

SB

49

<TARGET><BILL>SB 49</BILL><SUBJECT>SB
49</SUBJECT><COMM>SJUD28</COMM></TARGET>

Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: SSSB 49
Fiscal Note Number: 1
(S) Publish Date: 3/18/13

Identifier: SB049SS-DHSS-HCMS-2-22-13
Title: MEDICAID PAYMENT FOR ABORTIONS; TERMS
Sponsor: COGHILL
Requester: Senate Judiciary Committee

Department: Department of Health and Social Services
Appropriation: Medicaid Services
Allocation: Health Care Medicaid Services
OMB Component Number: 2077

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2014	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2014 Request	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
OPERATING EXPENDITURES	FY 2014	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Personal Services	***		***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	***	0.0	***	***	***	***	***

Fund Source (Operating Only)

None							
Total	***	0.0	***	***	***	***	***

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

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Estimated SUPPLEMENTAL (FY2013) cost: 0.0

Estimated CAPITAL (FY2014) cost: 0.0

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 01/01/14

Why this fiscal note differs from previous version:

Initial version, not applicable.

Prepared By: Margaret Brodie, Director
Division: Health Care Services
Approved By: Sarah Woods, Deputy Director
Finance & Management Services

Phone: (907)334-2520
Date: 02/22/2013 12:00 PM
Date: 02/22/13

FISCAL NOTE ANALYSIS #1

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. SSSB 49

Analysis

This bill would limit funding of abortions for Medicaid eligible individuals to medically necessary abortions and abortions that are the result of rape or incest. The bill provides a statutory definition of medical necessity. Currently, Alaska Medicaid only pays for medically necessary abortions and abortions that are the result of rape or incest. However, the determination of medical necessity is made by the physician requesting authorization of the abortion based on professional judgment, not a specific definition.

It is possible that use of specific criteria for medical necessity could reduce the number of abortions qualified for state funding. However, the Department lacks the data needed to estimate how many abortions would fail to meet the bill's definition of medical necessity. Therefore, we cannot determine the impact on expenditures.

Medicaid payment regulations would need to be amended to apply the specific definition of medical necessity as a condition of payment for abortion services.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HCS SSB 49(FIN)
Fiscal Note Number: 2
(H) Publish Date: 2/28/14

Identifier: SB049SS(am)-DHSS-PAFS-02-24-14
Title: MEDICAID PAYMENT FOR ABORTIONS; TERMS
Sponsor: COGHILL
Requester: House Finance Committee

Department: Department of Health and Social Services
Appropriation: Public Assistance
Allocation: Public Assistance Field Services
OMB Component Number: 236

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2015 Request	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services	***		***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	***	0.0	***	***	***	***	***

Fund Source (Operating Only)

None							
Total	***	0.0	***	***	***	***	***

Positions

Full-time	***		***	***	***	***	***
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 01/01/15

Why this fiscal note differs from previous version:

Fiscal Note reflects the Affordable Care Act (ACA) requirement that individuals purchase health insurance and the ACA mandate that those insurance policies offer Essential Health Benefits, which include Family Planning Services.

Prepared By:	Ron Kreher, Director	Phone:	(907)465-5847
Division:	Public Assistance	Date:	02/24/2014 02:00 PM
Approved By:	Sarah Woods, Deputy Director, Finance & Management Services	Date:	02/24/14
Agency:	Health & Social Services		

FISCAL NOTE ANALYSIS #2

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. HCS SSSB 49(FIN)

Analysis

This bill would limit funding of abortions for Medicaid eligible individuals to medically necessary abortions and abortions that are the result of rape or incest. The bill provides a statutory definition of medical necessity. Currently, Alaska Medicaid only pays for medically necessary abortions and abortions that are the result of rape or incest.

