

HB

95

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 21, 2005

FURTHER REFERRALS: Judiciary

Date of Committee Action: February 10, 2005

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered:

HB 95

HOUSE BILL NO. 95

PUBLIC HEALTH DISASTERS/EMERGENCIES

"An Act relating to public health and public health emergencies and disasters; relating to duties of the public defender and office of public advocacy regarding public health matters; relating to certain claims for public health matters; making conforming amendments; and providing for an effective date."

Recommends it be replaced with HCS or CS for _____ (_____)
 For Senate Bills with new title: Technical Title New Title: HCR _____ Same Title New Title

- 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
 LEG
 LAW
 LWF
 MVA
 DNR
 DPS
 REV
 DOT
 UA

<u>NEW FISCAL NOTES</u>				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
HSS	1			✓

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
<i>[Signature]</i>	CISSNA	✓			
Berta Gardner	Gardner			X	
Tom [Signature]	ANDERSON			X	
Vicki [Signature]	Keliring				X
Chair: <i>[Signature]</i>	WILSON	N			

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 95
 (H) Publish Date: 1/21/05
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title RELATING TO PUBLIC HEALTH AND PUBLIC HEALTH EMERGENCIES

RDU Public Health
 Component Public Health Admin Svcs

Sponsor (RLS) BY REQUEST OF THE GOVERNOR

Requester GOVERNOR

Component No. 292

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (0)						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Passage of this legislation is not expected to have a budget impact on the Division of Public Health, as the bill simply clarifies legal authority and provides new due process provisions for programmatic activities already conducted by the Division. The bill does not add new functions or mandates to the Department of Health & Social Services' legal responsibilities.

Prepared by: Richard Mandsager, M.D.
 Division: Public Health
 Approved by: Joel S. Gilbertson, Commissioner
 Agency: Department of Health and Social Services

Phone 465-3090
 Date/Time 01/05/2005
 Date 01/06/2005

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1192
Deliveries to: 129 6th St., Rm. 329


MEMORANDUM

February 2, 2005

SUBJECT: Public Health, HB 95 (HB 95 (Work Order No. 24-GH1002\A))

TO: Representative Peggy Wilson
Attn: Kathy Erickson

FROM: Jean M. Mischel
Legislative Counsel



You have asked generally whether there exist legal or drafting problems with the above referenced bill. Since this bill authorizes the Department of Health and Social Services to take actions that impinge on an individual's constitutional rights in the broadest sense, much of the authority will be subject to judicial review and interpretation. The bill allows for the isolation and quarantine of individuals and groups of individuals, medical screening and testing of an individual, and condemnation of facilities and businesses, all of which require, at a minimum, due process. Courts have generally upheld the exercise of broad police powers to protect public health but the following issues are brought to your attention. Most of the constitutional issues described in this memorandum can be addressed in regulation by the department.

With the exception of emergency orders, protective custody, and procurement "by condemnation or otherwise" of businesses or facilities, the bill establishes a court petition procedure in which the individual has a right to be heard before being deprived of a liberty or privacy interest. While the filing of a court petition implies sufficient notice under the applicable court rules, explicit notice requirements should be, and are not, included in this bill, particularly with regard to procurement and emergency administrative orders. For example, the bill at page 10, lines 2-7, requires the department to obtain a state medical officer's order and, if an individual objects to that order, an *ex parte* order of the court, to conduct screening, examination and testing of an individual who has or "may have been exposed to a contagious disease" without notice or an opportunity for hearing. In a public health emergency, covered in a different section of the bill, a deprivation of due process before the deprivation of the fundamental rights to privacy and association, may be supportable under the state's police powers. But when the deprivation is for the "prevention and control" of a contagious disease and the existence of the disease is speculative, the procedures eliminating notice and an early opportunity for hearing may be constitutionally infirm. In this instance, the bill does not even require that a copy of the orders be provided to the individual once the orders are issued.

It is surprising in light of such limited process available to an individual prior to being tested, examined or screened that the bill at page 11, lines 14-15 permits the refusal of

Representative Peggy Wilson

February 2, 2005

Page 2

medical treatment when an individual is screened for a contagious disease and found to be a carrier. Since isolation is available, the department may isolate the individual. However, isolation costs money and resources (for monitoring, etc.) and may be necessary indefinitely. The model public health act recommends the option of compulsory medical treatment in these circumstances, an option that raises constitutional questions of its own. The deprivation of constitutional rights in order to conduct the screening and examinations, (including protective custody) however, seems to be serving a less compelling interest when the existence of the disease is allowed to be perpetuated in this way.

Conspicuously absent in the bill is a penalty provision associated with violations of section 8 should an individual fail to cooperate or comply with an order. Presumably, contempt of court proceedings could be initiated when a court order has been issued but some of the authority of the department is not dependent upon the issuance of a court order. Moreover, contempt proceedings take time when time may be of the essence. A criminal penalty option may provide a greater incentive for compliance.

Access to an individual's medical records by the department, without the consent of the individual, at page 9, line 24, runs afoul of some federal laws, particularly the Health Information Privacy Act, and implicates privacy interests. The bill does not deal with the due process issues pertaining to the records access either.

