ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5704 HOUSE HEALTH, EDUCATION & SOCIAL SERVICES 108

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 411
PUBLISH DATE: 3/8/90

FISCAL NOTE

REQUEST:

Revision Date:
Title: Sale of alcoholic beverages by a package store licensee
Sponsor: Sen. Binkley,et al
Requestor: Sen. Hess Committee

Agency Affected: Department of Revenue
BRU: Alcoholic Beverage Control Board
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

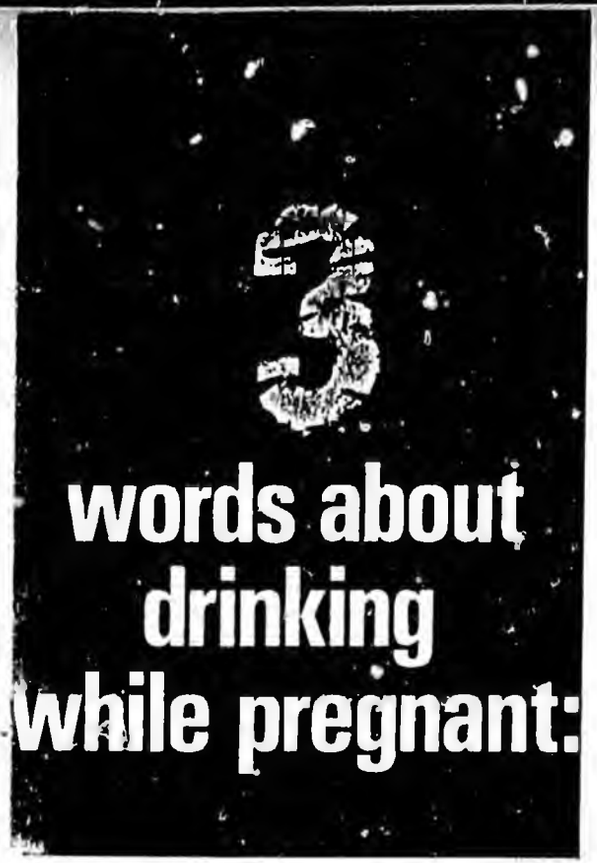
ANALYSIS: (Attach a separate page if necessary)

This legislation does not impact the ABC Board's FY 90 budget.

Prepared by: Patrick T. Sharrock, Director
Phone: 277-8638
Division: Alcoholic Beverage Control Board
Date: 2/9/90

Approved by Commissioner:
Date: 2/9/90
Agency: Department of Revenue

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)



Say No For Your Baby.

You wouldn't get your baby drunk after it's born. But it's just as harmful for your baby if you drink while you're pregnant.

Every time a pregnant woman takes a drink, she risks damaging her unborn baby (fetus).

When a pregnant woman drinks, the alcohol passes swiftly through the placenta to her unborn baby. It hits the baby harder than it would an adult because the baby's developing organs cannot break down the alcohol as fast as an adult's can. That means the baby can have more alcohol in its blood than the mother does . . . *and can suffer lifelong damage before it is even born.*

How Does Drinking Hurt An Unborn Baby?

Each year, 5,000 American babies are born with fetal alcohol syndrome (FAS). This is a pattern of physical and mental birth defects that is the direct result of drinking by the mother during pregnancy. FAS does not have to happen to any baby. It is *completely preventable.*

Babies with FAS:

- Are smaller than they should be when they are born. Most of them don't ever catch up to the size of other children.
- Have heads and brains that are too small, and varying degrees of mental retardation. Many are jittery and poorly coordinated; they may have short attention spans and behavior problems, too.
- May have defects of the heart and other body parts.
- Often have narrow eyes, a short nose, thin upper lip, absent upper lip crease, and underdeveloped jaws.

Babies with FAS have one thing in common — a mother who drank a lot during pregnancy.

How Much Is Too Much?

Heavy drinkers aren't the only ones who risk damage to the fetus. The baby of a "moderate" drinker may be born with one or more FAS features. Some women who drink moderately have babies with lesser forms of alcohol-related damage, often called fetal alcohol effects (FAE).

There are other dangers besides birth defects. Women who drink heavily have more miscarriages and stillbirths than other women. Even moderate drinking is suspected of causing these problems.

If you know a woman who drank while pregnant and delivered a baby who seems healthy, you can't count on this happening in your case.

- There is no way to tell which babies will be affected by the alcohol their mothers drink.
- There is no known "safe" level of alcohol consumption during pregnancy.

The only way to keep from risking severe damage to your baby is not to drink throughout pregnancy and while nursing.

When To Stop

If you're pregnant and have just learned about the dangers of drinking, the time to stop is now.

If you're thinking about having a baby, stop drinking before you get pregnant. During the weeks before a woman may know she is pregnant, the baby's brain, heart and other organs begin to form and are especially vulnerable to damage from alcohol.

Fetal alcohol syndrome can't be cured, but it can be prevented. What it takes is a choice between pregnancy and drinking:

- If you want to become a mother of a healthy baby, stop drinking.
- If you are a heavy drinker, do not get pregnant until you are sure you have your drinking under control and will not drink throughout your pregnancy.

Alaska State Legislature

SENATE

Committee on Finance

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

MEMORANDUM April 10, 1990

TO: Representative Johnny Ellis, Chairman
House Health, Education and Social Services Committee

FROM: Senator Johne Binkley

RE: SB 411 - relating to sale of alcoholic beverages by a package store licensee

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Sectional Analysis

Section 1. Amends licensing section of Alcoholic Beverage statutes to require that package store licensees include a brochure or other written material warning of the dangers of drinking alcohol during pregnancy.

The posting of the signs warning of the dangers of drinking alcoholic beverages during pregnancy has been a positive step. Alaskans who purchase their alcohol by mail, however, don't have the benefit of seeing this important message.

Several organizations, including the March of Dimes, produce inexpensive brochures which are designed to pass on the message. Attached is a sample which can be purchased for the small sum of $2.50 for 100 brochures. That's just 2.5 cents each.

This bill has a -0- fiscal note and is supported by the Alcoholic Beverage Control Board.

STEVE COWPER, GOVERNOR

DEPARTMENT OF REVENUE

550 W 7TH AVE
ANCHORAGE, ALASKA 99501-6698

ALCOHOLIC BEVERAGE CONTROL BOARD

February 28, 1990

The Honorable Johne Binkley
Alaska State Senate
Pouch V
Juneau, Alaska 99811

RE: SB 410 and SB 411
Attention: Pat Jackson

Dear Senator Binkley:

The Alcoholic Beverage Control Board has had an opportunity to review SB 410 and SB 411. The board does not have concerns or objections to the legislation and lends its encouragement for adoption.

If you have any questions, please do not hesitate to call.

Sincerely,

Patrick L. Sharrock
Director, ABC Board

PS/cl

90-41

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 411
PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: Sale of alcoholic beverages by a package store licensee
Sponsor: Sen. Binkley, et al
Requestor: Sen. Hess Committee

Agency Affected: Department of Revenue
BRU: Alcoholic Beverage Control Board
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: (Attach a separate page if necessary)

This legislation does not impact the ABC Board's FY 90 budget.

Prepared by: Patrick L. Sharrock, Director
Phone: 277-8638
Division: Alcoholic Beverage Control Board
Date: 2/9/90

Approved by Commissioner: _____
Date: 2/9/90
Agency: Department of Revenue

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

SB

431

HOUSE COMMITTEE REPORT

(7)
Date Referred: April 25, 1990 FURTHER REFERRALS:

FINANCE

Date of Committee Action: 4/30/90

The HESS Committee considered: CSSB 431(FINANCE)

CS SB NO. 431 (Fin) HEALTH FACILITY PAYMENT RATES

"An Act relating to health facility payment rates; and providing for an effective date."

RECOMMENDATIONS:
[X] be replaced with HCS CSSB 431 (HESS) [ ] the same title [X] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[X] fiscal note(s) 4/20/90 / DHS
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

J L Ellis
[illegible]
[illegible]
Sheri Davis
Mark Bogle

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

J L Ellis
Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSSB431 (FIN)
PUBLISH DATE: 4/20/90

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: DHSS
Title: An Act relating to health facility payment rates
BRU: Administrative Services
Sponsor: Senate HESS
Components: Medicaid Rate Advisory Commission
Requestor: Senate HESS

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY92	FY93	FY94	FY 95	FY 96
PERSONAL SERVICES	164.8	197.7	197.7	197.7	197.7	197.7
TRAVEL	7.6	7.6	7.6	7.6	7.6	7.6
CONTRACTUAL	16.0	15.4	15.4	15.4	15.4	15.4
SUPPLIES	3.2	3.2	3.2	3.2	3.2	3.2
EQUIPMENT	28.8	1.5	1.5	1.5	1.5	1.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	220.4	225.4	225.4	225.4	225.4	225.4
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	110.2	112.7	112.7	112.7	112.7	112.7
FEDERAL FUNDS	110.2	112.7	112.7	112.7	112.7	112.7
OTHER						
TOTAL	220.4	225.4	225.4	225.4	225.4	225.4

POSITIONS:

FULL-TIME	4	4	4	4	4	4
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

There is no effect on FY90. See attached analysis for effect on FY91 - FY96.

Prepared by: Jack Nielson, Executive Director
Phone: 562-1996
Division: Medicaid Rate Advisory Commission
Date: 04/19/90

Approved by Commissioner: Ken Quellet, Actg
Date: 4/19/90
Agency: Department of Health & Social Services

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Facility reimbursement rates for medicaid and general relief medical are currently set by use of a consistent methodology. This bill will require the department to issue written findings and conclusions regarding the rate established by the department for each facility. The bill also provides that the Commission may review alternative rate setting methodologies and requires the Commissioner to appoint a technical advisory committee and to hold public hearings regarding rate setting regulations and the extablishment of a new rate setting methodology.

The increased demand placed by the requirement of detailed findings and the legislative expectation of activity, including committee meetings and public hearings, to establish a new rate setting system will require at least two additional budget analysts. Without these positions, the requirements of the bill cannot be met without impairing the staff's capacity to meet the present demands placed on them, not only regarding rate rate setting, but also to fully protect the state's position in our relationship to the federal Health Care Financing Administration.

The bill also requires that a hearing concerning appeals of disputed rates be conducted within 120 days. Two positions are required to satisfy this provision: An appeals specialist (Budget Analyst III), and a secretary. The appeals specialist will answer discovery requests and requests for information, participate in depositions, serve as an expert witness, and perform other technical analysis. The secretary will provide critical word processing support to the current hearings examiner.

SUMMARY of FUNDING REQUIREMENTS CSSB431 (FIN)

	FY91	FY92 - FY96
Line 100		
Department Rate Setting Staff		
Program Budget Analysts III		
2 PFT @ Range 19A 10 months		
71100 Salary	66,720	80,064
71600 Benefits	24,707	29,649
Department Appeals Staff		
Program Budget Analyst III		
1 PFT @ Range 19A 10 months		
71100 Salary	33,360	40,032
71600 Benefits	12,354	14,824

		FY91	FY92 - FY96
Secretary I			
1 PFT @ Range 10B 10 months			
71100	Salary	18,930	22,716
71600	Benefits	8,683	10,419
	TOTAL LINE 100	164,754	197,704
Line 200			
72240	Field Travel	4,000	4,000
72250	Per Diem	3,600	3,600
	TOTAL LINE 200	7,600	7,600
Line 300			
73300	Communications	4,160	4,160
73323	Install 4 new phones	670	
73500	Printing, Binding	1,600	1,600
73850	Office Space 4 new pos.	9,600	9,600
	TOTAL LINE 300	16,030	15,360
Line 400			
74200	Office Supplies	1,600	1,600
74560	DP Supplies	1,600	1,600
	TOTAL LINE 400	3,200	3,200
Line 500			
75790	Telephones 4 new pos.	720	
75830	3 Enhanced PCs w/ Peripherals @ 6.3 ea	18,900	
75830	1 Std PC w/Peripherals	4,000	
76055	Office furn. 4 new pos.	5,200	
75690	Replacement Equipment		1,500
	TOTAL LINE 500	28,820	1,500
	GRAND TOTAL	$220,404	$225,364

Alaska State Legislature

PO BOX V
ROOM 508
STATE CAPITOL
(907) 465-3762

Senate Committee on Health, Education and Social Services

M E M O R A N D U M

To: Representative Johnny Ellis, Chairman, House Health, Education and Social Services Committee.

From: Senator Paul A. Fischer, Chairman, Senate Health, Education and Social Services Committee.

