HB 522

Health, Education, and Social Services Committee
Alaska State Legislature
House of Representatives

HB 522—MEDICAID PAYMENTS FOR ABORTION
SPONSOR STATEMENT

"An Act relating to medical services under the state Medicaid program."

HB 522 serves to implement the recent Alaska Supreme Court opinion State of Alaska v. Planned Parenthood of Alaska, 28 P.3d 904 (Alaska 2001), by authorizing the Department of Health and Human Services, under the Medicaid program, to pay for medically necessary abortions.

The Supreme Court has made clear that Roe v. Wade did not declare an unqualified constitutional right to abortion that would include funding for abortions that are not medically necessary. Further, the court stated that the right recognized in Roe; "implies no limitation on the authority of the State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds" (Maher v. Roe 432 US 453, 473 (1977).

Given that there is no blanket right to funding, the intent of HB 522 is to define the parameters to be used in determining when it is appropriate for Health and Social Services to pay for abortions under the State Medicaid program. HB 522 would allow payment only for abortions that are medically necessary or to terminate a pregnancy resulting from rape or incest. The bill defines the term "medically necessary abortion" broadly enough to cover those situations where an abortion is medically necessary yet narrowly enough to prevent fraud or abuse. The bill aims to ensure that funds appropriated to provide health care to indigent Alaskans are being used for that purpose and not to fund abortions on demand. In the same way, a majority of Alaskans agree that it is inappropriate to use taxpayer funds to provide elective abortions.

Alaska State Capitol, Room 106 • Juneau, Alaska 99801
(907) 465-3759 phone • (907) 465-4587 fax

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

IN THE SUPREME COURT FOR THE STATE OF ALASKA

KAREN PERDUE, Commissioner, Department of Health and Social Services, and the DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF ALASKA, Appellants, vs. PLANNED PARENTHOOD OF ALASKA, INC., JAN WHITEFIELD, M.D., and SUSAN LEMAGIE, M.D., Appellees.	Supreme Ct. No. S-09109 Superior Ct. No. 3AN-98-07004 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
JUDGE SEN K. TAN, PRESIDING

BRIEF OF APPELLANTS

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: _____

Lisa M. Kirsch
Assistant Attorney General
Civil Division, Human Services Section
P.O. Box 110300 Juneau, AK 99811-0300
Telephone: (907) 465-3600
Fax: (907) 465-2539
Alaska Bar No. 9106043

Filed in the Supreme Court
Of the state of Alaska this
24 day of November, 1999.

Marilyn May, Clerk

By: _____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL LAW

PUBLIC LAW

STATE CASES

ALASKA CONSTITUTION

STATE LAWS

STATE REGULATIONS

BILLS AND SESSION LAWS

AUTHORITIES PRINCIPALLY RELIED UPON

FEDERAL LAW

PUBLIC LAW NO. 105-78, § 510, 111 STAT. 1516 (1998).

(a) The limitations established in the preceding section shall not apply to an abortion-

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

(b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds).

(c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State's or locality's contribution of Medicaid matching funds).

ALASKA CONSTITUTION

Article I, § 22. Right of Privacy.
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section. [Approved August 22, 1972]

Article IX, § 13. Expenditures.
No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

ALASKA STATUTES

AS 37.07.080. Program execution.

(a) Except as limited by executive decisions of the governor, the mission statements and desired results issued by the legislature, appropriations by the legislature, and other provisions of law, the several state agencies have full authority for administering their program service assignments and are responsible for their proper management.

AS 37.07.100. Proposed supplemental or special appropriations.
The governor from time to time may transmit to the legislature proposed supplemental or special appropriations in accordance with AS 37.07.070 which in the governor's judgment are necessary. However, if the governor finds that an emergency situation necessitates the proposal of supplemental or special appropriations, the governor may transmit them to the legislature at any time. The governor shall accompany each proposal with a statement of the reasons for it, including the reasons for its omission from the budget

AS 47.07.020(d). Eligible persons.

(a) All residents of the state for whom the Social Security Act requires Medicaid coverage are eligible to receive medical assistance under 42 U.S.C. 1396 - 1396p (Title XIX, Social Security Act).

(b) In addition to the persons specified in (a) of this section, the following optional groups of persons for whom the state may claim federal financial participation are eligible for medical assistance:

. . .

(d) Additional groups may not be added unless approved by the legislature.

AS 47.07.030. Medical services to be provided.

(a) The department shall offer all mandatory services required under 42 U.S.C. 1396 - 1396p (Title XIX of the Social Security Act).

(b) In addition to the mandatory services specified in (a) of this section and the services provided under (d) of this section, the department may offer only the following optional services: case management and nutrition services for pregnant women; personal care services in a recipient's home; emergency hospital services; long-term care noninstitutional services; medical supplies and equipment; advanced nurse practitioner services; clinic services; rehabilitative services for substance abusers and emotionally disturbed or chronically mentally ill adults; targeted case management services for substance abusers, chronically mentally ill adults, and severely emotionally disturbed persons under the age of 21; inpatient psychiatric facility services for individuals age 65 or older and individuals under age 21; psychologists' services; clinical social workers' services; midwife services; prescribed drugs; physical therapy; occupational therapy; chiropractic services; low-dose mammography screening, as defined in AS 21.42.375(e); hospice care; treatment of speech, hearing, and language disorders; adult dental services; prosthetic devices and eyeglasses; optometrists' services; intermediate care facility services, including intermediate care facility services for the mentally retarded; skilled nursing facility services for individuals under age 21; and reasonable transportation to and from the point of medical care.

AS 47.07.040. State plan for provision of medical assistance.
The department shall prepare a state plan in accordance with the provisions of 42 U.S.C. 1396 - 1396p (Title XIX, Social Security Act, Medical Assistance) and submit it for approval to the United States Department of Health and Human Services. The plan shall designate that the Department of Health and Social Services is the single state agency to administer this plan. The department shall act for the state in any negotiations relative to the submission and approval of the plan. The department may make those arrangements or regulatory changes, not inconsistent with law, as may be required under federal law to obtain and retain approval of the United States Department of Health and Human Services to secure for the state the optimum federal payment under the provisions of 42 U.S.C. 1396 - 1396p (Title XIX, Social Security Act, Medical Assistance).

STATE REGULATIONS

7 AAC 43.140. ABORTIONS.

(a) Payment for an abortion will, in the department's discretion, be covered under Medicaid if the physician services invoice is accompanied by certification that the

(1) life of the mother would be endangered if the pregnancy were carried to term; or

(2) pregnancy is the result of an act of rape or incest.

(b) A procedure that is not covered under this section will be covered under General Relief Medical to the extent provided in 7 AAC 47.

7 AAC 47.290. DEFINITIONS.

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

(A) certified by a physician as medically necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health; or

(B) that resulted from actions that would constitute a crime of sexual assault under AS 11.41.410 - 11.41.425, a crime of sexual abuse of a minor under AS 11.41.434 - 11.41.440, or the crime of incest under AS 11.41.450.

JURISDICTIONAL STATEMENT

The Alaska Supreme Court has appellate jurisdiction over the judgment of the superior court in this matter under AS 22.05.010.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. Whether the superior court erred in concluding that failure to fund therapeutic abortion constrains and interferes with a fundamental right and violates the right of privacy set out in Article I, section 22 of the Alaska Constitution.

2. Whether the superior court erred when it held that Alaska's constitutional right of privacy entitles Medicaid eligible women to funding for therapeutic abortion by virtue of their eligibility for pregnancy-related services under Alaska's Medicaid program.

3. Whether the superior court erred when it found 7 AAC 43.140 unconstitutional, void, and unenforceable, insofar as it denies coverage for medically necessary abortions other than those already covered under the Medicaid program.

4. Whether the superior court erred when it enjoined the state from excluding therapeutic abortion from the Medicaid program, effectively amending AS 47.07.030, and thereby expanding the Medicaid program without legislative action in violation of the Alaska Constitution, Article II, section 1, and the separation of powers doctrine.

5. In that the superior court established a state obligation to pay for therapeutic abortion, whether the superior court erred in concluding that its decision did not result in a reappropriation of money previously appropriated for other purposes, in violation of AS 37.05.170 and the Alaska Constitution, Article IX, section 13.

6. Whether the superior court abused its discretion when it concluded that DHSS must either spend money to subsidize therapeutic abortion or refrain from spending any money on pregnancy-related services.

STATEMENT OF THE CASE

Origin of Programs

Medical Assistance in Alaska began with the implementation of the General Relief Medical program ("GRM") in 1953, a program that has helped pay providers for medical services for Alaska residents with low income and few assets. AS 47.25.120; § 2 ch 110 SLA 1953. In September 1972, Alaska created its Medicaid program. AS 47.07.050. The Medicaid program is a joint federal-state program that pays for many medical services to eligible recipients. 42 U.S.C.A. §§ 1396 et seq. (West 1992 & West Suppl. 1998); AS 47.07.010-47.07.020. To qualify for federal financial participation ("FFP"), a state program must provide certain mandatory services.[1] 42 U.S.C. A. § 1396a(a)(10)(A); 42 U.S.C.A. § 1396d(a)(1)-(5), (17), and (21). In addition, states may choose to provide various optional services. 42 U.S.C.A. §§ 1396a-1396u. Both mandatory and optional services entitle the state to federal matching funds. Generally the standard for eligibility for GRM has been more stringent than that of Medicaid, although there have been some periods over the years when that was not the case.