In addition to clarifying the notice and penalty provisions, I recommend a review of the relevant court rules to identify whether an indirect or direct court rule amendment is being made by this bill. The review of emergency and temporary orders and the relatively short time frames for hearings on petitions and continuances appear to me to affect the court rules. If you would like me to draft something in this regard, let me know.

The quarantine and isolation authority extends to unemancipated minors. While a guardian ad litem and even an attorney may be appointed to represent the minor by the authority conferred in this bill, the parent is deprived of party status at page 15, lines 16-17 in proceedings affecting the minor.

The shared jurisdiction of the Departments of Health and Social Services and Environmental Conservation in cases involving "contaminated material" as defined at page 17, lines 25-26 is not dealt with in the bill.

In addition to the legal issues, some drafting corrections could be made to bring the bill into full compliance with the drafting manual. However, none of the drafting issues appear to raise any additional substantive concern.

If I may be of further assistance, please advise.

JMM:lmb
05-028.lmb



PUBLIC HEALTH

**PROTECTING AND PROMOTING THE
HEALTH OF ALL ALASKANS**

HB 95: An Act Relating to Public Health

Presentation to the House HESS Committee

February 10, 2005

Richard Mandsager, M.D., Director

Alaska Department of Health & Social Services

Division of Public Health

“Public Health is what we, as a society, do collectively to assure the conditions in which people can be healthy.”

Institute of Medicine

PUBLIC HEALTH IS NOT HEALTH CARE

- Focus on **Populations**, not individuals
- Focus on **Prevention**, not treatment
- **Government** plays a unique role – legal obligations to prevent disease, disability, injury, and illness among populations

Preparedness Weaknesses

- Inadequate legal authorities (HB 95)
- Inadequate laboratory facility for virology (HB 100)
- Dependence on federal funds
- Insufficient staff capacity to allow time for both
1) response to existing priorities, and 2) training
and exercises for disasters

Old Public Health Enemies



PUBLIC HEALTH
PROTECTING AND PROMOTING THE
HEALTH OF ALL ALASKANS

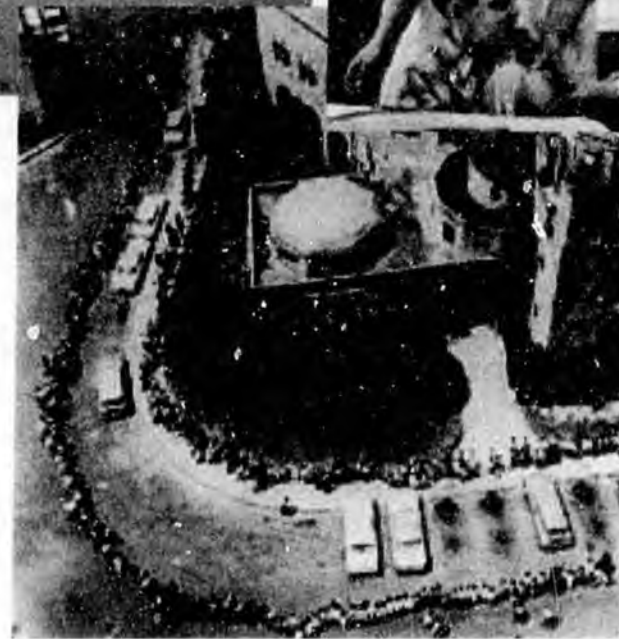
Traditional Disease Control

QUARANTINE
CONTAGIOUS DISEASE

NO ONE SHALL ENTER OR LEAVE THIS HOUSE WITHOUT WRITTEN PERMISSION
OF THE LOCAL HEALTH AUTHORITY. (AKS, 407 - V.A.C.S.)

