

HB

173

<TARGET><BILL>HB 173</BILL><SUBJECT>HB
173</SUBJECT><COMM>HJUD28</COMM></TARGET>

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue
Anchorage, Alaska 99501
Phone: (907) 269-0216
Fax (907) 269-0218
Rep.Gabrielle.LeDoux@akleg.gov



Session:
Alaska State Capitol
Juneau, Alaska 99801
Phone: (907) 465-4998
Fax: (907) 465-4419
Toll Free: (800) 698-4998

REPRESENTATIVE GABRIELLE LEDOUX
WWW.GABRIELLELEDoux.COM

March 19, 2013

Honorable Representative Wes Keller
Judiciary, Chair
State Capital Building
Juneau AK 99801

Dear Representative Keller,

I respectfully request a hearing date for HB 173 "An Act defining 'medically necessary abortion' for purposes of making payments under the state Medicaid program for your earliest convenience.

HB 173 specifically brings clarity to the term "medically necessary abortion" for the purposes of making payments under Medicaid. This bill is simply a definition bill that will define what a 'medically necessary abortion' is.

I look forward to presenting HB 173 to your committee.

If you have any questions with regard to scheduling this bill please contact Harmony Shields at 465-4998.

Sincerely

A handwritten signature in cursive script, appearing to read "Gabrielle LeDoux".

Rep. Gabrielle LeDoux
District 13

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue
Anchorage, Alaska 99501
Phone: (907) 269-0216
Fax (907) 269-0218
Rep.Gabrielle.LeDoux@akleg.gov



Session:
Alaska State Capitol
Juneau, Alaska 99801
Phone: (907) 465-4998
Fax: (907) 465-4419
Toll Free: (800) 698-4998

REPRESENTATIVE GABRIELLE LEDOUX
WWW.GABRIELLELEDoux.COM

Sponsor Statement

HB 173

An Act defining “medically necessary abortion” for purposes of making payments under the state Medicaid program.

HB 173 specifically brings clarity to the term “medically necessary abortion” for the purposes of making payments under Medicaid. In 2001, the Alaska Supreme Court determined the state must pay for medically necessary abortions for participants in the Medicaid program.

The question must be asked “why our tax payer’s money is being used for elective abortions?” Currently there is no definition of what a ‘medically necessary’ abortion is, therefore all abortions covered under Medicaid are considered medically necessary.

HB 173, based on recommendations and expert testimony from medical professionals, reasonably provides a neutral definition for a ‘medically necessary abortion.’

This bill does not prevent abortions from taking place in Alaska; HB 173 is simply a definition bill that defines what a ‘medically necessary abortion’ is.

I urge you to support HB 173

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue
Anchorage, Alaska 99501
Phone: (907) 269-0216
Fax (907) 269-0218
Rep.Gabrielle.LeDoux@akleg.gov



Session:
Alaska State Capitol
Juneau, Alaska 99801
Phone: (907) 465-4998
Fax: (907) 465-4419
Toll Free: (800) 698-4998

REPRESENTATIVE GABRIELLE LEDOUX
WWW.GABRIELLELEDoux.COM

SECTIONAL ANALYSIS

HB 149: "An Act defining 'medically necessary abortion' for purposes of making payments under the state Medicaid program."

Section 1: AS 47.07 is amended by adding a new section:

AS 47.07.068 shall read:

This section shall neutrally define "medically necessary abortions" for the purpose of making payments under Medicaid.

This section shall clearly distinguish between "medically necessary abortions" and "elective abortions."

Medicaid does not fund elective procedures (such as a facelift).

Medicaid also shall not fund elective abortions.

Medicaid only funds medically necessary procedures.

Medicaid shall only fund medically necessary abortions.

The definition was crafted after giving careful consideration to existing federal foundational thresholds found in the Hyde Amendment, the language in the 2001 "Planned Parenthood Case" (State, DHSS v. Planned Parenthood, 28 P.3d 904, 915 (Alaska 2001)), and the neutral, professional recommendations of medical experts.

- (a) The department shall not pay for abortions unless the services are medically necessary or the pregnancy was the result of rape or incest. Payment shall not be made for elective abortions.
- (b) (1) "Abortion" shall be as defined in AS 18.16.090.

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue
Anchorage, Alaska 99501
Phone: (907) 269-0216
Fax (907) 269-0218
Rep.Gabrielle.LeDoux@akleg.gov



Session:
Alaska State Capitol
Juneau, Alaska 99801
Phone: (907) 465-4998
Fax: (907) 465-4419
Toll Free: (800) 698-4998

REPRESENTATIVE GABRIELLE LEDOUX
WWW.GABRIELLELEDoux.COM

- (2) "Elective abortion" means an abortion that is not medically necessary.
- (3) "Medically necessary abortion" means, in a physician's objective and reasonable professional judgment, after considering neutral medically relevant factors, that an abortion must be performed to avoid a threat of serious risk to the life or physical health of a woman from continuation of the woman's pregnancy;
- (4) "Serious risk to the life or physical health" includes, but is not limited to, a serious risk to the pregnant woman of:
 - (A) death; or
 - (B) impairment of a major bodily function because of (i-xxii) the conditions listed.

ALASKA STATE LEGISLATURE

Interim:

716 West 4th Avenue
Anchorage, Alaska 99501
Phone: (907) 269-0216
Fax (907) 269-0218
Rep.Gabrielle.LeDoux@akleg.gov



Session:

Alaska State Capitol
Juneau, Alaska 99801
Phone: (907) 465-4998
Fax: (907) 465-4419
Toll Free: (800) 698-4998

REPRESENTATIVE GABRIELLE LEDOUX
WWW.GABRIELLELEDoux.COM

Attached is a memorandum from Kevin Clarkson in regards to SB 49 which is the exact same bill as HB 173. For your information, please review this material.

Gabrielle LeDoux

BRENA, BELL & CLARKSON, P.C.

ROBIN O. BRENA, MANAGING ATTORNEY
JESSE C. BELL, ATTORNEY
KEVIN G. CLARKSON, ATTORNEY
DAVID W. WENSEL, ATTORNEY
ANTHONY S. GUERNIERO, ATTORNEY
LAURA S. GOULD, ATTORNEY
MATTHEW C. CLARKSON, ATTORNEY
KELLY M. HELMBRECHT, ATTORNEY

ATTORNEYS AT LAW

810 N STREET, SUITE 100
ANCHORAGE, AK 99501
TELEPHONE: (907) 258-2000
FACSIMILE: (907) 258-2001
WEB SITE: BRENALAW.COM
EMAIL:
KCLARKSON@BRENALAW.COM

MEMORANDUM

TO: Senator John Coghill
FROM: Kevin G. Clarkson, Esq.
DATE: March 8, 2013
RE: Medicaid Funding for Abortion in Alaska

UNDER THE ALASKA CONSTITUTION THE STATE ONLY HAS TO PAY FOR MEDICALLY NECESSARY ABORTIONS, DOES NOT HAVE TO PAY FOR ELECTIVE ABORTIONS, AND CAN DEFINE MEDICAL NECESSITY FOR ABORTION USING STANDARD, NEUTRAL MEDICAL TERMS AND CONCEPTS

I. THE MEDICAID PROGRAM, THE HYDE AMENDMENT AND THE FEDERAL CONSTITUTION

The Medicaid program was created in 1965 when Congress added Title XIX to the Social Security Act, 42 U.S.C. 1396, *et. seq.* Medicaid is a comprehensive health care program designed to provide medical assistance for all eligible poor persons. In function, it is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons. Medicaid was designed for the purpose of providing federal assistance to States that choose to reimburse certain costs of medical treatment of needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate it must comply with the requirements of Title XIX. Alaska participates in the Medicaid program and provides funding for medical services for poor Alaskans primarily through the Medicaid program.

By federal law, if Alaska is to receive federal Medicaid funding, Alaska must pay for certain types of medical care that is required by Title XIX, which includes childbirth related care. Under federal law, pursuant to what is known as the Hyde Amendment, federal Medicaid funds can only pay for abortions that are necessary to save a woman's life or to end a pregnancy that resulted from either rape or incest. The United States Supreme Court long ago ruled that the Federal Constitution does not require a State to pay for the costs of elective or nontherapeutic abortions just because it pays for the costs of childbirth related medical care.¹ The United States Supreme Court explained that the limitation "places no obstacles-absolute or otherwise-in the pregnant woman's path to an

¹ See *Maher v. Roe*, 432 U.S. 464, 474 (1977).

abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the] ... decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires.”² The Court reasoned that although the funding limitation might make childbirth a more attractive alternative, thereby influencing the woman’s decision, it imposes no restriction on access to abortion that was not already there (*i.e.*, the woman’s indigency, which the State did not create).

The United States Supreme Court also long ago ruled that the Hyde Amendment does not violate an indigent woman’s federal constitutional right to obtain a medically necessary abortion.³ The Court explained that “regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Roe v. Wade*, it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”⁴ Thus, by the *Maher* and *Harris* decisions the United States Supreme Court has ruled that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation” (namely the woman’s indigency).⁵ As the Court explained in *Harris* “[t]he financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.”⁶

II. MEDICAID ONLY PAYS FOR MEDICALLY NECESSARY MEDICAL CARE

The Medicaid program only provides funding for medically necessary medical care. “Medically necessary” is a blanket prerequisite for all medical services covered by the Medicaid Program. “The department will pay for a service only if that service . . . is medically necessary.”⁷ The term “medically necessary” is replete throughout the regulations governing Alaska’s Medicaid Program. Hospital stays, eye care, emergency air or ground ambulances, mental health treatment, behavioral health services, B-complex vitamins, podiatry services, all are specifically limited to being covered by Medicaid only when they are “medically necessary.”⁸

III. THE ALASKA CONSTITUTION REQUIRES THE STATE TO PAY FOR MEDICALLY NECESSARY ABORTIONS IF THE STATE PAYS FOR CHILDBIRTH RELATED SERVICE

² *Id.*

³ *See Harris v. McRae*, 448 U.S. 297 (1980).

⁴ *Id.* at 316.

⁵ *Id.*

⁶ *Id.*

⁷ 7 AAC § 105.100.

⁸ *See* 7 AAC §§ 110.445(a)(1); 110.505(a); 110.715(a)(1); 120.110(e)(6)(H); 120.240; 120.415(a); 135.230(a)(1); 140.325.

With respect to Medicaid funding for abortion, the Alaska Supreme Court has interpreted the Alaska Constitution differently than the United States Supreme Court has interpreted the federal Constitution. The Alaska Court has interpreted the Alaska Constitution to require the State to fund medically necessary abortions through its Medicaid program (using State funds that are not restricted by the Hyde Amendment). The Alaska Court has ruled that the State must fund medically necessary abortions through its Medicaid program so long as the State pays for childbirth related medical care.⁹

IV. THE PLANNED PARENTHOOD DECISION CREATED NO OBLIGATION FOR THE STATE TO PAY FOR ELECTIVE ABORTIONS OR ABORTIONS THAT ARE NOT MEDICALLY NECESSARY

The Alaska Supreme Court's decision in *Planned Parenthood* cannot reasonably be read to require the State to fund elective abortions or those abortions that are not medically necessary. The Alaska Court emphasized in its Opinion that the *Planned Parenthood* case did "not concern State payment for elective abortions."¹⁰ The Court repeatedly limited the application of its decision to "medically necessary abortions."¹¹ The Court specifically and deliberately referred to the "medically necessary" nature of the abortions that it was addressing in the case on thirty-four (34) separate instances in its Opinion.¹² Given the Court's repeated limitation of its decision to "medically

⁹ See *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001).

¹⁰ *Planned Parenthood*, 28 P.3d at 905.

¹¹ *Id.* at 905-915.

¹² See *Planned Parenthood*, 28 P.3d at 905 ("it denies funding for medically necessary abortions"); *id.* ("the medically necessary procedure"); *id.* ("state funding of medically necessary abortions"); *id.* ("assistance to eligible women whose health depends on obtaining abortions"); *id.* ("women who's health is in danger"); *id.* at 906 ("women who medically require abortions"); *id.* at 906 n.7 ("government support for medically necessary abortions"); *id.* at 907 ("Medicaid assistance for medically necessary abortions"); *id.* ("a woman who medically requires an abortion"); *id.* ("face significant risks if they cannot obtain abortions"); *id.* ("funding for medically necessary abortions"); *id.* ("coverage for medically necessary abortions"); *id.* at 907 n. 11 ("funding for medically necessary abortions" . . . "available to pay for medically necessary abortions"); *id.* at 908 ("women who need abortions"); *id.* ("necessary care to eligible women"); *id.* at 908 n.21 ("jeopardize the health of . . . of poor women by excluding medically necessary abortions"); *id.* at 910 ("medically unnecessary inpatient treatment" is different); *id.* ("coverage for medically necessary abortions"); *id.* at 911 ("public assistance for medically necessary abortions"); *id.* ("State grants needed health care" to some but denies for abortion); *id.* ("provides necessary medical care" but not to those needing abortion); *Id.* ("women who medically require abortions"); *id.* at 912 ("jeopardize the health . . . of poor women by excluding medically necessary abortions"); *id.* at 913 ("women who for health reasons, require abortions"); *Id.* ("denying medically necessary care to women who need abortions"); *Id.* at 914 ("exclusion of medically necessary abortions"); *id.* at 914, n.78 ("require legislative funding for medically necessary abortion"); *Id.* at 915 ("to fund medically necessary abortions"); *Id.* ("medically necessary abortions"); *Id.* ("may not deny medically necessary services to eligible individuals"); *Id.* ("women who medically require abortions"); *Id.* at

necessary” abortions, and given the fact that Medicaid only provides funding for medically necessary medical care, it would be truly remarkable for anyone to claim that the Alaska Supreme Court’s decision in *Planned Parenthood* requires the State to fund “elective” abortions or abortions that are not “medically necessary.”