Reimbursement of Providers for Abortions in Alaska

Abortion first became legal in Alaska in 1970. [Exc. 5]. At that time the state did not have a Medicaid program. [Exc. 5-8]. The GRM program

[1] FFP is commonly referred to as "federal matching funds," and is defined at 2 C.F.R. § 1000.30 as, "the Federal Government's share of a State's expenditures under the Medicaid program."

has provided funding for abortion for eligible women since legalization in 1970. [Exc. 6].

For several years, abortions were paid for under both GRM and Medicaid. [Exc. 8]. In 1976, however, the first Hyde Amendment to a federal budget bill passed, ending federal Medicaid funding for many therapeutic abortions. Pub. L. No. 94-439 § 209; [Exc. 8].[2] In Alaska, "Therapeutic abortion" is defined in 7 AAC 47.290(8) as the termination of a pregnancy certified by a physician as medically necessary to prevent the death or disability of a woman, or to ameliorate a condition harmful to the woman's physical or psychological health; also included are abortions for pregnancies that result from sexual assault, sexual abuse of a minor or the crime of incest. While abortions to prevent death and to end pregnancies resulting from crimes have remained funded under federal law, public funding for many therapeutic abortions was limited or eliminated due to the Hyde Amendments.

The type of abortions covered under the Hyde Amendment changed several times between 1977 and 1998 through language attached to the federal appropriations for the Medicaid program. [Exc. 6]. Although some abortions remained reimbursable through federal Medicaid funding since 1977, the Department of Health and Social Services ("DHSS") has funded therapeutic

---

[2] The 1997 version of the Hyde Amendment is set out in the Authorities Principally Relied Upon above.

abortions almost entirely through GRM since 1977 using purely state funds. [Exc. 59]; 7 AAC 47.200(a)(4)(F), (5), (6), and (7).[3]

Payment for therapeutic abortions has not been continuous or unqualified over the last 27 years. [Exc.1-8]. Although initially abortion payments were provided whenever there was a medical reason for abortion, this policy changed over the years. [Exc.1-3]. During the 1970s, abortion coverage was subject to prior authorization and recipients with income too high to qualify for GRM had to pay back the cost of the abortion. [Exc. 4]. Because the most recent income limits for Medicaid eligibility were higher than those for GRM eligibility, the Medicaid payments for abortion that plaintiffs seek to restore today would have been subject to the pay back program in the 1970s.

Legislative Action to Eliminate Funding for General Relief Medical

During the 1998 legislative session, the legislature passed a medical assistance budget that did not include funding for the GRM program. Effective July 1, 1998, the Alaska legislature eliminated the GRM program funding from the operating budget for medical assistance.[4] Also effective July 1, 1998, the legislature created a new program called Chronic or Acute Medical Assistance

---

[3] The reluctance to claim against Medicaid for abortion was a result of the difficulty in collecting physician certifications to qualify for the federal reimbursement, and the shifting federal rules under the various Hyde Amendments that increased the likelihood of errors that would expose the state to federal audit.

[4] CCS HB 325(brf sup maj fld), [Exc. 36-39].

("CAMA") to provide essentially the same medical services formerly provided under the GRM program, with the exception of therapeutic abortions.[5]

Historically, the Alaska Medicaid program regulations have limited abortion payments to reimbursement for those procedures that are necessary to save the life of the woman. 7 AAC 43.140. By emergency regulation effective July 1, 1998, the DHSS amended this regulation to allow additional abortion payments for pregnancies resulting from rape or incest under the Medicaid program. [Exc. 41-42]. This regulation change assured compliance with the most recent federal Medicaid service requirements and federal funding limitations for abortions under the Alaska Medicaid program.

Proceedings in the Trial Court

This case began June 18, 1998, when Planned Parenthood, et al. ("Planned Parenthood") filed a complaint requesting a temporary restraining order, preliminary injunction, and permanent injunction to prevent the enforcement of 7 AAC 43.140, and a declaratory judgment that the elimination of funding for "medically necessary" abortions is unconstitutional. [Exc.17]. On June 23, 1998, Planned Parenthood filed its Motion for Temporary Restraining Order and/or

---

[5] Sec. 7, SCS CSHB 459(RLS) [Exc. 9-16]. Planned Parenthood refers to the elimination of "medically necessary" abortions, but the abortion payments eliminated with the termination of the GRM program were for "therapeutic abortion." The state uses this term because unlike "medically necessary abortion" which is not defined, "therapeutic abortion" is defined in 7 AAC 47.290(8) set out in the Authorities Principally Relied Upon above.

Preliminary Injunction [R.114]. The superior court, Judge Sen K. Tan, heard oral argument on June 30, 1998. [R. 101]. Judge Tan denied Planned Parenthood's motion for temporary restraining order on July 1, 1998. [R. 8]. The court found that the state would suffer harm from the issuance of a restraining order and that, "[b]y directing the Department to expend monies unauthorized by the legislative branch of government, part of the injury that will result from issuance of this restraining order will be inappropriate judicial interference with the role of the legislative branch." [R. 11].

In August 1998, the parties agreed to have the case resolved by summary judgment. [R.1]. Planned Parenthood filed its Motion for Summary Judgment on August 19, 1998. [R.323]. The state opposed and cross-moved for summary judgment. After opposition and replies, oral argument was heard on the motions on September 18, 1998.

On March 16, 1999, the superior court granted Planned Parenthood's summary judgment motion, and denied the state's cross motion. [R. 916]. The court ruled that 7 AAC 43.140 was unconstitutional insofar as it was applied to deny funding for "medically necessary" abortions while the state funded other pregnancy-related services.[6] [Exc. 124]. A final judgment was issued on April 2, 1999, which stated that, "[u]nder the Alaska Constitution women otherwise eligible for coverage of pregnancy-related services in Alaska's Medicaid Program

[6] The superior court used the term "medically necessary," but did not clarify whether this term is synonymous with "therapeutic" as defined in regulations.

are entitled to funding of abortion services as set forth in this Court's Memorandum and Decision dated March 16, 1999." [Exc.124-125]. This entitlement was given effect by the following injunction:

> Defendants, their departments and agencies, and each of their officers, agents, representatives and employees are hereby permanently enjoined and restrained from enforcing 7 AAC 43.140 so as to deny coverage for medically necessary abortions.

[Exc. 125].

The state moved for a stay of the injunction contained in the final judgment on April 13, 1999. [R. 873-90]. Planned Parenthood opposed the motion for stay and filed a motion for costs and attorney fees on April 23, 1999. [R. 785 and 818]. On October 19, 1999, the court granted Planned Parenthood's motion for costs and fees, with some reductions, and denied the state's motion for stay. [Exc. 126] On November 3, 1999, the state moved for a stay of the injunction in this court.

STANDARD OF REVIEW

The Alaska Supreme Court reviews a grant of summary judgment *de novo*. *Bennett v. Weimar,* 975 P.2d 691 (Alaska 1999), citing *Ramsey v. City of Sand Point,* 936 P.2d 126, 129 (Alaska 1997). Summary judgment is appropriate if the record fails to disclose a material fact in dispute, and the moving party is entitled to summary judgment as a matter of law. *Id.*, citing *Dayhoff v. Temsco Helicopters, Inc.*, 848 P.2d 1367, 1369 (Alaska 1993). All reasonable inferences

are drawn in favor of the non-moving party. *Ramsey v. City of Sand Point*, 936 P.2d 126, 129 (Alaska 1997).

Constitutional challenges are questions of law that are also reviewed *de novo*. *Langdon v. Champion*, 752 P.2d 999, 1001 (Alaska 1988). When reviewing questions of law, this court applies its independent judgment. *West v. City of St. Paul*, 936 P.2d 136, 138 (Alaska 1997), quoting *Estate of Lampert Through Thurston v. Estate of Lampert Through Stauffer*, 896 P.2d 214, 218 (Alaska 1995). A regulation is presumed to be valid. *State Bd. Of Marine Pilots v. Renwick*, 936 P.2d 526, 531 (Alaska 1997). The court's duty is to adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Guin v. Ha*, 591 P.2d 1281, 1284, n.6 (Alaska 1979).

ARGUMENT

I. The superior court erred in concluding that failure to fund therapeutic abortion constrains and interferes with a fundamental right and violates the right of privacy set out in Article I, section 22 of the Alaska Constitution.

The decision not to publicly fund therapeutic abortions that do not meet the federal requirements for Medicaid recipients does not violate the right of privacy under the Alaska Constitution. While this court has recently addressed the issue of whether the state privacy right encompasses a right to abortion, *Valley Hospital Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997), it has not addressed the question of whether a Medicaid eligible woman has a right to public funding for therapeutic abortion to facilitate her exercise of that right. In

this case, the funding decisions made by the legislature are within its prerogative and do not intrude on the privacy rights of women.