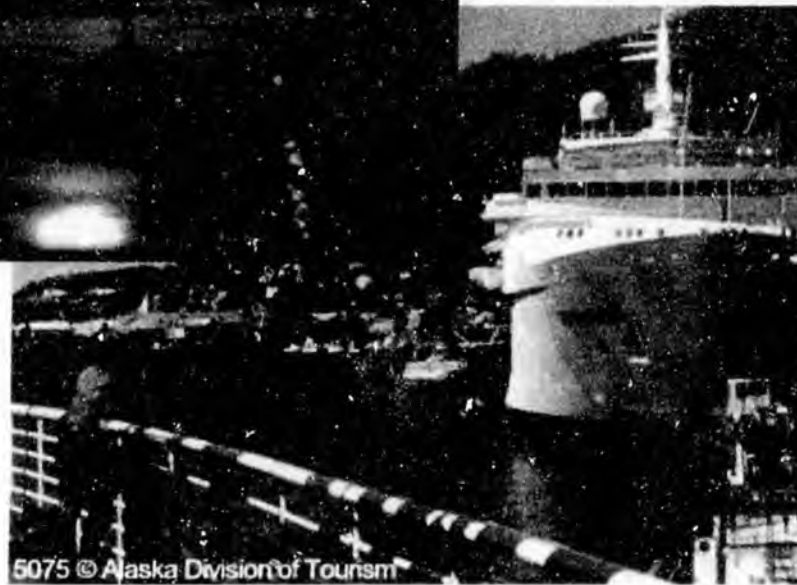
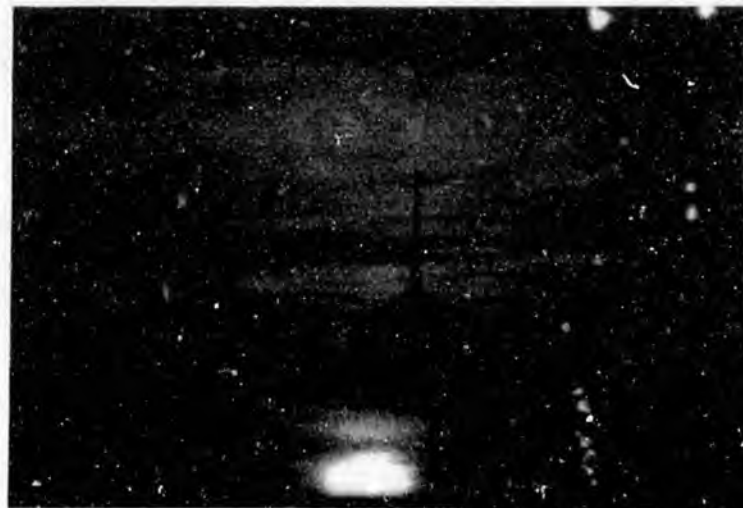
NO PERSON EXCEPT AN AUTHORIZED EMPLOYEE OF THE HEALTH DISTRICT SHALL
ENTER, DESTROY OR REMOVE THIS CARD. (AKS, 407 - V.A.C.S.)

VIOLATION WILL BE FINED NOT LESS
THAN \$50 FOR EACH VIOLATION. (AKS,



PUBLIC HEALTH
PROTECTING AND PROMOTING THE
HEALTH OF ALL ALASKANS

The Next SARS?



PUBLIC HEALTH
PROTECTING AND PROMOTING THE
HEALTH OF ALL ALASKANS

Alaska Public Health Law Reform Proposal

The Problem – *Our laws don't protect us anymore*

- Alaska's public health laws are antiquated and layered – Alaska Law Review, 2000
- Alaska is the only state in the nation that does not have adequate statutory authority to quarantine – Trust for America's Health, 2004

1949: AS 18.05.010

Administration of Laws by the
Department

1995: AS 18.15.120

Tuberculosis Control

2003: AS 18.15.350

SARS Control

Alaska Public Health Law Reform Proposal

The Proposed Solution - Updated Laws that Provide:

- A statutory framework that supports the public health mission, services and role
- Clear authority for control of conditions of public health importance; and,
- Modern due process provisions for the protection of individual rights

HB 95: An Act Relating to Public Health

- Defines “Essential Public Health Services”
- Describes State’s role in health protection and promotion
- Provides clear authority for disease control through:
 - Surveillance
 - Epidemiologic Investigation
 - Medical Treatment, Quarantine & Isolation
- Requires protection of individual rights - due process
- Strengthens requirements for confidentiality and data security

HB 95: An Act Relating to Public Health

- I. Purpose/Intent (Sec. 1)
- II. Administration of Public Health Laws by the Department (Sec. 4, 5, 7)
- III. Public Health Authority and Powers (Sec. 8)
- IV. Legal Representation and Court Powers
 - a) Right of indigent person to counsel (Sec. 9)
 - b) Judicial powers augmented (Sec. 10)
 - c) Guardian ad litem responsibilities (Sec. 11)
- V. General Provisions
 - a) State Immunity (Sec. 2)
 - b) Repeal and changes to citations of statutes (Sec. 3, 6, 12)
 - c) Effective Date (Sec. 13)

HB 95: An Act Relating to Public Health

I. Purpose/Intent (Sec. 1)

- To protect and promote the health of the citizens of this state to the greatest extent possible through the public health system
- Not intended to mandate provision of certain services or implementation of unfunded programs

II. Administration of Public Health Law by DHSS (Sec. 4, 5, and 7)

- Modernize and clarify department's public health powers
- Clarifies nature of mandated regulations for public health reporting and adds regulatory mandate for data security and confidentiality
- Adds definition of "conditions of public health importance"

III. Public Health Powers and Authority (Sec. 8)

- Prevention and control of conditions of public health importance
- Surveillance through data collection and public health reporting
- Epidemiological investigations
- Medical treatment
- Quarantine and isolation
- Public health disasters