V. THE STATE CAN DEFINE MEDICAL NECESSITY FOR ABORTION USING STANDARD, NEUTRAL MEDICAL CRITERIA

Under the *Planned Parenthood* decision the State of Alaska may not “grant[] needed health care to some Medicaid-eligible Alaskans, but den[y] it to others, based on criteria unrelated to the Medicaid program’s purpose of granting uniform and high quality medical care to all needy persons of this state.” *Planned Parenthood*, 28 P.3d at 911. Thus, if the State provides “medically necessary” care to Medicaid eligible women desiring childbirth, it must also provide “medically necessary” abortions to Medicaid eligible women who choose abortion. By repeatedly emphasizing that its decision required the State to pay for “medically necessary abortions” and by emphasizing that its decision did “not concern State payment for elective abortions,”¹³ the Court unmistakably concluded that there is a distinction between “elective” and “medically necessary abortions.” The Court drove home the distinction between elective abortions and medically necessary abortions by detailing the rare but potential medical conditions that could make an abortion medically necessary.¹⁴ By the Alaska Court’s 2001 decision, not all abortions are medically necessary and the State is not obligated to pay for abortions that are elective or that are not medically necessary.

The Alaska Supreme Court’s decision in *Planned Parenthood* did not define the difference between what is or what is not a “medically necessary” abortion. The Court simply summarized the “medical evidence” that had been provided to the superior court in that case to demonstrate that some abortions are “medically necessary.” *Id.* at 907 (“According to medical evidence provided to the superior court, some women . . . face significant risks if they cannot obtain abortions.”). The Court did not constitutionalize a definition of “medical necessity” in *Planned Parenthood* and it did not rule that any particular medical condition constitutionally rendered an abortion medically necessary. *Id.* Instead, the Court simply noted that medical evidence in the case established that some abortions are medically necessary. *Id.*

915 n. 79 (“funding medically necessary abortions”).

¹³ See *Planned Parenthood*, 28 P.3d at 905.

¹⁴ See *id.* at 907 (“The range of women whose access to medical care is restricted by the regulation is broad. According to medical evidence provided to the superior court, some women-particularly those who suffer from pre-existing health problems-face significant risks if they cannot obtain abortions. Women with diabetes risk kidney failure, blindness, and preeclampsia or eclampsia-conditions characterized by simultaneous convulsions and comas-when their disease is complicated by pregnancy. Women with renal disease may lose a kidney and face a lifetime of dialysis if they cannot obtain an abortion. And pregnancy in women with sickle cell anemia can accelerate the disease, leading to pneumonia, kidney infections, congestive heart failure, and pulmonary conditions such as embolus. Poor women who suffer from conditions such as epilepsy or bipolar disorder face a particularly brutal dilemma as a result of DHSS’s regulation-medication needed by the women to control their own seizures or other symptoms can be highly dangerous to a developing fetus.”).

The State is permitted to distinguish between the two types of abortions (those that are elective and those that are medically necessary) by way of “neutral criteria” that are related to “the purposes of the public health care program.” *Id.* at 915.¹⁵ The Alaska Court found in *Planned Parenthood* that the purpose of the Alaska Medicaid program is to grant “needed health care” to Medicaid eligible Alaskans. *Id.* at 911. The Court concluded that the constitutional problem with the Medicaid regulation at issue in 2001 was that it “grant[ed] needed health care to some Medicaid-eligible Alaskans, but denie[d] it to others, based on criteria entirely unrelated to the Medicaid programs purpose of granting uniform high quality medical care to all needy persons of th[e] state.” *Id.* at 911. In other words, by simply excluding all abortions from the Medicaid Program the State was excluding care from the Program without regard to medical evidence and medical knowledge. The Court observed that restrictions which limited funding based upon criteria like “medical necessity, cost and feasibility” are permissible; *i.e.*, distinguishing between medical care that is “medically necessary” and other medical care which is not, and then providing Medicaid funding only for that care which is “medically necessary”, involves the permissible use of neutral criteria which does not violate the Alaska Constitution. *Id.* at 910. The “neutral criteria” that the Court found permissible in *Planned Parenthood* was accepted medical knowledge regarding what is or is not medically necessary.

The constitutional key to distinguishing between “elective abortions” that the State is not obligated to fund, and “medically necessary” abortions that the State is obligated to fund, is the use of “neutral criteria” derived from accepted medical knowledge. The Court has already recognized “medical necessity” as being a “neutral criterion.” *Id.* at 910. Thus, the distinction between “medically necessary” care and “non-medically necessary” care is a constitutionally “neutral” distinction. If the criteria for distinguishing between what the state must fund and need not fund must be “neutral,” then the terms and concepts used in drawing that distinction must likewise be “neutral.” Medical necessity is a neutral medical concept. Thus, drawing a distinction between “medical necessity” and “election” with respect to abortion using accepted medical knowledge, terms and concepts is likewise constitutionally neutral. So long as the State defines the difference between “medically necessary” abortion and “elective” abortion using accepted medical knowledge, terms and and concepts, there is no constitutional infirmity in the State’s action in adopting such a definition for purposes of funding “medically necessary” abortions.

The State is not obligated to leave the definition of “medical necessity” for purposes of Medicaid funding in the sole and unquestioned discretion of the physician. If that were the case, then the State would not be permitted to define the types of medical care that is covered by Medicaid and the types of medical care that is not. But, the Alaska Court plainly indicated that it was permissible for the State to draw such a distinction independent of the physician. *See Id.* at 910 (unnecessary inpatient treatment and beautifying cosmetic surgery). The notion that the Legislature cannot define “medical necessity” for some or all, or even one, of the various medical procedures covered by Medicaid is simply incorrect. The Alaska Supreme Court recognized in its 2001 decision that “medical necessity” is a neutral criterion. *Planned Parenthood*, 28 P.3d at 910. And, the Court recognized that the Legislature or the Department of Health and Human Services could draw a distinction between “medically necessary” medical care and other elective medical care independent of the

¹⁵ *See also* 28 P.3d at 908 (“when the State government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as to not infringe upon the constitutional rights of its citizens”).

physician. *See id.* at 910 (the state was permitted to exclude from Medicaid such things as unnecessary inpatient treatment and beautifying cosmetic surgery; *i.e.*, the State was not required to leave it to a physician to decide whether such things were “medically necessary” but instead could place them in that category on its own).

Alaska abortion providers have proven themselves to be unreliable with respect to distinguishing between abortions that are medically necessary and those that are not. For example Dr. Whitefield, one of Alaska’s leading abortion providers and now employed with Planned Parenthood, has testified under oath three separate times in three separate cases that he has consistently defined medical necessity to include women who believe pregnancy will interfere with their employment or education plans, as well as women who view their pregnancy as being an “affront” to them (which essentially means nothing more than that the woman does not want to be pregnant). *See* attached Trial Transcript from the Alaska Parental Consent litigation.

If the Legislature receives medical testimony and opinion from recognized and qualified medical experts as what physical or medical conditions make an abortion “medically necessary,” and then crafts a definition based upon that expert medical testimony and opinion, then the Legislature is not running afoul of the Alaska Constitution in any manner or form.

1099

13 Q Now, in your practice the State will pay for a minor
14 girl's abortion -- and again we're -- i'm speaking now at
15 this time of -- when i speak of a minor i'm talking about
16 the classification of 16 and under for our purposes of
17 definitions -- and the State will pay for any abortion
18 that is medically necessary; is that correct?

19 A Correct.

20 Q And since you've been practicing since 1985 you have been
21 able to find a medical necessity for State-paid abortions
22 for these girls except perhaps for only 10; is that
23 correct?

24 A i believe that's what i said in my deposition.

25 Q And your definition of medical necessity is what you refer

1100

1 to if the pregnancy is an affront to the minor; is that
2 correct?

3 A It's that the pregnancy in some way is a threat to the
4 patient's medical or psychological well-being.

5 Q And what you use for a definition is a theoretical hazard
6 to her mental health; is that correct?

7 A i think i've used those terms.

8 Q And this could mean that if, in fact, the pregnancy would
9 cause her some conc-- problems in dealing with education,
10 her continued employment, things of this nature, would be

11 the kind of affront you're talking about; is that correct?

12 A Independence would be another one, the ability to raise a

13 family. There's multiple factors that will go into it.

March 19, 2013

Dear Representatives,

I am writing to support House Bill 173. I oppose the use of taxpayer's money being used to pay for an elective abortion. My definition of an elective abortion is any abortion performed other than to save the life of the mother. If a woman wants an abortion for any other reason, it should not be done at the taxpayer's expense. I honestly struggle with that fact that abortion is made so convenient in this nation while adoption is made so difficult.

I was told at a young age that I could never have children due to fertility issues. My husband and I looked into adoption in a couple states but discovered time and again that it was an arduous and expensive process that is seemingly unattainable unless one is independently wealthy. Meanwhile, abortions are performed in almost every populated area for a nominal fee and provided to girls and women of all ages. We were blessed after 13 years of marriage with a daughter and she will always know how precious life is and to respect it.

Yes, this is personal for me. I understand that I cannot evoke my morality on others nor would I try to in a free country. I do however, have a say on how my tax money is spent. In financially difficult times such as these, it should be spent on education, jobs, and infrastructure. Perhaps if we need to be involved in unwanted pregnancies, we could help these mothers through the pregnancy and find homes for the children where they would be wanted, loved, and cared for.

I urge my Representatives to support this legislation and thank you for the opportunity to share my opinion.

Sincerely,
Julie Gillette
4301 S. Well Site Rd
Wasilla AK 99654
907-376-5455

Harmony Shields

From: gabrielle satterfield <gesatterfield@gmail.com>
Sent: Tuesday, March 12, 2013 12:19 AM
To: GOV.AllLegislators@alaska.gov
Subject: Medically Necessary Abortion

Greetings Representatives,

When trying to define "Medically Necessary Abortions" I urge you to value Physical Life above all and in doing so value both the mother's life and the fetus' life equally. Please seek to close any gap in wording that would either elevate one life over the other or equate "quality of life" to actual "physical life." Please only allow necessary to mean "necessary to save the mothers life" as opposed to any number of so called necessities such as "necessary to maintain optimal health." And if a doctor deems it necessary to save the life of the mother then he should be able to prove within reasonable doubt that the mother would have indeed died - possibly with consensus from another doctor - after all, it should it up to a single man to carry the burden of choosing to end one life even if it is his best intentions to save another? If there is only one life that can be saved then it's worth it in the event that both would surely die otherwise. The truth is that abortion poses more risks and damage to a mother whose not at risk of losing her life and is never a good option for her health either physical or mental. It's my understanding that abortion only refers to ending a live pregnancy and not a miscarriage - otherwise I think the mother should have the option to have abortion procedures to remove the miscarried fetus.

Thank you for your time,
Gabrielle Satterfield

Harmony Shields

From: Scott Phillips <scottphillipsfamily@me.com>
Sent: Monday, March 11, 2013 5:00 PM
To: GOV.ALLlegislators@alaska.gov
Subject: State Funded Healthcare Concerns.

Greetings,

I wanted to thank you for your service to the State of Alaska and its people. I am writing you today concerning the issue of State Funded Abortions. I would ask that you please take into consideration any proposed legislation that would aid in closing any present loop holes allowing State Finances to be used for Abortions that are deemed medically necessary. It is my understanding that the term "Medically Necessary" is not clearly defined and allows many abortions to be State funded while in fact they're Not truly medically necessary.

Our State Constitution in part exists for those that are voiceless, to protect their basic human rights which includes the Right To Life. Please do your part in seeing The Dignity of our State preserved in the midst of Western Trends that Devalue human life.

Thank you for your consideration,
Scott Phillips
Wasilla, Alaska

Sent from my iPhone

KENAI LEGISLATIVE INFORMATION OFFICEEmail: Kenai_LIO@akleg.gov

Phone: 907-283-2030 / Fax: 907-283-3075

WRITTEN TESTIMONY

NAME: Bethany Swenson

REPRESENTING: _____

BILL # or SUBJECT: HB 173

COMMITTEE: House Judiciary **DATE:** 4-1-13

HB 173 attempts to define what a "medically necessary" abortion is to limit Medicaid funding accordingly. The bill restricts coverage to those pregnancies of low-income women resulting from rape and incest or when the pregnancy is causing a serious risk to the health or life of the woman.

Since 1973 when Roe vs. Wade was resolved by the Supreme Court, a woman can legally choose to end her pregnancy for any reason. The only medical procedure that ends a pregnancy is an abortion, which can be done with the abortion pill, mifepristone, or the procedures aspiration or dilation and evacuation. If a woman wants to end her pregnancy, an abortion is then "medically necessary." The cause of her pregnancy and her reasons for wanting the abortion are actually irrelevant.

HB 173 states that elective abortions will not be covered. Elective means "optional" in my Webster's dictionary. HB 173 implies that an abortion for anything other than a rape-, incest- or health-endangering pregnancy is elective. I argue that abortion is, paradoxically, always medically necessary and almost always elective.