A. While the right to privacy in Alaska is broader than its federal counterpart, this privacy right is not absolute.

The right of privacy under the Alaska Constitution has been held to provide a broader right than that found under the federal constitution, but it does not prevent all burdens on the exercise of a protected right. *Falcon v. Alaska Public Offices Comm'n.*, 570 P.2d 469, 476 (Alaska 1977); *Ravin v. State,* 537 P.2d 494 (Alaska 1975). In the case of abortion, the Alaska Supreme Court has stated that "the scope of the fundamental right to an abortion that we conclude is encompassed within Article I, section 22, [of the Alaska Constitution] is similar to that expressed in *Roe v. Wade.*" *Valley Hospital Ass'n., Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Roe v. Wade*, 410 U.S. 113 (1973). The implied privacy right expressed in *Roe* is not absolute. The United States Supreme court explained that,

> [A]ppellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive.[7]

[7] *Roe v. Wade*, 410 U.S. at 153.

The Supreme Court has made clear that *Roe v. Wade* did not declare an unqualified constitutional right to abortion that would preclude funding restrictions. *Maher v. Roe,* 432 U.S. 453, 473 (1977). Furthermore, the court states that the right recognized in *Roe*

> implies no limitation on the authority of the State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

Maher, 432 U.S. at 474.

The restriction of public funding for abortion in Alaska does not violate a woman's right of privacy and therefore, as shown below, the compelling state interest test does not apply here.

B. The state has not created an obstacle to the exercise of a woman's right to an abortion.

A lack of state funding for abortion does not constitute a government intrusion into the protected area of privacy. This is because an omission of state funding does not create the obstacle to exercise of the privacy right. *Harris v. McRae,* 448 U.S. 297, 317 (1980). In *Harris v. McRae,* the United States Supreme Court held that state funding of all alternatives in the exercise of constitutional rights was not essential to avoid interference with decision-making.

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all of the advantages of that freedom.

Id. at 317-318.

The legislature's action to end funding for certain abortions is the reduction of a benefit. As the Supreme Court of Michigan stated when faced with this issue:

> In the absence of some burden on the government to provide funds for the exercise of a right, a decision by the legislature not to fund the exercise of a right is distinct from a legislative action that impinges upon that right.

Doe v. Department of Social Services, 487 N.W.2d 166, 178 (Mich. 1992).

Alaska has offered payment for a broader range of abortions in the past. However, this does not create an affirmative right in the future, nor does it create an obstacle that did not already exist--namely, the indigency of the recipient.

> Clearly, the right involved in this case is not a right to continue to receive funds that were offered in the past; rather, it is the right to choose an abortion without unduly burdensome government interference.

Id.

In sum, the state has not created any obstacle to a woman's exercise of her right to abortion. The compelling state interest test does not apply because the state has no obligation to fund all alternative constitutional rights. As the Court stated in *Maher,* "[w]e think it abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth... ." *Maher* at 432 U.S. at 477. It follows that the superior court erred and its analysis should be reversed.

C. Planned Parenthood's evidence of the results of limiting funding for abortion is ambiguous and does not support the superior court's conclusions.

As the state has shown above, a decision not to fund certain abortions has no coercive effect as a matter of law. In addition, Planned Parenthood's evidence does not demonstrate that funding of childbirth coerces women to bear children. In other states, failure to publicly fund therapeutic abortion has had a limited effect on the number of women who receive abortion services. [R. 496.] Based upon figures from other jurisdictions, when public funding for abortion is eliminated, a small increase occurs in the number of women who carry to term, [R. 496-97.] ranging from 18 to 35 percent. [R. 496-497; 515]. Thus, in other states between 65 and 82 percent of the women who no longer have public funding for an abortion available to them find some other means of paying for this service. Clearly other factors influence this decision more than the availability of state funds.

Furthermore, these percentages are not evidence of any coercive effect of the lack of public funding for childbirth. In fact, there is no indication that these figures bear any relationship at all to the public funding of childbirth. The percentages might just as easily reflect the reaction to the loss of public funding independent from the funding of childbirth.

The analysis of the superior court is flawed because, contrary to evidence provided by both the defendants and plaintiffs, it concludes that "most indigent women who seek abortions for medical reasons will not be able to gather

the funds necessary to have the procedure performed." [Exc. 109]. In fact, the uncontradicted evidence shows that in other states 65 to 82 percent of low income women who would have aborted when abortion was available without cost will still find a way to finance an abortion after public funding ends. [R. 496-97; 515] Without any basis in the record, the court concludes that once public funding for abortion is ended, "a woman of financial means will have a real choice, but an indigent women [sic] will have no choice but to go forward with the pregnancy." [Exc. 114]. Yet, experience shows us that the vast majority of indigent women will still find a way to finance the procedure after public funding is withdrawn. Given the court's unsupported conclusion that most indigent women will not be able to gather funds, and therefore that indigent women have no choice at all, it is not surprising that the court finds that the end of state funding for abortion exceeds the permissible level of state interference.

In conclusion, the Alaska privacy right is not absolute. The state action in this case does not amount to a ban on the procedure or support Planned Parenthood's theory of coercion. Therefore, the superior court erred when it held that a failure to fund some therapeutic abortions interferes with a woman's fundamental right to choose to have an abortion.

II. The superior court erred when it held that Alaska's constitutional right of privacy entitles Medicaid eligible women to funding for therapeutic abortion by virtue of their eligibility for pregnancy-related services under Alaska's Medicaid program.

Planned Parenthood admits no right to funding of abortion exists and relies instead on the theory that the funding of childbirth coerces women to choose childbirth. Other state courts have rejected this theory and found that a legislative decision to fund childbirth and not abortion does not coerce a woman into forfeiting her rights any more than a legislative decision to fund public schools forces parents to forfeit the right to send their children to private schools. *Doe v. Department of Social Services*, 487 N.W.2d 166, 178 (Mich. 1992). Similarly, just because the right to use contraception is a protected right does not mean that the state has an affirmative duty to pay for contraceptives. *Harris*, 448 U.S. at 318.

While state authorities are split on the limitation of abortion funding, the courts generally agree that there is no constitutional entitlement to state funding for abortion. [8] The United States Supreme Court addressed

---

[8] *Compare Doe v. Department of Social Services*, 487 N.W.2d 166, 178 (Mich. 1992) (no right to abortion funding, and subsidy of childbirth does not coerce women into forfeiting the right to abort); *and Rosie J. v. North Carolina Department of Human Services*, 491 S.E.2d 535 (N.C. 1997) (no right to abortion funding; funding of childbirth rationally related to legitimate objective of encouraging childbirth) *with Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (no duty to fund abortion, but state must fund pregnancy-related services with genuine indifference), *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (no right to funding, but once the state funds pregnancy care it must proceed in neutral manner).

the issue in *Harris v. McRae*, and concluded that there is no constitutional right to payment for an abortion and an omission of benefits to pay for abortion does not alter a woman's basic circumstances to create an obstacle to the exercise of a right. 448 U.S. at 300 (1980).

A right to abortion funding is not created by virtue of a legislative decision to fund childbirth. In spite of a state equal protection guarantee that is broader than its federal counterpart, the Supreme Court of Michigan agreed with the United States Supreme Court and stated,

> we do not see how a decision to offer funds only for childbirth takes away any of the choices that would be available to an indigent woman if the state did not offer funds for childbirth. It may be that in the absence of state funding her indigency acts as a barrier to choosing abortion, but "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of [Michigan's] decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires."

Doe v. Department of Social Services, 487 N.W.2d at 178, quoting *Maher v. Roe,* 432 U.S. 464, 474 (1977).

Under this analysis and the United States Supreme Court decisions, a state is free to choose which services to subsidize or defund, so long as the federal minimum requirements are met. Even though the Alaska Supreme Court has held that a quasi-public hospital may not prohibit elective abortion services, denial of state payment for abortion services is separate and distinct from a prohibition on the provision of abortion services themselves. Valley Hospital's ban on certain abortion procedures was invalidated by this court because the hospital used its

"monopoly privileges" acquired through the certificate of need program to "limit access to lawful medical procedures for moral or religious reasons." *Valley Hospital Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 970 (Alaska 1997). This court has ruled that where a public hospital has a virtual monopoly, it may not refuse to provide abortions because there is a risk that the right will be completely frustrated. *Id.* The Michigan Supreme Court expressly distinguished this monopoly circumstance from the question at bar, finding:

> abortion funding cannot be equated to situations where public funding is required because the government has monopoly control over the means of exercising a fundamental right. The government has no monopoly on the performance of abortions or on the means to pay for abortions. Private clinics perform abortions, and, as in Jane Doe's case, private funds can be made available for that purpose.

Doe, 487 N.W.2d at 172.

For these reasons, the decision in *Valley Hospital* is not dispositive in this case because unlike a refusal to provide abortion services at a facility with a monopoly, funding limitations do not control the exercise of the right to abort. There is no right to funding, and the funding of childbirth does not create such a right.

III. The superior court abused its discretion when it concluded that DHSS must either spend money to subsidize therapeutic abortion or refrain from spending any money on pregnancy-related services.

In 1972, when the legislature created the Medicaid program, it decided not to fund Medicaid services other than those that are federally reimbursed. At that time, the existing GRM program continued to pay for services

not within the range of federally reimbursed Medicaid services. The legislature has more recently decided as a matter of policy to discontinue payments for abortions under the state funded program. The federally matched Medicaid program continues to pay for pregnancy-related services that receive federal matching funds, including a narrow range of abortions.

A. Compelling state interests that favor funding childbirth include prevention of birth defects, and an increase in the number of healthy outcomes by virtue of good prenatal care.