HB 95: An Act Relating to Public Health

Response to Feb. 2, 2005 Legal Services Memo

Legal Services/LAA Questions	DHSS & Dept. of Law Response
<ul style="list-style-type: none"> Sufficient notice provided in due process provisions? 	<p>The due process provisions included in the bill strike a fair balance between individual rights and public protection.</p>
<ul style="list-style-type: none"> Why is refusal of medical treatment allowed? 	<p>While forced medical treatment may benefit the physical health of an individual with a contagious condition, it does not serve a public health purpose if the individual can be isolated from the public.</p>
<ul style="list-style-type: none"> Why no criminal penalties for non-compliance? 	<p>Civil contempt proceedings would be utilized for non-compliance because 1) it will be required very infrequently and 2) in most of these very rare cases non-compliance will be motivated by fear, not criminal intent.</p>
<ul style="list-style-type: none"> Are access to medical records provisions HIPAA compliant? 	<p>Yes, under the public health exemption provided by HIPAA (45 CFR 164.512(b)).</p>
<ul style="list-style-type: none"> Is an indirect court rule amendment made by this bill? 	<p>Yes – an amendment is proposed to address this issue.</p>
<ul style="list-style-type: none"> Why are parents deprived party status in quarantine/isolation hearings of unemancipated minors? 	<p>No legal or public health purpose for denying parents party status can be identified – an amendment is proposed to remove this provision.</p>
<ul style="list-style-type: none"> Is shared jurisdiction with DEC in cases involving contaminated material in a public health disaster addressed? 	<p>The bill clearly designates DHSS and DMVA as the lead agencies for providing this type of service in a disaster and no further clarification in the bill is required. (DEC was consulted)</p>

State Quarantine Authority

Source: Trust For America's Health with analytic and research support from the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities.

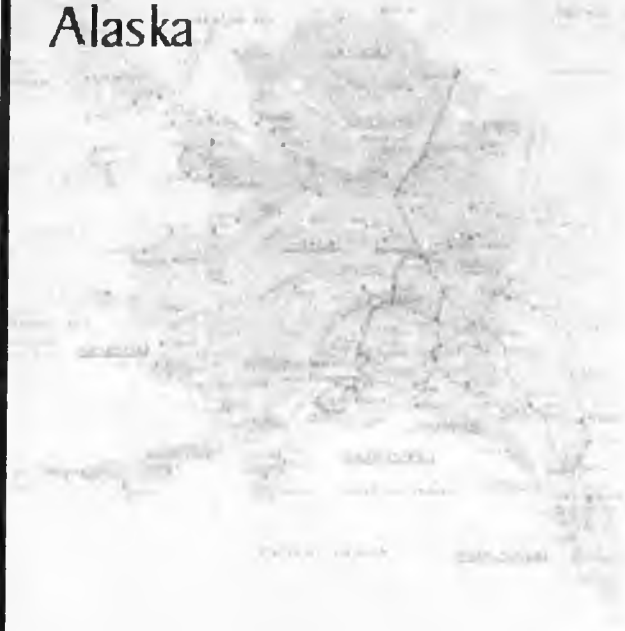
49 states and D.C. have adequate statutory authority to quarantine in response to a hypothetical bioterrorism attack scenario

Alabama *	Indiana *	Montana *	Pennsylvania *
Arizona *	Iowa *	Nebraska	Rhode Island *
California	Kansas	Nevada *	South Carolina *
Colorado	Kentucky	New Hampshire *	South Dakota *
Connecticut *	Louisiana *	New Jersey	Tennessee *
Delaware *	Maine *	New Mexico *	Texas
D.C. *	Maryland *	New York	Utah
Florida *	Massachusetts *	North Carolina *	Vermont
Georgia *	Michigan *	North Dakota	Virginia *
Hawaii *	Minnesota *	Ohio *	Washington ^
Idaho *	Mississippi	Oklahoma *	West Virginia *
Illinois *	Missouri	Oregon	Wisconsin *
			Wyoming *

* State has statutory quarantine powers that may be enhanced or capable of expedited performance during general or public health emergencies.

1 state does NOT have adequate statutory authority to quarantine in response to a hypothetical bioterrorism attack scenario

Alaska



^ Washington state has regulatory vs. statutory quarantine authority.

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@akclu.org

February 10, 2005

To: Rep. Peggy Wilson, Chair
Members of the House Health, Education and Social Services Committee
From: Michael W. Macleod-Ball, Executive Director

RE: House Bill No. 95
An Act relating to public health and public health emergencies and disasters . . .

Thank you, Rep. Wilson and members of the committee, for allowing me the opportunity to offer input on this important bill. I would also like to thank Dr. Mandsagar, who brought this bill to my attention a couple of weeks ago. He and I were unable to meet to discuss the bill before this past Monday, but I appreciate his effort to solicit the input of the Alaska Civil Liberties Union. It reflects the sincerity of his comments to the Senate committee yesterday when he spoke of the need to find a balance between the public health needs and our desire to preserve our individual freedoms under the US and Alaska Constitutions.

By its very nature, this bill contemplates that individual Alaskans will give up some of their personal freedoms and permit the government to intrude on their privacy in certain circumstances. We agree that under some of the dire circumstances cited by the administration that such restrictions may be appropriate. Our concern with this bill, however, is that -- as drafted -- it contemplates giving the government the right to quarantine and isolate individuals and to inspect and retain private medical records in circumstances not nearly so dire as the examples cited. We do not oppose the intent of this bill, rather we seek to limit the circumstances when the government can exercise these intrusions on our liberty and privacy solely to those dire emergencies that demand extraordinary government action to preserve our society. The Alaska Civil Liberties Union believes we can be both safe AND free. We have not presented a section-by-section analysis of this bill to the committee yet because Dr. Mandsagar has offered to meet with us to review our concerns with the bill. We are scheduled to meet tomorrow morning and thereafter I would hope to be able to provide you with some more detailed input. For purposes of today's hearing, I will speak for the most part in broader terms.