The Affordable Care Act (ACA) requires individuals with incomes above 100% of the federal poverty level (FPL) to purchase insurance through the Federally Facilitated Marketplace. These insurance plans include family planning as an essential health benefit. Individuals, primarily childless adults, with incomes at or below 100% FPL will not have access to family planning or related services, but are likely to be eligible should the State develop a Medicaid women's health program. The percentage of Alaska's population who will apply for and be eligible for insurance under ACA or who may wish access to a Medicaid women's health program is unknown. As a result, the Division of Public Assistance is unable to determine how many people would apply for a woman's health program.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HCS SSSB 49(FIN)
Fiscal Note Number: 3
(H) Publish Date: 2/28/14

Identifier: SB049HCSSS(FIN)-DHSS-HCMS-02-25-14
Title: MEDICAID PAYMENT FOR ABORTIONS; TERMS
Sponsor: COGHILL
Requester: House Finance Committee

Department: Department of Health and Social Services
Appropriation: Medicaid Services
Allocation: Health Care Medicaid Services
OMB Component Number: 2077

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2015 Request	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services	***		***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	***	0.0	***	***	***	***	***

Fund Source (Operating Only)

None							
Total	***	0.0	***	***	***	***	***

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? **Yes**
If yes, by what date are the regulations to be adopted, amended or repealed? **01/01/15**

Why this fiscal note differs from previous version:

Updated to reflect new House Finance Committee Substitute that deletes the requirement for the department to submit a Medicaid State Plan Amendment to create a women's health program.

Prepared By:	Margaret Brodie, Director	Phone:	(907)334-2520
Division:	Health Care Services	Date:	02/25/2014 11:00 AM
Approved By:	Sarah Woods, Deputy Director, Finance & Management Services	Date:	02/25/14
Agency:	Health & Social Services		

FISCAL NOTE ANALYSIS #3

**STATE OF ALASKA
2014 LEGISLATIVE SESSION**

BILL NO. HCS SSSB 49(FIN)

Analysis

This bill would limit funding of abortions for Medicaid eligible individuals to medically necessary abortions and abortions that are the result of rape or incest. The bill provides a statutory definition of medical necessity. Currently, Alaska Medicaid only pays for medically necessary abortions and abortions that are the result of rape or incest. However, the determination of medical necessity is made by the physician requesting authorization of the abortion based on professional judgment, not a specific definition.

It is possible that use of specific criteria for medical necessity could reduce the number of abortions qualified for state funding. However, the Department lacks the data needed to estimate how many abortions would fail to meet the bill's definition of medical necessity. Therefore, we cannot determine the impact on expenditures.

Medicaid payment regulations would need to be amended to apply the specific definition of medical necessity as a condition of payment for abortion services.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HCS SSSB 49(FIN)
Fiscal Note Number: 4
(H) Publish Date: 2/28/14

Identifier: SB049SSam-DHSS-MAA-02-24-14
Title: MEDICAID PAYMENT FOR ABORTIONS; TERMS
Sponsor: COGHILL
Requester: House Finance Committee

Department: Department of Health and Social Services
Appropriation: Health Care Services
Allocation: Medical Assistance Administration
OMB Component Number: 242

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2015 Request	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015					
Personal Services							
Travel							
Services	55.2						
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	55.2	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

1002 Fed Rcpts	41.5						
1003 G/F Match	13.7						
Total	55.2	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							

Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 01/01/15

Why this fiscal note differs from previous version:

Updated for 2nd session to accurately reflect FY2015 and out year costs.

Prepared By: Margaret Brodie, Director
Division: Health Care Services
Approved By: Sarah Woods, Deputy Director
Agency: Finance & Management Services

Phone: (907)334-2520
Date: 02/24/2014 12:00 PM
Date: 02/24/14

FISCAL NOTE ANALYSIS #4

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. HCS SSSB 49(FIN)

Analysis

This bill would limit funding of abortions for Medicaid eligible individuals to medically necessary abortions and abortions that are the result of rape or incest. The bill provides a statutory definition of medical necessity. Currently, Alaska Medicaid only pays for medically necessary abortions and abortions that are the result of rape or incest.

The legislation also directs the department to submit a Medicaid State Plan Amendment to create a women's health program. A women's health program would include family planning-related services, including testing and treatment of sexually-transmitted diseases, contraceptive methods, and an annual family planning visit at an office/clinic. We assume that we would make these services available to individuals with incomes below 175% of the federal poverty level for Alaska.

In order to add this program to Medicaid, it is necessary to make changes to the Medicaid claims processing system to recognize recipients of the new program and pay claims appropriately. The Department estimates that there will be a one-time cost of \$55.2, 75% of which will be reimbursed by the federal government.

Regulation changes will be necessary to specify the eligibility requirements and covered services included in this Medicaid option. No additional funding is required to change the regulations as the Department frequently updates its Medicaid regulations.