Unless a woman is dying from a pregnancy-related health problem, she has a choice. Even some women experiencing serious health risks choose to continue their pregnancies against their doctors' advice. Some women's health conditions are so serious that they are advised never to become pregnant; yet some want to be mothers so badly that they do choose to try.

I have known women who kept and raised the children that resulted from rape. In a 1996 study of 4,008 women by Dr. Melissa Holmes, et al., that was presented at the Fifty-eighth Annual Meeting of The South Atlantic Association of Obstetricians and Gynecologists, 32% of the women who happened to become pregnant from rape kept and raised the resulting child. Rounded up, 50% percent had an abortion, 12% miscarried, and 6% placed the infant for adoption. Because a woman was raped does not mean she has to or should have an abortion; that is her choice. Abortion for rape-pregnancies is elective.

<http://www.ajog.org/article/S0002-9378%2896%2970141-2/abstract>

I don't understand why incest is specified in this bill because incest is almost always rape and should be included in that category. Incest, in its nature, is abusive because it confuses familial relationships and is often perpetrated by a family member who, like any other sex offender, uses force (violence and coercion), tactics such as manipulation, and inequality such as authority, older age, physical strength, or higher intelligence to abuse others. Incest often begins when the victim is a child and lasts for years, sometimes even into adulthood. Even if an incest victim believes (because of manipulation by the abusive family member) that it is not abuse, it is abuse. All resulting sexual intercourse is rape.

Only when sex is occurring consensually between two related adults is incest not rape. However, it is still illegal and can produce children with deformities and debilitating disorders. A woman who committed incest may want an abortion because she fears the baby will have abnormalities. The bill does not clarify if such a case would be covered under cases of "incest."

If someone wants to strip abortion coverage of choice, the only cases that would be covered are those in which the pregnancy is threatening the life of the woman or when there is a terminal fetal abnormality. One of my aunts was advised by her doctor to abort because her baby was determined to have an abnormality that was terminal. Does that theoretical narrow coverage seem fair for poor women?

If someone doesn't want to pay for a woman's mistake and is concerned about personal responsibility, the only cases that would not be covered are those of pregnancies caused by unprotected sex or perhaps contraception misuse. Some cases that would be

KENAI LEGISLATIVE INFORMATION OFFICEEmail: Kenai_LIO@akleg.gov

Phone: 907-283-2030. / Fax: 907-283-3075

WRITTEN TESTIMONY

NAME: Bethany Swenson

REPRESENTING: _____

BILL # or SUBJECT: HB 173

COMMITTEE: House Judiciary **DATE:** 4-1-13

covered are serious risk to the health of the woman, fetal abnormality, rape (in its many forms, including incest), birth control failure, and birth control sabotage. Of these, HB 173 would only allow coverage for serious health risks and rape-pregnancies. Does that seem fair for poor women?

Birth control failure is not contraception misuse. For example, even if a woman uses oral contraceptives perfectly, she always has a 1% chance of becoming pregnant every year. That is 1 in every 100 women per year. "The Pill" is simply not perfect. IUDs can fail. Condoms break. Spermicides are not 100% effective. Even women who undergo tubal ligation can become pregnant. According to the Mayo Clinic website, 1 out of 100 women become pregnant within the first year of tubal ligation. Pregnancies that occur despite tubal ligation also carry a high risk of being ectopic, which is when the fertilized egg implants outside the uterus. According to a CDC study, the failure rate for every 1,000 vasectomies was 9.4% during the first year and 11.3% for the second to fifth years. The study acknowledged that vasectomies also fail after five years.

<http://www.mayoclinic.com/health/tubal-ligation/MY01000/METHOD=print>

<http://www.livestrong.com/article/217157-what-are-the-chances-of-a-vasectomy-failure/#ixzz2P8hzQnZY>

Birth control sabotage is when someone tampers with another person's contraception. It may be rare but does occur. One of my friends became pregnant because her boyfriend poked holes in the condoms they used. She always used condoms and knew none had broken, so when she discovered she was pregnant she confronted him and he confessed.

Also, in some abusive relationships, the man may be so controlling that he does not allow the woman to use any kind of contraception. I don't know what that would be called.

However, this bill does not claim to address personal responsibility and it fails to understand the unique paradoxical nature of abortion. HB 173 fumbles to define which abortions are medically necessary. Abortion does not need to be further defined in this way. To specify which cases are medically necessary is redundant. Once wanted, an abortion is necessary.

I understand that if someone thinks abortion is wrong, or even murder, that it is not viewed as a medical decision (involving the body, mind, and life of a woman) or medical procedure. I do acknowledge that abortion ends both a pregnancy and a life, but I also agree with current law that the killing is allowable. People are free to think abortion is wrong, but I am guessing that such views have resulted in this biased, illogical, unfair bill lacking in understanding.

Even if this bill were to address personal responsibility, it is targeting a most vulnerable group, low-income women. Even if a low-income woman doesn't want to be pregnant, a mother, or have another child and became pregnant because she irresponsibly chose not to use contraception, she is still needy. Abortions, especially aspiration and D & E, are not cheap and would be a financial hardship. Abortion is a kind of medical care, which is what the state provides for the poor with Medicaid. I do not need to echo what Planned Parenthood and the ACLU testified in recent Senate Judiciary hearings about the unconstitutionality of SB 49 according to past rulings, how it limits access to abortion, discriminates against the poor, and favors pregnancy.

I am concerned about the low-income women who would be denied if this bill is made into law. Many of them may be irresponsible, but I still feel compassion for them. I think Laura Einstein's extrapolation at the March 4 Senate Judiciary hearing for SB 49 is realistic: gathering the money will be difficult and take more time therefore delaying abortion perhaps into the second trimester, in which case women will have to travel to Washington state to receive the specific abortion procedure needed,

KENAI LEGISLATIVE INFORMATION OFFICEEmail: Kenai_LIO@akleg.gov

Phone: 907-283-2030 / Fax: 907-283-3075

WRITTEN TESTIMONY

NAME: Bethany Swenson

REPRESENTING: _____

BILL # or SUBJECT: HB 173

COMMITTEE: House Judiciary **DATE:** 4-1-13

compounding the financial burden. The abortion may be further delayed or become impossible. I also think it's realistic that women may seek underground abortions. Those would cost, too, but may still be cheaper and more accessible. In underground abortions, women may be able to make deals that don't involve money. A timely abortion is more humane for the fetus and poses less health risks for the woman. Underground abortions may be deadly botches. When abortion is too expensive and nearly inaccessible a woman's choice is sabotaged. A low-income woman may end up staying pregnant, against her want, and signing up for more government assistance as a mother.

I e-mailed senators and representatives about this bill in February. One response I received was that many Alaskans are uncomfortable paying for abortions with their tax dollars. Is that what this bill is really about: taxpayers and not low-income women? Abortion is legal, but people have the right to think that it is immoral or even murder. I wish there were some way that we could sort out exactly where every cent we pay in taxes goes, but it's impossible. Each of us pays for things we disagree with or find repulsive every day, because we, as taxpayers, pay for everything. Someone who hates the death penalty may be paying for executions. Someone who thinks homosexuality is wrong may be paying for certain benefits for homosexuals. Someone may be paying for a war they think is unjust. We could find an example for everyone. My point is that our nation allows for freedom and diversity. That is what we pay for. Some of us live and let live.

People fight hard every day to change what is law, too. Perhaps some people think that if they can legally define what a necessary abortion is that they can eventually illegalize most reasons women have for choosing abortion.

House Judiciary Committee Hearing
April 1, 2013

The Case for Opposing House Bill
173:

Protect Freedom, Privacy and
Fairness for All Alaskan Women



Planned Parenthood Votes Northwest

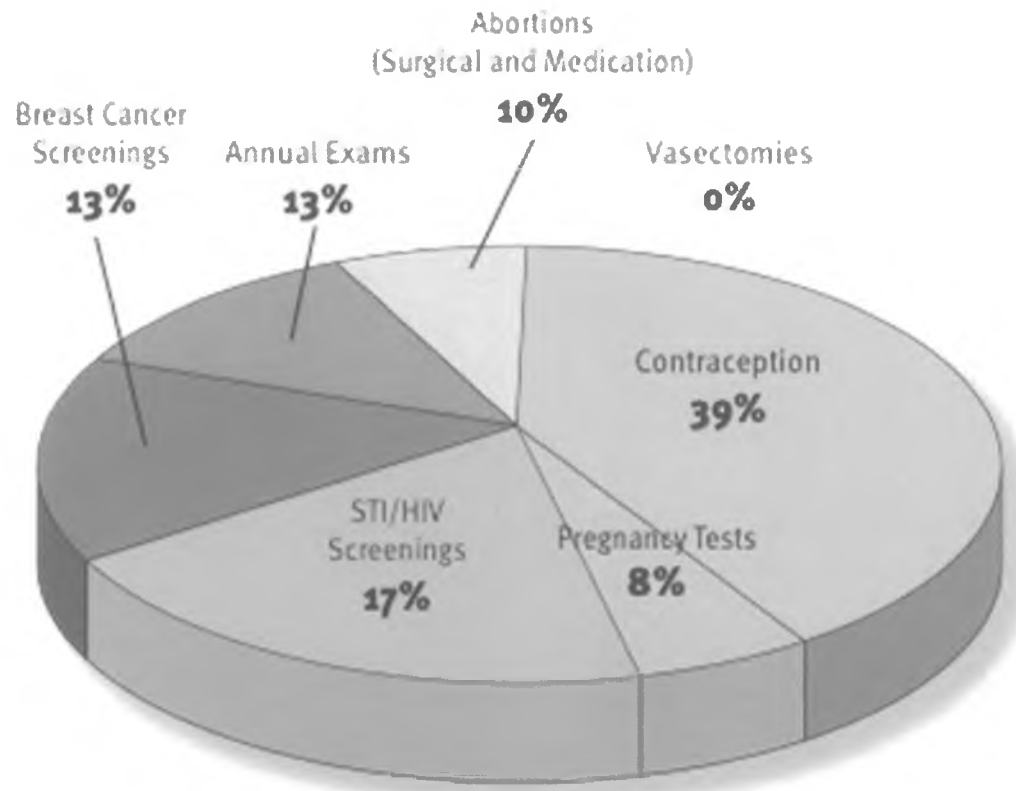
Who We Are

- Planned Parenthood of the Great Northwest operates 5 health centers in Alaska:
 - Anchorage
 - Fairbanks
 - Juneau
 - Sitka
 - Soldotna



Who We Are

- In 2011, Planned Parenthood health centers:
 - Served 7,294 Alaskans
 - Provided 13,948 services



Why Oppose House Bill 173?

- House Bill 173 puts Alaskan women's health at risk.
- Pregnancy decisions, like other medical decisions, should be made privately by a woman and her doctor, not by politicians.
- The Alaska Supreme Court has long recognized that abortion should be available for low-income women ***without government interference.***
- There is a regulation in place to ensure medical necessity already, and no evidence it's not working.
- The cost of litigating this issue again would likely cost the taxpayers \$1 million or more.



Why Oppose House Bill 173?

- **In Summary:**

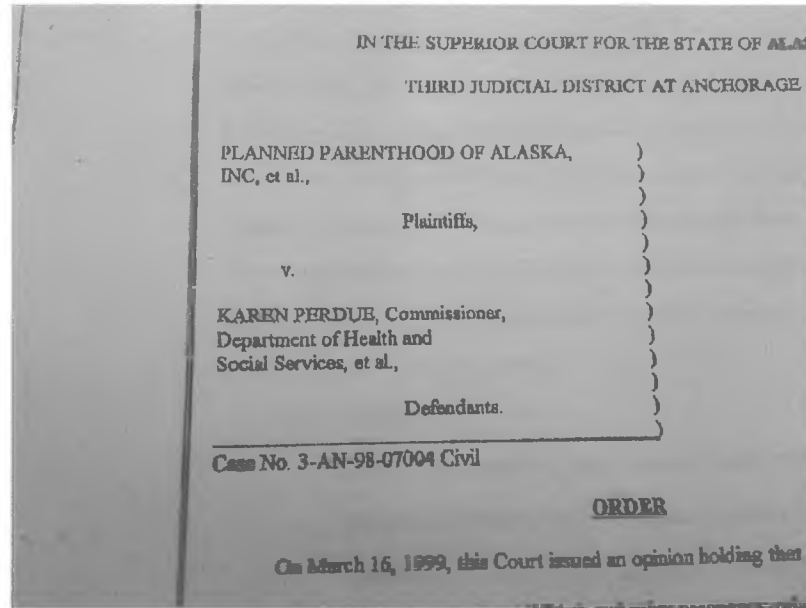
- There is no evidence of misapplication of the medical necessity standard that exists today.
- The restrictions proposed in this bill are unnecessary and unconstitutional.
- This bill is a solution seeking a problem at a high cost to Alaskans in the state budget.
- If the legislature wants to reduce the number of abortions in Alaska and also reduce costs to the state, it should use a proven method to reduce unintended pregnancy: provide Medicaid birth control to more low-income women.



2001: SOA v. PPA

“... The terms medically necessary abortions or therapeutic abortions are used interchangeably to refer to those abortions certified by a physician as necessary to prevent the death or disability of a woman, or ameliorate a condition harmful to a woman's physical or psychological health, as determined by the treating physician performing the abortion. PPA v. Perdue, No. 3-AN-98-07004 (2000)

SOA v. PPA: 2001



- “...abortions certified by a physician as necessary to prevent the death or disability of a woman, or ameliorate a condition harmful to a women’s physical or psychological health..”