The bill outlines two broad areas for consideration: the substantive basis for action by the public health director and the procedure to be followed when that basis for action arises. Our concern is primarily with the former category: what circumstances must exist for the government to exercise the extraordinary powers available to it under this bill?

- 1) The government's right to quarantine or isolate an individual against his or her will, or to access that individual's private medical records, should only exist in a narrow set of limited circumstances.

As written, we believe the right to access identifiable private medical records, and to quarantine or isolate an individual against his or her will is too broad. The department's authority to access records or to quarantine or isolate derives from section 355 – page 7 of the bill. There it states that the department may use the powers set out in the bill “to prevent, control, or ameliorate conditions of public health importance or accomplish other essential public health services and functions.” By our reading, that would give the department the right to impose a quarantine or isolation order on an individual, or to access private medical records, based on nothing more than routine administrative purposes. “Essential public health services and functions” is defined in section 390 (page 18) and includes a list of routine functions, which list is not unreasonable in any sense. However, that list of functions should NOT serve as the basis for the department's exercising its extraordinary authority to quarantine or isolate individuals against their will or to access their private medical records. Instead, that authority should not be triggered except in the most unusual circumstances.

We believe the other phrase – “conditions of public health importance” – is the key phrase here. If the definition of this phrase was very narrow so as to define extreme public health emergencies, then the department's right to use the quarantine and isolation authority would only be available in those extreme cases. Our concern, however, is that the definition of “conditions of public health importance” is rather broad. In section 390 (2), a condition of public health importance arises from a “threat to health that is identifiable on an individual or community level and can reasonably be expected to lead to adverse health effects in the community.” By that standard, the department could trigger its ability to restrict individual liberty interests and to invade personal medical privacy in the event of a minor bug that runs through a community without endangering anyone's lives.

We do not believe that it is the intent of the department to interpret this bill in this fashion – but the fact remains that the language of the bill can reasonably and fairly be interpreted in this way as it stands. We would strongly recommend that the definition of “condition of public health importance” be narrowed to reflect only far more serious public health events, giving due consideration to the nature of the disease, the level of contagion, the means of transmission, and seriousness of the impact on individual patient.

We have similar concerns with several other definitions, which seem to us to be too broad for the government's need. All the definitions appear in section 390: “contagious disease”, “disease outbreak”, “epidemic”, “infectious disease”, “isolation”, and “quarantine”.

- 2) The government should be required to affirmatively protect the privacy of identifiable medical records and to destroy such records when no longer needed to address a crisis.

We also are concerned with the language surrounding the government's right to access and retain identifiable medical records. In Section 360(d), the statute contemplates issuance of regulations to govern the department's access to such private information. The only standard to limit the regulatory scheme is set forth in Section 365, which does mandate that such records be

held in confidence. We would prefer a more rigorous set of standards to govern the rulemaking process, including the following:

- A specific prohibition on the use of private medical records for any purpose other than those in connection with the disease outbreak that served to justify the collection of the record in the first place
 - A specific prohibition on the disclosure of such information to anyone other than those public health officials involved in the disease outbreak
 - The obligation to destroy copies of such records upon the conclusion of the crisis and to return originals to their source
 - An affirmative statement that such records cannot be used in any civil or criminal proceeding without the individual's consent
- 3) The bill should contain affirmative protections that the affected individuals will not suffer negative impacts in their civil transactions or criminal proceedings due solely to the government's actions.

We also believe the law can be improved by adding affirmative protections for the individuals directly impacted by the quarantine, isolation, and medical records authority. We would like the bill to include the following assurances:

- That the quarantine, isolation or medical records access will have no impact on the individual's housing, employment, parental rights, or other civil rights
 - That the action will have no impact on any civil or criminal proceedings involving the individual
 - That the individual be compensated for any property taken or lost through the government's exercise of its authority
 - That the action does not act to waive the doctor - patient confidentiality and imposes such a restriction on any medical professional who gains access to the information as a result of the government action (except as necessary to deal with the public health event)
 - That no individual will bear any cost associated with challenging the government's exercise of its authority
- 4) The affected individual should have access to the legal system throughout the process and the restrictions imposed should be narrowly drawn.

We also have some concerns about the procedural regimen proposed. We appreciate the efforts of the department to provide a clear process and though our concerns are significant, it is clear that there is a process available to individuals whose rights have been restricted. Most of our concerns in the procedural area could be resolved by the following.

- Removing the availability of an ex parte proceeding. Section 375 contemplates a proceeding to which the affected individual would have no access. But under the statute, that individual would already have been made aware of the department's concern and therefore there is no reason to bar his or her access to the legal proceeding.
- The isolation or quarantine order should include a specific date of termination based on the projected course of contagiousness. The statute allows an open-ended term up to 30 days, with the individual having the right to challenge. Instead, we believe the state should have to show how long the order should be in place at the outset – and then put the burden on the state to seek an extension, if necessary.
- Change and heighten the standard for issuing a quarantine or isolation order. As written, the standard is "substantial risk to the public health". Instead, we would prefer a defined term more closely aligned with the basis for the action. As before, we would like due consideration given to the nature of the condition, the level of contagion, the means of transmission, and the impact on the individual.