Re: CS SB 431 (Finance)

Date: April 26, 1990

CS SB 431 (Finance) is legislation that is intended to clarify the medicaid rate setting process. Many facilities from around the state have expressed concerns over the medicaid rate setting process since Executive Order 72 took effect last March.

This bill establishes that a rate set by the department take effect only after it is approved in writing by the Commissioner of Health and Social Services. Rates set by the department must include a statement of the department's findings, a description of the basis of the findings, a citation to the regulation supporting the findings, and a statement of the decision.

This bill requires the commissioner to also establish time limits applicable to the various phases of an administrative appeal. A time limit of 120 days is required of the department to schedule an appeal unless there is a delay for good cause, or at the request of the facility. Also, after receiving the recommendation of the hearing office, the department is required to render a decision on the appeal after 30 days.

If either of these time limits are not met, the department must submit a report to the legislature with an explanation of the delay and proposed corrective actions by January 20.

This bill is not opposed by the department, and is the product of many hours of work by the Senate HESS Committee. I would ask for your support for this legislation.

Thank You.

Sectional Analysis For CS SB 431 (Finance)

Section 1.

Establishes that a rate set under this section does not take effect until it is approved in writing by the commissioner of Health and Social Services, or the agency assigned by the commissioner to perform this function. Written determinations by the department must include a statement of the department's findings, and a description of the basis of the findings and conclusions, a citation to the regulation supporting the findings and conclusions, and a statement of the decision.

Section 2.

The commissioner of Health and Social Services shall appoint a technical Advisory Committee to hold hearings on the department's rate setting regulations.

Section 3.

Places actions of the department regarding health facility payment rates under the provisions of the Administrative Procedure Act, except as provided in section 4.

Section 4.

Requires the Commissioner to establish time limits applicable to various phases of an administrative appeal.

A hearing appeal described in this section must be scheduled to occur no more than 120 days after written notice of rate appeal has been received by the department from a facility unless the facility requests a delay or good cause for the delay is demonstrated to the satisfaction of the hearing officer.

The commissioner must, within 30 days after receiving a recommendation of the hearing officer, either render a decision in the case or refer the case to a hearing officer for additional findings.

If either time limit is not met, the commissioner must report to the legislature and the governor with an explanation of the length of delay, reasons for the delay and proposed corrective action by the following January 20 .

Section 5.

Establishes that the commission shall advise the department on policies relating to payment rates for health facilities. The commission may also review the department's regulations on payment rates and recommend alternative rate-setting system if it determines that the department's system is inadequate.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSSB431 (FIN)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: DHSS
Title: An Act relating to health facility payment rates
BRU: Administrative Services
Sponsor: Senate HESS
Components: Medicaid Rate Advisory Commission
Requestor: Senate HESS

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY92	FY93	FY94	FY 95	FY 96
PERSONAL SERVICES	201.2	234.1	234.1	234.1	234.1	234.1
TRAVEL	9.0	9.0	9.0	9.0	9.0	9.0
CONTRACTUAL	20.2	19.2	19.2	19.2	19.2	19.2
SUPPLIES	4.0	4.0	4.0	4.0	4.0	4.0
EQUIPMENT	36.6	1.5	1.5	1.5	1.5	1.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	271.0	267.8	267.8	267.8	267.8	267.8
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	135.5	133.9	133.9	133.9	133.9	133.9
FEDERAL FUNDS	135.5	133.9	133.9	133.9	133.9	133.9
OTHER						
TOTAL	271.0	267.8	267.8	267.8	267.8	267.8

POSITIONS:

FULL-TIME	4	4	4	4	4	4
PART-TIME	1	1	1	1	1	1
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

There is no effect on FY90. See attached analysis for effect on FY91 – FY96.

Prepared by: Jack Nelson, Executive Director
Phone: 562-1996
Division: Medicaid Rate Advisory Commission
Date: 04/06/90

Approved by Commissioner: Myra M Munson
Date: 4/6/90
Agency: Department of Health & Social Services

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Facility reimbursement rates for medicaid and general relief medical are currently set by use of a consistent methodology. This bill will require the department to issue written findings and conclusions regarding the rate established by the department for each facility. The bill also provides that the Commission may review alternative rate setting methodologies and requires the Commissioner to appoint a technical advisory committee and to hold public hearings regarding rate setting regulations and the extablishment of a new rate setting methodology.

The increased demand placed by the requirement of detailed finding and the legislative expectation of activity, including committee meetings and public hearings, to establish a new rate setting system will require at least two additional budget analysts. Without these positions, the requirements of the bill cannot be met without impairing the staff's capacity to meet the present demands placed on them, not only regarding rate rate setting, but also to fully protect the state's position in our relationship to the federal Health Care Financing Administration.

The bill also requires that a hearing concerning appeals of disputed rates be conducted within 120 days. Three positions are required to satisfy this provision: An appeals specialist (Budget Analyst III), a half-time hearing examiner and a secretary. The appeals specialist will answer discovery requests and requests for information, participate in depositions, serve as an expert witness, and perform other technical analysis. The half-time hearing officer is required to conduct the appeals hearing within the 120 day deadline. The secretary will provide word processing support to the hearings examiners.

SUMMARY of FUNDING REQUIREMENTS SB431

	FY91	FY92 - FY96
Line 100		
Department Rate Setting Staff		
Program Budget Analysts III		
2 PFT @ Range 19A 10 months		
71100 Salary	66,720	80,064
71600 Benefits	24,707	29,649
Department Appeals Staff		
Program Budget Analyst III		
1 PFT @ Range 19A 10 months		
71100 Salary	33,360	40,032
71600 Benefits	12,354	14,824

Hearing Examiner		
1 PPT @ Range 24A 6 months		
71100 Salary	28,122	28,122
71600 Benefits	8,314	8,314
	FY91	FY92 - FY96
Secretary I		
1 PFT @ Range 10B 10 months		
71100 Salary	18,930	22,716
71600 Benefits	8,683	10,419
TOTAL LINE 100	201,190	234,140
Line 200		
72240 Field Travel	5,000	5,000
72250 Per Diem	4,000	4,000
TOTAL LINE 200	9,000	9,000
Line 300		
73300 Communications	5,200	5,200
73323 Install 5 new phones	1,000	
73500 Printing, Binding	2,000	2,000
73850 Office Space 5 new pos.	12,000	12,000
TOTAL LINE 300	20,200	19,200
Line 400		
74200 Office Supplies	2,000	2,000
74560 DP Supplies	2,000	2,000
TOTAL LINE 400	4,000	4,000
Line 500		
75790 Telephones 5 new pos.	900	
75830 4 Enhanced PCs w/ Peripherals @ 6.3 ea	25,200	
75830 1 Std PC w/Peripherals	4,000	
76055 Office furn. 5 new pos.	6,500	
75690 Replacement Equipment		1,500
TOTAL LINE 500	36,600	1,500
GRAND TOTAL	$270,990	$267,840

Sec. 47.07.070. Payment to health facilities. (a) The commission shall advise the department on the prospective rate of payment to a health facility under this chapter and AS 47.25.120 — 47.25.300 based on a fair rate for reasonable costs incurred by the facility. The department shall set the rates of payment to a health facility. The department shall by regulation list the factors it considers in making its rate determinations under this section, after consideration of any recommendations made by the commission.

(b) In determinning a rate of payment to a health facility under this section, the department shall consider the proportionate share of the facility's financial requirements for patient care for

(1) costs of current operations, including salaries and wages, purchased services, supplies, insurance, leases, depreciation, taxes, interest expense, maintenance and other health facility operating expenses; and

(2) education, research, and appropriate capital development.

(c) In determining a rate of payment to a health facility under this section, the department may consider whether the rate of utilization of the facility has been reduced because of improvident or careless development of the facility.

(d) In determining a rate of payment to a health facility under this section, the department shall consider the appropriation limit set by the legislature for the department's programs under this chapter and under AS 47.25.120 — 47.25.300, and available federal revenue.

(e) When an actual rate paid by the department is reviewed at the end of the year for which the approved rate was established and the review is conducted to determine whether the actual rate paid was in conformance with the approved rate under this section, all or part of an adjustment for year-end conformance may be waived for the facility if the facility provides proof of manifest injustice resulting from application of the adjustment for year-end conformance. When the adjustment for year-end conformance of the base year is waived, in whole or part, for a facility under this subsection, the amount waived may not be included as part of the base upon which the prospective rate is determined if the nonconformity affects both costs and charges. When the adjustment for year-end conformance of the base year is waived, in whole or part, for a facility under this subsection, the amount waived shall be included as part of the base upon which the prospective rate is determined if the nonconformity affects only charges. (§ 1 ch 182 SLA 1972; am § 3 ch 95 SLA 1983; am § 7 ch 105 SLA 1986; am § 1 ch 9 SLA 1989; am E.O. No. 72 § 4 (1989))

Effect of amendments. — The 1986 amendment added subsection (d).

The first 1989 amendment, effective March 31, 1989, added subsection (e).

The second 1989 amendment, effective March 1, 1989, substituted "department" for "commission" where the word appears throughout the section; and in subsection (a), substituted "advise the department on the prospective" for "determine prospec-

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tively the" in the first sentence, added the present second sentence, and added "after consideration of any recommendations made by the commission" at the end of the present third sentence.

Editor's notes. — Section 2, ch. 9, SLA 1989, provides: "TRANSITIONAL PROVISION. (a) For the services provided on or after January 1, 1989, an approved prospective payment rate determined for a facility for fiscal year 1989, based on a conformance review of that facility's rate for fiscal year 1987 shall be recalculated as if the provisions of AS 47.07.070(e), as enacted by sec. 1 of this Act, were in effect at the time of the determination of the prospective payment rate in effect for the period. If the application of this section results in a higher prospective payment rate for a health facility than that which had previously been calculated for the facility, the difference shall be promptly remitted to the health facility. If the application of this section results in a lower prospective payment rate for a health facility for fiscal year 1989 than had previously been calculated for the facility, this section may not be applied to decrease a rate to a facility for fiscal year 1989 for any part of year-end conformance waived.

(b) In this section, "conformance review" means the review undertaken after the end of the year for which a facility's approved rate has been set to determine whether actual payments made to a health facility under AS 47.07 and AS 47.25.120—47.25.300 conformed to the payment rate approved for that health facility under AS 47.07 and to determine whether the prospective payment rate for that facility should be adjusted for the next rate-setting year."

Sec. 47.07.071. Reports by health facilities. Not later than 120 days after the end of each fiscal year of a health facility, the facility shall submit to the department a report on the facility's financial performance during the fiscal year. (§ 4 ch 95 SLA 1983; am E.O. No. 72 § 5 (1989))

Effect of amendments. — The 1989 amendment, effective March 1, 1989, substituted "department" for "commission."

Sec. 47.07.072. Report by the department. Not later than September 30 of each year, the department shall submit to the governor a report on the prospective payments made under this chapter during the current fiscal year and an estimate of the prospective payments that will be made during the remainder of the current fiscal year and the next fiscal year. The report shall state the assumptions that are used as a basis for the estimates. (§ 4 ch 95 SLA 1983; am E.O. No. 72 § 6 (1989))

Effect of amendments. — The 1989 amendment, effective March 1, 1989, substituted "department" for "commission" in the first sentence.

Sec. 47.07.073. Uniform accounting, budgeting, and financial reporting. (a) The department by regulation shall require a uniform system of accounting, budgeting, and financial reporting for health facilities receiving prospective payments under this chapter. The regulations shall provide for reporting revenues, expenses, assets, liabilities, and units of service. The department shall specify the date the system becomes effective for each health facility.

(b) In adopting regulations under this section, the department shall consider

(1) accounting, budgeting, and financial reporting procedures used by health facilities;

(2) variations among health facilities in the types of health care services provided by health facilities;

(3) the size and organizational structure of health facilities;

(4) the methods used by health facilities to obtain payments;

(5) other factors the department considers relevant; and

(6) the recommendations of the commission.

(c) The department may waive or modify a requirement for accounting, budgeting, or financial reporting for a health facility if waiver or modification is

(1) necessary to avoid excessive costs to the facility; and

(2) consistent with the policies of this chapter.

(d) Notwithstanding other provisions of this section, the department may, by regulation, modify the system of accounting, budgeting, and financial reporting required under this section for a health facility having fewer than 25 acute care beds in order to reduce the operating costs of that facility. (§ 4 ch 95 SLA 1983; am E.O. No. 72 § 7 (1989))

Effect of amendments. — The 1989 amendment, effective March 1, 1989, substituted "department" for "commission" throughout the section and added paragraph (b)(6), making related grammatical changes.