ALASKA STATE LEGISLATURE

SENATOR JOHN COGHILL

State Capitol, Room 119, Juneau, AK 99801-1182 (907) 465-3719
301 Santa Claus Lane, Suite 3B, North Pole, AK 99705 (907) 488-5725

SB 49: An Act defining “medically necessary abortion” for purposes of making payments under the state Medicaid program.

Sponsor Statement

Senate Bill 49 (“SB 49”) 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.¹ Since 2001, 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.

SB 49 answers that issue. SB 49, based on recommendations and expert testimony from medical professionals, reasonably provides a neutral definition for a “medically necessary abortion.”

I urge you to support SB 49.

¹ See *State, Department of Health and Social Services v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001).



ALASKA STATE LEGISLATURE

SENATOR JOHN COGHILL

State Capitol, Room 119, Juneau, AK 99801-1182 (907) 465-3719
301 Santa Claus Lane, Suite 3B, North Pole, AK 99705 (907) 488-5725

SECTIONAL

SB 49: “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.

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 and the rape or incest was promptly reported to law enforcement or public health authorities. Payment shall not be made for elective abortions.
- (b) (1) “Abortion” shall be as defined in AS 18.16.090.

- (2) "Elective abortion" means an abortion that is not medically necessary.
- (3) "Medically necessary abortion" means, in a physician's objection and reasonable professional judgment, after considering 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 pregnancy woman of:
 - (A) death; or
 - (B) impairment of a major bodily function because of (i-xxii) the conditions listed.



February 27, 2013

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STUDENT ADVISOR

The Honorable John Coghill, Chair
The Honorable Lesil McGuire, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801

via email: Sen.John.Coghill@akleg.gov
Sen.Lesil.McGuire@akleg.gov

Re: SB 49: Reproductive Health Funding
ACLU Review of Constitutional Issues

Dear Chair Coghill and Vice-Chair McGuire:

Thank you for the opportunity to provide written testimony about Senate Bill 49, which strips 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.

SB 49 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, but 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.

SB 49 Is Unconstitutional On Its Face

SB 49’s definition of “medically necessary abortion” is dramatically narrower than the Alaska Constitution’s. 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[.]”

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.”).

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.

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 (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 SB 49’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 SB 49 unconstitutional on its face.

SB 49’s Impetus Violates Equal Protection

SB 49 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

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).

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.

The explicit purpose of SB 49, 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 SB 49, the courts will note that “medically necessary” permeates the Medicaid regulations and that its lack of an exhaustive SB 49-like definition has not caused the State to lack “guidance” on how it “is to be construed.” Rather, courts will probably acknowledge that SB 49’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, which is not rooted in “neutral criteria” that have a “fair and substantial relation to the object of the legislation,”²¹ but is grounded instead in a political desire to reduce publicly funded abortions, violates equal protection.²²

Conclusion

We appreciate the opportunity to share our concerns about Senate Bill 49. We hope that our comments were helpful in identifying the Bill’s constitutional infirmities; because it violates the Equal Protection Clause and the separation of powers, we oppose it.

We further hope that this Committee will refrain from approving legislation that squarely violates the Alaska Constitution and would entangle the State in expensive, needless litigation.

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).

Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Fred Dyson, Sen.Fred.Dyson@akleg.gov
Senator Donald Olson, Sen.Donald.Olson@akleg.gov
Senator Bill Wielechowski, Sen.Bill.Wielechowski@akleg.gov

Karen Lidster

From: Sen. John Coghill
Sent: Wednesday, March 06, 2013 12:25 PM
To: Karen Lidster
Subject: FW: SB49

From: Tammie Wilson [mailto:balotabookbinding@gmail.com]
Sent: Tuesday, March 05, 2013 7:08 PM
To: Sen. John Coghill; Sen. Lesli McGulre; Sen. Fred Dyson; Sen. Donny Olson; Sen. Bill Wielechowski
Subject: SB49

Dear Senate Judiciary Committee,

RE: Senate Bill 49

I currently live in Senate District J, and grew up in Palmer, AK. After viewing the testimony today on this bill, I was immediately compelled to respond to Senator Dyson's comment that abortions are morally repugnant. This medical procedure may be morally repugnant to Senator Dyson, but thankfully he does not determine what is medically moral for me or any other women on this earth. I have the freedom to define my own morality and I find that comment extremely offensive and would hope that in the future Senator Dyson refrain from such judgement of women who are faced with making such a difficult choice in their life. Have your opinion about abortion, but it is not your choice. It is MINE. My choice. Fought and won by women and men across this country.