Summary

In short, because this law contemplates placing restrictions on an individual's liberty and because it contemplates granting the government access to someone's most private records, the closest scrutiny is required. For each element of this bill, we would urge the committee to ask:

- 1) Is there a compelling state interest?
- 2) Is the state action targeted narrowly?
- 3) Is the state action the least restrictive in both time and scope?
- 4) Do the individual have an effective right to object before imposition of the restrictions?

If each of these questions can be answered in the affirmative, then the bill will be better than in its current form. We look forward to working with the department and the committee to fashion a bill that allows Alaska to remain both safe and free.

Thank you for your time.

STATE OF ALASKA

DEPARTMENT of HEALTH & SOCIAL SERVICES
DIVISION of PUBLIC HEALTH

FRANK H. MURKOWSKI, GOVERNOR

OFFICE OF THE DIRECTOR
P.O. BOX 110610
JUNEAU, AK 99811-0610
PHONE: (907) 465-3090
FAX: (907) 465-4632

February 8, 2005

The Honorable Peggy Wilson
Alaska House of Representatives
State Capitol Room 108
Juneau, AK 99801-1182

Dear Representative Wilson,

Thank you for taking the time to meet with me last week regarding HB 95, the public health bill, and HB 100, the bill that authorizes certificates of participation for the construction of a new virology laboratory in Fairbanks.

As we discussed, I have an amendment to propose to HB 95 that clarifies the right counsel and authority to request guardian ad litem services. A description of the proposed amendment (enclosed) follows:

The current bill provides the right to counsel for a person in a court action when the department asks a court for an order to quarantine or isolate that person to protect the public from substantial risk due to exposure to an infectious disease. Appointed counsel will be provided to the person if he or she can not afford their own. The bill also gives the court in such a proceeding authority to direct the Office of Public Advocacy to provide guardian ad litem services to the person upon the request of the person's attorney. These provisions are found in AS 18.15.385(g).

The amendment would delete these provisions from AS 18.15.385(g) and insert a new statutory provision, AS 18.15.389, devoted solely to the issues of representation and guardian ad litem services. This section would expand the right to counsel to include proceedings brought pursuant to AS 18.15.375(e) (challenging ex parte testing orders) as well as isolation/quarantine provisions. The section would also give the court authority, on its own motion or at the request of a party, to direct the Office of Public Advocacy to provide guardian ad litem services for the person responding to the court proceeding. Current language in the bill would only allow the appointment of a guardian ad litem if requested by the lawyer of the person.

Representative Peggy Wilson

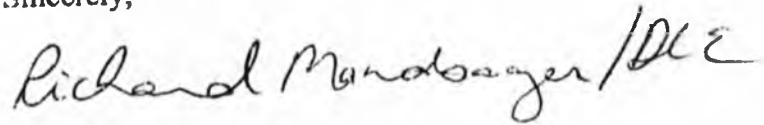
-2-

February 8, 2005

Also enclosed for the committee is a copy of the Sectional Analysis on HB 95 prepared by the Department of Law.

Thank you for your consideration and assistance in advancing the proposed amendment and sharing the Sectional Analysis with the HESS Committee members. Please contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Richard Mandsager / DLE".

Richard Mandsager, M.D.
Director, Division of Public Health

enclosures

AMENDMENT

OFFERED IN THE HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES COMMITTEE
TO: HB 95

BY _____

1 Page 13, line 28, following "(g)," through page 13, line 31:

2 Delete all material.

3

4 Page 14, line 1:

5 Delete "the office of public advocacy to provide a guardian ad litem for the individual."

6

7 Page 17, following line 14:

8 Insert the following new material:

9 "Sec. 18.15.389. Representation; guardian ad litem. An individual who is the
10 respondent in proceedings under AS 18.15.375(e) or 18.15.385 has the right to be
11 represented by counsel in the proceedings. If the individual cannot afford an attorney, the
12 court shall direct the public defender agency to provide an attorney. The court may, on
13 its own motion or upon request of the individual's attorney or a party, direct the office of
14 public advocacy to provide a guardian ad litem for the individual."

Sectional Analysis of HB 95/SB 75 (Public Health)

*(Prepared by the Department of Law and the Department of Health and Social Services,
January 25, 2005)*

HB 95/SB 75 would clarify the Department of Health and Social Services' legal authority to detect and respond to a public health threat, including the authority to conduct testing, screening, and examination of individuals, as well as quarantine and isolation powers with court authority; and the authority to collect relevant data; the Department's powers are augmented in conjunction with the Department of Military and Veterans' Affairs when the governor declares a condition of disaster emergency related to public health; and legal representation and court powers are clarified with respect to court proceedings related to conditions of public health importance.

I. Purpose and Intent (Section 1):

Sec. 1: Section 1 sets out the purpose and intent of the bill.

II. Changes to kinds of claims that may not be brought against the state or its agents, officers, or employees (Section 2):

Sec. 2: Types of damage: Section 2 adds acts or omissions related to isolation, quarantine, medical treatment, or other actions taken under the state's public health authority and power to a list of damages for which an action may not be brought against the state or its agents, officers, or employees.