Sec. 47.07.075. Application of administrative procedure act. Actions of the department regarding health facility payment rates under this chapter and AS 47.25.120 — 47.25.300 are subject to the provisions of the Administrative Procedure Act (AS 44.62). (§ 4 ch 95 SLA 1983; am E.O. No. 72 § 8 (1989))

Effect of amendments. — The 1989 amendment, effective March 1, 1989, substituted "department regarding health facility payment rates under this chapter" for "commission under AS 47.07."

Sec. 47.07.110. Medicaid rate advisory commission established. The Medicaid Rate Advisory Commission is established in the Department of Health and Social Services. (§ 6 ch 95 SLA 1983; am E.O. No. 72 § 9 (1989))

Effect of amendments. — The 1989 amendment, effective March 1, 1989, inserted "Advisory."

Sec. 47.07.180. Duties. (a) The commission shall review proposed payment rates of health facilities and advise the department on payment rates for health facilities under this chapter and AS 47.25.120 — 47.25.300.

(b) The commission shall advise the department on the state plan as it relates to health facilities.

(c) When the department enters into a substantially revised state plan under AS 47.07.040, and when, as part of the revised state plan, the department adopts regulations that substantially change the methods used or the factors considered in determining the prospective payment rates, the commission may, at its discretion, recommend that the department redetermine the prospective payment rates for all facilities from the effective date of the new regulations forward. Each redetermined rate will be effective from the date of the department's new order as to each facility.

(d) By March 1 of each year, the department shall develop for the fiscal year starting the next July 1 an annual estimate of medical assistance program expenditures in health facilities under the jurisdiction of the department under this chapter and AS 47.25.120 — 47.25.300. The estimate shall consider anticipated utilization and payment rates for each facility. The methodology used by the department to develop the estimate shall be consistent with the regulations governing the department's rate-setting process. (§ 6 ch 95 SLA 1983; am § 8 ch 105 SLA 1986; am E.O. No. 72 § 10 (1989))

Effect of amendments. — The 1986 amendment rewrote this section.

The 1989 amendment, effective March 1, 1989, substituted "department" or "department's" for "commission" or "commission's" throughout the section; in subsection (a), deleted "and may review budgets" following "rates" and substituted "advise the department on" for "establish"; in subsection (b), substituted "advise" for "consult with" and deleted a second sentence which prohibited the commission from changing the unit of payment without written consent of the department; in subsection (c), inserted "recommend that the department" and made a stylistic change in the first sentence; and, in subsection (d), substituted "department under this chapter and AS 47.25.120 — 47.25.300" for "commission" at the end of the first sentence.

Sec. 47.07.190. Employment of personnel. The department may employ and determine the salary of an executive director, who shall provide staff assistance to the commission. With the approval of the department, the executive director may select and employ additional staff. The commission shall be assisted by the officers or personnel of the department as the commissioner of health and social services directs. The executive director of the commission is in the exempt service under AS 39.25. (§ 6 ch 95 SLA 1983; am E.O. No. 72 § 11 (1989))

Fairbanks Memorial Hospital
1650 Cowles Street
Fairbanks AK 99701
(907) 452-8181 FAX (907) 452-5776

March 7, 1990

Senator Paul Fischer
P O Box V (MS 3100)
Juneau, Alaska 99811

Dear Senator Fischer:

Please take time from your busy schedule to consider some important health bills pending before the State Senate. Your help is needed.

SB 326 - <u>SUPPORT</u> -	Provides grants to assist communities or regions within state to maximize use of their health dollar. Substance abuse, mental health, and fetal alcohol syndrome programs would greatly benefit natives in Fairbanks and the northern region if such a grant could be provided.
SB 431 - <u>SUPPORT</u>	Clarifies Medicaid Rate Setting Process for hospitals and nursing homes.
SB 319 - <u>SUPPORT</u> -	Authorizes general obligation bonds for construction for hospitals in Ketchikan, Seward, and Kodiak, plus help for Unalaska, Juneau, and Kenai.
SP 451 - <u>SUPPORT</u> -	Major tort reform bill with provision to correct negative State Supreme Court decision (Jackson v. Power).
SB 304 - <u>SUPPORT</u> -	Creates state subsidized insurance pool for the uninsurable.

If you have any questions, please call me or in Juneau call Harlan Knudson, the Health Association president, at 586-1790, or Jerry Reinwand at 586-8966.

Sincerely,

James H. Gingerich
Administrator

JHG/js

attorney as the hearing officer. She continued to explain the process.

Commissioner Munson said that during the first year that she was commissioner the commission and commission staff asked that a hearing officer be hired to work in the department in order that the hearing process could be speeded up because private counseling is too slow and they didn't know enough about the cases. She said the commission did the hiring in that instance. She continued to explain how the person was chosen. Commissioner Munson said whoever the hearing officer was and is now makes the rate decisions. If it is appealed, it goes to the hearing officer.

Senator Kelly asked how long the hearing officer has been employed full-time. Commissioner Munson said it has been about a year. She noted she signs the hearing officer's evaluation which was a glowing positive evaluation.

An unidentified speaker said there are twenty-six appeals which are currently outstanding. Commissioner Munson added that approximately 1/3 of the appeals have a pending request.

Senator Fischer asked who prioritizes the cases. Mr. Nielson said the hearing officer prioritizes the the cases.

Senator Kelly asked the commissioner if she keeps track of what the hearing officer is working on. Commissioner Munson said she regularly receives a report of the pending appeals. She noted she has allowed him a lot of latitude.

Senator Fischer said he would like an average number of the cases that have been appealed this year. Senator Jones asked what the liability would be if the appeals came down on the side of the facility. Commissioner Munson said there was 14 appeals in 1989. She referred to Senator Jones' question and said apparently no one has added it up. Mr. Campbell said his appeal amounts to $344 thousand.

Senator Jones asked what the percentage of wins were for the facilities. Mr. Campbell said his impression is that in the early years there was a fair amount of give and take. An analysis can be obtained from the Rate Commission. After the fist couple of years there were rapid changes of regulation. Every time there was a new ceiling from the state budgeting factor, there was a new set of regulations.

TAPE 2, SIDE 2

Commissioner Munson discussed one of the cases that had come back from the hearing officer and noted she had

adopted his decision. She said she stands by the decision for the cases she remanded.

Commissioner Munson explained that when Mr. Nielson makes a decision on a administrative appeal, it goes to the hearing officer. Mr. Nielson and an attorney general present their side. The facility then presents their side. The hearing officer then makes a legal decision on the kinds of issues. He prepares a written decision. The point where facilities no longer have input is after it leaves the hearing officer's desk. She explained that in September, she remanded three cases which had identical issues with the same instructions. Those are now pending further fact finding if the facilities request it. She said she is not aware of any cases where the commission didn't accept the hearing officer's decision as written. There was continued discussion regarding the process of appeals. Commissioner Munson said she would forward to Senator Kelly, Jones, and Fischer, a copy of instructions on remand decisions.

Emmit Wilson, Humana Hospital, asked Commissioner Munson how may decisions have been made under her regime. Commissioner Munson said she believes it it six. One was adopted and four had identical legal issues which were remanded. She said she has been told that there is one more on the way to her desk.

Senator Kelly asked how she came to the decision to remand the four cases. Commissioner Munson said she read the decisions very closely and was alarmed and concerned about the outcome. She said the state had the burden of proof even in approving the need for a rate to be reduced or held at a certain level. Commissioner Munson said in the past, the commission had violated its own regulation that at the point at which it chooses to come into compliance and recognizes that problem, the burden of proving that you should act somehow otherwise should remain on the appealing part, not on the state. She noted there has been six decisions since March and she received the first of them in April. The rate of reporting out a decision has increased.

Senator Jones asked how much it costs facilities to keep up with Medicaid appeals. He said he is sure they charge the users for it. Mr. Stokes referred to SB 166 and said they had in excess of $15 thousand in airline tickets. He said the appeals process is expensive not only to the facilities but to the state. Commissioner Munson said those costs are built in that derive the Medicaid rate. The costs of preparing rates and coming to hearings are built into the base of the rate, win or loose. There is talk at the federal level of not permitting the state to include the match, that which is used to sue the Federal Government.

Mr. Knudson noted he would like to give Commissioner Munson a lot of credit. During the last year there has been a couple of situations where they felt that the long-term care facilities were in serious jeopardy and the commissioner had met with the board after midnight. He said he would like the committee to revisit this issue when session convenes.

Mr. Emmit Wilson said there were six appeals and four of them were remanded, one was still on her desk, so there has been one conclusion. Commissioner Munson said there has been two conclusions and one of them was to remand four cases.

Mr. Stokes said there are two major of acute care hospitals in the State of Alaska and both are located in Anchorage and they service the whole state. The reason they are in Anchorage is because of the medivac system and both hospitals have in excess of 360 positions which include nero surgeons, etc. He referred to the patients and said sometimes it takes six months or more to put them back together so they can have a quality of life. He said there are going to be patients with fees in excess of $50 thousand where the other facilities will never have those except in some cases where the patients may have cancer.

Dennis Murray, Heritage Place Nursing Home, said there has been a lot of talk about costs. He said the costs are really people. Every administrator's budget is the people that it takes to provide health services. The health care facilities is one of the largest employers in the communities. Mr. Murray said a decision has been made that there is four classes of providers and the system has created rates based upon inadequate decisions. He said when it comes to the legislature they give a budgetary item which says "medicaid." He said it is so hard to unbundle that to figure out who these people are. He continued to discuss expenditures of facilities.

Commissioner Munson said issues have been raised and she would report back on them. She continued to give her closing statement [PARTS OF THIS TESTIMONY WAS INDISCERNIBLE].

Mr. Murray said what if it boils down to the Federal Government deciding what they believe, under Medicare, is reasonable and that upper limit for his facility is $92 per day for routine services which includes the nurses, nurse assistants, secretaries, dietary people, social workers, etc. Mr. Murray said they have given Alaska an adjustment of 58 percent to get to the $92. The Federal Government and Medicare considers it a 50 percent differential between the State of California and Alaska in wages. He continued to discuss the wages of people in Alaska.

health
association
of alaska

319 Seward St., Juneau, Alaska 99801 • (907) 586-1790
FAX (907) 463-3573
REPRESENTING ACUTE, LONG TERM AND OUTPATIENT FACILITIES

April 23, 1990

Jim
FYI

Representative Johnny Ellis
Chairman
House Committee on Health,
Education and Social Services
Legislative Building
Juneau, Alaska 99811

RE: SB 431, Medicaid Rate Setting Process

Dear Johnny:

This is to ask you to schedule CSSB 431, amendments to the Medicaid Rate Setting Process, for hearing before the House HESS Committee, pending referral.

CSSB 431, passed the Senate today, but has been held for reconsideration. The bill should reach your committee within the next few days. Our goal is to meet the five-day "notice of consideration".

Enclosed is a summary of the bill. The intent is to clear up confusion created by the enactment of Executive Order #72. There is a reasonable fiscal note on the bill.

The Department testified before the Senate Finance Committee that it was not opposed to this legislation.

Hospitals and nursing homes consider this to be a very important bill, though its' over all impact on the Department will be minor.

Your scheduling and support for the bill is needed.

Sincerely,

Harlan Knudson

CC: Representatives: Mark Boyer, Peter Goll,
Max Gruenberg, George Jacko,
Cheri Davis, Walter Furnace.

HEALTH ASSOCIATION OF ALASKA

STATEMENT OF SUPPORT
CSSB 431 - Amendments Medicaid Rate Setting Process
April 19, 1990

SB 431, amending the Medicaid rate setting process for health facilities was introduced by the Senate HESS Committee. This, following public hearings on the implementation of Executive Order #72 (Effective March 11, 1989). That order transferred the rate and regulating authority of the Medicaid Rate Commission to the Department of Health & Social Services, and placed the Commission in an advisory capacity to the Department.

The Purpose of SB 431 is to clarify "confusion," created by the implementation of Executive Order #72.

The Finance Subcommittee bill will:

1. Establish that the Medicaid Rate Advisory Committee will hold public hearings on health facility Medicaid rates. A hearing may be waived by the Department if a facility is applying for new rates under "exceptional relief" regulations. Page 1, Section 1, Line 13.

2. Writes into law that the Department will set the Medicaid rate for health facilities, and that a written determination of the rate set must include a written statement of the Department's findings. Page 1, Section 1, Line 20.