2001: SOA v. PPA

- ***The Alaska Supreme Court affirmed the Superior Court—effectively affirming its definition of “medically necessary.”***
- ***Medicaid benefits must be applied in a neutral manner:***
 - When state governments seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an **obligation to do so in a neutral manner** so as not to infringe upon the constitutional rights of our citizens. “ *SOA v. PPA*, 28 P.3d 904, 908 (2001)



2001: SOA v. PPA

- ***The Court found that the challenged regulation violated equal protection.***
- “By providing health care to all poor Alaskans except women who need abortions, the challenged regulation violates the state constitutional guarantee of “equal rights, opportunities, and protection under the law.” *SOA v. PPA*, 28 P.3d 904, 908 (2001)
- “Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. **Alaska’s equal protection clause does not permit government discrimination against either woman; both must be granted access to state health care under the same terms...**” *SOA v. PPA*, 28 P.3d 904 (2001)



2002: Senate Bill 364

- In 2002, the Attorney General's office, at the request of the Governor, issued a brief on SB 364:
 - “...the limitations imposed by this legislation likely exclude many women for whom the women's physician would consider the procedure to be medically necessary. *Memo to the Honorable Tony Knowles, Governor Our file: 883-02-0031 May 28, 2002*
 - “To the extent that the certification criteria of (b) divide payments for medical services for similarly situated women for whom an abortion is medically necessary into two groups of women, one comprised of women for whom an abortion is medically necessary for one of the enumerated reasons and another of a woman for whom an abortion is medically necessary for a reason not enumerated, **the bill would be found to fail equal protection analysis and will be determined unconstitutional.**” *Memo to the Honorable Tony Knowles, Governor Our file: 883-02-0031 May 28, 2002*



2010: Inquiry to Legislative Counsel

- In referring to language in the *SOA v. PPA* case, the legislative counsel memo states: “...**strongly suggests that the Alaska Supreme Court considers women who carry their pregnancy to term to be similarly situated with women who have an abortion (in that they are both exercising their constitutional freedom of reproductive choice)...And in the absence of comparable burdens on continuation of pregnancy the state cannot burden the right to abortion services.**” Legislative Counsel memo to Senator Bettye Davis, From: Jean M Mischel, Legislative Counsel Work Order No. 27-LS0175



2012: House Bill 363, Inquiry to Legislative Counsel

- Constitutionality of prohibition on the use of public funds and facilities for an abortion?
 - **“Short answer is ‘no’** under current Alaska Supreme Court interpretations of equal protection principles unless all reproductive services coverage, including pregnancy and childbirth, is similarly restricted and the combined restriction withstands the state’s significant constitutional protections over privacy an liberty interests.” Legislative Counsel Memo to Representative Lindsey Holmes, From Jean M Mishcel Legislative Counsel Work Order No. 27-LS1441A March 13, 2012



2013: Senate Bill 49, Inquiry to Legislative Counsel

- Constitutionality of prohibition on the use of public funds and facilities for an abortion?
 - **“Short answer is ‘no’** under current Alaska Supreme Court interpretations of equal protection principles unless all reproductive services coverage, including pregnancy and childbirth, is similarly restricted and the combined restriction withstands the state’s significant constitutional protections over privacy an liberty interests.” Legislative Counsel Memo to Representative Lindsey Holmes, From Jean M Mishcel Legislative Counsel Work Order No. 12-28 REV March 1, 2013



2012: DHSS Rulemaking

- DHSS proposed a rule that would have defined “medically necessary abortions” to mean that “the health of the mother is endangered by the pregnancy.”
- After considering constitutional concerns DHSS abandoned its proposed rule and adopted a new rule that recognizes that medically necessary is a determination that will be made in the judgment of the treating physician, as is true for virtually all Medicaid services.
- This rule, currently in place, does add a layer of work for providers, but keeps the determination of medical necessity in the purview of the physician.



Conclusion

- Only trained and licensed health care providers can determine medical necessity on an individual basis in consultation with individual patients.
- HB 173 puts politicians between women and their doctors, and puts women's health at risk.
- HB 173 is unnecessary, unconstitutional, and potentially costly.

For the health of Alaskan women, no matter their income level, we urge you to oppose HB 173.



From: "Einstein, Laura" <Laura.Einstein@ppgnw.org>

Date: Mon, 01 Apr 2013 17:40:57 -0700

To: "Currey, Alyson" <alyson.currey@ppvotestnw.org>

Cc: "Allen, Jennifer" <jennifer.allen@ppvotestnw.org>, Mark Hickey <mshickey@gci.net>, Caren Robinson <dcc@alaska.net>

Subject: pricing information

Alyson, per Representative Gruenberg's request, our pricing for certain services is as follows:

The charge for birth control methods range from \$25/month (or \$300/year) for birth control pills to \$650 for long acting methods such as Implanon. We provide discounts between 20% - 100%, depending on a patient's income. Patients at 250% of poverty or below get the smallest discounts; patients at 100% of poverty or below may get the full slide.

An abortion costs \$695, but we offer a discount to patients who pay at time of service - \$594

A vasectomy costs \$800.

Please let me know if you need other information.

Laura Einstein

Chief Legal Counsel

Planned Parenthood of the Great Northwest

2001 East Madison, Seattle, WA 98122

P 206.328.6880 | C 202.320.0301 | F 206.720.4657 ppgnw.org <<http://ppgnw.org>> <<http://bit.ly/VO2tYR>>

ALASKA STATE SENATE

Interim:
301 Santa Claus Lane
North Pole Plaza Mall Ste. 3B
North Pole, Alaska 99705
Phone: (907) 451-2063
Fax (907) 451-2332



Session:
State Capitol, Room 119
Juneau, Alaska 99801-1182
Phone: (907) 465-3719
Fax (907) 465-3258

SENATOR JOHN COGHILL

Date: April 1, 2013

To: Finance Committee Members

From: Sen. John Coghill's Office

Re: SB 49

Rebuttal to Planned Parenthood and Testimony from Saturday, March 30, 2013

1. The testimony was broad and, at times, emotional. That is generally a common trait when debating issues involving abortion.
2. Sen. Coghill wants to correct some misunderstandings about the bill including some misunderstandings that come from its opponents.

POINT 1 - PLANNED PARENTHOOD STILL COULD NOT CLEARLY DEFINE WHAT AN ELECTIVE ABORTION WAS OR THAT ELECTIVE ABORTIONS EVEN EXIST.

- a. Of course, a reasonable person could argue that Planned Parenthood cannot openly clearly admit that elective abortions exist because that would make them elective procedures.
 - i. As we are all aware elective procedures are not covered under Medicaid.
 - ii. Paying for elective procedures would therefore be an open abuse of Medicaid.

POINT 2 - SB 49 DOES SATISFY EQUAL PROTECTION.

1. The 2001 Supreme Court Opinion stated that the State has to provide medically necessary care for women seeking to give birth to a child.
2. The court also stated that the State has to provide medically necessary care for women seeking an abortion.
 - a. What some opponents, even to this day, fail to recognize is the Supreme Court directed that a definition for a medically necessary abortion can be crafted as long as we base it on neutral criteria directly related to the health care program. See tab 4c, Page 16

highlighted portion. That is what SB 49 does. It was based on the very language of the 2001 Planned Parenthood decision and includes direct language found in the federal Hyde Amendment. The conditions are neutral and taken specifically from doctors in the field.

- i. One doctor disagreed with the conditions on Saturday. What she may or may not know is that the conditions were overwhelmingly directly taken from the 2001 *Planned Parenthood* decision.

POINT 3 – SB 49 UNFAIRLY TARGETS POOR WOMEN?

1. The US Supreme Court, long ago ruled that the Federal Constitution **does not** require a State to pay for the costs of elective abortions just because it pays for the costs of childbirth related medical care. See *Maier v. Roe*, 432 US 464, 474 (1977)
2. Additionally, the United States Supreme Court, in 1980, ruled that the Hyde Amendment (which is the foundation for SB 49) does not violate women with lower incomes right to obtain a medically necessary abortion. The case was *Harris v. McRae*, 448 US 297 (1980). The State has no obligation to remove obstacles that it did not create (namely the woman's status of being of little means).

POINT 4 – OTHER ATTEMPTS TO LIMIT ABORTIONS SINCE 2001 MAY OR MAY NOT HAVE BEEN SUCCESSFUL.

1. SB-49 has nothing to do with those attempts. We cannot comment on the reasons they may or may not have been successful. This is a total different focus. SB-49 is a "lean muscle" bill. We have high confidence in how thorough and specific the bill is drafted.

POINT 5 – SURVIVAL OF FETUS IS NOT CONSIDERED?

1. That is simply incorrect. We've heard testimony as to the "floating tomb" and the child being "brainless." We considered that option and incorporated Paragraph 4, B, 22 (See Tab 1). "Another physical disorder...arising from the pregnancy....that would be a major bodily impairment."

POINT 6 – AN OPPONENT OF THE BILL STATED THAT YOU CANNOT SEPARATE "PHYSICAL HEALTH" AND "MENTAL HEALTH."

1. With all due respect, President Obama via Executive Order 13535, case law, and the very existence of the Hyde Amendment prove otherwise. Sen. Coghill invites you to look at tab 7 in your binders. The language is clear to emphasize "physical disorder", "physical injury", or "physical illness." It specifically does not include mental or psychological disorders.
2. In addition, SB 49 supporters, including 3 national doctors and 7 Alaskan doctors fundamentally disagree with that presumption. There is a genuine disagreement in the medical community

that mental and psychological conditions should be included under the definition of “medically necessary abortion.”



March 29, 2013

**AMERICAN CIVIL
LIBERTIES UNION OF
ALASKA**

1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

OFFICERS AND DIRECTORS

DONNA J. GOLDSMITH, Anchorage
PRESIDENT

RICH CURTNER, Anchorage
VICE PRESIDENT

LLOYD EGGAN, Anchorage
TREASURER

JOSHUA HEMSATH, Eagle River
SECRETARY

WILLIE ANDERSON, Juneau
AFFIRMATIVE ACTION OFFICER

PAUL GRANT, Juneau
SCOTT HENDERSON, Anchorage
KATIE HURLEY, Wasilla
MARJORIE KAISER, Anchorage
MICHAEL KING, Anchorage
RACHEL MUIR, Dillingham
BESSIE O'ROURKE, Anchorage
CONNIE OZER, Anchorage
GALEN PAINE, Sitka
BRIAN SPARKS, Sitka
JUNE PINNELL-STEPHENS, Fairbanks
TONY STRONG, Douglas

EMMA HILL, Anchorage
STUDENT ADVISOR

The Honorable Wes Keller, Chair
The Honorable Bob Lynn, Vice-Chair
House Judiciary Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801

via email: Rep.Wes.Keller@akleg.gov
Rep.Bob.Lynn@akleg.gov

**Re: House Bill 173 – Defining “Medically Necessary”
ACLU Review of Constitutional Issues**

Chair Keller, Vice-Chair Lynn:

Thank you for the opportunity to provide written testimony about House Bill 173, which seeks to impermissibly strip public funds from an important area of women's health.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, we write to advise you that this bill is unconstitutional or, at best, an academic nullity.

HB 173 Cannot Narrow or Further Define the Current Constitutional Right to Medicaid-Funded Medically Necessary Abortions

The ability of all women in Alaska to make their own medical decisions, including reproductive ones, is a fundamental right guaranteed by the Alaska

Constitution.¹ “Reproductive rights are fundamental ... [and] include the right to an abortion.”²

This fundamental right of reproductive choice is specifically protected by the “state constitutional guarantee of ‘equal rights, opportunities, and protection under the law,’”³ and Alaska may not “selectively exclude from [its Medicaid] program women who medically require abortions.”⁴ The requirement to publicly fund medically necessary abortions “affects the exercise of a constitutional right”⁵ **and thus it may not be narrowed or otherwise altered through legislation.**⁶

The contours of this right are clear. Even if, as the Sponsor Statement provides, “the term ‘medically necessary abortion’ has acquired a constitutional component of unknown scope,” this Bill may not delimit that right in any manner that narrows its original constitutional contours.⁷ At best, this Bill is a nullity that simply mirrors what the Supreme Court required in *State, Department of Health & Social Services*.

But, the Bill’s text and purpose belie this anodyne construction: it is narrower than the constitutional right announced by the Supreme Court and, aside from its separation of powers infirmity, it is substantively unconstitutional.

HB 173 Is Unconstitutional On Its Face

HB 173’s definition of “medically necessary abortion” is dramatically narrower than that guaranteed by the Alaska Constitution. First, the Bill subjects “medically necessary abortions” to an after-the-fact, second-guessing scrutiny, linking it to “a physician’s objective and reasonable professional judgment after considering medically relevant factors[.]”

Second, and more worrisome, the Bill exclusively limits “medically necessary abortion” to “avoid[ing] a threat of serious risk to the life or physical health” of the pregnant woman. Subpart

¹ *State, Dept. of Health & Soc. Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001).

² *Id.* at 907 (quoting *Valley Hosp. Ass’n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997)) (omission and alteration in *id.*).

³ *Id.* at 908 (quoting Alaska Const. art. I, § 1).

⁴ *Id.* at 906.

⁵ *Id.* at 909.

⁶ *Valley Hosp. Ass’n Inc.*, 948 P.2d at 972 (“However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action.”); *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”), (emphasis added).

⁷ *Dickerson*, 530 U.S. at 437 (overturning legislation that sought to overrule the *Miranda v. Arizona*, 384 U.S. 436 (1966) decision, which “interpret[ed] and appl[ied] the Constitution.”). Emphasis of the Sponsor Statement’s quote omitted.

