personal than one's body."⁸ In Breese, a school policy regulating hair length was at issue; the regulation was held unconstitutional because the State failed to show a compelling interest that justified the policy. Id. at 170-72. Surely "few things are more personal" than a woman's control of her body, including the choice of whether and when to have children.

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to

⁸ Breese was decided before the 1972 passage of the privacy amendment now found in article I, section 22 of the Alaska Constitution. Breese relied exclusively on the inherent rights provision found in article I, section 1 of the Alaska Constitution. The Coalition argues that article I, section 1 of the Alaska Constitution protects abortion as a fundamental right. Because we hold this right is grounded in the privacy provision of the constitution, we do not address whether the right could be based solely on article I, section 1. While Breese's discussion of personal autonomy remains instructive, we choose to analyze reproductive rights under the privacy provision of our constitution, as other states have done. See, e.g., In re T.W., 551 So. 2d at 1193.

The relationship between a woman and her doctor is threatened by VHA's abortion policy, and thus privacy rights are implicated in addition to the notions of personal autonomy that were at issue in Breese. The information exchange between a woman and her doctor about the woman's health and her reproductive choices is intensely private. The reasons a doctor and patient choose a medical procedure, so long as it is legal, must not be subject to the approval of a hospital's board of directors, according to their own values.

Other privacy interests are also implicated. If a woman is unable to obtain an abortion near her home, there is an increased chance that she will have to reveal her pregnancy to others in order to arrange the necessary travel. The fact that a woman has visited a certain doctor can be intensely private, when the doctor is one who specializes in abortion services.

become the vehicle for another human being's creation; second, when and how--this time there is no question of "whether"---one's body is to terminate its organic life.

Laurence H. Tribe, American Constitutional Law 1337-38 (2d ed. 1988). We agree that "[t]he decision whether or not to have a child is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (citing Roe, 410 U.S. at 153).

For the above reasons, we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion. The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in Roe v. Wade. We do not, however, adopt as Alaska constitutional law the narrower definition or that right promulgated in the plurality opinion in Casey.

VHA argues that there can be no state constitutional protection for reproductive rights under article I, section 22, because the section was intended to encompass protection from unwarranted surveillance and data collection by the State and private businesses. It cannot extend beyond this "informational"

privacy.⁹ To support this argument, VHA cites newspaper articles and other bills introduced contemporaneously with the adoption of article I, section 22.

The only informative legislative history consists of the privacy amendment as originally proposed.¹⁰ The earliest form of the proposed amendment stated:

Section 22. Right of Privacy. The right of the people to privacy in their opinions, persons, families, reputations and property is recognized and shall not be violated. Neither warrants nor writs of investigation in abrogation of privacy shall issue, except upon probable cause and upon a showing of a legitimate and pressing need, supported by oath or affirmation, particularly describing the information or data sought and the person whose privacy may be affected, and particularly setting forth the reasons for the search or investigation. The legislature shall provide for the prosecution and punishment of public officials and private parties who act in violation of this section, and shall provide civil remedies to redress and prevent such violations. The legislature shall provide for the protection and security of information available to the State to the extent necessary to protect the rights of the individual recognized in this section and shall further provide for the protection and

⁹ The Alaska State Hospital and Nursing Home Association, argues only that the "legislative" history of the amendment prevents this court from applying the privacy provision of the constitution to private parties. We have already established that proposition. See Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989).

¹⁰ The Alaska State Hospital and Nursing Home Association argues that a summary of a House Judiciary Committee meeting during which the proposed amendment was modified is evidence that the privacy clause was intended to apply only to informational privacy. The meeting summary is largely a debate over grammar and style and provides no information which alters our interpretation of article I, section 22. See H. Jud. Comm. minutes at 318-19, 7th Leg., 1st Sess. (May 30, 1972).

security of information gathered under this section by the State.

1972 Senate Joint Resolution No. 68, 7th Leg., 2d Sess. While the initial draft of the amendment attempted to specify privacy interests to be protected, the final constitutional amendment simply protected the right of the people to privacy. The plain language of article I, section 22 is a broad protection of privacy rights. The legislative history is insufficient to limit the general language of the privacy amendment.