I would urge any person in support of this bill to stop wasting our taxpayer money on redefining legal definitions that have already been hashed out through court processes and previous legislation. As a matter of fact I am embarrassed that our elected politicians are cheapening the office of legislator to claim moral superiority at the expense of underprivileged women and men. There are much larger looming problems in our society that I would prefer elected professionals focus their efforts on. Defining what is medically necessary for individuals needs to be determined by medical experts not policy makers. Further definitions and decisions about my ovaries and uterus belong in a private room protected by the Hippocratic Oath with the help of a caring medical professional. This bill is insulting to a woman's and a trained doctor's intelligence.

Currently I run my own business in Anchorage. I have a Bachelor of Physics, and a Master's in Engineering. Before obtaining my education and becoming a professional I went to Planned Parenthood for over 20 years for my primary health care. I lived below the poverty level for most of that time. My primary employment for 13 years was early childhood education and I was not offered any affordable health care in my teaching position. However, to put myself through college and graduate school without ending up in too much debt I also worked in the food service industry, and was never offered health care in those positions either. I relied on Planned Parenthood's services.

When applying for graduate school I was an intern at the University of WI in Madison, WI in Physical Oceanography. During that time, I had an unplanned pregnancy. I threw myself on the floor and cried after taking that test, because I knew this would mean a PhD would be out of the question now if I had this child. When I told my boyfriend of four years of our situation, he told me he wasn't ready. He was also a graduate student in Madison, and said that he could not be involved with helping me if I kept it. He actually told me to have an abortion or leave him. In fact when pressured, I asked him if I miscarried would he take me back and he said yes. I was needless to say shocked, and devastated. Everything I thought I had was suddenly gone, and I

could give this (excuse the language) jerk what he wanted, abort the baby, or face single motherhood on my own.

To confirm my pregnancy and document it to fly home to Alaska, I went to Planned Parenthood. I heard Senator McGuire in testimony today ask for a less speculative situation when a pregnant women comes into Planned Parenthood. Well, I'll tell you exactly what happens. You go in saying "I think I'm pregnant and need to know for certain". They confirmed my pregnancy and inquired if I understood all of my choices. I said yes. Then they asked what sort of support network I had.

Here is what they heard; I was unemployed, no money in savings, no family nearby, and a boyfriend that was begging me to abort my child. In the several times I went back before returning to Alaska not a single time did any person at planned parenthood encourage me to do anything but what I wanted. I always knew I would keep the baby, but these circumstances were not ideal. How could I get a job pregnant? At that time I only had a bachelor in Physics, much to my dismay, not a very employable degree without graduate school.

That was the hardest year of my life. I cried every day of my pregnancy and wondered how I would make it...buy shoes...afford hockey, but I made it thanks to a supportive family, Planned Parenthood, food stamps and childcare assistance. I had never been treated so disrespectfully in my life until my boyfriend dumped me because I was carrying his baby and then had to experience the welfare office in Muldoon. I do not say all this to endorse my particular choice, but to illustrate how planned parenthood helped me do what was right for me. Not a single Planned Parenthood nurse or physician mentioned abortion even though I was a complete wreck every time I went in. It's usually not the same person and each time I had to explain where the father was, and my economic circumstances, I was a mess. There was no judgment. I felt safe and encouraged. They provided resource information for what I would need to make it through.

When he was three months old I walked into UAA and found an advisor in the engineering program to put myself into graduate school and become more employable. I needed all of those social services to accomplish it. And I did. I am proud to say my son is a smart and healthy boy. I am now happily married with a second child. I am happy to have my first child, and I am thankful for the support from Planned Parenthood. In fact, I donate yearly now. But, I understand what I accomplished is not possible for everybody. I don't belong in the room with a woman or doctor making that choice and either do you. So please, vote no on this offensive and useless legislation and please put your mind on something that really does something to help people.

Thank your for you time and attention. Your actions do not go unnoticed.