3. Directs the Commissioner to appoint technical advisory committees and hold public hearings on the Department's rate setting regulations, methodology, and alternative payment systems. Page 2, Section 2, Line 1.

4. Requires that a hearing for an appeal must be scheduled within 120 days after written notice is received by the Department. The Department, after showing good cause, and with the approval of the hearing officer, may request a delay in scheduling the hearing. Page 2, Section 4, Line 19.

5. Requires the Commissioner to render a decision on appeals within 30 days. Page 2, Section 4, Line 24.

6. Requires the Commissioner to report noncompliance of meeting appeal deadlines to the Governor. Page 2, Section 4, Line 28.

7. Authorizes Advisory Commission to review the Department's regulations and recommend alternative payment systems. Page 3, Section 5, Line 9.

FOR MORE INFORMATION CONTACT:
Harlan Knudson - 586-1790 Health Association of Alaska
Jerry Reinwand - 586-896.

# # #

HEALTH ASSOCIATION OF ALASKA

STATEMENT OF SUPPORT
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April 19, 1990

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7. Authorizes Advisory Commission to review the Department's regulations and recommend alternative payment systems. Page 3, Section 5, Line 9.

FOR MORE INFORMATION CONTACT:
Harlan Knudson - 586-1790 Health Association of Alaska
Jerry Reinwand - 586-8966

# # #

SB

445

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

SB 444S

H HESS 5/2/90

HOUSE COMMITTEE REPORT

(7)
Date Referred: April 28, 1990 FURTHER REFERRALS:

Date of Committee Action: 5/2/90

The HESS Committee considered: CSSB 445(HESS)

CS SB NO. 445 (HESS) SUBSIDIZED GUARDIANSHIPS

"An Act relating to subsidized adoption and guardianship; and providing for an effective date."

RECOMMENDATIONS:
[X] be replaced with HCS CSSB 445 [X] the same title [ ] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[X] zero fiscal note(s) 3/13/90 / 0115S
[ ] zero fn/analysis _____

SIGNING DO PASS:

J. Ellis
Rhea Davis Davis
Mark Boyer Boyer
Ed Rudenberg Grunberg

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
George Danburg Jr.		X	
Mike Moncrief		X	

J. Ellis
Chairman's Signature

FISCAL NOTE

REQUEST: CS SB 445 (HESS) 3/13/90

Revision Date: _____
Title: An Act relating to Subsidized Guardianship . . .
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Health & Social Services
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: (Attach a separate page if necessary)

FY 90 fiscal impact is "0."

Changes in CS SB 445 (HESS) have no fiscal impact. This fiscal note is appropriate. Projections of no fiscal impact would continue through 1996.

DCM - S-HESS

Prepared by: Russ Webb, Director
Phone: 465-3170
Division: Family and Youth Services
Date: _____

Approved by Commissioner: Myra M. Munson
Date: Feb 5, 1990
Agency: Department of Health & Social Services

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

SB 15

February 7, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the establishment of a subsidized guardianship program for hard-to-place children who are in the custody of the Department of Health and Social Services. This bill addresses one facet of permanency planning for foster children.

The purpose of this proposed legislation is to provide the Department of Health and Social Services with another tool to assist children who require long-term foster placement. Many times it is not possible, or not in the child's best interest, to free the child for adoption. Many foster parents who have had a child placed with them on a long-term basis might not wish to adopt the child but are willing to take on legal responsibility beyond foster parenthood for the foster child growing up in their home. However, if assuming guardianship would mean that the state will release the child from state custody and leave the foster parents without needed financial resources to provide for the child, foster parents might reasonably be reluctant to become a hard-to-place child's legal guardian. This proposed legislation will allow the state to continue to subsidize the child's care even though the state no longer has legal custody of the child.

The bill would amend AS 25.23.200, which currently provides that foster parents who are caring for a hard-to-place child and who have applied to adopt the child and receive a subsidy for the care and support of the child, must be evaluated as to their suitability as adoptive parents. The amendment to AS 25.23.200 would require that persons who are caring for a hard-to-place child and who wish to be appointed the child's guardian and receive a subsidy, would, in the same manner, be evaluated as to their suitability as guardians.

Under existing AS 25.23.210, the amount and duration of a monthly subsidy for a hard-to-place child is left to the discretion of the commissioner of the Department of Health and Social Services, but cannot exceed the existing rate being paid by the department for foster care.

Section 2 of the bill amends AS 25.23.220 to require that when a guardianship with subsidy has been ordered by the court and the court has released the child from the state's legal custody, the guardian will be independent of the department except for an annual evaluation by the department of the need for continued subsidy and the amount of the subsidy.

Sections 3 and 4 of the bill amend the definitions in AS 25.23.240(5) and (7), respectively, to add a reference to guardianships.

The subsidy program proposed in this bill recognizes that not only subsidized adoption but subsidized guardianship will be of benefit to the children of our state who are not able to grow up in their birth families.

Sincerely,

Steve Cowper
Governor

go0370sH
Lauterbach
4/30/90

Original sponsor(s): Rules/Governor

IN THE SENATE

HOUSE CS FOR CS FOR SENATE BILL NO. 445 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to subsidized adoption and guardianship."

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

* Section 1. AS 13.26 is amended by adding a new section to read:

Sec. 13.26.062. SUBSIDIZED GUARDIANSHIP; PROCEDURE. Procedures relating to subsidized guardianships for hard-to-place children are governed by AS 25.23.200 - 25.23.240.

* Sec. 2. AS 25.23.200 is amended to read:

Sec. 25.23.200. INVESTIGATION. Persons who are caring for a hard-to-place child on a foster parent basis and who have applied to adopt the hard-to-place child and to receive payments for the care and support of the hard-to-place child shall be evaluated as to their suitability as adoptive parents by means of an adoptive home study. Persons who are caring for a hard-to-place child in the state's custody and who wish to be appointed legal guardians of the child under AS 13.26.045, and to receive payments for the care and support of the child, shall be evaluated as to their suitability as guardians by means of a guardianship study. A [THIS] home study or guardianship study shall be made by the commissioner's adoption staff or on the commissioner's behalf by an authorized agency or individual that [WHICH] provides adoption services.

* Sec. 3. AS 25.23.220 is amended to read:

Sec. 25.23.220. ANNUAL REEVALUATION. After an adoption with subsidy is final or a guardianship with subsidy has been ordered by

the court and the court has released the child from the state's legal custody, the family is independent of the department except for an annual evaluation by the department of the need for continued subsidy and the amount of the subsidy.

* Sec. 4. AS 25.23.240(5) is amended to read:

(5) "court" means the superior court of this state, and, when the context requires, the court of another state empowered to grant petitions for adoption or guardianship or to terminate parental rights;

* Sec. 5. AS 25.23.240(7) is amended to read:

(7) "hard-to-place child" means a minor who is not likely to be adopted or to obtain a guardian by reason of physical or mental disability, emotional disturbance, recognized high risk of physical or mental disease, age, membership in a sibling group, racial or ethnic factors, or any combination of these conditions;

* Sec. 6. AS 47.10.230(d) is amended to read:

(d) In addition to money [FUNDS] paid for the maintenance of foster children under (b) of this section, the department

(1) shall pay the costs of caring for physically or mentally handicapped foster children, including the additional costs of medical care, habilitative and rehabilitative treatment, services and equipment, special clothing, and the indirect costs of medical care, including child care and transportation expenses; [AND]

(2) may pay for respite care; in this paragraph "respite care" means child care for the purpose of providing

(A) temporary relief from the stresses of caring for a foster child who has a physical or mental disability or a physical or mental impairment; in this subparagraph

(i) "physical or mental disability" has the

meaning given in AS 18.80.300(12)(A), (B), and (D); and

(ii) "physical or mental impairment" has the meaning given in AS 18.80.300; and

(B) protection for the child when the foster parent is

(i) away from the home because of an emergency and other care is not available for the child; or

(ii) on vacation and the child, because of age or infirmity, cannot be placed in any other type of temporary care facility; and

(3) may pay a subsidized guardianship payment under AS 25.-23.210 when a foster child's foster parents or other persons approved by the department become court-appointed legal guardians of the child.

go0370sH
Lauterbach
4/30/90

Original sponsor(s): Rules/Governor

IN THE SENATE

HOUSE CS FOR CS FOR SENATE BILL NO. 445 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to subsidized adoption and guardianship."

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

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Sec. 13.26.062. SUBSIDIZED GUARDIANSHIP; PROCEDURE. Procedures relating to subsidized guardianships for hard-to-place children are governed by AS 25.23.200 - 25.23.240.

* Sec. 2. AS 25.23.200 is amended to read:

Sec. 25.23.200. INVESTIGATION. Persons who are caring for a hard-to-place child on a foster parent basis and who have applied to adopt the hard-to-place child and to receive payments for the care and support of the hard-to-place child shall be evaluated as to their suitability as adoptive parents by means of an adoptive home study. Persons who are caring for a hard-to-place child in the state's custody and who wish to be appointed legal guardians of the child under AS 13.26.045, and to receive payments for the care and support of the child, shall be evaluated as to their suitability as guardians by means of a guardianship study. A [THIS] home study or guardianship study shall be made by the commissioner's adoption staff or on the commissioner's behalf by an authorized agency or individual that [WHICH] provides adoption services.

* Sec. 3. AS 25.23.220 is amended to read:

Sec. 25.23.220. ANNUAL REEVALUATION. After an adoption with subsidy is final or a guardianship with subsidy has been ordered by

the court and the court has released the child from the state's legal custody, the family is independent of the department except for an annual evaluation by the department of the need for continued subsidy and the amount of the subsidy.

* Sec. 4. AS 25.23.240(5) is amended to read:

(5) "court" means the superior court of this state, and, when the context requires, the court of another state empowered to grant petitions for adoption or guardianship or to terminate parental rights;

* Sec. 5. AS 25.23.240(7) is amended to read:

(7) "hard-to-place child" means a minor who is not likely to be adopted or to obtain a guardian by reason of physical or mental disability, emotional disturbance, recognized high risk of physical or mental disease, age, membership in a sibling group, racial or ethnic factors, or any combination of these conditions;

* Sec. 6. AS 47.10.230(d) is amended to read:

(d) In addition to money [FUNDS] paid for the maintenance of foster children under (b) of this section, the department

(1) shall pay the costs of caring for physically or mentally handicapped foster children, including the additional costs of medical care, habilitative and rehabilitative treatment, services and equipment, special clothing, and the indirect costs of medical care, including child care and transportation expenses; [AND]

(2) may pay for respite care; in this paragraph "respite care" means child care for the purpose of providing

(A) temporary relief from the stresses of caring for a foster child who has a physical or mental disability or a physical or mental impairment; in this subparagraph

(i) "physical or mental disability" has the

meaning given in AS 18.80.300(12)(A), (B), and (D); and

(ii) "physical or mental impairment" has the meaning given in AS 18.80.300; and

(B) protection for the child when the foster parent is

(i) away from the home because of an emergency and other care is not available for the child; or

(ii) on vacation and the child, because of age or infirmity, cannot be placed in any other type of temporary care facility; and

(3) may pay a subsidized guardianship payment under AS 25.-23.210 when a foster child's foster parents or other persons approved by the department become court-appointed legal guardians of the child.

SB

450

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

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Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

SB 450

N. HESS	3/29/90
H. HESS	4/4/90
H HESS	4/18/90
H HESS	4/19/90
H HESS	4/20/90

HOUSE COMMITTEE REPORT

(7)
Date Referred: March 21, 1990 FURTHER REFERRALS:
(Removed from Judiciary, HESS added) JUDICIARY

Date of Committee Action: 4/20/90

The HESS Committee considered: CSSB 450(JUD) am

CS SB NO. 450 (Jud) am CHILD ABUSE REPORTING

"An Act relating to reporting and investigation of child abuse and neglect; relating to training of persons required to report child abuse or neglect; and amending the definition of 'child abuse or neglect'."

RECOMMENDATIONS:
[X] be replaced with HCS CSSB 450 [X] the same title [ ] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal impact _____ [ ] fiscal note(s) _____
[ ] zero fiscal note _____ [ ] zero fiscal note(s) _____
[ ] zero with analysis _____ 2 [X] zero fn/analysis 2/23/90 DHSS & DPS

SIGNING DO PASS

Ellis
Cheri Davis
Mark Boyer
Terry Ely

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Bill Hennessy		—	

Ellis
Chairman's Signature

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/13/90 ASD/HESS/Law Teleconference)

Page 7, lines 3 - 12:

Delete all material.