C. . VHA's Abortion Policy Is Subject to the Provisions of the Alaska Constitution.

We previously have determined that a hospital may be a "quasi-public" institution. Storrs v. Lutheran Hosps. and Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980). In Storrs, we held that a quasi-public hospital "cannot violate due process . . . in denying staff privileges."¹¹ Id. at 28. The hospital was quasi-public because: (1) it was the only hospital serving the community; (2) the construction of the hospital was funded in significant part by State and federal grants; and (3) over twenty-five percent of the funds received for hospital services came from governmental sources. Id. Storrs established that a quasi-public medical

¹¹ One state court has rejected this application of procedural due process to private hospitals. See Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368 (Me. 1988). At least eight other states have concluded that private hospitals must follow procedural due process for physician staffing decisions. Id. at 368 n.4.

facility is bound to protect constitutional rights affected by the administration of the hospital.¹²

The elements that led us to conclude that the hospital in Storrs was quasi-public show that the hospital in this case is quasi-public; thus, the conduct of VHA qualifies as "state action," meaning that it "may be fairly treated as [the action] of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), quoted in United States Jaycees v. Richardet, 666 P.2d 1008, 1013 (Alaska 1983).

In order to determine whether the hospital operated by VHA is a quasi-public institution, we look to a number of factors, just as we did in Storrs. First, VHA has a special relationship with the State through the State's Certificate of Need program. Under this program, the State must review and approve expenditures of one million dollars or more for construction or alteration of a health care facility. AS 18.07.031. The Department of Health and Social Services determines whether to grant a Certificate of Need

¹² VHA argues that constitutional due process was never at issue in Storrs because the hospital stipulated that Dr. Storrs was entitled to due process. We have stated, however, that Storrs was a constitutional due process case. Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 n.2 (Alaska 1992); see also Amerada Hess Pipeline Corp. v. Alaska Pub. Util. Comm'n, 711 P.2d 1170, 1180 (Alaska 1986) (relying on Storrs to find the right to an impartial decision maker basic to a guarantee of due process). Furthermore, the Storrs court would not have needed to address whether Dr. Storrs received due process were he not entitled to it. The determination that due process applied was material to the holding.

based on health care demand and resources. AS 18.07.041.¹³ This program creates in VHA a type of health care monopoly. Indeed, VHA is the only hospital serving the Mat-Su Valley, just as the hospital in Storrs was the only hospital serving the Fairbanks area. The public need for medical facilities makes this sort of regulation essential. However, such monopoly privileges may not be used by VHA to limit access to lawful medical procedures for moral or religious reasons.

Second, VHA has received construction funds, land, and operating funds from the State, local, and federal governments,¹⁴ including more than ten million dollars for construction from the State and a grant of five acres of public land from the City of Palmer.¹⁵ Money from the city and borough came from pass-through

¹³ AS 18.07.041 provides:

The office shall grant a sponsor a certificate of need or modify a certificate of need if the availability and quality of existing health care resources or the accessibility to those resources is less than the current or projected requirement for health services required to maintain the good health of citizens of this state.

¹⁴ VHA's assets totaled \$31.7 million as of December 31, 1993. Between 1985 and 1993, VHA provided \$37.5 million in unreimbursed care. In 1991, 14.71% and 5.98% of VHA's gross receipts were from Medicare and Medicaid respectively. VHA's April 1993 Certificate of Need application to the State showed that Medicare and Medicaid receipts total approximately \$3.75 million to \$5.1 million for the 1990, 1991, and 1992 fiscal years. This is approximately 25% of VHA's patient revenues for those three years.

¹⁵ The Alaska State Hospital and Nursing Home Association argues that money received under the federal Hill-Burton Act cannot be used as a basis for requiring hospitals to perform abortions. 42 U.S.C. § 300a-7(b). The record does not show that any Hill-

(continued...)

grants from the State legislature.¹⁶ VHA is required to operate as a "public facility" under State laws governing the pass-through grants from the State to the city and borough. AS 37.05.315(a) and (c). Finally, a significant portion of the operating funds VHA receives for hospital services comes from governmental sources. We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the superior court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public.'"

VHA argues that the Storrs quasi-public criteria are limited to determining whether a hospital must afford due process in staffing determinations and should not be extended to require hospitals to protect other constitutional rights. VHA relies on language in Kiester, which discusses limitations on judicial review to avoid intruding upon a hospital's recognized expertise in evaluating medical qualifications. Kiester v. Humana Hosp. Alaska.

¹⁵(...continued)

Burton money was used when the facilities were rebuilt in the early 1980s.