The policy decisions of the legislature to fund services that promote the general welfare can be distinguished from the decision to ban a procedure at a quasi-public hospital such as Valley Hospital. Valley Hospital banned elective abortions at that facility as a matter of conscience. The facility did not attempt to justify its affirmative action to stop performance of the procedure with any argument that lack of access to this procedure would further the public welfare. *Valley Hospital,* 948 P.2d at 971. While the privacy right "clearly . . . shields the ingestion of food, beverages or other substances" the right is not absolute and may be "held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare." *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974).

Acceptance of the legislature's interests in the public welfare that influence the affirmative decision to fund pregnancy-related services would not lead to a ban on abortion nor even a ban of the procedure at a quasi-state hospital. This is true because the general welfare of pregnant women who choose to

continue their pregnancies, and the state's interest in assuring the best potential outcome of those pregnancies, does not depend upon a ban or a limitation of lawful abortion procedures.

Planned Parenthood admits that there is no right to abortion funding. [R. 25] Given that there is no right to funding, the legislature need not provide a compelling reason for the omission of funding. Nonetheless, there are compelling reasons for the affirmative action to fund pregnancy and childbirth. See, *Maher*, 432 U.S. at 474 (state may favor childbirth and allocate public funds accordingly, and indigent women suffer no disadvantage as a consequence).

There are medical and public welfare interests that are served by the legislature's decision to fund childbirth. Pregnancy is a medical condition that requires good preventative care and ongoing monitoring in order to assure the best outcome possible. The importance of a good outcome is greater than it would be with other medical procedures because it may affect the well-being of a child many years into the future. The state has a compelling interest in assuring that the children of the state have the best possible start in life. These concerns justify funding decisions that provide additional medical payments for women carrying children above and beyond what women who elect not to carry children receive, or what men receive.

The superior court mischaracterizes the argument regarding the compelling state interest in funding pregnancy, prenatal care, and childbirth. [Exc.116-118]. The court attempts to characterize the state interest in healthy

pregnancies as a merging of rights of the child after birth and the rights of the fetus during the first and second trimester of pregnancy. The state has made no attempt to assert rights of the fetus or the child; instead the state asserts the compelling interest of the state in preventative care that furthers the public welfare by minimizing complications and health problems of both mother and child, both now and in the future. It is undisputed that childbirth is a more complicated, expensive, and potentially dangerous course than abortion and for this reason the need for public funding is more compelling. [R. 496, 928-29].

The state has compelling interests in the public welfare goals fostered by the funding of pregnancy-related services, that do not exist for the funding of abortion. The court's decision assumes that pregnancy is always a balancing between the rights of the mother and the fetus, that a benefit for one is necessarily a detriment to the other, and that the trimester analysis precludes any consideration of the rights of the fetus until the third trimester. The state respectfully submits that in the vast majority of pregnancies, the interests of the mother and the child are not at odds, but closely aligned.

B. The decision to provide state funding for pregnancy and childbirth does not penalize the decision to abort.

The lower court ruled that the challenged regulation impermissibly interferes with the right of privacy because it discriminates against the exercise of a constitutional right and penalizes women who choose to abort by treating them differently from women who carry to term. [Exc. 115] This penalty analysis fails

because Medicaid eligible women who choose to abort still receive all Medicaid benefits. [Exc. 71-74]. Like many other services, unless the procedure meets the Medicaid criteria, there is no Medicaid payment for the abortion procedure, but this does not affect payment for other Medicaid services. [Exc. 71-74].

For example, a Medicaid eligible woman with health complications may suspect that she is pregnant. Medicaid would cover her costs for a pregnancy test. If she needed to travel to an urban center to determine the status of her pregnancy, Medicaid would cover the cost of that travel. [Exc. 71-74] If she needed further tests, ultrasound or amniocentesis, Medicaid would cover those services. If the results show that a therapeutic abortion was indicated, and the woman chose that alternative, she could make other payment arrangements for that procedure. If, after the abortion, she had complications, Medicaid would cover those services. After the termination of the pregnancy, she would have 60 days of postpartum care. *Id.* This postpartum care would be provided to women who abort even if their Medicaid eligibility was solely by virtue of the pregnancy. If she had other unrelated medical needs at the time of the abortion or afterward, Medicaid would cover those services. [Exc. 73].

Therefore, the exclusion of most therapeutic abortions from state funding is similar to the exclusion of other medical procedures, and does not penalize a woman for her choice to abort.

IV. The superior court erred when it found 7 AAC 43.140 unconstitutional, void, and unenforceable, insofar as it denies coverage for therapeutic abortions other than those already covered under the Medicaid program.

The regulation that the superior court found unconstitutional, 7 AAC 43.140, sets out the criteria for payment for abortion services under Medicaid. Subsection (a) states the federal criteria for payment in the Medicaid program as set out in the Hyde Amendment to the federal budget bill. Subsection (b) states that "[a] procedure not covered under this section will be covered under General Relief Medical to the extent provided in 7 AAC 47." This regulation section does not control what services will be paid for under Medicaid; that authority comes from the legislature via the enabling act for the Alaska Medicaid program. AS 47.07.030.

Since the elimination of GRM funding, Planned Parenthood has argued that state subsidy of some pregnancy-related services, but not certain abortions impermissibly coerces the decision-making of Medicaid recipients and violates their right of privacy under the Alaska Constitution, and for this reason 7 AAC 43.140 is unconstitutional. The state has argued that 7 AAC 43.140 merely implements spending that the legislature must first authorize, that this legislative power of appropriation does not implicate privacy rights, and that intervention by the court into the exercise of the legislature's appropriation power violates the doctrine of separation of powers. By voiding this regulation and simultaneously creating an entitlement to payment for therapeutic abortion, the decision of the

superior court does not simply void the challenged regulation, but effectively changes the state Medicaid enabling statutes, and transforms Medicaid from a program designed to maximize federal financial participation to a program which may result in a material loss of federal support.

When it found the challenged regulation unconstitutional, the superior court relied upon the decision of the California Supreme Court which found that the denial of state funds affects a woman's reproductive choice and interferes with her exercise of a fundamental right under the California Constitution. *Committee to Defend Reproductive Rights v. Myers,* 625 P.2d 779 (Cal. 1981). [Exc. 115] The superior court followed the California court's reasoning to find that, "7 AAC 43.140 impermissibly interferes with a Medicaid-eligible woman's right to privacy to decide whether or not to carry a child to term." [Exc. 115].

The United States Supreme Court, however, has held that it is not unconstitutional under the United States Constitution to selectively subsidize some constitutionally protected rights and not others, and has approved the federally mandated abortion funding restrictions imposed in Alaska regulations. *Harris v. McRae*, 448 U.S. 297 (1980). State supreme courts that have addressed this issue offer a mixed response. Like California, the Minnesota Supreme Court found funding restrictions unconstitutional because they infringe on a privacy right under Minnesota's constitution. *Women of State of Minn. by Doe v. Gomez,* 542 N.W.2d 17 (Minn. 1995). Other state supreme courts have found these restrictions

unconstitutional under different theories. *Women's Health Center of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658 (W.Va. 1993)(due process); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982)(equal protection); *Moe v. Secretary of Administration and Finance*, 417 N.E. 2d 387 (Mass. 1981)(due process); *Planned Parenthood Ass'n, Inc. v. Dept. of Human Resources of State of Oregon*, 687 P.2d 785 (Or. 1984)(privileges and immunities). Yet another group of state supreme courts have upheld the constitutionality of restrictions similar to those imposed here in Alaska. *Rosie J. v. North Carolina Dept. of Human Resources*, 491 S.E.2d 535 (N.C. 1997); *Doe v. Department of Social Servs.*, 487 N.W.2d 166 (Mich. 1992); *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985).

Alaska law is consistent with the law of the majority of the states in limiting state assistance to the Hyde Amendment exceptions approved by the United States Supreme Court in *Harris*. Of the 50 states, 29, including Alaska, limit state assistance to abortions that meet the Hyde exceptions.[9] Of the ten states with an express constitutional privacy right, five, including Alaska, limit assistance for abortion to the Hyde Amendment exceptions (Arizona, Louisiana, Florida and South Carolina). Only three of the ten states with express privacy guarantees have a court decision permanently enjoining the enforcement of assistance limits to

[9] States which currently limit state funding for abortion to cases of life, threat, rape or incest are Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Wyoming.

those imposed by the Hyde exceptions. These three are California, Illinois and Montana. In the remaining two states, Hawaii and Washington, the state legislatures have chosen to provide abortion assistance to women with exclusively state money.[10]

The regulation found unconstitutional by the superior court merely implements medical assistance payments that first must be authorized by legislative appropriation. This regulatory section is not unconstitutional, and it is not made unconstitutional by the legislature's decision to appropriate funds for pregnancy-related services other than therapeutic abortion.

V. The superior court erred when it enjoined the state from excluding therapeutic abortion from the Medicaid program, effectively amending AS 47.07.030, and thereby expanding the Medicaid program without legislative action in violation of the Alaska Constitution, Article II, section 1, and the separation of powers doctrine.

Alaska law controls how the DHSS may spend state money. The Alaska Constitution provides that "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. . . ." Article IX, section 13. This constitutional section is implemented by AS 37.05.170, AS 37.07.080, and AS 37.10.030. The court has indicated that "[s]tatutory language implementing this constitutional section establishes a budgetary system

[10] This information is based upon the most recent CCH Medicare and Medicaid Guide state charts, which appear in Volume 4, paragraphs 15,550 - 15,660.

in which all appropriations are made by legislative act." *Municipality of Anchorage v. Frohne,* 568 P.2d 3, 5, n.5 (Alaska 1977).