Insert a new bill section to read:

"* Sec. 12. AS 47.17.050 is amended to read:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview under AS 47.17.027, or [WHO] participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, except that a person who knowingly makes an untimely report is not immune from civil or criminal liability based on the delay in making the report."

Page 9, lines 8 - 12:

Delete all material.

Insert a new subsection to read:

"(13) "maltreatment" means an act or omission that causes, or could cause, a child to be a child in need of aid under AS 47.10.010(a)(2) if the act were committed by a person responsible for the child's welfare;"

Page 9, lines 22 - 25:

Delete all material.

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/10/90 HESS Committee Work Session)

Page 1, line 21, after "reports":

Insert "before making a report required under this chapter to the department"

Page 3, line 23:

Delete "a new section"

Insert "new subsections"

Page 3, line 26, after "school":

Insert "or school district"

Page 3, line 28, after "school":

Insert "or school district"

Page 4, line 1, after "student":

Insert "or on the premises of a school within the district in which the child is enrolled as a student"

Page 4, lines 1 - 2:

Delete "at the conclusion of its investigation"

Page 4, line 3, after "enrolled":

Insert "immediately after the agency determines that a child has been abused or neglected under the circumstances set out in this section"

Page 4, line 5, after "." through line 11:

Delete all material.

Insert "If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall send a copy of the notification required under this subsection to the Professional Teaching Practices Commission."

Page 4, after line 11:

Insert a new subsection to read:

"(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section."

Page 4, line 24, after "district":

Insert "at least once every five years"

Page 5, line 9, after "(6)":

Insert "a brief description of"

Page 6, line 16, after "custodian":

Insert "if the department or law enforcement agency provides written certification to the school officials that (1) there is reasonable cause to suspect that the child has been abused or neglected by a person responsible for the child's welfare, or as a result of conditions created by a person responsible for the child's welfare; (2) the interview at school is a necessary part of the investigation to determine whether the child has been abused or neglected; and (3) the interview at school is in the best interests of the child"

Page 6, line 17, after "official":

Delete "may"

Insert "shall"

Page 6, line 20, after ".":

Insert "Immediately after conducting an interview authorized under this section, the department or agency shall make every reasonable effort to notify the child's parent, guardian, or custodian that the interview took place."

Page 7, line 16, after "liability":

Insert "for the child abuse or neglect"

Page 8, lines 8 - 9:

Delete "knowing of the circumstances giving"

Insert "and who knows or should have known that the circumstances give"

Page 8, lines 11 - 16:

Delete all material.

Renumber following sections accordingly.

Page 9, line 7, after "and":

Delete "within"

Insert "no later than"

Page 9, lines 13 - 16:

Delete all material.

Renumber following subsections accordingly.

Page 9, line 19, after "to":

Delete "suspect"

Insert "believe"

ANCHORAGE SCHOOL DISTRICT

4600 DeBarr Avenue
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AREA CODE (907) 333-9561

April 16, 1990

Representative Johnny Ellis, Chairman
Health, Education & Social Services Committee
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Mr. Ellis:

The Anchorage School District is very appreciative of the opportunity to provide input on Senate Bill 450. The work we accomplished last week through the meeting on April 10 in Juneau, and the subsequent telephone conversations with Commissioner Myra Munson and Ms. Laurie Otto has been very useful in developing suggestions for changes to Senate Bill 450.

While we have not seen the final draft of the entire bill, we are supportive of the proposed amendments agreed to last week by Commissioner Munson, Ms. Otto, and the Anchorage School District. At the same time we realize our efforts are just a portion of the public input in this process.

The District's legal counsel has informed us of continuing legal concerns about the constitutional issues relative to the proposed definition for the term or terms *'Cause to Believe'* or *'Reasonable Cause to Suspect'*. We also understand the Attorney General's office has researched the issue and believes it is constitutionally sound. We will leave to the legal community the debate on constitutional issues. We are supportive of the proposed revised draft of the legislation because we feel it is beneficial for the welfare and safety of students which is and always has been our primary concern in this matter.

If we can be of further assistance, please let us know. Again, we appreciate the opportunity to be involved in the review and discussion on Senate Bill 450.

Sincerely,

Bob Christal
Assistant Superintendent
of Instruction

Mike Malone
Special Assistant
for Organizational Development

mt

The Alaska School Nurse Association does not support Senate Bill 450 regarding reporting and investigation of child abuse and neglect. This bill does not encourage cooperation between school districts, law enforcement agencies, and social services agencies. Those agencies need to work closely together to benefit and protect students.

Senate Bill 450 does not improve the clarity of definitions and still needs more revision. The following terms need to be defined: immediately, maltreatment, investigations. The social service agency needs school nurses who are trained to identify child abuse and neglect to conduct appropriate and effective investigations to gather the facts to report to the Division of Family and Youth Services. If school nurses were not available to gather this information then DFYS would be even more overwhelmed than they are today. Now school nurses are talking to answering machines because they cannot get an intake screener and sometimes must wait two days to get a call back. Teachers cannot wait for DFYS to call back when they must be in class with 30 students.

Please reconsider better definitions for this important Senate Bill.

"reasonable cause to suspect" - ok sec 941.96

that a "high degree of certainty" is a significantly stricter standard than the proposed "substantial certainty," it fails to cite convincing or binding authority for this assertion. Before we can find misdirection of the jury, we must be convinced from the entire record that the trial's result would probably have differed. *See Bohlman v. American Family Mutual Insurance Co.*, 61 Wis.2d 718, 729, 214 N.W.2d 52, 58–59 (1974). Because we determine that the difference, if any, between the two standards would have had no effect on the trial's outcome, we uphold the trial court's version of the intent instruction.

Judgment and order affirmed.

135 Wis.2d 266

STATE of Wisconsin, Plaintiff-Respondent,

v.

Richard HURD, Defendant-Appellant.

No. 86–0558–CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Aug. 1, 1986.

Opinion Released Nov. 18, 1986.

Opinion Filed Nov. 18, 1986.

Defendant was convicted in the Circuit Court, Trempealeau County, Robert W. Radcliffe, J., of failing to report suspected child abuse, and his motion for postconviction relief was denied. Defendant appealed. The Court of Appeals, Myse, J., held that: (1) statute prohibiting failure to report suspected child abuse is not unconstitutionally vague; (2) failure to instruct jury that State was required to prove that defendant acted wilfully in failing to report suspected child abuse relieved State of portion of its burden of proof, thus denying defendant due process so as to require new trial; but (3) whether defendant wilfully failed to report suspected child abuse was question for jury.

Reversed and remanded.

1. Constitutional Law ⇐48(1)

There is strong presumption favoring constitutionality of statute, and, if possible, reviewing court will interpret statute to preserve it.

2. Constitutional Law ⇐258(2)

Due process mandates that criminal statute be sufficiently definite to give person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law ⇐13.1(1)

To avoid being impermissibly vague, statute need not define with absolute clarity and precision what is and what is not unlawful.

4. Criminal Law ⇐13.1(1)

Statute is not void for vagueness simply because there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease; it is enough if statute alerts person of ordinary intelligence to type of conduct, active or passive, that is proscribed.

5. Infants ⇐13

Reasonable cause requirement, under statute requiring person who has reasonable cause to suspect child abuse to report suspected abuse, examines totality of facts and circumstances actually known to, and is viewed from standpoint of, person possessing suspicion; thus, test becomes whether prudent person would have reasonable cause to suspect child abuse if presented with same totality of circumstances as that acquired and viewed by defendant. U.S.C.A. Const.Amends. 5, 14; W.S.A. 48.981.

6. Infants ⇐12

Use of reasonableness standard under statute requiring reporting of child abuse

by person having reasonable cause to suspect that child has been abused or neglected does not itself render statute unconstitutionally vague. W.S.A. 48.981.

7. Infants ⇐12

Use of term "suspicion" in statute requiring reporting facts and circumstances contributing to suspicion of child abuse does not itself create unconstitutionally vague statute. W.S.A. 48.981.

8. Infants ⇐12

Phrase "reasonable cause to suspect" in statute requiring reporting of child abuse by person who has reasonable cause to suspect abuse is readily ascertainable and understandable standard involving belief that ordinary person would reach as to existence of abuse, and thus, statute sufficiently alerts person of ordinary intelligence as to what conduct is required so that statute is not unconstitutionally vague. W.S.A. 48.981.

9. Criminal Law ⇐847

Objection to jury instructions is not waived where instructions misstate law.

10. Criminal Law ⇐1038.1(2)

Notwithstanding waiver of objection to instruction, reviewing court in its discretion may consider whether error is so plain or fundamental that it affects defendant's substantial rights and so mandates reversal. W.S.A. 901.03(4).

11. Criminal Law ⇐1165(1)

Reviewing court may find error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that error contributed to conviction.

12. Constitutional Law ⇐266(7)

Due process clause protects against conviction except upon proof beyond reasonable doubt of all elements of charged offense.

13. Infants ⇐20

To convict defendant of failing to report child abuse that defendant had reasonable cause to suspect, State is required to prove beyond reasonable doubt that defendant not only failed to report suspected child abuse, but that defendant did so wilfully. W.S.A. 48.981.

14. Constitutional Law ⇐268(11)
Criminal Law ⇐1038.2
Infants ⇐20

Failure to instruct jury that State was required to prove that defendant acted wilfully in failing to report suspected child abuse relieved State of portion of its burden of proof, allowing jury to convict defendant simply because he failed to report abuse, thus denying defendant due process and affecting substantial right so as to require remand for new trial, even though defendant failed to object to lack of instruction. U.S.C.A. Const.Amends. 5, 14; W.S.A. 48.981.

15. Statutes ⇐176

Interpretation of statutory words is question of law.

16. Statutes ⇐181(1)

Primary goal of statutory interpretation is to ascertain and give effect to legislature's intent.

17. Statutes ⇐208

"Wilfully" must be defined within context of statute in which it was used.

18. Infants ⇐13

"Wilfully" requirement for conviction of failing to report suspected child abuse allows defendant to raise defenses such as mistake, neglect, or misadventure that caused failure to report, but does not allow defense that defendant was unaware of statutory duty to report child abuse. W.S.A. 48.981, 48.981(6), 939.23(3, 5), 939.43.

See publication Words and Phrases for other judicial constructions and definitions.

19. Infants ⇐20

Evidence that counselor at youth ranch told defendant, the administrator at ranch, on several occasions that another employee was making "advances" toward boys and that defendant had previously expressed his low opinion of competency of law en-

forcement and social service agencies raised jury question as to whether defendant wilfully failed to report suspected child abuse. W.S.A. 48.981.

Richard Hurd, Glenn L. Cushing, asst. state public defender, Madison, for defendant-appellant.

LaVerne Michalak, dist. atty., Whitehall, for plaintiff-respondent, State of Wisconsin.

Before CANE, P.J., LaROCQUE and MYSE, JJ.[1]

MYSE, Judge.

Richard Hurd appeals from a judgment convicting him of failing to report suspected child abuse and from an order denying his motion for postconviction relief. Hurd argues that the charging statute is unconstitutionally vague, that the trial court erred by failing to instruct the jury on an element of the offense, and that there was insufficient evidence to convict. We conclude that the challenged statute is constitutional and that there was sufficient evidence to convict. However, because the trial court's error in failing to instruct on an element of the offense violated Hurd's constitutional right to due process, the judgment and order are reversed and the cause remanded for a new trial.

Richard Hurd is the administrator of the Berean Christian Ranch and the Berean School. In 1984, six boys resided at the youth ranch with ages ranging from seven to nineteen. Also residing at the ranch were two adults, Kenneth Murray, a young counselor, and Tom Chrystal. Chrystal was convicted of sexually assaulting certain boys at the youth ranch. Hurd was charged with failing to report suspected child abuse contrary to sec. 48.981, Stats.

At Hurd's trial, Murray testified that he had informed Hurd several times that Chrystal was making "advances" toward the boys. Murray stated further that after witnessing an incident in which Chrystal was lying on top of one of the boys with his pants down, he told Hurd that he had personally observed one of the "advances" and that he wanted something done about it. One of the boys also testified that he had informed Hurd of a sexual assault by Chrystal. The jury convicted Hurd of the offense.

Hurd first challenges the constitutionality of the charging statute, sec. 48.981. He claims that the statute's undefined phrase "reasonable cause to suspect" is ambiguous and vague.[2] As a result, he argues that the statute fails to notify a person of ordinary intelligence of the conduct required by the statute. We disagree.