III. Repeal of statutes and changes to citations of repealed statutes (Sections 3, 6, and 12):

Sec. 3: Section 3 deletes a citation to a statute that would be repealed by the bill regarding tuberculosis screening of public school employees.

Sec. 6: Section 6 renumbers citations to reflect statutes that would be repealed by the bill regarding registry of person with impairments.

Sec. 12: Section 12 repeals certain statutes regarding registry of persons with impairments and regarding tuberculosis and other disease control.

IV. Changes to general section regarding the Department of Health and Social Services' administration of public health laws (Sections 4, 5, and 7):

Sec. 4: Section 4 rewrites the section on the administration of public health laws to modernize and more clearly and accurately reflect the Department of Health and Social Services' public health powers.

Sec. 5: Section 5 clarifies the nature of the regulations the Department of Health and Social Services is charged with adopting as regards reporting of conditions of public health importance and confidentiality of information received under provisions regarding public health authority and powers.

Sec. 7: Section 7 adds a definition of "condition of public health importance" to the chapter regarding the administration of public health laws.

V. Updates to the Department of Health and Social Services' public health powers and authority (Section 8):

Sec. 8: Section 8 adds new sections regarding the Department of Health and Social Services' public health authority and powers to the chapter dealing with disease control. These sections replace provisions for two disease-specific conditions (tuberculosis and SARS), repealed under sec. 12, and provide authority that is not specific to a particular disease. The new sections are described as follows:

- prevention and control of conditions of public health importance
- data collection
- requirement to maintain confidentiality of information obtained
- requirement to maintain list of reportable diseases
- power to conduct epidemiological investigation
- medical treatment powers and authority
- isolation and quarantine powers and authority
- powers in a public health disaster
- definitions

Section 8 also balances the state's public health powers with modernized due process provisions for protection of individual rights.

VI. Changes to legal representation and court powers (Sections 9-11):

Sec. 9: Section 9 amends the right of an indigent person to counsel to include when the person is subject to isolation, quarantine, testing, screening, or examination related to disease control. If eligible, such right to counsel may be provided by the Public Defender Agency.

Sec. 10: Section 10 gives magistrates and district court judges the power to issue orders related to testing, screening, and examination of individuals related to disease control.

Sec. 11: Section 11 expands the Office of Public Advocacy's responsibilities to include acting as guardian ad litem for individuals in court proceedings related to testing, screening, examination, isolation, and quarantine related to disease control.

VII. Effective date (Section 13):

Sec. 13: Section 13 sets out an immediate effective date for the bill.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329


MEMORANDUM

February 2, 2005

SUBJECT: Public Health, HB 95 (HB 95 (Work Order No. 24-GH1002\A))

TO: Representative Peggy Wilson
Attn: Kathy Erickson

FROM: Jean M. Mischel
Legislative Counsel



You have asked generally whether there exist legal or drafting problems with the above referenced bill. Since this bill authorizes the Department of Health and Social Services to take actions that impinge on an individual's constitutional rights in the broadest sense, much of the authority will be subject to judicial review and interpretation. The bill allows for the isolation and quarantine of individuals and groups of individuals, medical screening and testing of an individual, and condemnation of facilities and businesses, all of which require, at a minimum, due process. Courts have generally upheld the exercise of broad police powers to protect public health but the following issues are brought to your attention. Most of the constitutional issues described in this memorandum can be addressed in regulation by the department.

With the exception of emergency orders, protective custody, and procurement "by condemnation or otherwise" of businesses or facilities, the bill establishes a court petition procedure in which the individual has a right to be heard before being deprived of a liberty or privacy interest. While the filing of a court petition implies sufficient notice under the applicable court rules, explicit notice requirements should be, and are not, included in this bill, particularly with regard to procurement and emergency administrative orders. For example, the bill at page 10, lines 2-7, requires the department to obtain a state medical officer's order and, if an individual objects to that order, an *ex parte* order of the court, to conduct screening, examination and testing of an individual who has or "may have been exposed to a contagious disease" without notice or an opportunity for hearing. In a public health emergency, covered in a different section of the bill, a deprivation of due process before the deprivation of the fundamental rights to privacy and association, may be supportable under the state's police powers. But when the deprivation is for the "prevention and control" of a contagious disease and the existence of the disease is speculative, the procedures eliminating notice and an early opportunity for hearing may be constitutionally infirm. In this instance, the bill does not even require that a copy of the orders be provided to the individual once the orders are issued.

It is surprising in light of such limited process available to an individual prior to being tested, examined or screened that the bill at page 11, lines 14-15 permits the refusal of

Representative Peggy Wilson

February 2, 2005

Page 2

medical treatment when an individual is screened for a contagious disease and found to be a carrier. Since isolation is available, the department may isolate the individual. However, isolation costs money and resources (for monitoring, etc.) and may be necessary indefinitely. The model public health act recommends the option of compulsory medical treatment in these circumstances, an option that raises constitutional questions of its own. The deprivation of constitutional rights in order to conduct the screening and examinations, (including protective custody) however, seems to be serving a less compelling interest when the existence of the disease is allowed to be perpetuated in this way.