(b)(4)'s list does not save the Bill, because though it attempts to tie the Bill's narrower scope to the Supreme Court's examples of medically necessary abortions,⁸ HB 173's touchstone is still just "life or physical health," which impermissibly omits mental health from medical need. **This squarely and unconstitutionally contradicts the Supreme Court, which recognized that mental health, such as "bipolar disorders," is a constitutionally protected and medically necessary basis for an abortion.**⁹ This omission makes HB 173 unconstitutional on its face.

HB 173's Impetus Violates Equal Protection

HB 173 stands alone in the Alaska Medicaid scheme. "Medically necessary" is a common term, scattered throughout the Medicaid regulations. The State specifically lists "medically necessary" in the regulations for

- hospital stays,¹⁰
- eye care,¹¹
- emergency air or ground ambulances,¹²
- mental health treatment,¹³
- community behavioral health services providers,¹⁴
- enteral and oral nutritional products,¹⁵
- B-complex vitamins,¹⁶ and
- podiatry services¹⁷

and "medically necessary" is a blanket prerequisite for each and every Medicaid claim: "[t]he department will pay for a service only if that service . . . (5) is *medically necessary*[.]"¹⁸

Yet, despite its ubiquity, "medically necessary" is not defined in the Alaska Statutes or the Administrative Code. And, given that Alaska administers a functional Medicaid program, "medically necessary" is not vague, unwieldy, or cumbersomely overbroad.

⁸ *State, Dept. of Health & Soc. Services*, 28 P.3d at 907.

⁹ *Id.*

¹⁰ 7 Alaska Admin. Code § 140.325.

¹¹ 7 Alaska Admin. Code § 110.715(a)(1).

¹² 7 Alaska Admin. Code § 120.415(a).

¹³ 7 Alaska Admin. Code § 110.445(a)(1).

¹⁴ 7 Alaska Admin. Code § 135.230(a)(1).

¹⁵ 7 Alaska Admin. Code § 120.240.

¹⁶ 7 Alaska Admin. Code § 120.110(e)(6)(H).

¹⁷ 7 Alaska Admin. Code § 110.505(a).

¹⁸ 7 Alaska Admin. Code § 105.100 (emphasis added).

The explicit purpose of HB 173, as announced in the Sponsor Statement, is to “provide[] a neutral definition for a ‘medically necessary abortion,’” because there is insufficient “guidance as to how broadly the term ‘medically necessary abortion’ is to be construed.”

In a constitutional challenge of HB 173, the courts will note that “medically necessary” permeates the Medicaid regulations and that its lack of an exhaustive HB 173-like definition has not caused the State to lack “guidance” on how it “is to be construed.” Rather, courts will likely acknowledge that HB 173’s extensive definition is unique in Alaska law and will then likely conclude that this Bill is “based on criteria unrelated to the purposes of the public health care program,”¹⁹ namely, that it is “based solely on political disapproval of the medically necessary procedure.”²⁰

This Bill is *not* rooted in “neutral criteria” that have a “fair and substantial relation to the object of the legislation,”²¹ but instead, is grounded in a political desire to reduce publicly funded abortions, and thus violates equal protection.²²

Conclusion

We appreciate the opportunity to share our concerns about House Bill 173. We hope that our comments will be helpful to the Committee in identifying the Bill’s constitutional infirmities, specifically that it violates the Equal Protection Clause and the separation of powers. For these reasons the ACLU opposes this Bill, and urges the Committee to vote Do Not Pass.

We trust that the Judiciary Committee will not approve legislation that squarely violates the Alaska Constitution, and would also entangle the State in expensive, needless litigation.

Please feel free to contact the undersigned should you require any additional information. Again, we are happy to reply to any questions that Members of the Committee may have. Thank you again for the opportunity to share our concerns.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

¹⁹ *State, Dept. of Health & Soc. Services*, 28 P.3d at 915.

²⁰ *Id.* at 905.

²¹ *Id.* at 910–11.

²² *See id.* at 912 n.59 (noting by example that a “bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest,” and that a “purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest” satisfy equal protection) (internal quotation omitted and alteration in original).

cc: Representative Neal Foster, Rep.Neal.Foster@akleg.gov
Representative Gabrielle LeDoux, Rep.Gabrielle.LeDoux@akleg.gov
Representative Charisse Millett, Rep.Charisse.Millett@akleg.gov
Representative Lance Pruitt, Rep.Lance.Pruitt@akleg.gov
Representative Max Gruenberg, Rep.Max.Gruenberg@akleg.gov

A M E N D M E N T

OFFERED IN THE HOUSE
TO: HB 173

BY REPRESENTATIVE GRUENBERG

1 Page 1, following line 12:

2 Insert a new paragraph to read:

3 "(3) "incest" means an act that constitutes a sexual offense defined in
4 AS 11.41.450, or a similar law of another jurisdiction;"

5

6 Renumber the following paragraphs accordingly.

7

8 Page 2, following line 2:

9 Insert a new paragraph to read:

10 "(5) "rape" means an act that constitutes a sexual offense defined in
11 AS 11.41.410 - 11.41.440, or a similar law of another jurisdiction;"

12

13 Renumber the following paragraph accordingly.

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 173

BY REPRESENTATIVE GRUENBERG

1 Page 3, line 1:

2 Delete "or"

3

4 Page 3, following line 1:

5 Insert new sub-subparagraphs to read:

6 "(xxii) myocardial infarction;

7 (xxiii) gestational trophoblastic disease;

8 (xxiv) chorioamnionitis; or"

9

10 Renumber the following sub-subparagraph accordingly.

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

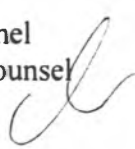
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 1, 2013

SUBJECT: Constitutionality of abortion funding restrictions under Medicaid (HB 173) (Work Order No. 28-LS0512\N)

TO: Representative Max Gruenberg

FROM: Jean M. Mischel
Legislative Counsel 

You have asked whether HB 173 is limited to Medicaid funding. The answer is "yes." HB 173, at page 1, line 6, limits its restrictions on funding to abortion services provided "under this chapter," which is AS 47.07. That chapter pertains only to the state Medicaid program.

You have also asked about the constitutionality of HB 173. HB 173 prohibits Medicaid funding for abortions that are not medically necessary except for terminations of a pregnancy resulting from an act of rape or incest. The bill also defines "medically necessary" only as it applies to abortion services. A restriction and definition of "medically necessary" that limits a person's exercise of a fundamental constitutional right takes on constitutional significance. Unless the Alaska Supreme Court modifies its previous holdings, or the state can articulate a compelling state interest, the restrictions in HB 173 that apply only to abortion services appear to be unconstitutionally discriminatory and may violate privacy rights, as further explained below.

HB 173 is similar to the federal exclusion for coverage of most abortion services known as the "Hyde Amendment," which is more restrictive than the general concept of "medically necessary" applicable to other types of Medicaid services, including prenatal services.¹ The Alaska Supreme Court has previously rejected the uniquely restrictive

¹ The bill also appears to be more restrictive, except for the provision for immediacy, than the federal definition of "emergency medical condition" for coverage of costly emergency care under Medicaid. That definition under 42 C.F.R. 438.114, defines "emergency medical condition" as:

Emergency medical condition means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably

limitation on Medicaid coverage that was based on the "Hyde Amendment" as it was worded in the 1990s.² In addition, the express legislative purpose for providing medical care at public expense for needy persons is to provide "only uniform and high quality care that is appropriate to [a person's] condition and cost-effective to the state" under AS 47.07.020. Consistent with this purpose, the current state standard for "medically necessary" under Medicaid generally relies on the treating health care provider's expert knowledge of the standard of care and the patient's condition, and includes services that are broader than life saving services but less than purely elective services. In contrast, federal law treats pregnant women who terminate their pregnancy differently and requires a more demanding standard than the generally applicable standard of medical necessity.

In several close decisions, the U.S. Supreme Court determined that the federal constitution does not require public financial support of the right to choose an abortion in cases that do not involve rape or incest or a threat to the mother's life. *Beal v. Doe*,

expect the absence of immediate medical attention to result in the following:

- (1) Placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy.
- (2) Serious impairment to bodily functions.
- (3) Serious dysfunction of any bodily organ or part.

² The current version of the "Hyde Amendment" in the federal budget provides as follows:

Sec. 506(a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.

...
Sec. 507(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).

432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). It is instructive to note that the trial court definition in the *McRae* case of the phrase "medically necessary" for purposes of abortion funding was "a professional judgment for the physician that may be exercised in the light of all factors -- physical, emotional, psychological, familial and the woman's age -- relevant to the well-being of the patient." The federal courts ruled in these cases that governments are not required to provide money to assist in the exercise of constitutional rights; governments are only prohibited from placing obstacles in the way of exercising those rights.

However, the Constitution of the State of Alaska has been consistently interpreted by the Alaska Supreme Court to provide broader protections than the federal constitution. In *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997), the Alaska Supreme Court held that "reproductive rights are fundamental . . . [and] include the right to an abortion."

In the early 1990s, the state attempted to adopt an older but similar federal standard for funding of abortion services.³ In a direct challenge to the state regulation that provided for public funding of abortion services only to preserve the life of the mother or in cases of rape or incest, the Alaska Supreme Court held that the state must pay for medically necessary abortions for participants in the Medicaid program, as it does for other types of services. *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001). The Alaska Supreme Court determined then that the "rape, incest, and to prevent the death of the mother" restrictions of the Hyde Amendment were too narrow to satisfy the equal protection requirements of the Alaska state constitution. The conclusion was that if the state Department of Health and Social Services (DHSS) restricted abortion coverage for Medicaid-eligible women to only those covered by the exceptions in the Hyde Amendment, it would result in unconstitutional implementation of Medicaid in Alaska.

There is language in the *Planned Parenthood of Alaska, Inc.* case strongly suggesting that the Alaska Supreme Court considers women who carry their pregnancy to term to be similarly situated with women who have an abortion (in that they are both exercising their constitutional freedom of reproductive choice). The court explained:

Because 7 AAC 43.140 infringes on a constitutionally protected interest, the State bears a high burden to justify the regulation. Unless the State

³ The invalidated and later repealed regulatory definition in 7 AAC 43.140 provided that:

(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.

asserts a compelling state interest, the statute will necessarily fail constitutional scrutiny. The State has failed to demonstrate such an interest in this case. It primarily defends 7 AAC 43.140 on the grounds that "medical and public welfare interests . . . are served by the legislature's decision to fund childbirth." But the regulation does not relate to funding for childbirth, and the State's decision to fund prenatal care and other pregnancy-related services has not been challenged. Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person. The State's undisputed interest in providing health care to women who carry pregnancies to term has no effect on the State's interest in providing medical care to Medicaid-eligible women who, for health reasons, require abortions.

The State also asserts an interest in minimizing health risks to mother and child, and submits that these interests are often closely aligned. But those interests are not aligned in precisely the situation contemplated by 7 AAC 43.140's Medicaid exclusion: when pregnancy threatens a woman's health. Under the U.S. Supreme Court's analysis in *Roe v. Wade*, the State's interest in the life and health of the mother is paramount at every stage of pregnancy. And in Alaska, "the scope of the fundamental right to an abortion . . . is similar to that expressed in *Roe v. Wade*." Thus, although the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman.

Planned Parenthood, supra, 28 P.3d at 913 (footnotes omitted).

If the court continues to hold that position when faced with a renewed public abortion funding challenge to HB 173, if enacted, it is likely that the court will find HB 173 an unconstitutional burden on the right to abortion services under the state Medicaid program unless a similar burden is placed on medical services to continue a pregnancy. In the absence of comparable burdens on public funding for continuation of a pregnancy, the state may not uniquely burden the right to abortion services by limiting public funding for them absent a compelling state interest.

Over the years, language has appeared in Alaska budget acts that purports to prohibit DHSS from using any of its appropriated money for abortions outside the scope of the Hyde Amendment. However, DHSS has been under court order to continue to pay for medically necessary abortions and has complied with the state attorney general's advice

to do so.⁴ The August 2002 Superior Court for the Third Judicial District order enjoined the state from denying Medicaid coverage for all abortions except those necessary to save a woman's life or where the pregnancy resulted from rape or incest. The stipulated order,

⁴ For instance, with regard to the 2007 fiscal year operating budget, the attorney general wrote the following:

This year's budget, as did the prior four years' budgets, contains the following language regarding abortion funding:

No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for medical assistance that has been approved by the United States Department of Health and Human Services

[citation omitted]. As we opined before, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions. DHSS, however, is under a superior court order to operate its Medicaid program in a constitutional manner by providing payment for them. That superior court order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001). Thus, the DHSS is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the money available to pay for services to operate the program legally. . . . Five years ago, the plaintiffs in the Planned Parenthood case asked the superior court to clarify how similar budget restrictions impacted its judgment. The superior court, three days after the supreme court affirmed the judgment, issued an opinion ordering the DHSS not to comply with the restrictions. To date, therefore, DHSS has obeyed the superior court's order and we must advise DHSS to continue to obey it; i.e., to continue to pay for these medically necessary abortions, until such time as a court reverses the order that is now in effect.

at paragraphs 6 and 7, distinguishes between life saving and otherwise medically necessary abortions as follows:

6. Because federal Medicaid mandates coverage only for those abortions necessary because the pregnancy is life-threatening or results from rape or incest, the current budget restrictions are identical to the restrictions adopted [and held to be constitutionally infirm] in 1998 and 2001.