[1, 2] There is a strong presumption favoring the constitutionality of a statute, and if possible, a reviewing court will interpret a statute to preserve it. *State v. Popanz*, 112 Wis.2d 166, 172, 332 N.W.2d 750, 753 (1983). Nevertheless, due process mandates that a "criminal statute must be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of the conduct required or prohibited." *Id.* at 173, 332 N.W.2d at 754. The proper test for determining whether a statute is impermissibly vague was recently set forth by our supreme court in *Popanz*:

> Before a court can invalidate a statute on grounds of vagueness, it must conclude that "some ambiguity or uncertainty in the gross outlines of the duty im-

1. Upon order of the Chief Judge, this has been issued as a three-judge opinion pursuant to sec. 809.41(3), Stats.

2. Hurd challenges the constitutionality of sec. 48.981 on other grounds. He claims that the statute's undefined phrase "reason to believe" is also vague and fails to notify a person of ordinary intelligence of the conduct required by the statute. The statute's use of "reason to believe" is distinctly tied to those circumstances in which it is probable a child is threatened with abuse. Section 48.981(2), (3)(a), Stats. Hurd was neither charged nor convicted under this aspect of sec. 48.981. Consequently, this issue need not be addressed. *See State v. Courtney*, 74 Wis.2d 705, 713, 247 N.W.2d 714, 719-20 (1976); *see also State ex rel. Dessinger v. Treffert*, 85 Wis.2d 257, 271, 270 N.W.2d 402, 409 (1978).

posed or conduct prohibited" appears in the statutes, "such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule."

Id. (quoting *State v. Courtney*, 74 Wis.2d 705, 711, 247 N.W.2d 714, 719 (1976)).

[3, 4] Section 48.981 states in part:

(2) [A]n ... administrator ... *having reasonable cause to suspect* that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with an injury and that abuse of the child will occur shall report as provided in sub. (3)....

(3)(a) Referral of report of suspected child abuse or neglect. Persons required to report ... shall immediately contact, ... and shall inform the agency or department of the fact and circumstances contributing to a *suspicion of child abuse* or neglect or to a belief that abuse will occur.... [Emphasis added.]

It is true that the statute does not define "reasonable cause to suspect." However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct. *Courtney*, 74 Wis.2d at 710, 247 N.W.2d at 718. A statute is not void for vagueness simply because "there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease." *Id.* at 711, 247 N.W.2d at 719. It is enough if the statute alerts a person of ordinary intelligence to the type of conduct, active or passive, that is proscribed. *Id.* at 713, 247 N.W.2d 719.

Section 48.981's use of the phrase "reasonable cause to suspect" fairly notifies a person of ordinary intelligence that if there is a reasonable basis to suspect that child abuse has occurred, that person must make a report to the appropriate agency. Whether a person possesses a reasonable suspicion that child abuse has occurred is not subject to misunderstanding. This requirement examines the totality of the facts and circumstances actually known to, and as viewed from the standpoint of, that person.[3] *See, e.g., State v. Lossman*, 118 Wis.2d 526, 543, 348 N.W.2d 159, 167 (1984). Thus, the test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. Under this statute, conviction is only permitted when, under the totality of the circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse.

[5] The use of the standard of reasonableness does not in itself render sec. 48.981 unconstitutionally vague. This standard is employed in a number of statutes including disorderly conduct (unreasonably loud), refusing to aid an officer (reasonable excuse), arrest without warrant (reasonable grounds to believe), and the statutory definition of "reasonably believes." *See* secs. 947.01, 946.40, 800.02(6), and 939.22(32), Stats. Testing information actually possessed by a defendant against the standard of reasonableness is not so ambiguous or vague as to preclude a citizen from conforming his conduct to that required by the law.

[6] Nor does use of the term "suspicion" create an unconstitutionally vague statute. This is a nontechnical term commonly used and understood by the general populace. It is not a term of art that requires legal expertise to comprehend its meaning. Absent statutory definition, the common and approved meaning of a nontechnical word may be ascertained by reference to a recognized dictionary. *State v. Ehlenfeldt*, 94 Wis.2d 347, 350, 288 N.W.2d

3. A similar analysis has been applied in other contexts. *See State v. Wilks*, 117 Wis.2d 495, 501-02, 345 N.W.2d 498, 501 (Ct.App.1984), *cert. denied*, 471 U.S. 1067, 105 S.Ct. 2144, 85 L.Ed.2d 501 (1985); *State v. Boggess*, 115 Wis.2d 443, 445-56, 340 N.W.2d 516, 519-21 (1983).

786, 790 (1980); *see also* sec. 990.01(1), Stats. "Suspicion" is defined as a "belief or opinion based upon facts or circumstances which do not amount to proof." Black's Law Dictionary 1298 (5th ed. 1981); *see also Gordon v. Gordon*, 270 Wis. 332, 343, 71 N.W.2d 386, 392 (1955). It is a concept dealing with the degree of certainty with which one holds a belief or opinion.

[7] The phrase "reasonable cause to suspect" is a readily ascertainable and understandable standard that involves a belief, based on evidence but short of proof, that an ordinary person would reach as to the existence of child abuse. Therefore, sec. 48.981 sufficiently alerts a person of ordinary intelligence as to what conduct is required. *See Courtney*, 74 Wis.2d at 713, 247 N.W.2d at 719.

Next, Hurd argues that the trial court erred by failing to instruct the jury on the element of "wilfully." The penalty provision of sec. 48.981 states:

> (6) Penalty. Whoever *wilfully* violates this section by failure to report as required may be fined not more than $1,000 or imprisoned not more than 6 months or both. [Emphasis added.]

The state concedes that "wilfully" is an element of the offense of failing to report suspected child abuse under sec. 48.981. However, the state argues that Hurd has waived this error by failing to timely object at trial to the jury instructions as given. *See* secs. 972.10(3) and 805.13(3), Stats. Alternatively, the state claims that this error was harmless.

[8–11] A trial court has broad discretion in instructing the jury. *State v. Danforth*, 125 Wis.2d 293, 297, 371 N.W.2d 411, 414 (Ct.App.1985). Nevertheless, instructions should fully and fairly state the law that applies to the case. *Id.* It is well established that an objection to jury instructions is not waived where the instructions misstate the law. *State v. Moriarty*, 107 Wis.2d 622, 630, 321 N.W.2d 324, 329 (Ct.App.1982). Moreover, notwithstanding waiver, a reviewing court in its discretion may consider whether an error in instruction is so plain or fundamental that it affects a defendant's substantial rights and so mandates reversal. *Id.*; sec. 901.03(4), Stats. A reviewing court may find an error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 542, 370 N.W.2d 222, 231–32 (1985).

[12–14] The due process clause of the United States Constitution protects against conviction except upon proof beyond a reasonable doubt of all elements of the charged offense. *State v. Ivy*, 119 Wis.2d 591, 608, 350 N.W.2d 622, 631 (1984). Here, the state was required to prove beyond a reasonable doubt that Hurd had not only failed to report suspected child abuse, but that he had done so wilfully. Under the instructions given by the trial court, the state was relieved of the latter burden. *See Moriarty*, 107 Wis.2d at 631, 321 N.W.2d at 329. Thus, the jury was allowed to convict Hurd simply because he had failed to report. This is neither the offense with which he was charged nor the legislature's intent in enacting sec. 48.981 as indicated by the inclusion of "wilfully" within the statute. Hurd was denied an opportunity to present defenses negating the wilfulness element because the jury was not advised that this was an element of the offense. The error in instruction violated Hurd's right to due process and so affected his substantial rights. *Id.*; *see also Morissette v. United States*, 342 U.S. 246, 274–76, 72 S.Ct. 240, 255–56, 96 L.Ed. 288 (1952). Accordingly, we conclude that there is a reasonable possibility that the error in instruction contributed to Hurd's conviction. Hurd is therefore entitled to a new trial.

[15, 16] Having determined that the trial court erred by failing to instruct on the wilful element, this court must next address the meaning of this term within the context of sec. 48.981. The interpretation of statutory words is a question of law. *State ex rel. Brockway v. Milwaukee County Circuit Court*, 105 Wis.2d 341, 344, 313 N.W.2d 845, 847 (Ct.App.1981). The primary goal of statutory interpreta-

tion is to ascertain and give effect to the legislature's intent. *Id.*

Hurd contends that "wilfully" should be construed to mean that a defendant intentionally violated a known legal duty. It is well established that ignorance of the law is no defense to a violation thereof. *State v. Kemp*, 106 Wis.2d 697, 712, 318 N.W.2d 13, 21 (1982); *State v. Britzke*, 108 Wis.2d 675, 683, 324 N.W.2d 289, 292 (Ct.App. 1982). If the legislature had wished to make ignorance of the law a defense to a crime, it would have done so more clearly and less ambiguously than simply using the term "wilfully." Rules of common law are not to be changed by doubtful implication and to give such effect to a statute, the language must be clear and preemptory. *Rose v. Schantz*, 56 Wis.2d 222, 227, 201 N.W.2d 593, 597 (1972); *see also* sec. 939.10, Stats.

[17] "Wilfully" must be defined within the context of the statute in which it is used. *State v. Cissell*, 127 Wis.2d 205, 210–13, 378 N.W.2d 691, 694 (1985), *cert. denied*, — U.S. —, 106 S.Ct. 1651, 90 L.Ed.2d 194 (1986). Section 48.981 creates an offense for certain individuals who fail to report possible child abuse if they have reason to suspect that such child abuse has occurred. By adding the term "wilfully," the legislature made the offense punishable only if such individuals "wilfully violate this section by failure to report as required...." Section 48.981(6), Stats.

[18] "[W]ilfully" as used in sec. 48.-981(6) means "intentionally" as defined in sec. 939.23(3).[4] *See Cissell*, 127 Wis.2d at 210–13, 378 N.W.2d at 694; *see also* Black's Law Dictionary 1434 (5th ed. 1981); Webster's New World Dictionary 1627 (2d ed. 1980). Section 939.23(3) defines "intentionally" as: "[T]he actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result." Thus, a defendant charged under sec. 48.981 may raise defenses such as mistake, neglect, or misadventure that caused the failure to report. *See* sec. 939.43, Stats. It is not a defense to this offense, however, that the defendant was unaware of the statutory duty to report suspected child abuse. *Id.*; *see also* sec. 939.23(5), Stats.

Such a construction of sec. 48.981 is consistent with the legislature's intent. When created in 1965, sec. 48.981(6) originally stated, "Anyone knowingly and wilfully violating this section by failing to report...." Laws of 1965, ch. 333, sec. 3 at 584. In the statute's 1977 revision, the legislature deleted "knowingly." Laws of 1977, ch. 355, sec. 4 at 1412. Additionally, the legislature stated that sec. 48.981 was intended to "protect the health and welfare of children by encouraging the reporting of suspected child abuse and child neglect...." *Id.*, sec. 1 at 1409. The legislature's deletion of "knowingly" and the stated purpose of sec. 48.981, indicate that the legislature did not intend ignorance of the statute to be a defense. Rather, this demonstrates that the legislature intended to hold accountable those persons who reasonably suspect child abuse and intentionally fail to notify the appropriate agencies.

Finally, Hurd argues that the evidence adduced at trial was insufficient to support his conviction. He asserts that the state failed to prove an element of the offense, that is, that he willfully failed to report suspected child abuse. *See Ivy*, 119 Wis.2d at 607, 350 N.W.2d at 631. This argument rests on Hurd's erroneous definition of "wilfully," as an intentional violation of a known legal duty. Nevertheless, because this argument raises a double jeopardy issue, this court must determine whether under the correct definition of "wilfully," there was sufficient evidence to convict. *Id.*

The test for sufficiency of the evidence is whether a reviewing court can conclude that a reasonable trier of fact could be convinced of a defendant's guilt beyond a reasonable doubt by the evidence that it had a right to believe and accept as true. *State v. Wyss*, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Evidence is to be considered in a light most favorable to the

4. The legislature has recently deleted the term "wilfully" from sec. 48.981(6) and inserted the term "intentionally." 1985 Wis. Act 29, sec. 926 at 237.

state and the conviction. *Id.* The credibility of the witnesses and the weight of the evidence is exclusively for the trier of fact to determine. *Id.*

[19] The evidence adduced at Hurd's trial was sufficient to prove that he had a reasonable cause to suspect child abuse and that he willfully failed to report this suspicion. At trial, Murray testified that he had told Hurd on several occasions that Chrystal was making "advances" toward the boys. One of the boys testified that he had told Hurd of a sexual assault by Chrystal. Chrystal testified that Hurd had stated that he had heard Chrystal was sexually abusing the boys. Additionally, Murray testified that Hurd had previously expressed his low opinion of the competency of law enforcement and social service agencies. From this testimony, the jury could have reasonably inferred that Hurd had wilfully failed to report suspected child abuse.[5]

Judgment and order reversed and cause remanded for a new trial.