¹⁶ The statute allowing pass-through grants requires the municipality to agree that the facilities and services provided by the grant will be available for the use of the general public, and that the municipality will operate and maintain the facility for the practical life of the facility. AS 37.05.315(a) and (c). This is an additional indication that VHA is a quasi-public institution. See 1986 Informal Op. Att'y Gen. 1 (Apr. 8, 1982) (stating that municipality accepting funds for construction of a public facility must ensure the operation and maintenance of the facility, even if the facility will be owned and operated by a private non-profit organization); see also 1991 Informal Op. Att'y Gen. 19 (Sept. 22, 1986) (indicating that the State may have a cause of action against a city that allows a facility funded by pass-through grants to be converted to private use).

Incl., 843 P.2d 1219, 1223 (Alaska 1992). However, no medical qualification or decision is at issue here. Neither the issue whether the hospital is quasi-public, nor the issue whether the abortion policy is invalid on constitutional grounds, involves intruding on a medical decision that is within the hospital's expertise. Likewise, VHA has acknowledged that its abortion policy is not a medical policy, but one founded on "sincere moral conscience." The scope and application of the Alaska Constitution to this kind of policy presents a question of law that is within this court's expertise.

Considering all factors similar to those found persuasive in Storrs, we conclude that the hospital operated by VHA is a quasi-public hospital. Its policy concerning abortion must comply with the Alaska Constitution.

D. VHA Has Not Demonstrated a Compelling State Interest Justifying Its Abortion Policy.

Since VHA is a quasi-public institution, its policies are subject to the limitations which the Alaska Constitution imposes on legislation and government regulations. Under Alaska's Constitution, there is a protected right to an abortion; and VHA's policy interferes with that right. Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest. Further, assuming the existence of such an interest, there also must be no less restrictive means by which the interest might be advanced.¹⁷ In re A.B., 791 P.2d 615,

¹⁷ We have used both the compelling state interest/least
(continued...)

621 (Alaska 1990) and Vogler v. Miller, 651 P.2d 1, 5 (Alaska 1981). VHA has not demonstrated a compelling state interest justifying its policy. It has not advanced any medical, safety, or other public-welfare interest to justify precluding elective abortions. VHA has stated unequivocally that its policy is a matter of conscience, and not a medical, safety, or economic issue. As VHA cannot raise a free exercise claim,¹⁸ this does not amount to a compelling state interest.

E. Alaska Statute 18.16.010(b) Is Unconstitutional to the Extent It Applies to Quasi-Public Institutions.

VHA argues that even if the Alaska Constitution encompasses the right to an abortion, and even if the hospital is a quasi-public institution, the legislature already has addressed the issue in AS 18.16.010(b),¹⁹ and has determined that a "hospital

¹⁷(...continued)
restrictive means test and the legitimate state interest/close and substantial relationship test in the privacy context. See Jones v. Jennings, 788 P.2d 732, 737-38 (Alaska 1990); State v. Erickson, 574 P.2d 1 (Alaska 1978); Ravin, 537 P.2d at 504. However, "[w]here the right to privacy is manifested in terms of interests . . . squarely within personal autonomy," as here, we use the compelling state interest test. Erickson, 574 P.2d at 22, n.144.

¹⁸ See infra note 20. Nothing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as "compelling" could violate the Establishment Clause of the First Amendment to the United States Constitution. As this point is not raised, we do not rule on it.

¹⁹ AS 18.16.010(b) provides:

Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion

(continued...)

may decline to offer abortions for reasons of moral conscience." VHA argues that "[i]nconsistent with its previous approach to the highly-sensitive question of abortion, this Court should defer to the considered judgment of the legislature." However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action. The issue before us includes the question whether AS 18.16.010(b) is a permissible limitation on a constitutional right.

VHA has a "sincere moral belief" that elective abortion is wrong.²⁰ However, constitutional rights "cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 U.S. 294, 300 (1955).

The Alaska Attorney General has concluded that AS 18.16.010(b) is invalid, unless construed to be applicable only to sectarian facilities. 1978 Formal Op. Att'y Gen. No. 8 (February 10, 1978). The New Jersey Supreme Court struck down an almost identical statute:

To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action . . . [f]or the state to frustrate [the constitutional right to a first trimester

¹⁹ (...continued)
under this section.

²⁰ VHA bases its argument in part on Frank v. State, 604 P.2d 1068 (Alaska 1979), a free exercise of religion case based on the First Amendment to the United States Constitution and article I, section 4 of the Alaska Constitution. See Frank, 604 P.2d at 1070 (killing of cow moose for funeral potlatch protected as free exercise of religion). VHA is not affiliated with any religion and cannot raise a free exercise claim.

abortion] by its action would be violative of the constitutional guarantee.

Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641, 647 (N.J. 1976).