7. Consistent with the prior Order of this Court and of the Alaska Supreme Court, the current budget restriction is without effect and the Department shall continue to pay all claims for services for medically necessary abortions for women otherwise eligible for coverage of pregnancy-related services in Alaska's Medicaid program.

According to DHSS, the money used for Medicaid abortions not covered by the Hyde Amendment (i.e., abortions for which the federal government will not contribute federal money) comes from the appropriation made by the legislature to DHSS for Medicaid.⁵ For that reason, DHSS modified the medical necessity form required for abortions in November 2012 to assist in getting reimbursement of federal funds.

Following the *Planned Parenthood* decision in 2001 and subsequent injunction, attempts to narrow the definition of "medically necessary" for purposes of abortion services funding have also failed. In 2002, for example, the Alaska Legislature passed and the governor vetoed a bill (SB 364, 22nd Legislature) that added a new section to AS 47.07 to provide that the state Medicaid program may only pay for medically necessary abortions as described in the bill and for abortions to terminate pregnancies resulting from rape or incest. That bill provided as follows:

(b) A claim for payment for a medically necessary abortion that is submitted to the department must be accompanied by a written certification by the treating physician that the abortion is medically necessary to treat a serious

(1) adverse physical condition of a pregnant woman that

(A) either is caused by the pregnancy or would be significantly aggravated by continuation of the pregnancy; and

(B) would seriously endanger the physical health of the woman if the pregnancy were not terminated by an abortion; or

(2) psychological illness of a pregnant woman who requires medication for treatment of the illness if

⁵ If the physician submitting the Medicaid claim for costs associated with an abortion does not provide the information that would allow DHSS to document to the federal government that a particular abortion falls within the Hyde Amendment exceptions, then DHSS does not seek a federal match for the costs associated with that abortion.

- (A) the medication required to treat the illness would be highly dangerous to the fetus; and
- (B) the health of the woman would be endangered if the medication was not taken during pregnancy.

Since the bill was vetoed, and the definition of "medically necessary" for purposes of abortion services funding contained in former 7 AAC 43.140(a) was held to be unconstitutional in 2001, the state currently has no separate definition of the phrase as it applies to abortion services and the treating physician must continue to verify medical necessity of the services as is done for some other services.

In 2012, the DHSS again proposed, but did not adopt, a change to the meaning of "medically necessary" in the context of abortions. The phrase "medically necessary" is used by the department at least 40 times in its implementing regulations for Medicaid without definition. In addition to the new certification, what remains in the regulations that pertains uniquely to abortion services funding are the terms "elective" and "therapeutic" (a term that appears to be used as a substitute in the regulations for "medically necessary"), defined in 7 AAC 47.290, along with the general concept of "medically necessary" for all covered services under 7 AAC 105.100.⁶

⁶ For general relief funding that is not directly applicable to Medicaid funding, 7 AAC 47.290 provides as follows:

- (7) "elective abortion" means a procedure, other than a therapeutic abortion, to terminate a pregnancy;
- (8) "therapeutic abortion" means the termination of a pregnancy;
 - (A) certified by a physician as medically necessary 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.

For state funding under Medicaid for all services, 7 AAC 105.100 describes "covered services" to include the general concept of "medically necessary" with cross-references to specified types of services as follows:

- The department will pay for a service only if that service
- (1) is identified as a covered service in accordance with AS 47.07, 7 AAC 43, and 7 AAC 105 - 7 AAC 160;
 - (2) is provided to an individual who is eligible for Medicaid under 7 AAC 100 on the date of service;

Except for a few limited and costly services, funding for other Medicaid covered services is limited by physician determinations of what is "medically necessary." I don't know whether the costs of abortion services could provide a similar cost-saving basis for limiting coverage of them. Because the right to state funding for medically necessary abortions under the current state Medicaid program is protected by the Alaska constitution as interpreted by the Alaska Supreme Court, the term "medically necessary abortion" has acquired a constitutional component of unknown scope. The relatively few Alaska cases involving abortion rights do not provide guidance as to how broadly the term "medically necessary abortion" is to be construed, but do indicate that reproductive services should be similarly available for all pregnant women absent a compelling state interest that justifies discriminatory treatment.

The restriction on funding in HB 173 is not made applicable to all reproductive services covered for pregnant indigent women and therefore is facially discriminatory. There is also the possibility that the Alaska courts will find that there are additional situations, other than those described in HB 173, that fall within the scope of a medically necessary abortion and thus must be covered under the state Medicaid program. The "catch-all" or the inclusive language in the bill to describe serious risk of death or "impairment of a major bodily function" may allow for circumstances that are protective of the health of the mother in situations that are not threats to her life, consistent with the general concept of medical necessity for other types of covered reproductive services. But the exclusions of fetal abnormalities, mental health conditions, and other bases for the provision of health care appear to narrow the definition more than a court may tolerate under strict scrutiny standards, which require a compelling state interest. In addition, the lack of availability of health promotion and preventive care in the bill, which are considered to be medically necessary for other Medicaid recipients, including medical coverage for

(3) is ordered or prescribed by a provider authorized to order or prescribe that service under applicable law;

(4) is provided by a person who is enrolled as a Medicaid provider or rendering provider under 7 AAC 105.210, or otherwise eligible to receive payment for services under 7 AAC 43 and 7 AAC 105 - 7 AAC 160;

(5) is medically necessary as determined by criteria established under 7 AAC 43 and 7 AAC 105 - 7 AAC 160 or by the standards of practice applicable to the provider;

(6) has received prior authorization from the department, if prior authorization is required under 7 AAC 43 or 7 AAC 105 - 7 AAC 160; and

(7) is not specifically excluded as a noncovered service under 7 AAC 43 or 7 AAC 105 - 7 AAC 160.

(Emphasis added.)

Representative Max Gruenberg

April 1, 2013

Page 9

prenatal care for pregnant women without regard to the medical conditions mandated by HB 173, establishes a dual standard that the court may again find to be unconstitutional.

In summary, the concept of what is "medically necessary" provides the baseline for Medicaid and other types of public and private funding of covered health care services. Under federal law, the United States Supreme Court upheld an exemption for coverage of abortion services that was much narrower than the standard for all other types of covered services. Some states, including Alaska, found an equal protection, privacy, or due process violation in drawing a distinction that unduly restricts access to services when the services implicate a constitutional right. Although the issue in Alaska was decided over ten years ago, attempts at new legislation and regulations have failed to subsequently describe the meaning of the phrase "medically necessary" as it applies only to abortion services covered under Medicaid. I do not know whether the record in HB 173 can establish a compelling state interest for a separate and more restrictive standard for abortion services alone that is different than the interests previously considered by the court. If not, it is likely the Alaska Supreme Court will again find an equal protection violation if it has occasion to review HB 173.

If I may be of further assistance, please advise.

JMM:ljw

13-228.ljw

- (1) reasonably believed the victim to be that age or older; and
- (2) undertook reasonable measures to verify that the victim was that age or older. (§ 3 ch 166 SLA 1978; am § 2 ch 43 SLA 1985; am § 1 ch 83 SLA 2002)

NOTES TO DECISIONS

Constitutionality of mistake of age defense. — In promulgating subsection (b), the Alaska legislature balanced society's interest in deterring sexual abuse of minors against the policy of allowing defendants to show that they did everything reasonably possible to ascertain the age of their sexual partners; such a balancing — and, in particular, the decision to allocate the burden of proof to the defendant — is within the constitutional bounds of legislative action and does not violate the Federal Constitution's guarantee of due process. *Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994).

Because the defendant's belief concerning the victim's age is a matter of defense, not an element of the crime, the legislature can constitutionally allocate the burden of proof where it sees fit, in light of the societal interests involved; therefore, subsection (b) is constitutional. *Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994).

Burden of proof in mistake of age defense. —

Subsection (b) creates a mistake-of-age defense to relieve defendants from strict liability for sexual relations with children older than 13 and younger than 16; however, the defendant must prove this exculpatory mistake by a preponderance of the evidence. *Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994).

Allowance of affirmative defense not required. — In prosecution for sexual abuse of minor in first degree, trial court was required to allow defendant to present an affirmative defense that he reasonably believed that at the time that he engaged in sexual penetration with victim, she was sixteen years of age or older. *State v. Fremgen*, 889 P.2d 1083 (Alaska Ct. App. 1995).

Applied in *Jager v. State*, 748 P.2d 1172 (Alaska Ct. App. 1988).

Cited in *Peters v. State*, 943 P.2d 418 (Alaska Ct. App. 1997); *Kelly v. State*, 116 P.3d 602 (Alaska Ct. App. 2005); *Doe v. State*, 189 P.3d 999 (Alaska 2008).

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

- (1) an ancestor or descendant of the whole or half blood;
 - (2) a brother or sister of the whole or half blood; or
 - (3) an uncle, aunt, nephew, or niece by blood.
- (b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

NOTES TO DECISIONS

Separate sentences for incest and second-degree assault. — Where the two statutes required proof of different conduct and the social interests to be vindicated or protected by each statute were different, separate sentences on defendant's convictions for incest and second-degree sexual assault did not violate double jeopardy. *Harmon v. State*, 11 P.3d 393 (Alaska Ct. App. 2000).

Death of defendant abated prosecution under former section. *Hartwell v. State*, 423 P.2d 282 (Alaska 1967) (decided under former AS 11.40.110).

Cited in *Theodore v. State*, 692 P.2d 987 (Alaska Ct. App. 1985); *Bingaman v. State*, 76 P.3d 398 (Alaska Ct. App. 2003); *Alaska Civ. Liberties Union v. State*, 122 P.3d 781 (Alaska 2005); *Davison v. State*, 282 P.3d 1262 (Alaska 2012).

Collateral references. — Consent as element of incest, 36 ALR2d 1299.
Sexual intercourse between persons related by half blood, 72 ALR2d 706, 34 ALR5th 723.

Prosecutrix as accomplice or victim, 74 ALR2d 705.
Rape, incest as included within charge of, 76 ALR2d 484.

Sec. 11.41.452. Online enticement of a minor. (a) A person commits the crime of online enticement of a minor if the person, being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455(a)(1) — (7) and

- (1) the other person is a child under 16 years of age; or
- (2) the person believes that the other person is a child under 16 years of age.

Construction and application of U.S. sentencing guideline 2G1.3(b)(3), providing two-level enhancement for use of computer to persuade, induce, entice,

coerce, or facilitate the travel of, minor to engage in prohibited sexual conduct, 58 ALR Fed. 2d 1.

Sec. 11.41.410. Sexual assault in the first degree. (a) An offender commits the crime of sexual assault in the first degree if

- (1) the offender engages in sexual penetration with another person without consent of that person;
 - (2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;
 - (3) the offender engages in sexual penetration with another person
 - (A) who the offender knows is mentally incapable; and
 - (B) who is in the offender's care
 - (i) by authority of law; or
 - (ii) in a facility or program that is required by law to be licensed by the state; or
 - (4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and
 - (A) the offender is a health care worker; and
 - (B) the offense takes place during the course of professional treatment of the victim.
- (b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983; am § 1 ch 96 SLA 1988; am § 7 ch 4 SLA 1990; am § 5 ch 79 SLA 1992; am § 3 ch 30 SLA 1996; am § 1 ch 61 SLA 1996)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fine. For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12.45.045.

Editor's notes. — From May 16 through September 1, 1996, "the Department of Administration under AS 47.33 or by the Department of Health and Social Services" appeared where "the state" now appears in AS 11.41.410(b)(ii).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

For legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 545 (Jud)), see 1988 House Journal 3065.

NOTES TO DECISIONS

- I. General Consideration.
- II. Former Law.
 - A. Generally.
 - B. Age of Consent.
 - C. Procedure.

I. GENERAL CONSIDERATION.

History of first-degree sexual assault statute. — See *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983).

Constitutionality. — In order to prove a violation of AS 11.41.410(a)(1), the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent. Construed in this way, the statute does not violate the state's constitution. *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983).

Construing the Revised Code and the concurrent amendments governing sentences together indicates that the legislature has not irrationally failed to distinguish between degrees of culpability; and the amendments to the sexual offenses provisions of the Revised Code did not subject defendant to cruel

and unusual punishment or deny him substantive due process or the equal protection of the laws. *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983).

Victim's vulnerability is not a necessary element of the offense of first-degree sexual assault; therefore, there was no error in using that as an aggravating factor. *Grandstaff v. State*, 171 P.3d 1176 (Alaska Ct. App. 2007).

Where defendant had a pattern of sexually abusing his stepdaughters, it was reasonable for the jury to conclude that the victim was afraid of protesting his assault and that his assault was coerced. Her failure to protest did not constitute consent, and the applicability of the language in (a)(1) was clear in light of the evidence presented. *Adams v. State*, — P.3d — (Alaska Ct. App. Mar. 28, 2012), (memorandum opinion).

Probable cause for arrest. — Police did not need a warrant to arrest defendant for sexual assault in the first degree because they had probable cause, based on

burglary held excessive. — See Hansen v. State, 706 P.2d 1164 (Alaska Ct. App. 1985) (decided under 657 P.2d 862 (Alaska Ct. App. 1983); Hancock v. State, section as it read before 1982 amendment).

Collateral references. — Defense of mistake of fact as to victim's consent in rape prosecution. 102 ALR5th 447.