Most Sincerely,

Tammie L. Wilson

Balota Bookbinding and Restoration
1508 Nunaka Drive
Anchorage, AK 99504
balotabookbinding@gmail.com

907-306-9344

Karen Lidster

From: Sen. John Coghill
Sent: Wednesday, March 06, 2013 12:26 PM
To: Karen Lidster
Subject: FW: Oppose SB 49 -- No Government Between Women and Doctors

-----Original Message-----

From: Planned Parenthood Votes Northwest [<mailto:ppaction@ppvotewa.org>] On Behalf Of Andrea Peterson
Sent: Wednesday, February 27, 2013 4:43 PM
To: Sen. John Coghill
Subject: Oppose SB 49 -- No Government Between Women and Doctors

Feb 27, 2013

Senator John Coghill
State Capitol, Room 119
120 Fourth Street
Juneau, AK 99801-1182

Dear Senator Coghill,

I am writing to ask you to respect Alaska's Constitution and oppose Senate Bill 49. Senator John Coghill and co-sponsors Senators Cathy Giessel, Donny Olson, Fredy Dyson and others are making a blatant government overreach into a woman's personal and private decision making and attempting to shame and demean low-income women who seek safe and legal abortion.

This is about fairness for low-income women. All women, no matter their income, deserve the freedom and privacy to make the best pregnancy decisions for themselves and their families. Our Constitution says that privacy is a fundamental right, and the Alaska Supreme Court has already said TWICE before that politicians cannot restrict access to abortion for low-income women.

Please Oppose Senate Bill 49. Our state government needs to focus on the issues that matter to Alaskans most, not inserting politicians between women and their doctors.

Sincerely,

Mrs. Andrea Peterson
9338 Northland St
Juneau, AK 99801-9644

Senate bill 49

sidewalk cn.
My name is Shirleen Rannals and I am testifying in favor of Senate bill 49

I have gone regularly to abortions clinics in Anchorage and listened to hundreds of mothers over the past 25 years who regret their abortions.

They don't understand that their baby in their wombs will be vacuumed out like a piece of dirt and thrown away or put into an ~~incinerator~~ and burned.
incinerator

Any time women experience a difficult pregnancy I support all efforts to save both the mother and the baby.

As a member of the public I regret that my tax money has been used to fund abortions.

I support Senate bill 49 and any measures that will limit tax funding of abortion

Paige Hodson

From: Paige Hodson [paigeh@alaska.net]
 Sent: Tuesday, March 05, 2013 9:01 AM
 To: 'Paige Hodson'
 Subject: HB 49 testimony/Senate Judiciary 3/5/13

— Speaking in
 opposition —

My name is Paige Hodson.

I am the mother of 3 children and a life-long Alaska resident currently residing in Senator McGuire's district.

My parents came to Alaska before Statehood.

My father was a long haul truck driver who cut his teeth during the war building the Alcan Highway.

My parents were quite poor and struck out for Alaska to try to better themselves.

They were ~~in~~ young and in love, and as things happen, babies kept coming.

This was before the advent of the pill, and birth control methods were clearly not as effective.

They thought baby 4 would be the last, but 9 years later my mother found herself pregnant with number 5.

Living in a 1-room house, with no car, barely enough money to feed the 4 children she had, raising them essentially alone due to my fathers work, my mother collapsed from a combination of exhaustion, stress and depression and was hospitalized.

Safe and legal abortion wasn't available and my mother was not a well woman. Our family dove deeper into poverty when my father could not work to take care of a pregnant, fragile and ailing wife and 4 young children.

My mother recovered and the pregnancy continued. During childbirth, something went wrong. Her doctor told her that both she and the baby were in grave danger, and that it might come down to a decision of which life to save.

My mother chose the baby's life. Thankfully, both survived.

That 5th baby was me.

My own family's story underlines vividly why women and their doctors must be given the choice over their own lives, their own health, their own families.

I would have gladly exchanged my life for my mothers. Who knows what might have happened to my 4 brothers and sisters had my mother died.

But the bottom line is that it was her decision to make.

These sorts of decisions should never be limited by what an Alaska State Legislator decides is "necessary".

Women's mental and physical health is too complex to be set down in a predetermined list for politicians to pick and choose what they deem medically necessary.

Respectfully, you are not qualified to make these decisions.

Please, please get on to more important state business.