VHA argues that because the statute states that abortions may be performed only in certain situations, but that individuals and institutions may always refuse to participate in or provide them, "the legislature has determined that the ability to protect one's conscience outweighs the ability to procure an abortion." VHA has no constitutional right at issue; it has at most a statutory right. The legislature, however, may not balance statutory rights against constitutional ones, like the right to an abortion. Therefore, AS 18.16.010(b) is unconstitutional to the extent that it applies to VHA.

F. The Superior Court's Award of Attorney's Fees Was Not an Abuse of Discretion.

The superior court awarded full reasonable attorney's fees to the Coalition. The court based its decision on the factors articulated in Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990). The superior court concluded that VHA was not a public interest litigant immune from having to pay an award of attorney's fees.²¹

²¹ A party qualifies as a public interest litigant if (1) the case effectuates a strong public policy, (2) numerous people will benefit from the litigation, (3) only a private party could be expected to bring the action, and (4) the party would not have sufficient economic incentive to bring the lawsuit even if the action involved only narrow issues lacking general importance. Evak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 423 (Alaska 1995).

We review a trial court's determination of a litigant's public interest status under the abuse of discretion standard. Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162, 171 (Alaska 1991). "Such an abuse is regarded as present only where the trial court's decision appears to be manifestly unreasonable or motivated by an inappropriate purpose." Kenai Lumber Co., Inc. v. LeResche, 646 P.2d 215, 222 (Alaska 1982).

VHA asserts two arguments for challenging the fee award: (1) VHA is a public interest litigant;²² and (2) VHA relied in good faith on a statute which authorized its policy.

A prevailing public interest plaintiff is normally entitled to full reasonable attorney's fees. Hunsicker v. Thompson, 717 P.2d 358, 359 (Alaska 1986). We have determined that "where both parties are individual, public interest litigants, neither should be made to bear the fees of the other, each should simply pay their own." McCormick v. Smith, 799 P.2d 287, 289 n.5 (Alaska 1990). However, VHA is not a public interest litigant. We

²² The Coalition argues that VHA did not challenge the superior court's determination that VHA is not a public interest litigant in its points on appeal and is barred from doing so now. Alaska Appellate Rule 204(e) provides that this court will consider only points included in the statement of points on appeal. See also Kalenka v. Taylor, 896 P.2d 222, 229 (Alaska 1995) (holding that where appellants failed to properly appeal a fee award and offered no mitigating circumstances to explain the failure, they cannot raise the issue). However, whether VHA is a public interest litigant is a legal issue that can be considered on the record before the court. See, e.g., Oceanview Homeowners Ass'n v. Quadrant Const., 680 P.2d 793, 797 (Alaska 1984). Additionally, although VHA's public interest status is not mentioned in the points on appeal, the issue of fees is raised. See Putnam v. State, 629 P.2d 35, 39 n.2 (Alaska 1980). There is no prejudice to the Coalition in considering the issue on appeal.

are not persuaded by VHA's assertion that its defense of its abortion policy is in the public interest simply because it raises constitutional issues.

We have decided one case where we determined that attorney's fees should not be awarded against a losing private party in public interest litigation, because an award might have the effect of deterring citizens from litigating issues of public concern. Whitson v. Anchorage, 632 P.2d 232, 233 (Alaska 1981). In Whitson, the defendant was an individual who had placed an initiative on the next municipal election ballot, and the plaintiff was the City of Anchorage, which had obtained a judgment finding the initiative illegal and ordering it removed from the ballot. We found it significant that Whitson would have been a traditional private party plaintiff seeking relief against the governmental entity had the city not "beat[en] him to the courthouse steps," making him the nominal defendant. Id. at 234. Had the city refused to place his initiative on the ballot, rather than doing so and then suing him to get it removed, Whitson would likely have sued the city and been the traditional private party plaintiff seeking relief against the governmental entity. Id. at 233-34. In this case VHA is not an individual raising a public interest defense against a governmental entity. Rather, VHA is a quasi-public institution whose policy has infringed a constitutional right.

VHA also cannot assert its good faith reliance on AS 18.16.010(b). As discussed above, that statute cannot

constitutionally be applied to a quasi-public hospital. See Part III.D. Because VHA is not a private defendant, as it asserts, it cannot escape liability for attorney's fees by arguing that it relied in good faith on AS 18.16.010(b).

The superior court did not abuse its discretion in awarding fees to the Coalition.

IV. CONCLUSION

The superior court's summary judgment and injunction are AFFIRMED. The superior court's award of attorney's fees was not an abuse of discretion and is AFFIRMED.