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if

- (1) the offender engages in sexual contact with another person without consent of that person;
 - (2) the offender engages in sexual contact with a person
 - (A) who the offender knows is mentally incapable; and
 - (B) who is in the offender's care
 - (i) by authority of law; or
 - (ii) in a facility or program that is required by law to be licensed by the state;
 - (3) the offender engages in sexual penetration with a person who the offender knows is
 - (A) mentally incapable;
 - (B) incapacitated; or
 - (C) unaware that a sexual act is being committed; or
 - (4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and
 - (A) the offender is a health care worker; and
 - (B) the offense takes place during the course of professional treatment of the victim.
- (b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983; am § 2 ch 96 SLA 1988; am § 8 ch 4 SLA 1990; am § 6 ch 79 SLA 1992; am § 4 ch 30 SLA 1996; am § 2 ch 61 SLA 1996)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Editor's notes. — From May 16 through September 9, 1996, "the Department of Administration under AS 47.33 or by the Department of Health and Social

Services" appeared where "the state" now appears in (a)(2)(B)(ii).

Legislative history reports. — For legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 545 (Jud)), see 1988 House Journal 3065.

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.

Constitutionality. — Where man was convicted of second-degree sexual assault under paragraph (a)(3) for engaging in sexual penetration with a woman who was so intoxicated that she was either incapacitated or unaware of the sexual penetration, the court of appeals held that the definition of second-degree sexual assault did not violate the single subject clause of the Alaska Constitution and was not unconstitutionally vague. Ragsdale v. State, 23 P.3d 653 (Alaska Ct. App. 2001).

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Construction. — The statutory language in this section is not so imprecise that ordinary persons of common intelligence are left to guess at its meaning and are apt to differ as to its scope; the trial court did not err in rejecting defendant's claim of vagueness and

overbreadth. Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995).

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Attempt to commit sexual assault is a crime under Alaska law and requires that defendant, intending to engage in sexual contact with another person without regard to that person's lack of consent, take a substantial step toward accomplishing this goal. Guertin v. State, 854 P.2d 1130 (Alaska Ct. App. 1993).

Evidence was sufficient to convict defendant of attempted sexual assault in the second degree; an eyewitness's testimony, which was corroborated, was that the victim was incapacitated. Other corroborating evidence led the trial judge to the conclusion that

defendant which might defendant's obvious P.3d — (Alaska opinion).

Without opinion where that his statement too intimate contact. Who who awoke of resister State, —

(memorandum) **Mentally** and consequences penetration understanding social, mental act entails App. 1995

To prove the state's certainty of circumstances an inference substantial capable. J. App. 1995

Where to prove that instead, reliance on the jury, victim's spot trial and decision which was that, absence evidence totally incapable appearance trial inter evidence 0587 (Alaska

Exchange case where tenants in efficient evidence second degree in the testimony after mediation Grandstaff 2007).

Health second degree tion that a ing that ex the state n knew that that the p ceeded the State, 16 F

The evi sufficient care work degree sex that the m with patient contact wa (Alaska Ct **Incapac**

v. State, — P.3d — (Alaska Ct. App. Sept. 23, 2009),
(memorandum opinion).

Sec. 11.41.425. Sexual assault in the third degree. (a) An offender commits the crime of sexual assault in the third degree if the offender

- (1) engages in sexual contact with a person who the offender knows is
 - (A) mentally incapable;
 - (B) incapacitated; or
 - (C) unaware that a sexual act is being committed;
- (2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment;
- (3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person; or
- (4) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual penetration with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

(b) In this section, “peace officer” has the meaning given in AS 01.10.060.

(c) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988; am § 9 ch 4 SLA 1990; am § 7 ch 79 SLA 1992; am § 1 ch 33 SLA 2000; am §§ 3, 4 ch 20 SLA 2011)

Revisor’s notes. — Subsection (b) was enacted as (c). Relettered in 2011, at which time former subsection (b) was relettered as (c).

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Effect of amendments. — The 2011 amendment,

effective July 1, 2011, added (a)(4), and made a related stylistic change; added (b) (now (c)).

Legislative history reports. — For governor’s transmittal letter concerning the amendment of subsection (a) by § 1, ch. 33, SLA 2000 (HB 99), see 1999 House Journal 256.

NOTES TO DECISIONS

Cited in Herreid v. State, 69 P.3d 507 (Alaska Ct. App. 2003); Simon v. State, 121 P.3d 815 (Alaska Ct. App. 2005).

Sec. 11.41.427. Sexual assault in the fourth degree. (a) An offender commits the crime of sexual assault in the fourth degree if

- (1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment;
- (2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person; or
- (3) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, the offender engages in sexual contact with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

(b) In this section, “peace officer” has the meaning given in AS 01.10.060.

(c) Sexual assault in the fourth degree is a class A misdemeanor. (§ 2 ch 33 SLA 2000; am §§ 5, 6 ch 20 SLA 2011)

Revisor's notes. — Subsection (b) was enacted as (c). Relettered in 2011, at which time former subsection (b) was relettered as (c).

Cross references. — For punishment of class A misdemeanors, see AS 12.55.135(a) for imprisonment and AS 12.55.035 for fines.

Effect of amendments. — The 2011 amendment,

effective July 1, 2011, added (a)(3), and made a related stylistic change; added (b) (now (c)).

Legislative history reports. — For governor's transmittal letter concerning the enactment of this section by § 2, ch. 33, SLA 2000 (HB 99), see 1990 House Journal 256.

NOTES TO DECISIONS

Cited in *Doe v. State*, 189 P.3d 999 (Alaska 2008).

Sec. 11.41.430. Sexual assault in the third degree. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.425.]

Sec. 11.41.432. Defenses. (a) It is a defense to a crime charged under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is

- (1) mentally incapable; or
- (2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.

(b) Except as provided in (a) of this section, in a prosecution under AS 11.41.410 or 11.41.420, it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant. (§ 4 ch 96 SLA 1988; am § 27 ch 50 SLA 1989)

Legislative history reports. — For an analysis of the 1989 amendment to this section, see Senate House Joint Journal Supplement No. 10, May 5, 1989, p. 5, under "Sec. 27."

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988; am § 1 ch 151 SLA 1990)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

For legislative letter of intent in connection with the amendment of subsection (a) by § 1, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Annotator's notes. — Some of the cases cited in the notes below were decided under former AS

11.15.134. Some were also decided under former AS 11.41.410(a)(4), which provided that a person 18 years

contest to attempted first-degree sexual abuse of a minor and received a sentence of 12 years' imprisonment with seven years suspended, for an effective five-year sentence, to establish the sentencing range defendant stipulated to two aggravating factors; defendant knew the victim of his offense was particularly vulnerable and his prior criminal history included a delinquency adjudication for felony conduct. *Malutin v. State*, 198 P.3d 1177 (Alaska Ct. App. 2009).

Sentence under former AS 11.15.134 held excessive. — See *Qualle v. State*, 652 P.2d 481 (Alaska Ct. App. 1982).

Sentence for assault held excessive. — Sentence of 20 years imprisonment for first-degree sexual assault of two-year old child was excessive and case was remanded for resentencing not to exceed 10 years. *Langton v. State*, 662 P.2d 954 (Alaska Ct. App. 1983).

Sentence for assault held too lenient. — Suspended five-year sentence for first-degree sexual assault of defendant's four-year old son was disapproved as too lenient, with a 90-day to three-year sentence suggested. *Langton v. State*, 662 P.2d 954 (Alaska Ct. App. 1983).

Sentence under former AS 11.41.410(a)(4) for assault held too lenient. — See *State v. Rushing*, 680 P.2d 500 (Alaska Ct. App. 1984); *State v. Woods*, 680 P.2d 1195 (Alaska Ct. App. 1984).

Given a series of nine assaults of a stepdaughter by a stepfather, substantial evidence that intercourse was accomplished without consent, and the fact that the victim has left the defendant's home, a sentence of one year of incarceration under former AS 11.41.410(a)(4) was disapproved and a sentence of at least three years recommended. *State v. Couey*, 680 P.2d 513 (Alaska Ct. App. 1984).

Remand for resentencing for conviction under former law. — See *State v. Covington*, 711 P.2d 1183 (Alaska Ct. App. 1985).

Sentence clearly mistaken. — A sentence of 24 years with four years suspended, upon conviction of three counts of sexual abuse of a minor in the first degree, was clearly mistaken, where the trial court did not address the 10- to 15-year benchmark established in prior decisions concerning aggravated cases of sexual assault, and nothing in the record established that a sentence in excess of 15 years was necessary to protect the public. *Mosier v. State*, 747 P.2d 548 (Alaska Ct. App. 1987).

A sentence of 20 years with five years suspended for a first felony offender, for sexual abuse of a minor in the first degree, was clearly mistaken, where the offense did not involve multiple acts with multiple victims or a prior felony record. *Zackar v. State*, 761 P.2d 1015 (Alaska Ct. App. 1988).

Sentence of 15 years with five years suspended was clearly mistaken, where defendant was a first felony offender with an otherwise good record. *Lawrence v. State*, 764 P.2d 318 (Alaska Ct. App. 1988).

Composite term of sixty years upon conviction of two counts of sexual abuse of a minor in the first degree was clearly mistaken, and the case was re-

manded for imposition of a total sentence not to exceed sixty years with ten years suspended, where the sentencing court's reliance upon the seriousness of defendant's prior murder conviction placed inordinate and disproportionate weight on a single aggravating factor. *Murray v. State*, 770 P.2d 1131 (Alaska Ct. App. 1989).

Remand for resentencing. — See *Lewis v. State*, 706 P.2d 715 (Alaska Ct. App. 1985); *Bodine v. State*, 737 P.2d 1072 (Alaska Ct. App. 1987); *Howell v. State*, 758 P.2d 103 (Alaska Ct. App. 1988).

Conditions of probation. — Conditions of probation restricting defendant from unauthorized contact with his daughter and with other girls under 18-years of age were not vague or unduly restrictive of his constitutionally protected right to freedom of association. *Nitz v. State*, 745 P.2d 1379 (Alaska Ct. App. 1987).

Applied in *Seymore v. State*, 655 P.2d 786 (Alaska Ct. App. 1982); *Juelson v. State*, 758 P.2d 1294 (Alaska Ct. App. 1988); *Allen v. State*, 769 P.2d 457 (Alaska Ct. App. 1989); *Simpson v. State*, 796 P.2d 840 (Alaska Ct. App. 1990); *Carr v. State*, 840 P.2d 1000 (Alaska Ct. App. 1992); *Hess v. State*, 20 P.3d 1121 (Alaska 2001); *State v. Moreno*, 151 P.3d 480 (Alaska Ct. App. 2006); *Sikeo v. State*, 258 P.3d 906 (Alaska Ct. App. 2011).

Quoted in *Harris v. State*, 790 P.2d 1379 (Alaska Ct. App. 1990).

Cited in *Higgs v. State*, 676 P.2d 610 (Alaska Ct. App. 1984); *Benboe v. State*, 698 P.2d 1230 (Alaska Ct. App. 1985); *Dancer v. State*, 715 P.2d 1174 (Alaska Ct. App. 1986); *James v. State*, 739 P.2d 1314 (Alaska Ct. App. 1987); *Patterson v. State*, 747 P.2d 535 (Alaska Ct. App. 1987); *Kirby v. State*, 748 P.2d 757 (Alaska Ct. App. 1987); *Jager v. State*, 748 P.2d 1172 (Alaska Ct. App. 1988); *James v. State*, 754 P.2d 1336 (Alaska Ct. App. 1988); *Osterback v. State*, 789 P.2d 1037 (Alaska Ct. App. 1990); *Cook v. State*, 792 P.2d 682 (Alaska Ct. App. 1990); *Capwell v. State*, 823 P.2d 1250 (Alaska Ct. App. 1991); *Curl v. State*, 843 P.2d 1244 (Alaska Ct. App. 1992); *Boerma v. State*, 843 P.2d 1246 (Alaska Ct. App. 1992); *Nunn v. State*, 845 P.2d 435 (Alaska Ct. App. 1993); *State v. Angaiak*, 847 P.2d 1068 (Alaska Ct. App. 1993); *Haire v. State*, 877 P.2d 1302 (Alaska Ct. App. 1994); *Beltz v. State*, 895 P.2d 513 (Alaska Ct. App. 1995); *Plate v. State*, 925 P.2d 1057 (Alaska Ct. App. 1996); *State v. Simpson*, 946 P.2d 890 (Alaska Ct. App. 1997); *Gwalthney v. State*, 964 P.2d 1285 (Alaska Ct. App. 1998); *Krack v. State*, 973 P.2d 100 (Alaska Ct. App. 1999); *Harmon v. State*, 11 P.3d 393 (Alaska Ct. App. 2000); *Schumacher v. State*, 11 P.3d 397 (Alaska Ct. App. 2000); *Jack C. v. State*, 68 P.3d 1274 (Alaska 2003); *Parker v. State*, 90 P.3d 194 (Alaska Ct. App. 2004); *Wholecheese v. State*, 100 P.3d 14 (Alaska Ct. App. 2004); *Bryant v. State*, 133 P.3d 690 (Alaska Ct. App. 2006); *State v. Parker*, 147 P.3d 690 (Alaska 2006); *Zemljich v. Municipality of Anchorage*, 151 P.3d 471 (Alaska Ct. App. 2006); *Garland v. State*, 172 P.3d 827 (Alaska Ct. App. 2007); *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Holden v. State*, 190 P.3d 725 (Alaska Ct. App. 2008); *Davison v. State*, 282 P.3d 1262 (Alaska 2012).