We can not afford these continued attempts to micromanage women's lives.

The Alaska courts have held consistently that we women have a fundamental right to privacy and that you may not discriminate between classes and genders in medical decisions.

It is especially unnerving that you continue to try to undermine and take away rights from disadvantaged women who are less likely to have the ability to fight for their rights.

We can not afford more million dollar legal battles.

I know that some of you who have deeply held convictions about abortion are well intentioned.

Believe me, all of your constituents love babies as much as you do. But the reality is that you will save more lives by fully funding family planning services and health care to all Alaskans than by trying to deprive women of the right to control their own lives and bodies.

A Comprehensive Study

A living breathing

SB 49 Defining Medically Necessary

We should not be wasting legislative time, energy and state money over ideological differences. We have been down this road before. If SB49 is passed, it will be challenged in our courts and found unconstitutional. Our legislature has far more pressing issues that have real impact on the majority of Alaskans and our future. I would prefer you focus your efforts on energy issues, the economy and improving education.

I oppose SB 49. In our pluralistic society, we all end up financially supporting actions we don't approve of or believe in. This is being taken to extremes in this country when it comes to contraception and abortion. It is wrong to impose one's personal beliefs on everyone else.

Nothing I say will change anyone's beliefs here today. But just as none of us wants a woman to be forced to have an abortion, I do not want a woman forced to carry a pregnancy to term and potentially risk her health. I ask this committee to give all women the same respect. Only a woman should make this choice with the help of her physician.

The impacts of unintended pregnancy are large. It can harm a woman and her family physically, emotionally and financially. There are a myriad of situations that could make an abortion medically necessary.

An abortion costs approximately \$700. For women already on the edge financially this is a huge problem. SB 49 will force some women who want an abortion to carry their pregnancy to term, delay care, attempt to abort on their own or as you heard yesterday consider suicide. We forget that before abortion was legalized many women died from back alley abortions.

What is "medically necessary" and who should decide? Is prenatal care really "medically necessary" or do we provide this care for the benefit of the mother and fetus. I do not want government determining whether my healthcare is "medically necessary" or not.

I believe men feel the same way. Recently, treatment of prostate cancer has become controversial. Do the gentlemen on this committee really want the government determining their treatment if they have prostate cancer? Or do you want your physician helping you make those choices?

If Sen. Coghill really wants to reduce the number of abortions, we have much better options. I urge Sen. Coghill to support programs to reduce unintended pregnancies through ~~proven effective methods~~ and not by limiting healthcare access for women who really need it.

*GREATER ACCESS TO BIRTH CONTROL
AND BY OPPOSING COMPELLATIVE SEX ED
IN OUR SCHOOLS*

Trust women and their doctors. Vote no on SB49.

~~ROBIN SMITH~~

*ROBIN SMITH
14100 JARVI DRIVE
ANCHORAGE, AK 99515*

March 5, 2013

To the Senate Judiciary Committee

Re: Senate Bill 49

I have sat through two-days of hearings on SB 49, without being granted the opportunity to testify. I waited 2 hours yesterday and another 1.5 hours today, along with six other women at the Anchorage LIO.

After hearing today's testimony I am more strongly convinced that SB 49 is a bad bill. For a bill that is purportedly about funding, we were dragged through an ideological battleground today. It would be a mistake for the committee to think that every woman who has had an abortion makes the choice lightly, thinks of her pregnancy as an inconvenience, lives a miserable life wracked by guilt, thinks God has anything to do with it, or would want people with radically different ideological, medical and political views to have a say in such an important decision. This bill will end up in court and will fail, but not before costing Alaskans money that could be better spent elsewhere.

Senate Bill 49 will hurt people, specifically poor Alaskan women. SB 49 violates a poor woman's Constitutional rights to privacy, equal treatment and equal access. It singles out the most vulnerable segment of our population upon which to cast moral judgment. It is not neutral; far from it.

Regardless of personal or religious beliefs, abortion is legal and medically ethical in Alaska. Because of this, it is safe and must remain so for the welfare of Alaskan women. Yet through SB 49, this committee is bending over backwards to find a way to make abortion illegal while disregarding the consequences this could have on Alaska's low income population. Medical decisions affect not only a woman but entire families, the people who depend on her, and the people who care about her. Poor women don't need the Alaska Legislature questioning their moral fiber or worth as a prerequisite to healthcare.