Conspicuously absent in the bill is a penalty provision associated with violations of section 8 should an individual fail to cooperate or comply with an order. Presumably, contempt of court proceedings could be initiated when a court order has been issued but some of the authority of the department is not dependent upon the issuance of a court order. Moreover, contempt proceedings take time when time may be of the essence. A criminal penalty option may provide a greater incentive for compliance.

Access to an individual's medical records by the department, without the consent of the individual, at page 9, line 24, runs afoul of some federal laws, particularly the Health Information Privacy Act, and implicates privacy interests. The bill does not deal with the due process issues pertaining to the records access either.

In addition to clarifying the notice and penalty provisions, I recommend a review of the relevant court rules to identify whether an indirect or direct court rule amendment is being made by this bill. The review of emergency and temporary orders and the relatively short time frames for hearings on petitions and continuances appear to me to affect the court rules. If you would like me to draft something in this regard, let me know.

The quarantine and isolation authority extends to unemancipated minors. While a guardian ad litem and even an attorney may be appointed to represent the minor by the authority conferred in this bill, the parent is deprived of party status at page 15, lines 16-17 in proceedings affecting the minor.

The shared jurisdiction of the Departments of Health and Social Services and Environmental Conservation in cases involving "contaminated material" as defined at page 17, lines 25-26 is not dealt with in the bill.

In addition to the legal issues, some drafting corrections could be made to bring the bill into full compliance with the drafting manual. However, none of the drafting issues appear to raise any additional substantive concern.

If I may be of further assistance, please advise.

JMM:lmb
05-028.lmb



ALASKA PUBLIC HEALTH ASSOCIATION

Committed To Advancing Alaska's Public Health Since 1978

**HB 95 (H) Calendar
April 4, 2005**

In Support of HB 95 Public Health Disasters and Emergencies

Dear Representative:

HB 95 "Public Health Disasters and Emergencies" is on the House calendar for Monday April 4 2005.
We urge you to support HB 95 as presented and to not amend this bill.

The Alaska Public Health Association Board of Directors has affirmed its support for the framework of HB 95 and the recent amendments to the bill and its companion, SB 75. We are carefully examining the developments on these bills, to assure the proper balance in protecting the public's health and allowing for due process.

However the **suggested amendment to HB 75- which we oppose - is a provision that would make state employees personally liable for civil penalties for violating provisions of the quarantine and isolation requirements.** The bill already includes a criminal penalty.

There many concerns regarding the civil penalty provisions - 1) it's not consistent with state law generally (state employees are generally criminally liable, but usually exempt from civil penalty for abusing their governmental powers); 2) the state might be viewed as the "deep pocket" and opened up to more frivolous law suits; 3) added burden for the Division of Public Health to recruit and retain good staff, as state employees may be reluctant to work under this threat; most significantly 4) the threat of criminal penalty hanging over public health officials' heads when they are responding in an emergency could result in their being hesitant to do the right thing to protect the public if they are worried too much about going too far with a quarantine order, and not acting promptly and decisively in an emergency could result in disaster.

There are already enough measures in place to assure state employees act in the best interest of the public, during times of public health disasters and emergencies. These range from Division of Public Health officials' medical license requirements, to public health professional ethics, the threat of losing their job, and criminal penalties (including fines and jail) to guarantee appropriate action. **Adding personal liability goes too far when employees are just trying to do their jobs.**

After several amendments being added to HB 95 (and its companion SB 75), the standards and due process provisions around quarantine and isolation will result in individual rights during a public health emergency and disaster being fairly protected. If this bill passes, the due process provisions will be the strictest in the nation.

Recognizing that Alaska's statutes need revision in order to better meet the health needs of all Alaskans, the Alaska Public Health Association urges you to pass HB 95 as it is presented - to not amend this bill - and to make its passage a priority this session.

Sincerely,

Marie J. Lavigne, LMSW Executive Director
Alaska Public Health Association

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110601
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030
FAX: (907) 465-3068

January 24, 2004

Honorable Peggy Wilson, Chair
House Health, Education and
Social Services Committee
Alaska State Capitol; Rm. 108
Juneau, AK 99801

Dear Representative Wilson,

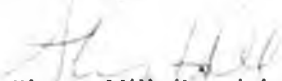
The Department of Health and Social Services respectfully requests a hearing in the Senate Health, Education, and Social Services Committee on House Bill 95 "An Act relating to public health and public health emergencies and disasters; relating to duties of the public defender and office of public advocacy regarding public health matters; relating to certain claims for public health matters; making conforming amendments; and providing for an effective date."

This bill is the culmination of a number of years work to develop a modern public health statute for Alaska.

A copy of Governor Murkowski's transmittal letter providing additional information on the bill and the associated fiscal note should be on file with the committee. The department is preparing a detailed sectional analysis of the bill that will be provided to your committee staff within the next several days.

Your favorable consideration of this request will be appreciated.

Sincerely,


Sherry Hill, Special Assistant
Office of the Commissioner

cc: Kevin Jardell, Legislative Director
Office of the Governor

Dr. Richard Mandsager Director
Division of Public Health