The courts may not appropriate money, or order the legislature to appropriate money, for services the legislature has made a policy decision to defund. *Estate of Cirone, et al. v. Cory*, 234 Cal. Rptr. 749, 753 (Cal. App. 6th 1987)(court could not order attorney fees in excess of restriction in appropriation). The court has recognized that the judiciary does not have the power to order executive agencies to act, stating that "the judiciary may not bequeath such a power to itself." *Granato v. Occhipinti*, 602 P.2d 442, 444 (Alaska 1979)(the court could not constitutionally require the state to conduct a home-study in a child custody dispute). The superior court may not infringe upon the discretionary powers of another branch of government. *Public Defender Agency v. Superior Court,* 534 P.2d 947 (Alaska 1975)(court violated separation of powers when it ordered the Attorney General to prosecute). Appropriation of state funds is clearly within the discretionary powers of the legislative branch. Constitution of Alaska, Article IX, section 13. Given the law governing appropriations, and the court's inability to order appropriations, DHSS has no authority to expend money for therapeutic abortion services outside the Hyde Amendment exceptions, or to incur an obligation to pay for these services by virtue of the superior court's order.

A. Budget decisions are a legislative function and court intervention to appropriate funds for a purpose expressly rejected by the legislature violates the separation of powers doctrine.

Planned Parenthood asked the superior court to enjoin the state from enforcing 7 AAC 43.140 so as to deny funding for therapeutic abortions that do not meet the Hyde Amendment requirements. Pub. L. No. 105-78 § 510 (1997); [Exc.671] In effect, this relief for Planned Parenthood would require the court to order expenditures that the legislature expressly chose not to authorize. CCS HB 325 [R. 1094] This requested relief runs counter to the constitutional and statutory powers of the legislature regarding appropriations. Article IX, section 13 of the Alaska Constitution provides that "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. . . ."[11]

The statutory provisions implementing the legislature's power of appropriation in Alaska prohibit the relief requested here. Alaska statutes mandate that funds cannot be certified for spending unless there is a valid existing appropriation. AS 37.05.170; AS 37.10.030; *Zerbetz v. Alaska Energy Center,* 708 P.2d 1270 at 1277 (Alaska 1985). The legislature must adopt legislation to provide authority for specific obligations incurred. The legislature may not delegate its authority to other branches of government unless it is narrowly proscribed. *State v. Fairbanks North Star Borough,* 736 P.2d 1140 (Alaska

[11] The requested relief is also barred by the doctrine of separation of powers as explained above.

1987)(statute which gave the executive sweeping power over the entire budget without limitation found unconstitutional). In the absence of extraordinary circumstances, the court may not usurp legislative authority to redirect appropriations in a manner expressly rejected by the legislature. *C.f., e.g., Granato v. Occhipinti* at 602 P.2d 442, 443-44 (Alaska 1979)(Court may not constitutionally order state to conduct home study in custody dispute, even if in best interest of child); *City of Sacramento v. California State Legislature,* 231 Cal. Rptr. 686 (Cal. App. 3d 1987)(court may declare legislative action unconstitutional, but cannot order an appropriation).[12]

In the case of abortion, the legislature has clearly exercised its authority to appropriate medical assistance funds and has chosen to pay for only those abortions that receive federal reimbursement. The legislature eliminated the state funded program that paid for abortion in the past, and designated funds appropriated for medical assistance so as to limit their use. [Exc. 92-93] The Legislature has restructured the budget to separate purely state funds and federal matching funds. [Exc. 38, line 22; Exc.39, line 26; Exc. 82, 88, 92]. While it is true that no federal law prevents states from using purely state funds to pay for therapeutic abortions that fail to meet the federal criteria for reimbursement, it is

[12] There is a narrow exception to allow the court to redirect an agency where there is an overriding constitutional imperative, but as explained above, Planned Parenthood has failed to meet the burden of establishing this exceptional circumstance. Furthermore, even if Planned Parenthood could establish an exceptional circumstance, there remains the prohibition against court ordered appropriations. *Granato*; *Mandel v. Meyers,* 629 P.2d 935 (Cal. 1981).

also true that federal law does not require states to use state funds to pay for those therapeutic abortions excluded from federal funding. *Williams v. Zbaraz*, 448 U.S. 328 (1980); *Harris v. McRae,* 448 U.S. 297, 310 (1980) (no constitutional violation when public funding withheld for certain medically necessary abortions, while providing funding for other medically necessary services); *quoting Zbaraz v. Quern*, 596 F.2d 196, 200 (CA7 1979). The choice whether to pay for the federally excluded therapeutic abortions resides with the legislatures of the individual states, and Alaska has chosen not to fund these services.[13] 448 U.S. at 311 n.16.

The degree of the intrusion into the realm of the Legislature that the superior court decision undertakes is significant. This is not a simple matter of restoring services and maintaining the status quo. Reappropriation of Medicaid funds that were conditionally appropriated causes the loss of federal funds; moving state funds from one appropriation to another violates the Executive Budget Act; and using CAMA's purely state funds to fund a service deliberately excluded from CAMA risks termination of that program.

The power to appropriate state money for Medicaid services falls squarely within the authority of the legislature, and the judicial branch may not

[13] Immediately following the Hyde Amendment exceptions to the abortion funding ban is a subsection of the public law which affirms that the choice to fund abortion with purely state funds is left to the states. Pub.L. No. 105-78 § 510 (November 13, 1997), set out in the Authorities Principally Relied Upon above.

order appropriation of state money to replace funds not appropriated by the legislative branch.

B. Medicaid funds cannot be transferred to cover the abortions at issue here because Medicaid funds are conditionally appropriated based on the condition that DHSS claim federal financial participation, and the abortions at issue here are not eligible for federal financial participation.

All state money appropriated to the Medicaid services budget request unit (BRU)[14] must be matched with federal Medicaid funds. AS 47.07.020 and AS 47.07.030; [Exc. 52, lines 2-13] There should be no dispute over the fact that the expenditure of state money can be conditional upon the receipt of federal funds.

By law the DHSS only has the authority to administer a state Medicaid program to pay for services that qualify for federal financial participation (FFP).[15] Under the Social Security Act, a state must provide certain mandatory services in its Medicaid program. 42 U.S.C.A. § 1396a(a)(10). The state may also provide certain optional services listed in the Social Security Act. Both mandatory and optional services qualify the state Medicaid program for FFP. Finally, a state may pay for other services that are not listed as mandatory or optional under the Act, but FFP is not available for such services.

In the Medicaid program's enabling legislation, DHSS is directed to participate in the national medical assistance program and to maximize federal receipts. AS 47.07.010 and AS 47.07.040. Alaska does not pay for any services

[14] A "budget request unit" is the largest budgeting or appropriation entity. [Exc. 80, line 24]. Generally, the terms "appropriation" and "BRU" are synonymous.

[15] In the context of Medicaid budget documents, these federal matching funds appear under the source code "Fed Rcpts."

that are not federally reimbursable as part of its Medicaid program.[16] Instead, Alaska has chosen to pay for services not federally reimbursable through separate, entirely state funded programs like CAMA or GRM.

The Alaska statutes expressly limit Medicaid payments to federally matched services by authorizing Medicaid payments for persons required to be covered by federal law and optional groups, "for whom the state may claim federal financial participation." AS 47.07.020. The statutes clearly direct DHSS to provide payment for services for "all residents of the state for whom the Social Security Act requires Medicaid coverage," and to "optional groups of persons for whom the state may claim federal financial participation." AS 47.07.020. As to services, the statutes direct DHSS to include in the state Medicaid program services that are mandatory under the Social Security Act. AS 47.07.030(a). In addition to mandatory services, DHSS may provide a specifically prescribed list of services that are optional under the Social Security Act. AS 47.07.030(b). The optional services listed in AS 47.07.030 are the only optional services the state may pay for through the Medicaid program and all of the listed services are eligible for federal matching funds. AS 47.07.030(b). Another indication of the legislative intent that Medicaid cover matched services is the directive to "secure for the state the optimum federal payment" under the Social Security Act. AS 47.07.040.

As noted above, Alaska does offer some medical assistance to its residents that does not qualify for federal matching funds under the Social Security Act, but it pays for these non-matching services, and groups of persons who are not eligible for FFP, with state funds that are not appropriated to the Medicaid

[16] There is a small part of the budget which is not federally matched and that is the funding specifically appropriated by the legislature for the hold harmless programs to protect people who lose Medicaid eligibility when they receive a PFD or longevity bonus.

program. For example, before July 1998, General Relief Medical (GRM) provided services to needy groups not eligible for Medicaid or for services not provided by Medicaid. AS 47.25.120. The Catastrophic Illness Assistance program was designed to serve residents who may not be Medicaid eligible, but have suffered a financial catastrophe as a result of an illness or accident. AS 47.08.010.[17] The recently created Chronic or Acute Medical Assistance program (CAMA), which replaced GRM in July 1998, covers needy groups not eligible for Medicaid for a limited list of services. AS 47.08.150; Chapter 130, SLA 1998; SCS CSHB 459(RLS) (effective July 1, 1998). Use of funds in the CAMA appropriation is governed by legislation that was created with specific legislative intent to exclude abortion and the CAMA program is subject to shutdown if the program is found to be unconstitutional. SCS CSHB 459(RLS) sections 8 and 13; [R. 1096-1103].