Senate Bill 49 represents gross government overreach. It is about exerting control over a particular segment of the population that is within reach only because of their economic status. No one should be made to climb political and religious hurdles to get healthcare to which they are legally entitled, particularly not to satisfy someone else's ideological beliefs.

Respectfully,

**Lynda Giguere
239 W. Cook Avenue
Anchorage, AK 99501**

Senate Judiciary Committee
Hearing

March 4, 2013

The Case for Opposing Senate Bill
49:

Protect Freedom, Privacy and
Fairness for All Alaskan Women



Planned Parenthood Votes Northwest

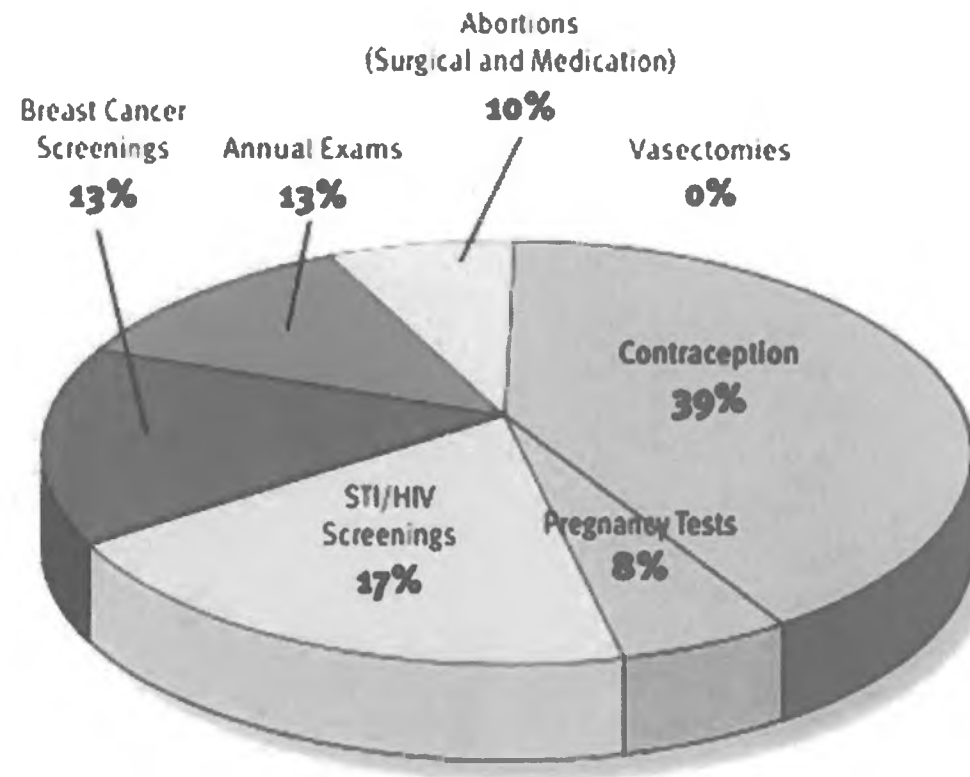
Who We Are

- 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 Senate Bill 49?

- The Alaska Supreme Court has long recognized that abortion should be available for low-income women ***without government interference.***
- Pregnancy decisions, like other medical decisions, should be made by ***a woman and her doctor, not by politicians.***
- Senate Bill 49 seeks to put government into women's private decision-making, and it puts Alaskan women's health at risk.