135 Wis.2d 280

In re the PATERNITY OF J.S.C.

B.A.C., Petitioner-Respondent,

v.

T.L.G., Respondent-Appellant.

No. 85-2343.

Court of Appeals of Wisconsin.

Argued Oct. 2, 1986.

Opinion Released Nov. 19, 1986.

Opinion Filed Nov. 19, 1986.

Review Denied.

Paternity action was brought. The Circuit Court, Waukesha County, Patrick L. Snyder, J.[1], declared alleged father to be father of child whose paternity was in dispute, and alleged father appealed. The Court of Appeals, Nettesheim, J., held that: (1) testimony of mother was sufficient to establish that conceptive period occurring during period of sexual activity between mother and alleged father, even though statutory presumptive period of conception did not apply due to low birth weight of child; (2) statute governing admissibility of expert testimony relating to blood test results in paternity case did not contemplate or require technicians who assisted in blood testing process to be experts in examining genetic markers; and (3) evidence was sufficient to render it improbable that blood test samples were exchanged, contaminated, or tampered with, so expert's testimony and report relating to probability of paternity of alleged father were properly admitted.

Affirmed.

1. Children Out-of-Wedlock ⇐53

Proof of conceptive period of child is essential element of paternity case.

2. Children Out-of-Wedlock ⇐53

If child who is subject of paternity proceeding is not full-term child, conceptive period must be established by competent evidence other than statutory presumption as to conceptive period, but it is not essential that exact date of conception be proven. W.S.A. 891.395.

3. Children Out-of-Wedlock ⇐53

Testimony of mother of child who was subject of paternity proceeding that she experienced her last menstrual period prior to birth of child before she met alleged

5. Hurd also argues that he is entitled to a new trial in the interest of justice pursuant to sec. 752.35, Stats. Because Hurd is entitled to a new trial on other grounds, this court need not address this issue. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

1. Judge Snyder presided over all the hearings in this case and his rulings form the basis for the issues raised upon appeal. Judge Marianne Becker, however, signed the judgment.

"reasonable cause to suspect" ok
see pgs. 412-413

172 Mich.App. 706

PEOPLE of the State of Michigan, Plaintiff–Appellant,

v.

Alfred CAVAIANI, also known as Lambert Cavaiani, Defendant–Appellee.

Docket No. 101942.

Court of Appeals of Michigan.

Submitted June 21, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

A psychologist was charged with failing to comply with statute requiring him to report suspected child abuse. The 52nd District Court refused psychologist's motion to quash complaint and warrant. The Oakland Circuit Court, Fred M. Mester, J., granted the psychologist leave to appeal and reversed. After granting the State leave to appeal, the Court of Appeals, Kaufman, J., held that: (1) statute requiring reporting of suspected child abuse was not overbroad or vague; (2) section of child protection law which abrogated all privileged communications except attorney and client communications did not unconstitutionally amend by implication statute creating psychologist-patient privilege; and (3) abuse reporting requirement did not violate any party's Fourth or Fifth Amendment rights.

Reversed and remanded.

1. Constitutional Law ⇐48(3)

Where a statutory provision would otherwise be unconstitutional, it is court's duty to give statute narrow construction so as to render it constitutional if such construction is possible without doing violence to legislature's interest in enacting statute.

2. Constitutional Law ⇐82(4)

A successful overbreadth challenge allows a person charged with violating a statute to escape punishment based on First Amendment right of others impinged upon by statute, even though under a narrower, properly drawn statute, his own behavior could be punished because it is not so protected. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐90.1(1)

To support an overbreadth challenge, overbreadth of statute must not only be real, but substantial as well, judged in relation to statute's plainly legitimate sweep where conduct and not merely speech is involved. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐82(10)
Infants ⇐12

Section of statute requiring psychologists and family therapists to report suspected child abuse was a constitutionally permissible invasion of a family's First Amendment right of privacy since a family did not have a protected First Amendment right to seek treatment for offender. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐42.2(1)

A person generally lacks standing to challenge overbreadth of statute where his own conduct is clearly within contemplation of statute, even where some marginal application of statute might infringe on First Amendment activities. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇐42.2(1)

Defendant has standing to raise vagueness challenge to statute only if statute is vague as applied to his conduct. U.S.C.A. Const.Amend. 14.

7. Constitutional Law ⇐48(4)

Even though statute may be susceptible to impermissible interpretations, reversal is not required if statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and defendant's conduct falls within that prescribed by the properly construed statute. U.S.C.A. Const.Amend. 14.

8. Statutes ⇐47

A statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, common law, dictionaries, treatises, or even the words themselves, if they possess a common and generally ac-

cepted meaning. U.S.C.A. Const.Amend. 14.

9. Infants ⇐12

Words "reasonable cause to suspect" in statute requiring psychologists to report suspected child abuse provided psychologist fair notice of conduct expected and, therefore, were not vague, in light of fact that psychologist was told by his patient that her father was fondling her breasts. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 14.

10. Statutes ⇐142

Section of child protection law which abrogated all privileged communications except attorney and client communications did not unconstitutionally amend by implication statute creating psychologist-patient privilege. M.C.L.A. Const. Art. 4, § 25; M.C.L.A. §§ 330.1750, 722.631.

11. Infants ⇐12

Statute requiring psychologist to report suspected child abuse did not violate psychologist's asserted Fourth Amendment right to privacy from unreasonable seizure of oral evidence. M.C.L.A. §§ 772.623, 722.633(2); U.S.C.A. Const.Amend. 4.

12. Witnesses ⇐306

Psychologist convicted of violating statute requiring reporting of suspected child abuse had no standing to assert a Fifth Amendment privilege. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const. Amend. 5.

13. Criminal Law ⇐393(1)

Any information a patient chose to divulge to psychologist convicted of violating statute requiring him to report suspected child abuse was not protected by the Fifth Amendment, since psychologist was not agent of government. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 5.

Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., L. Brooks Patterson, Pros. Atty., Robert C. Williams, Chief, Appellate Div., and Paul J. Fischer, Asst. Pros. Atty., for the People.

Mueckenheim & Mueckenheim, P.C., by Robert C. Mueckenheim, Detroit, for defendant-appellee.

James Gregard by Jerold Schrotenboer, Jackson, for amicus curiae Pros. Attys. Ass'n of Michigan.

Tom Downs, Lansing, for amicus curiae Michigan Society for Psychoanalytic Psychology.

Colleen V. Ronayne, Pontiac, amicus curiae Guardian ad Litem.

Before WAHLS, P.J., and HOOD, and KAUFMAN,* JJ.

KAUFMAN, Judge.

We granted the people leave to appeal from the circuit court's order declaring M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2) unconstitutional and dismissing the complaint and warrant charging that defendant failed to report an instance of suspected child abuse, a misdemeanor.

Originally charged in the 52nd District Court with failing to report as required by § 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), defendant moved to quash the complaint and warrant on the grounds that the statute was unconstitutionally vague, overbroad, and that it violated Const.1963, art. 4, § 25. After the district court denied defendant's motion, the Oakland Circuit Court granted defendant leave to appeal and reversed. In turn, this Court granted the people leave to appeal on February 11, 1988, and we reverse the order of the circuit court.

The victim's mother initiated family therapy with defendant after suspecting that her husband had sexually molested their 9-year-old daughter. Defendant, a psychologist and family therapist, rendered therapy and treatment to the victim, the victim's mother and the victim's father.

During individual therapy sessions in early 1986, the victim told defendant about

* NATHAN J. KAUFMAN, former Court of Appeals judge, sitting on the Court of Appeals by assignment.

recurring incidents in which her father fondled her breasts. When defendant questioned the victim's father about these allegations at a therapy session, defendant claims that the victim's father made it clear to defendant that if he had touched the victim, such touchings were completely accidental and not done for the purpose of sexual arousal or gratification.

The victim herself later reported her father's conduct to a school counselor, who reported the incident to Protective Services. A petition based on the victim's allegations of sexual abuse was filed in the probate court. Contending that defendant had reasonable cause to suspect that the victim had been molested but had failed to report the suspected child abuse as required by M.C.L. § 722.623; M.S.A. § 25.248(3) of the Child Protection Law, the county prosecuting attorney's office brought the disputed misdemeanor charge of failure to report, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), against defendant.

Section 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), requires that

> "(1) A physician, coroner, dentist, medical examiner, nurse, a person licensed to provide emergency medical care, audiologist, psychologist, family therapist, certified social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or duly regulated child care provider who has reasonable cause to suspect child abuse or neglect immediately, by telephone or otherwise, shall make ... [a] report ... of the suspected child abuse or neglect to the department....
>
> "(2) The ... report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age. The report shall contain other information available to the reporting person which might establish the cause of the abuse or neglect and the manner in which the abuse or neglect occurred.
>
> • • • • • •
>
> "(4) The ... report required in this section shall be mailed or otherwise transmitted to the county department of social services of the county in which the child suspected of being abused or neglected is found.
>
> "(5) Upon receipt of a ... report of suspected child abuse or neglect, the department may provide copies to the prosecuting attorney and the probate court of the counties where the child suspected of being abused or neglected resides and is found.
>
> "(6) If the report indicates a violation of section ... 750.145c of the Michigan Compiled Laws, and the department believes that the report has basis in fact, the department shall transmit a copy of the ... report to the prosecuting attorney of the counties in which the child resides and is found."

Section 3 of the Child Protection Law was amended by 1984 P.A. 418, § 1 to require psychologists and family therapists to report. Prior to March 29, 1985, the effective date of this amendment, practitioners such as defendant were under no statutorily imposed duty to report.

Section 13 of the Child Protection Law, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), provides:

> "A person required to report an instance of suspected child abuse or neglect who knowingly fails to do so is guilty of a misdemeanor."

Defendant first claims, as he did below, that the Child Protection Law, M.C.L. § 722.621 *et seq.*; M.S.A. § 25.248(1) *et seq.*, is unconstitutionally overbroad because it violates defendant's First Amendment rights to associate in legal endeavors and invades the privacy of the family and those in association to cure private family problems. Defendant argues that there is no compelling state interest in "suspicious" behavior, whether or not the suspicion is reasonable.

[1] Legislative enactments are cloaked with a presumption of constitutionality. Where a statutory provision would otherwise be unconstitutional, it is the Court's duty to give the statute a narrow construction so as to render it constitutional if such a construction is possible without doing violence to the Legislature's interest in enacting the statute. *People v. O'Donnell*, 127 Mich.App. 749, 757, 339 N.W.2d 540 (1983).

[2] The doctrine of overbreadth is primarily applied to First Amendment cases where an overbroad statute prohibits constitutionally protected conduct. *People v. McCumby*, 130 Mich.App. 710, 714, 344 N.W.2d 338 (1983), lv. den. 419 Mich. 911 (1984). A successful overbreadth challenge allows a person charged with violating a statute to escape punishment based on the First Amendment right of others impinged upon by the statute although under a narrower, properly drawn statute, his own behavior could be punished because it is not so protected.

[3] However, not every First Amendment right supports an overbreadth challenge. *Woll v. Attorney General*, 409 Mich. 500, 534–535, 297 N.W.2d 578 (1980). The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep where conduct and not merely speech is involved. *Broadrick v. Oklahoma*, 413 U.S. 601, 614–615, 93 S.Ct. 2908, 2917–2918, 37 L.Ed.2d 830 (1973).

[4] While § 3 does not prevent a psychologist or family therapist from treating those of his patients who have engaged in child abuse, there is little doubt that it places such a patient at greater risk that her or his misconduct will be discovered and prosecution will follow. In the context of a family, § 3 invades its privacy to the extent that the family members' collective desire to seek treatment for the offender and risk the continued abuse of the victim rather than initiating criminal proceedings may not be honored. However, we do not believe that this invasion constitutes a constitutionally impermissible violation of a family's First Amendment right of privacy. A family does not have a protected First Amendment right to undertake a course of action which may do little or nothing to protect the child victim from continued abuse.