Sec. 11.41.436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if,

(1) being 17 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least four years younger than the offender, or aids, induces, causes, or encourages a person who is 13, 14, or 15 years of age and at

leas
pers
(2
whc
yeal
(3
whc
adoj
(4
pers
— (1
(5
who
(A
offe
(E
(6
pers
the
(7
pers
(b
198:
ch 8

Cr
12.5f
fines
Ed
provi
secti
28, 2
the s
2006
4, 20

Pr
notes
“F
the t
defin
11.81
its p
less
810 l
“C
sexu:
pose:
Care
State
denic
386 (

least four years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6);

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim;

(6) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim; or

(7) being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983; am § 4 ch 66 SLA 1988; am § 2 ch 151 SLA 1990; am § 1 ch 14 SLA 2006; am § 1 ch 88 SLA 2006)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Editor's notes. — Section 13, ch. 14, SLA 2006, provides that the 2006 amendment of (a) of this section applies "to offenses committed on or after April 28, 2006." Section 3, ch. 88, SLA 2006 provides that the amendment to (a)(6) made by sec. 1, ch. 88, SLA 2006 applies "to offenses occurring on or after October 4, 2006."

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

For legislative letter of intent in connection with the amendment of subsection (a) by § 2, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

"Female breast." — The legislature intended that the term "female breast," as used in the statutory definition of "sexual contact" contained in AS 11.81.900(b)(53) (now (b)(58)), be applied according to its plain meaning — referring to all females regardless of age or degree of development. *Stephan v. State*, 810 P.2d 564 (Alaska Ct. App. 1991).

"Crime of violence." — Defendant's conviction for sexual abuse constituted a crime of violence for purposes of a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C.S. § 924(e). *United States v. Melton*, 344 F.3d 1021 (9th Cir. 2003), cert. denied, 541 U.S. 953, 124 S. Ct. 1696, 158 L. Ed. 2d 386 (2004).

No culpable mental state required. — Under the current statutory definition of "sexual contact," the offense of sexual abuse of a minor in the second degree may properly be established by evidence proving knowing conduct within the scope of AS 11.81.900(b)(52)(A) (now (b)(58)(A)); no secondary culpable mental state need be established with respect to surrounding circumstances. *Van Meter v. State*, 743 P.2d 385 (Alaska Ct. App. 1987).

In a prosecution for sexual abuse of a minor in the second degree, there was no need for the jury to find that defendant acted with the specific intent of achieving sexual satisfaction. *Braun v. State*, 911 P.2d 1075 (Alaska Ct. App. 1996).

Burden of proving exclusions. — If some evidence of justification is advanced in the record, the state must bear the additional burden of establishing that the defendant's conduct did not fall within the exclusions of AS 11.81.900(b)(52)(B) (now (b)(58)(B)). *Van Meter v. State*, 743 P.2d 385 (Alaska Ct. App. 1987).

Defense of misunderstanding as to victim's age. — Defendant was entitled to defend on the ground that he reasonably believed the thirteen year old victim was sixteen years of age or older, where most of the information he knew about her came from a telephone conversation with her in which he claimed she discussed her prior sexual history and experience in detail. *Bibbs v. State*, 814 P.2d 738 (Alaska Ct. App. 1991).

Separate counts arising from single episode. — Defendant was properly convicted of four counts of second-degree sexual abuse of a minor where the

(Alaska Ct. App. 1990); *Nunn v. State*, 845 P.2d 435 (Alaska Ct. App. 1993); *Heath v. State*, 849 P.2d 786 (Alaska Ct. App. 1993); *Kolkman v. State*, 857 P.2d 1202 (Alaska Ct. App. 1993); *Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994); *Mullin v. State*, 886 P.2d 1323 (Alaska Ct. App. 1994); *State v. Fremgen*, 889 P.2d 1083 (Alaska Ct. App. 1995); *Cole v. State*, 923 P.2d 820 (Alaska Ct. App. 1996); *Plate v. State*, 925 P.2d 1057 (Alaska Ct. App. 1996); *Williams v. State*, 928 P.2d 600 (Alaska Ct. App. 1996); *Beaver v. State*, 933 P.2d 1178 (Alaska Ct. App. 1997); *State v. Simp-*

son, 946 P.2d 890 (Alaska Ct. App. 1997); *Scroggins v. State*, 951 P.2d 442 (Alaska Ct. App. 1998); *Schumacher v. State*, 11 P.3d 397 (Alaska Ct. App. 2000); *Wholecheese v. State*, 100 P.3d 14 (Alaska Ct. App. 2004); *Kelly v. State*, 116 P.3d 602 (Alaska Ct. App. 2005); *Labrake v. State*, 152 P.3d 474 (Alaska Ct. App. 2007); *Garland v. State*, 172 P.3d 827 (Alaska Ct. App. 2007); *Malutin v. State*, 198 P.3d 1177 (Alaska Ct. App. 2009); *Thompson v. State*, 210 P.3d 1233 (Alaska Ct. App. 2009).

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if being 17 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least four years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983; am § 3 ch 151 SLA 1990; am § 14 ch 124 SLA 2004; am § 2 ch 14 SLA 2006)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

Section 13, ch. 14, SLA 2006, provides that the 2006 amendment of (a) of this section applies "to offenses committed on or after April 28, 2006."

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 3, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree for touching the victim's breasts, and sexual abuse of a minor in the second degree for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. *Newsome v. State*, 782 P.2d 689 (Alaska Ct. App. 1989).

Conviction for lesser degree of offense. — The legislature intended AS 11.81.615 to permit a court or jury to convict a sexual offender of a lesser degree of offense, in this case, third-degree sexual abuse, despite the fact that the evidence reasonably (or even convincingly) demonstrated that the defendant committed a greater degree of offense because the victim was younger than alleged. *Thiessen v. State*, 844 P.2d 1137 (Alaska Ct. App. 1993).

Position of authority. — Whether the live-in boyfriend of the minor's mother was in a position of authority was a question of fact for the jury; and because defendant assumed authority over the victim as her stepfather and primary caretaker, the jury

reasonably concluded that he was in a position of authority over her for purposes of this statute. *Wurthmann v. State*, 27 P.3d 762 (Alaska Ct. App. 2001).

Applicability of motor vehicle insurance. — Where taxi driver was found to have knowingly engaged in sexual penetration and sexual contact with a minor, his sexual contact with the minor was deliberate rather than accidental, and because his motor vehicle insurance agreement only covered injuries "caused by an accident," there was no coverage under this provision. *Kim v. National Indem. Co.*, 6 P.3d 264 (Alaska 2000), overruled on other grounds, *Shaw v. State Farm Mut. Auto Ins. Cos.*, 19 P.3d 588 (Alaska 2001).

Quoted in *Toney v. Fairbanks N. Star Borough Sch. Dist.*, 881 P.2d 1112 (Alaska 1994).

Stated in *State v. Williams*, 855 P.2d 1337 (Alaska Ct. App. 1993).

Cited in *State v. Ridgway*, 750 P.2d 362 (Alaska Ct. App. 1988); *M.C. v. Northern Ins. Co.*, 1 P.3d 673 (Alaska 2000); *Kelly v. State*, 116 P.3d 602 (Alaska Ct. App. 2005); *Malutin v. State*, 198 P.3d 1177 (Alaska Ct. App. 2009).

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983; am § 4 ch 151 SLA 1990; am § 15 ch 124 SLA 2004)

George W. Brown, MD

Community Pediatrician

1640 Second Street Douglas, AK 99824 -5211 907 364 2726

abrow177637@yahoo.com

HONORABLE MEMBERS OF ALASKA HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE

I am a practicing pediatrician, living in Douglas and pleased to speak as a concerned physician and participating citizen. I speak, with respect, in opposition to HB 173.

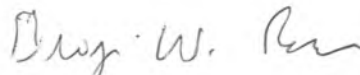
Unintended pregnancies are not a criminal problem. Likewise, they are not a moral problem. Unintended pregnancies are a health problem. Preventing them is complicated, especially as they involve individual choices. Our best approach is to assure early childhood and lasting family and community support for as many young Alaskans as possible. Such support enhances healthy and sensible brain development – for both boys and girls - to be able to delay pregnancies until able to do the challenging work of parenting.

Physical health and mental health cannot be separated. Treatment for either requires attention to the other. The increasing knowledge by medical and behavioral science about Post Traumatic Stress Disorder continue to strengthen this understanding.

Respect for those who disagree with our opinions is a difficult practice to follow. It requires more than lip service and manners. For all of us to approach solving social problems, such practice is vital. Unintended pregnancy is one of our most contentious social problems. I believe both sides can come together in one area in which there is rational agreement – to prevent as many unintended pregnancies as possible.

SB 49 and HB 173 do not promote such cooperation. At the very least, they should be given a hearing in the Health and Social Services Committees of both chambers, since this is a public health and individual health problem we are trying to understand and solve.

Respectfully,


George W. Brown, MD

From: Clover Simon <clover.simon@gmail.com>

Date: April 1, 2013, 13:50:03 AKDT

To: <Representative.Wes.Keller@akleg.gov>, <Representative.Bob.Lynn@akleg.gov>, <Representative.Lance.Pruitt@akleg.gov>, <Representative.Max.Gruenberg@akleg.gov>, <Representative.Neal.Foster@akleg.gov>, <Representative.Charisse.Millett@akleg.gov>

Subject: Testimony HB173

Mr. Chairman and Committee Members-

Please find my written testimony that was delivered in committee this afternoon. Thank you for taking time here all sides of the issue.

Clover

907-240-7449

Thank you for the opportunity to testify. For the record my name is Clover Simon, I am testifying as a private citizen and I live in House district 23. I'm here today to urge the committee to vote no on House Bill 173.

Only health care providers can know what is medically necessary, and pregnancy decisions should be left up to a woman with the consult of her doctor, not politicians.

You have heard ample evidence that this bill is unconstitutional and that the Alaska Supreme Court has already made a determination about publicly funded abortion.

This bill is about more than definitions, this is about women's lives and the decisions families are faced with when they experience an unintended pregnancy. It is not okay to single out families who are poor; everyone in Alaska is protected by the constitution regardless of socioeconomic position.

Alaska continues to have higher than average rates of unintended pregnancy, disproportionately affecting low income and minority women. Abortion, child abuse, and poor mother/ child health outcomes are just a few of the symptoms of unintended pregnancy.

It is time for us to take a proactive stance on reducing the rates of unintended pregnancy, the secondary effect will be a reduction in abortion, healthier children, and healthier women, something I think we can all stand behind.

Through various grantees the state of Alaska benefits from nearly 2 million dollars in Federal Family Planning Funding, this funding helps avert thousands of unintended pregnancies every year and more importantly allows low income Alaskans access to family planning services so they can plan the size of their family.

The legislature could initiate the process to obtain a family planning waiver through Medicaid, this program is a 90/10 match and saves nearly 4\$ for every dollar spent in future Medicaid

costs. This would cover women up to 175% of the Federal Poverty level for birth control services and cervical cancer screening. These are women who won't be covered under Medicaid if Alaska doesn't opt into the expansion and are in the group of people potentially left uninsured by the affordable care act.

Have vision for Alaska and our families.

Thank you for your time and I appreciate the work all of you do every day for Alaskans. Please make it count.

ALASKA FAMILY MEDICAL CARE LLC
ILONA FARR, M.D.

4045 Lake Otis Pkwy., Suite 201
Anchorage, AK 99508
Telephone : (907) 562-4045
Fax: (907) 562-4047

April 3, 2013



To Whom It May Concern;

My name is Ilona Farr, MD. I am a Family Medicine Physician who has been a resident of Alaska for 52 years and practiced medicine here for over 26 years. I am speaking out in favor of HB 173/ SB 49. As a physician I do my best to promote life and do not wish to pay for abortions that are not medically necessary as this results in the deaths of unborn Alaskan children with my tax dollars.

18 states now have passed legislation prohibiting abortions in the new state exchanges set up under Obamacare or ACA. ACA rules violate the HYDE amendment, thus it is vitally important that Alaska sets a clear standard for what is medically necessary now before the federal government imposes their definition.

I agree with most of the reasons listed, but would add the words "kidney infection with sepsis" as many women have kidney infections that are easily treatable during pregnancy so that is not a reason for an abortion. Mental health issues by themselves are not a reason for abortions nor are economic considerations. I have several patients with mental and severe physical disabilities, including one with schizophrenia, who have successfully raised children. Moreover, I have seen many women become depressed and turn to alcohol and drug use following abortions to numb the pain of killing their unborn child.

In my practice I have seen women commit suicide after having abortions, and other women die because of congenital heart disease when they became pregnant. I have seen women make the difficult decision when they have babies with congenital abnormalities about whether or not to continue to carry a child when they were developing complications related to pregnancy. These are rare exceptions (less than 4% of abortions) as most abortions are related to choice on the part of the mother and these should not be paid for with tax dollars. I also know of a person who developed breast cancer while pregnant and successfully underwent treatment while pregnant and both she and the baby are healthy. We need to get clearly worded legislation passed to limit tax payer funded abortion as there are many places in the world where abortions are forced upon women and we do not want that here in Alaska.

Please pass HB 173/ SB 49 as it is needed to clearly define and limit tax payer funded abortions to those that are truly medically necessary. Medicaid funds should not be used for elective procedures as this takes needed services away from patients who are disabled, have cancer, children, and those that are unable to care for themselves, the poorest among us, the true purpose of Medicaid.

Sincerely,

Dr. Ilona Farr, M.D.