Federal matching funds are a significant part of the Medicaid services appropriation. Federal funds account for well over half of the Medicaid BRU.[18] This is because the general match rate for most services is 59.8 percent federal funds to 40.2 percent state funds. [Exc. 66, line 9]. For some services, the rate is actually 100 percent. [Exc. 66, line 15.] For this reason, the transfer of Medicaid funds to services unauthorized by statute and unmatched with federal funds would mean a loss of federal funding greater than the amount of the funds transferred. For example, the expenditure of $1 million purely state dollars intended for federally matched services on an unmatched service would mean a minimum loss of $1,487,562.20 and a maximum loss of $2 million in federal matching funds that the transferred state funds would have generated for the

[17] The catastrophic illness program, however, has not received funding for years. [Exc. 65].

[18] For Fiscal year 1999 federal receipts of $253,744,300 comprise approximately 66 percent of a total Medicaid budget of $384,577,600.

Medicaid program. This could mean a $3 million impact on the Medicaid program. It is clear that the significance of the state matching funds was considered when the Fiscal Year 1999 budget was prepared because the state funds allocated to the various Medicaid services provide the basis for the federal matching figures used to calculate the total appropriation.[19] [Exc. 44-49]. Thus the total appropriation is a combination of state funds appropriated by the legislature, and federal funds that the state anticipates receiving when the state funds are spent on services that are eligible for FFP. If the amounts appropriated for a service eligible for FFP could be combined and reallocated to non-matching services outside the scope of the appropriation regardless of their designations, the state would not receive the federal funds anticipated in the allocations within the appropriation, and those allocations within the budget bill that were based upon FFP would be meaningless.

There are no state funds available to cover therapeutic abortions that are not federally matched in the Medicaid appropriation because the Alaska Legislature has either conditioned appropriation for Medicaid upon the receipt of federal matching funds, or made appropriations for a specific service not including therapeutic abortion. The operating budget for the Medicaid Services BRU includes several different sources of funds; however, these funds are almost entirely appropriated on the condition that they are matched with federal funds. Of a $384 million budget, the longevity bonus hold harmless program had only a $45,700 appropriation. [R. 1106.] [20]

---

[19] Fiscal year 1999 or "FY 99" begins July 1, 1998 and ends June 30, 1999. [Exc. 76, line 21]; AS 37.07.120(6).

[20] The allocation for the PFD hold harmless program is covered by a source outside the Medicaid BRU.

There are two hold harmless programs that have funds appropriated for a specific purpose, which could not be used for therapeutic abortion. These hold harmless programs also have specific, independent statutory authority outside of Medicaid that controls the use of these state funds. AS 47.45.122; AS 43.23.075. The hold harmless programs maintain recipients' Medicaid benefits when recipients receive a longevity bonus or PFD that would otherwise increase their income or resources above the limit for Medicaid eligibility. These funds are appropriated for a very specific purpose: to assure that Medicaid eligible Alaskans do not lose continuous Medicaid coverage due to the receipt of a longevity bonus or a permanent fund dividend. This could not be expanded to cover abortion services.

The conditional appropriation of Medicaid funds prevents DHSS from spending them on therapeutic abortions not covered under the Medicaid statutes.

C. Budget structure controls allowable state expenditures.

In fiscal year 1999 funds within the "Medicaid Services" BRU are not broken into separate components or allocations[21] [Exc. 82] as they have been in years past. This change, however, does not mean that these funds have not been allocated to various services. The detail of the operating budget shows that within the single Medicaid services component there are allocations for specific programs and services. The single component BRU for Medicaid services allows those administering the Medicaid program to shift funds between these services. [Exc. 86-87]. But, it does not allow funds to be shifted out of one BRU (appropriation) to another BRU (appropriation) or to a service that has no allocation in the budget.

[21] For purposes of medical assistance, "components" and "allocations" are synonymous terms.

[Exc.90, lines 9-12]. The statutes expressly prohibit transfers between appropriations. AS 37.07.080(e).

Unlike budgets in earlier years, state Medicaid funds for fiscal year 1999 were appropriated in a BRU separate from the BRU for the purely state funded medical assistance programs. Transferring purely state dollars from other programs into Medicaid is not possible given the structure of the 1999 fiscal year's budget. The 1999 fiscal year was different from earlier years in that the purely state dollars for the CAMA program were placed in a separate appropriation or BRU. In fiscal year 1998, GRM and Medicaid shared one BRU. Ch. 98, SLA 1997; [Exc. 92, lines 2-6]. The budgets for GRM and Medicaid contained separate allocations within one umbrella appropriation. If there was a shortfall in Medicaid, the funds from a GRM allocation could be transferred to a Medicaid allocation, so long as the approval processes within the executive branch were followed. This eliminates the budget component to which funds might have been transferred. When the new CAMA program was funded it was designed to be a completely separate program with completely separate funding. CAMA funding is in a BRU separate from the Medicaid BRU. The executive branch cannot transfer Medicaid funds to CAMA and CAMA funds cannot be transferred to Medicaid because they are in separate BRUs. [Exc. 90, lines 9-12]; AS 37.07.080(e).

D. Under Alaska law, funds appropriated in FY99 for federal matching through the Medicaid program may not be diverted to a non-matching expense.

Spending of funds designated as matching funds for a non-matching purpose would also constitute a diversion in violation of the Alaska Constitution and Alaska Statutes. Alaska Const. art. IX, § 13; AS 37.05.170. Before payments can be made from a state fund, the Department of Administration must certify that

there is a sufficient unencumbered balance in the state fund and that an appropriation or expenditure authorization has been made. AS 37.05.170. While a state agency has authority to administer its program, this authority is limited by legislative appropriation. AS 37.07.080(a). Transfers or changes may not be made between appropriations, and agreements may be used to finance a service only where the agency has an appropriation that may be used for that purpose. AS 37.07.080(e), [Exc. 43-49]. The power to transfer between appropriations or to change the purpose for an appropriation is tantamount to the power to amend a statute. That is a purely legislative power that is not entrusted to the judiciary.

In the fiscal year 1999 budget, funds were appropriated to the Medicaid program for federally reimbursable services identified in statute and these state funds were to be matched with federal funds. [Exc. 43-49]. DHSS may not spend these funds on therapeutic abortion not covered under Medicaid without violating Alaska law.

E. Separation of powers as well as Alaska statutes governing appropriation prevent a court ordered expenditure of medical assistance funds for therapeutic abortions.

Just as the executive branch may not transfer funds from one BRU to another, the judicial branch is similarly limited. Medicaid funds are conditionally appropriated in Alaska; state only funds are in a separate BRU and cannot be transferred to the Medicaid BRU. Unlike other states where the courts were able to redirect an existing appropriation because the legislature had made a general appropriation, here the court is faced with a Medicaid appropriation conditionally

appropriated with the authority to spend state funds dependent upon those funds being matched by federal funds.[22] [Exc. 43-50]. With the exception of the hold harmless programs, there are no services offered under the Alaska Medicaid program that are not eligible for federal matching funds.[23]

The situation in Alaska differs from that in other states. It is significant that when the Massachusetts court stated that, "the relief sought here would not jeopardize Federal reimbursement for other services provided by the Massachusetts Medicaid program," it was not faced with a situation like that in Alaska where all state Medicaid funds must be matched.[24] *Moe v. Secretary of Administration and Finance,* 417 N.E.2d 387, 391 (Mass 1981). If the Alaska Medicaid program reallocated state matching funds appropriated for a federally reimbursable service to non-reimbursable abortions, Alaska would give up both the reimbursable service that the funding was taken from and the ability to access

---

[22] *See, e.g., Moe v. Secretary of Administration and Finance,* 417 N.E.2d 387, 391 (Mass 1981)(medical assistance appropriation general in form and otherwise unrestricted); *Committee to Defend Reproductive Rights v. Rank,* 198 Cal. Rptr. 630, 632 (Cal. App. 1st 1984)(no bar to spending of broadly appropriated Medi-Cal funds on abortion).

[23] In actual practice, there might be some narrow circumstances where the state does not receive federal matching funds for Medicaid services. For example, the state may not receive or claim FFP while resolving a regulation updating problem or settling a claim where the eligibility of a particular claim was arguable, yet justifying the claim to the federal Medicaid program might be problematic. Aside from this type of anomaly, however, the Alaska Medicaid program offers only those services reimbursable under the federal Medicaid program.

[24] Similarly, when questioned on the effect from the perspective of federal law, rather than state law, Nancy Weller, a Medical Assistance Administrator for the Division of Medical Assistance, testified that it would violate no federal rules to use purely state funds to cover abortion so long as the state didn't claim federal matching for those funds. [Exc. 68-70].

federal matching funds for that reimbursable service. This result would do more than "jeopardize Federal reimbursement for other services," it would wipe out both the reimbursement and the state funds appropriated for some services.[25] This would violate the statutory directive to DHSS to "secure for the state the optimal federal payment under the provisions of 42 U.S.C.A. §§ 1396-1396p (Title XIX, Social Security Act, Medical Assistance)." AS 47.07.040.