The U.S. Supreme Court

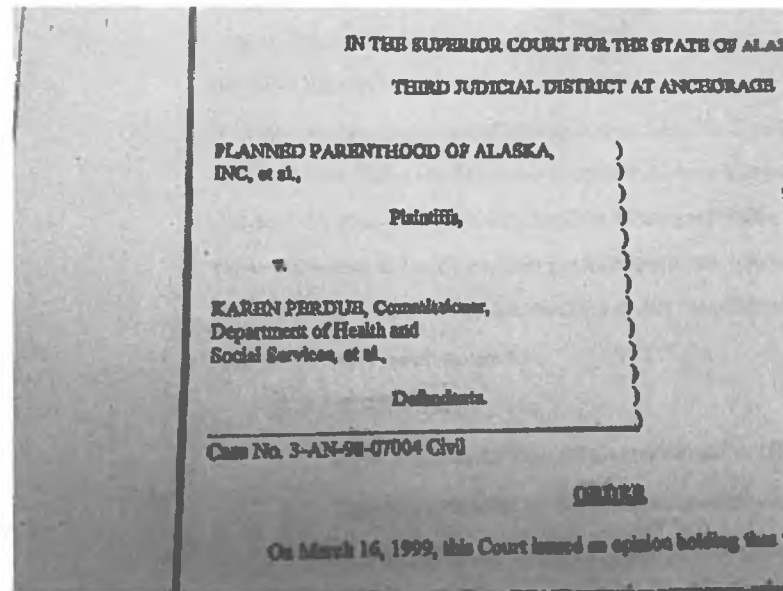
- The Medicaid Act does not define “medically necessary.”
- “Whether...an 'abortion is necessary' is a professional judgment that...may be exercised in the light of all 'factors—physical, emotional, psychological, familial, and the women's age—relevant to the well being of the patient.' All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.” *Doe v. Bolton*, 410 U.S. 179 at 192 (1973)



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.”***
- ***The Court found that the challenged regulation violated equal protection.***
 - [3] “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)



2001: *SOA v. PPA*

- 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)
- “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 and liberty interests.”** Legislative Counsel Memo to Representative Lindsey Holmes, From Jean M Mishcel Legislative Counsel Work Order No. 27-LS1441A March 13, 2012



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.
- SB 49 puts politicians between women and their doctors, and puts women's health at risk.
- SB 49 is unnecessary and unconstitutional.

For the health of Alaskan women, no matter their income level, we urge you to oppose SB 49.



Karen Lidster

From: Sen. John Coghill
Sent: Sunday, March 10, 2013 7:32 PM
To: Karen Lidster
Subject: FW: SB49 Medically Necessary

From: Lance Roberts [<mailto:roberts.lance@gmail.com>]
Sent: Sunday, March 10, 2013 7:27 PM
To: Sen. John Coghill; Sen. Lesil McGuire; Sen. Fred Dyson; Sen. Donny Olson; Sen. Bill Wielechowski
Subject: SB49 Medically Necessary

To the Senate Judiciary Committee:

The State of Alaska desperately needs a solid definition of medically necessary, since the activist Alaska Supreme Court has demanded that we pay for killing babies that are seen as health impediments. I certainly don't want my share of the state revenue going for abortions for reasons of mental stress or other reasons of convenience.

Please move this bill forward, I'm certainly hoping we can see a good legal definition implemented this year.

Good law demands good definitions.

Thanks,

Lance Roberts
Fairbanks

March 5, 2013

To the Senate Judiciary Committee

Re: Senate Bill 49

I have sat through two-days of hearings on SB 49, without being granted the opportunity to testify. I waited 2 hours yesterday and another 1.5 hours today, along with six other women at the Anchorage LIO.

After hearing today's testimony I am more strongly convinced that SB 49 is a bad bill. For a bill that is purportedly about funding, we were dragged through an ideological battleground today. It would be a mistake for the committee to think that every woman who has had an abortion makes the choice lightly, thinks of her pregnancy as an inconvenience, lives a miserable life wracked by guilt, thinks God has anything to do with it, or would want people with radically different ideological, medical and political views to have a say in such an important decision. This bill will end up in court and will fail, but not before costing Alaskans money that could be better spent elsewhere.

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Regardless of personal or religious beliefs, abortion is legal and medically ethical in Alaska. Because of this, it is safe and must remain so for the welfare of Alaskan women. Yet through SB 49, this committee is bending over backwards to find a way to make abortion illegal while disregarding the consequences this could have on Alaska's low income population. Medical decisions affect not only a woman but entire families, the people who depend on her, and the people who care about her. Poor women don't need the Alaska Legislature questioning their moral fiber or worth as a prerequisite to healthcare.

Senate Bill 49 represents gross government overreach. It is about exerting control over a particular segment of the population that is within reach only because of their economic status. No one should be made to climb political and religious hurdles to get healthcare to which they are legally entitled, particularly not to satisfy someone else's ideological beliefs.

Respectfully,

**Lynda Giguere
239 W. Cook Avenue
Anchorage, AK 99501**

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.