In the superior court's order denying the plaintiff's request for a temporary restraining order, the court recognized that there were two sources of harm to the defendants if they were enjoined from enforcing 7 AAC 43.140:

> First, the Department of Health and [Social] Services ("the Department") has no appropriations to pay for the services. If the restraining order issues, this court will be ordering the State to either reallocate money from other sources or to incur a debt to continue funding. The level of funding required to comply with such a restraining order would be more than relatively slight. [footnote omitted] This injury would increase over time. And, plaintiffs have not suggested that the injury which the State might suffer could be indemnified by a bond.
>
> Perhaps more importantly, though, there is a harm that will result which cannot be indemnified by bond. By directing the Department to expend monies unauthorized by the legislative branch of government, part of the injury that will result from issuance of this restraining order will be inappropriate judicial interference with the role of the executive branch.

[25] Federal matching accounts for reimbursement of 59.8 percent to 100 percent of the state's expenditures for Medicaid services.

This harm has not been resolved by the Final Judgment. The superior court ultimately entered a permanent injunction that affords the *same relief* that plaintiffs originally requested in their Motion for Temporary Restraining Order. The separation of powers doctrine prevents the court from ordering the spending of money specifically, and conditionally, appropriated for other services.

VI. When the superior court ordered the state to pay for therapeutic abortion, it effectively reappropriated money previously appropriated for other purposes, in violation of AS 37.05.170 and the Alaska Constitution, Article IX, section 13.

Even if this court affirms the superior court's finding that 7 AAC 43.140 is unconstitutional, the relief the lower court ordered is unavailable because it requires appropriation. In Alaska, no Medicaid appropriation is reasonably available to cover therapeutic abortion, and the court may not order the Legislature to appropriate money. *Estate of Cirone*, 234 Cal. Rptr. 749, 753 (Cal. App. 6th 1986)(separation of powers violated by order directing legislature to appropriate money in excess of budget restriction on attorney fee awards). It is true that a court may find a budget constraint unconstitutional and order spending of funds that have already been appropriated broadly. *Committee to Defend Reproductive Rights v. Rank*, 198 Cal. Rptr. 630, 632 (Cal. App. 1st 1984)(separation of powers does not bar spending of broadly appropriated Medi-Cal funds on abortion). However, such authority depends upon an appropriation becoming reasonably available for spending once the unconstitutional restraint is removed by the court; it does not abrogate the prohibition on court ordered appropriations. *Id.*; *City of Sacramento v. California State Legislature*, 231 Cal. Rptr. 686, 688 (Cal. App. 3d 1987)(separation of powers doctrine prevents judiciary from compelling legislature

to appropriate money for unemployment insurance reimbursement). Here there is no appropriation reasonably available for spending on therapeutic abortions if the challenged regulation is stricken. The statutory constraints on the scope of the Medicaid program remain in full force, and the GRM program still has no funding in its BRU.

The separation of powers doctrine prohibits the court from ordering the Legislature to make a specific appropriation to the GRM program BRU. *Cf. Mandel v. Meyers,* 629 P.2d 935 (Cal. 1981) (although a court cannot order a legislative appropriation to pay attorney fees, an order removing an invalid restriction on an otherwise valid appropriation does not violate separation of powers doctrine). Here, however, it appears that the superior court may have intended for the state to pay for therapeutic abortion from the Medicaid appropriation. The Medicaid appropriation, however, cannot be used for this purpose because the stated purpose is too narrow to cover the purpose intended by the superior court.

Medicaid in Alaska is narrowly proscribed in the state-enabling act to include only federally matched services under the federal Medicaid statute. AS 47.07.030. In other states that allowed court-ordered spending, Medicaid services were broadly defined. In California, for example, the Medi-Cal act expansively defines health care services.[26] Another factor that the court relied upon in California was that Medi-Cal traditionally covered abortions prior to the budget riders that were contested by abortion advocates. *Committee to Defend Reproductive Rights,* 198 Cal. Rptr. at 632. Alaska's Medicaid program is

[26] Medi-Cal is California's Medicaid program.

distinguishable from California's Medi-Cal program because Alaska's enabling act lists the services covered (by reference to the federal Social Security Act) and the Alaska Medicaid program has not traditionally paid for abortions. [R. 1086]. As a result, when the lower court struck 7 AAC 43.140 down as unconstitutional, the enabling act remained, and still limits Medicaid in Alaska to services that are mandatory under the federal law and only those federally matched optional services listed in state statute. AS 47.07.030(b). Other sections in the Alaska Medicaid statutes evidence the legislative intent to retain strict control on the Medicaid services paid for under the Medicaid program. *See, e.g.,* AS 47.07.020(d).

For the reasons set out above, the appropriation for Medicaid is not otherwise reasonably available for therapeutic abortion claims without legislative action. Either the Legislature must amend the Medicaid enabling act to include therapeutic abortion services that do not appear in the lists of mandatory or optional services allowed under the federal law, or the Legislature must appropriate state money without a federal matching requirement to be used for therapeutic abortion. In *City of Sacramento v. California State Legislature*, the California court of appeal held that it is a violation of separation of powers doctrine for the court to order these legislative actions. *City of Sacramento v. California State Legislature,* 231 Cal. Rptr. 686 (Cal. App. 3d 1986). In *City of Sacramento*, the California court of appeal stated:

> It is within the legitimate power of the judiciary to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of non-action. The

> Legislature being the creative element in the system, its action cannot be quickened by the other departments. Therefore, when the Legislature fails to make an appropriation, we cannot remedy that evil.

231 Cal. Rptr. at 688 (quoting from *Myers v. English*, 9 Cal. 341, 349 (1858)). Here, the order of the superior court leaves DHSS without direction as to how its order overcomes both the non-action of the Legislature, and the prohibitions on spending state money without an appropriation.

The judiciary cannot intrude upon the legislature's power to make policy and appropriate funds.[27] It is clear that the Legislature eliminated funding for therapeutic abortion for policy reasons and not to save the state money. Chapter 137, SLA 1998. It is constitutionally permissible for the state to favor childbirth over abortion. *Beal v. Doe*, 432 U.S. 438, 446 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Rosie J. v. North Carolina Dep't of Human Resources*, 491 S.E.2d 535, 537 (N.C. 1997). The state has compelling interests in good prenatal care and healthy outcomes from childbirth. The United States Supreme Court has found that states have a compelling interest in protecting potential human life throughout the pregnancy. *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). It is the province of legislature to decide policy issues and

---

[27] *Cf. State v. Dupere*, 709 P.2d 493, 496-97 (Alaska 1985) (judiciary may not intrude on the legislative power to appropriate, but no separation of powers violation where a sufficient appropriation exists for payment), *modified*, 721 P.2d 638 (Alaska 1986).

encourage certain behaviors by funding decisions. *Doe v. Dep't of Social Services*, 487 N.W.2d 166, 186 (Mich. 1992).

Therefore, when the superior court acted to establish a state obligation, notwithstanding an explicit legislative decision not to fund most therapeutic abortions, the court acted in violation of Alaska law and the separation of powers doctrine.

CONCLUSION

This court should reverse the ruling of the superior court, vacate the permanent injunction and the award of costs and fees, and find that the superior court erred in concluding that failure to fund all therapeutic abortions constrains and interferes with a fundamental right and violates the right of privacy set out in Article 1, section 22 of the Alaska Constitution; the superior court erred when it held that Alaska's constitutional right of privacy entitles Medicaid eligible women to funding for therapeutic abortion by virtue of their eligibility for pregnancy-related services under Alaska's Medicaid program; and that the superior court did not have authority to reappropriate money previously appropriated for other

///

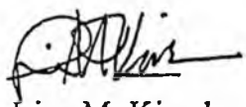
///

///

purposes, in violation of AS 37.05.170 and the Alaska Constitution, Article IX, section 13.

Dated: November 24, 1999.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 

Lisa M. Kirsch
Assistant Attorney General
Alaska Bar Number 9106043

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 522
( ) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services
Title: MEDICAL SERVICES UNDER MEDICAID
BRU: Medical Assistance
Component: Medicaid Services

Sponsor: HOUSE (HES)
Requestor: HOUSE (HES)
Component Number: 2077

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Othe (Specify Type--do not abbrevia						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost:

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

The department cannot determine a fiscal impact related to this bill, as it is unclear how physicians will interpret the language in subsection (b), and how that interpretation may or may not differ from current practice in referring a woman for an abortion.

Prepared by: Nancy Weller
Phone 465-3355
Division Medical Assistance
Date/Time 04/22/2002
Approved by: Elmer A. Lindstrom, Deputy Commissioner
Date 04/22/2002
Agency Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

Testimony for House Bill 522
April 23, 2002

I would like to state my opposition and concerns regarding House Bill 522. For the record, my name is Victoria Halcro. I am the Director of Public Affairs and Marketing for Planned Parenthood of Alaska.

House Bill 522 includes especially vague statements such as "serious adverse physical condition", "significantly aggravated", "seriously endanger" and "highly dangerous". Who decides the degree of viability for a condition to be certifiably serious enough to exist or what a significant health consequence is? Shouldn't the patient make that determination, since she will be the one suffering the "significantly aggravated" health problem possibly for the rest of her life?

House Bill 522 would require Doctors to predict the future and certify that their predictions are correct – no human being has that gift. A physician can only, to the very best of their knowledge and experience provide the most accurate medical diagnosis with regards to each individual's unique physical condition.

Asking physicians to prognosticate and certify their diagnosis with vague terms is indefensible.

In addition, there is a glaring omission in House Bill 522. This bill covers abortions only if a woman's health is at risk, completely ignoring situations involving fetal anomalies. Therefore, this legislation would not pay for an abortion even if the fetus is so deformed or ill that it cannot survive outside of the womb, will be born dead or with severe birth defects. Such cases would not be deemed medically necessary ONLY because the woman is capable of physically carrying the pregnancy to term.

In closing, Mr. Chairman, I would again like to stress my concern regarding House Bill 522 and I'd like to urge that if you hold the same goal as Planned Parenthoods, which is "to reduce the number of abortions" in the state of Alaska, I would greatly encourage you to please take action on House Bill 313, which would grant women prescriptive equity with regards to contraceptives.

Subject: House Bill 522
Date: Tue, 23 Apr 2002 11:33:44 -0800
From: "FIS" <fis@gci.net>
To: <Representative_Fred_Dyson@legis.state.ak.us>

Dear HESS Committee member,

I am writing to express my extreme concern about House Bill 522, scheduled for a hearing in the House HESS Committee at 3:00 p.m. today. This bill only covers abortions if the woman's health is at risk. Fetal abnormalities are not considered. Psychological conditions are not considered - a significant change from current law. Furthermore, by changing "could" to "would" (the physician finding of risk to health) it forces doctors to make guarantees about outcomes of health situations that no doctor or scientist could possibly forsee with 100% certainty. This is threatening to doctors. This is outrageous discrimation against poor women. Please do not allow this bill to go forward.

Janet Smoker
Juneau, Alaska

Mother, Activist Christian and Professional Biologist.

I am p[redacted]

Subject: I am pro choice
Date: Tue, 23 Apr 2002 11:06:25 -0800
From: "Donna Bell" <sahmi60@hotmail.com>
To: Representative_Fred_Dyson@legis.state.ak.us

These two new bills now attempt to narrow the definition of medical necessity to such an extreme that many poor women who need abortions will in fact be excluded from coverage under Medicaid. The bills' exact language is at the bottom of this email. Here are a few of the problems with these bills:

* These bills are intended to deter doctors from performing abortions because the definitions of medical necessity in the bill are vague and unworkable.

* The bills use vague adjectives in phrases such as "serious adverse physical condition," "[condition would be] significantly aggravated by continuation of the pregnancy," "seriously endanger [the woman's health]," and "highly dangerous to the fetus..." Who decides what is a serious danger? What is a significant health consequence? Significant to whom -- shouldn't the patient make that determination, since she will be the one suffering the "significantly aggravated" health problem? This bill would have a bureaucrat at DHSS making these determinations, thereby potentially undermining physician autonomy and the doctor-patient relationship.

* The word "would" should be changed to "could." The bills use the word "would" throughout, requiring the doctor to certify that a serious adverse physical condition of the woman would be significantly aggravated by continuing the pregnancy, would seriously endanger the woman's health, medication for treating psychological illness would be highly dangerous to the fetus, etc. However, physicians are often in a position of being able to speak only in terms of probability, likelihood, the possible risks ... in other words, the doctors are telling patients what might happen, not what will or would happen.

* If a patient with diabetes is told that there is a 50% chance that her kidneys will fail and she'll have to go on dialysis if she continues the pregnancy, this bill does not cover her because it cannot be said for sure that continuing the pregnancy would significantly aggravate her diabetic condition. The most that can be said is that it could harm her, that it might harm her. Right now, under the current reg's, that woman can decide whether she is wil ing to gamble on a 50/50 chance of kidney failure in order to carry her pregnancy to term. This new legislation seems to take that choice away from her unless it can be said that she definitely will suffer harm.

* An pregnant woman who is told that due to a pre-existing illness (epilepsy, for example), she has a 25% chance of ending up paralyzed if she delivers the baby, should be empowered to decide what degree of risk is too high, what consequences are too severe.

She may have other children at home, she may be a single working mom, she may not want to play Russian Roulette with her health. And she should not have to!!!

* These bills only cover abortions if the woman's health is at risk. Fetal anomalies are not considered. It is horribly cruel and barbaric to force a woman to carry to term a pregnancy in which the fetus is so deformed or ill that it cannot survive outside the womb, will be born with severe birth defects, will be born dead, or has only a slim chance of survival outside the womb. Yet this legislation will not pay for an abortion in these medically necessary cases, because the woman is capable of physically carrying the pregnancy to term and delivering the fetus.

* Psychological conditions are not considered part of "medical necessity" unless the woman is taking prescription medication for the condition. This is a significant change from current law.

* There is no consideration given to women who face physical abuse from violent spouses if the pregnancy is discovered. That kind of physical danger plays no role in the determination of medical necessity under these new bills.

Senate Bill 364 is scheduled for a hearing in the Senate Finance Committee at 9:00 Tuesday morning, April 23rd.

House Bill 522 is scheduled for a hearing in the House HESS Committee at 3:00 p.m. Tuesday, April 23rd.

Testimony for House Bill 522
April 23, 2002

I would like to state my opposition and concerns regarding House Bill 522. For the record, my name is Victoria Halcro. I am the Director of Public Affairs and Marketing for Planned Parenthood of Alaska.

House Bill 522 includes especially vague statements such as "serious adverse physical condition", "significantly aggravated", "seriously endanger" and "highly dangerous". Who decides the degree of viability for a condition to be certifiably serious enough to exist or what a significant health consequence is? Shouldn't the patient make that determination, since she will be the one suffering the "significantly aggravated" health problem possibly for the rest of her life?

House Bill 522 would require Doctors to predict the future and certify that their predictions are correct – no human being has that gift. A physician can only, to the very best of their knowledge and experience provide the most accurate medical diagnosis with regards to each individual's unique physical condition.

Asking physicians to prognosticate and certify their diagnosis with vague terms is indefensible.

In addition, there is a glaring omission in House Bill 522. This bill covers abortions only if a woman's health is at risk, completely ignoring situations involving fetal anomalies. Therefore, this legislation would not pay for an abortion even if the fetus is so deformed or ill that it cannot survive outside of the womb, will be born dead or with severe birth defects. Such cases would not be deemed medically necessary ONLY because the woman is capable of physically carrying the pregnancy to term.

In closing, Mr. Chairman, I would again like to stress my concern regarding House Bill 522 and I'd like to urge that if you hold the same goal as Planned Parenthoods, which is "to reduce the number of abortions" in the state of Alaska, I would greatly encourage you to please take action on House Bill 313, which would grant women prescriptive equity with regards to contraceptives.

Subject: OPPOSE HB 522
Date: Thu, 25 Apr 2002 12:17:24 -0800
From: "Alex Johnston" <Alex.Johnston@ppfa.org>
Organization: Planned Parenthood of Alaska
To: <Representative_Fred_Dyson@legis.state.ak.us>,
<Representative_Peggy_Wilson@legis.state.ak.us>,
<Representative_John_Coghill@legis.state.ak.us>,
<Representative_Vic_Kohring@legis.state.ak.us>,
<Representative_Gary_Stevens@legis.state.ak.us>,
<Representative_Sharon_Cissna@legis.state.ak.us>,
<Representative_Reggie_Joule@legis.state.ak.us>

Dear Representative:
I am writing to let you know that I oppose HB 522 and am asking you to oppose it too. This bill is attempting to narrow the definition of "medically necessary" in relation to abortion to such an extreme that many poor women who need abortions will in fact be excluded from coverage under Medicaid. Please take a serious look at some of the language (serious adverse physical condition, significantly aggravated, seriously endanger, highly dangerous) and understand that these vague adjectives and phrases may significantly endanger the lives of women needing a medically necessary abortion.

Most important, is the use of the word "would" throughout the bill, which I hope at the very least you will consider changing to "could." The use of "would" requires the doctor to certify that a serious adverse physical condition of the woman **would** be significantly aggravated by continuing the pregnancy, **would** seriously endanger the woman's health... However, physicians are often in a position of being able to speak only in terms of probability, likelihood, the *possible* risks... in other words, the doctors are telling patients what *might* happen, not what *will* or *would* happen. For example, if a patient with diabetes is told that there is a 50% chance that her kidneys will fail and she'll have to go on dialysis if she continues the pregnancy, this bill does not cover her because it cannot be said for sure that continuing the pregnancy **would** significantly aggravate her diabetic condition.

Again, I am asking you to seriously consider the effects this bill will have on women's health in Alaska. Please OPPOSE HB 522!

Kimberly A. Johnston
3040 E. 142nd Ave.
Anchorage, AK 99516

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: April 18, 2002 **FURTHER REFERRALS: Judiciary Finance**

Date of Committee Action: 4.25.02

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: **HB 522**

HOUSE BILL NO. 522 **MEDICAID PAYMENTS FOR ABORTION**

"An Act relating to medical services under the state Medicaid program."

Recommends it be replaced with _____CS_____(_____) [ ] Same Title [ ] New Title
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev. for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*For Chief Clerk's Office Use Only

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
HSS			X	

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
John Cobb	Cogh. H	✓			
Jim Lehning	Lehring	X			
Jeanne Wilson	Wilson	N			
Shirley Cissna	Cissna		✓		
Chair: Fred Dyson	Dyson	✓			
Chair:					