The United States Supreme Court has long recognized that a state has an interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might prevent their growth into free and independent well-developed citizens. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). Even assuming that the reporting requirement does invade the protected rights of defendant and his patients, the state has the constitutional power to regulate for the well-being of its children. 390 U.S. at 637–639, 88 S.Ct. at 1279–1280.

We distinguish the cases cited by defendant in support of his overbreadth argument from the issue presented here. Rather, we find this case to be analogous to *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), where physicians and patients challenged the constitutionality of New York statutes requiring that the state be provided with the names and addresses of all persons obtaining certain prescription drugs. The United States Supreme Court found that the statutes did not deprive individuals of their right to seek medical advice from their physician and obtain needed medication. Accordingly, the Court held that the patient-identification requirements did not invade any of the plaintiffs' constitutional rights or liberties.

[5] Further, a person generally lacks standing to challenge overbreadth where his own conduct is clearly within the contemplation of the statute. This is so even where there is some marginal application which might infringe on First Amendment activities. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). In this case, the victim told defendant, and the victim's father did not deny, that the abuse occurred. Therefore, defendant had more than a "reasonable suspicion" of its occurrence. The Legislature intentionally used "reasonable cause to suspect" as the

threshhold for requiring a report in the belief that public policy is better served by investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred. Such an interpretation is consistent with the remedial history of the statute, which the Legislature amended to include psychologists and family therapists following the Attorney General's suggestion that these professionals were not covered by the terms of the original statute. See OAG 1979-1980, No 5815, p 1075.

[6,7] Defendant next claims that the Child Protection Law is void for vagueness because it offers no reasonably precise standard to those charged with adhering to or enforcing the law. Defendant contends that the phrase "reasonable cause to suspect" is not clearly defined and does not give him fair notice of what conduct the statute prescribes. A vagueness challenge must be examined in light of the facts at hand. *People v. Harbour*, 76 Mich.App. 552, 558, 257 N.W.2d 165 (1977), lv. den. 402 Mich. 832 (1977). A defendant has standing to raise a vagueness challenge to a statute only if the statute is vague as applied to his conduct. *People v. Mitchell*, 131 Mich.App. 69, 74, 345 N.W.2d 611 (1983). Even though a statute may be susceptible to impermissible interpretations, reversal is not required where the statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and where defendant's conduct falls within that prescribed by the properly construed statute. *Harbour, supra.*

[8] A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *People v. Gilliam*, 108 Mich.App. 695, 699, 310 N.W. 2d 843 (1981); *People v. Herron*, 68 Mich. App. 381, 382, 242 N.W.2d 584 (1976). However, a statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning. *McCumby*, 130 Mich.App. at 714, 344 N.W.2d 338.

[9] We find that the words "reasonable cause to suspect" speak for themselves and provide fair notice of the conduct expected in reporting suspected child abuse. Based upon the fact that defendant was told by his patient, the victim, that her father was fondling her breasts, the § 3 reporting provisions are not vague.

In this case, the circuit court suggested that defendant, in the course of exercising professional judgment, might have concluded that the information supplied to him indicating that the victim was being abused was inaccurate or some kind of fantasy. That hardly makes the statute vague or overbroad. Defendant had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded. With respect to defendant's legal obligations under § 3, it was not for him to make this determination, but for the responsible investigative agencies, such as the Department of Social Services, to make. While defendant is free to decide that the victim's allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself the right to foreclose the possibility of a legal investigation by the state. The state has different interests, and its sovereignty is offended by child abuse.

[10] Defendant next contends that § 11 of the Child Protection Law, M.C.L. § 722.631; M.S.A. § 25.248(11), which abrogates all legally recognized privileged communication except that between attorney and client for purposes of reports required to be made, or the admission of evidence in a civil child protection proceeding resulting from such a report, also amends by implication the psychologist-patient privilege, M.C. L. § 330.1750; M.S.A. § 14.800(750), in violation of our Michigan Constitution, Const. 1963, art. 4, § 25. This claim is without merit. Amendment by implication is not constitutionally prohibited in every instance, e.g., where, as here, an act is complete within itself. *People v. Stimer*, 248 Mich. 272, 292-293, 226 N.W. 899 (1929);

Wayne County Prosecutor v. Recorder's Court Judge, 92 Mich.App. 433, 444, 285 N.W.2d 318 (1979), lv. den. 408 Mich 905 (1980).

Defendant's last claim is that the Child Protection Law is unconstitutional because it violates his Fourth Amendment and Fifth Amendment rights, as well as those of his patients.

[11] The first prong of this argument is that defendant and his clients have a Fourth Amendment right to privacy from unreasonable seizure of oral evidence, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). However, this case is readily distinguishable from *Katz*; here, no governmental eavesdropping or intrusion or electronic surveillance was involved.

[12, 13] With regard to the second prong of the argument, we find the defendant has no standing to assert a Fifth Amendment privilege. *United States v. Goldfarb*, 328 F.2d 280, 281-282 (CA 6, 1964), cert. den. 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964); *Paramount Pictures Corp. v. Miskinis*, 418 Mich. 708, 715, 344 N.W.2d 788 (1984); *In re Moser*, 138 Mich. 302, 305, 101 N.W. 588 (1904). Moreover, defendant is not an agent of the government, therefore any information a patient chooses to divulge to him is not protected by the Fifth Amendment.

We are concerned with the difficulty pointed out by the circuit court of child abusers in need of psychological counseling who are dissuaded by the § 3 reporting provisions from obtaining unfettered access to psychiatric services due to the risk of prosecution for any abuse they have perpetrated. However, as noted by the United States Supreme Court in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the difficulty in analyzing this problem under the Fifth Amendment is that this approach fails to recognize the essential link between coercive activity of the state on the one hand and a resulting confession by a defendant on the other hand. In this regard, the *Connelly* Court held that the flaw in this constitutional argument is that it would expand the previous line of voluntariness cases into a far ranging requirement that courts must devine a defendant's motivation for speaking or acting as he did even though there is no claim that governmental conduct coerced his decision. 479 U.S. at 165, 107 S.Ct. at 521.

We congratulate the parties and amicus curiae on their excellent briefs.

REVERSED and REMANDED.

172 Mich.App. 718

Brian MONTGOMERY and Jill Montgomery Plaintiffs-Appellants,

v.

DEPARTMENT OF NATURAL RESOURCES, Defendant-Appellee,

and

Department of Transportation, Defendant.

Docket No. 102480.

Court of Appeals of Michigan.

Submitted May 4, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

Snowmobile operator who was injured when snowmobile collided with motor vehicle at intersection of snowmobile trail and public roadway brought suit against state Natural Resources Department which provided funds to maintain snowmobile trail. The Court of Claims, John D. Payant, J., granted Department's motion for summary disposition based on defenses of governmental immunity and recreational use act. Driver appealed. The Court of Appeals, Weaver, J., held that: (1) Department was not grossly negligent and did not engage in willful and wanton misconduct, so as to remove it from protection of Recreational Use Act providing that landowner is not

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/13/90 ASD/HESS/Law Teleconference)

Page 7, lines 3 - 12:

Delete all material.

Insert a new bill section to read:

"* Sec. 12. AS 47.17.050 is amended to read:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview under AS 47.17.027, or [WHO] participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, except that a person who knowingly makes an untimely report is not immune from civil or criminal liability based on the delay in making the report."

Page 9, lines 8 - 12:

Delete all material.

Insert a new subsection to read:

"(13) "maltreatment" means an act or omission that causes, or could cause, a child to be a child in need of aid under AS 47.10.010(a)(2) if the act were committed by a person responsible for the child's welfare;"

Page 9, lines 22 - 25:

Delete all material.

PROPOSED AMENDMENTS TO CSSB 450 (Judiciary) am
(Consensus Reached During 4/10/90 HESS Committee Work Session)

Page 1, line 21, after "reports":

Insert "before making a report required under this chapter to the department"

Page 3, line 23:

Delete "a new section"

Insert "new subsections"

Page 3, line 26, after "school":

Insert "or school district"

Page 3, line 28, after "school":

Insert "or school district"

Page 4, line 1, after "student":

Insert "or on the premises of a school within the district in which the child is enrolled as a student"

Page 4, Lines 1 - 2:

Delete "at the conclusion of its investigation"

Page 4, line 3, after "enrolled":

Insert "immediately after the agency determines that a child has been abused or neglected under the circumstances set out in this section"

Page 4, line 5, after "." through line 11:

Delete all material.

Insert "If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall send a copy of the notification required under this subsection to the Professional Teaching Practices Commission."

Page 4, after line 11:

Insert a new subsection to read:

"(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section."

Page 4, line 24, after "district":

Insert "at least once every five years"

Page 5, line 9, after "(6)":

Insert "a brief description of"

Page 6, line 16, after "custodian":

Insert "if the department or law enforcement agency provides written certification to the school officials that (1) there is reasonable cause to suspect that the child has been abused or neglected by a person responsible for the child's welfare, or as a result of conditions created by a person responsible for the child's welfare; (2) the interview at school is a necessary part of the investigation to determine whether the child has been abused or neglected; and (3) the interview at school is in the best interests of the child"

Page 6, line 17, after "official":

Delete "may"

Insert "shall"

Page 6, line 20, after ".":

Insert "Immediately after conducting an interview authorized under this section, the department or agency shall make every reasonable effort to notify the child's parent, guardian, or custodian that the interview took place."

Page 7, line 16, after "liability":

Insert "for the child abuse or neglect"

Page 8, lines 8 - 9:

Delete "knowing of the circumstances giving"

Insert "and who knows or should have known that the circumstances give"

Page 8, lines 11 - 16:

Delete all material.

Renumber following sections accordingly.

Page 9, line 7, after "and":

Delete "within"

Insert "no later than"

Page 9, lines 13 - 16:

Delete all material.

Renumber following subsections accordingly.

Page 9, line 19, after "to":

Delete "suspect"

Insert "believe"

TAPE 2
SIDE 1

505

Section 17 take out "mental injury"
language, it is in SB175

Sec 20.
define
specificity of what conduct, what things
must be reported

"no later than 24 hrs"
rather than "w

SIDE 2

Definition of neglect: is it
unconstitutionally vague?
maltreatment

all definitions in Sec 20

"mental injury" section of Sec 2 deleted

victims' groups oppose use of
language re new terms in (15) Sec 20

(15) "reasonable cause to suspect":
line 19: "reasonable person to believe that something might be the case"
~~same "reasonable" from line 19 not agreed~~

ANCHORAGE SCHOOL DISTRICT'S ANALYSIS
AND COMMENTS ON SENATE BILL 450
AND PROPOSED CHANGES TO AS 47.17.010 ET SEQ.

The recently issued report from the grand jury which has been investigating the issues arising out of the Carlson incident in Anchorage contains two basic conclusions, both of which have been previously and consistently asserted by the Anchorage School District: (1) it is essential that there be inter-agency cooperation between school districts, law enforcement authorities, and social services agencies if the common goal of protecting children from abuse and neglect is to be realized, and (2) that the provisions of AS 47.17.010 et seq. are vague and confusing as presently written.

Unfortunately, Senate Bill 450 frustrates, instead of promotes, inter-agency cooperation. Instead of providing mechanisms which would encourage greater cooperation, the Bill resorts to imposing additional legal duties, pretty much unilaterally upon school districts. Instead of improving the clarity of existing legislation by providing clear definitions, the Bill uses more vague language and adds terms even more confusing than those already contained in the statute. The only clearly discernable intent of the proposals contained in Senate Bill 450 is the desire to increase and make easier the prosecution of persons who make judgment calls concerning when to report suspected abuse and neglect through second-guessing by police and prosecutors. The amendments do nothing to increase protection of children, nothing to facilitate cooperation between agencies, and nothing to assist

the persons required to report to better understand their obligations.

In the remainder of this Memorandum, the Anchorage School District presents its analysis of Senate Bill 450, and proposes, instead, provisions which would facilitate inter-agency cooperation and remove, rather than increase, uncertainty and confusion in the meaning of statutory terms.

SECTION 1 (AMENDMENT TO AS 47.17.010)

The purported expression of intent added to AS 47.17.010 which concerns the distinction between reporting and investigating child abuse and neglect requires further comment.[1] As drafted, the Senate Bill ignores the fact that school districts, as well as social services and law enforcement authorities, have lawful and legitimate needs to investigate suspected child abuse or neglect. In the case of school districts, it is imperative that as an employer, the District to be able to identify, substantiate, and provide a basis for action against any employees who may have committed reportable acts against students. Indeed, the school district's interest is even broader. As in the Carlson case, the District needs to be able to develop information which may appropriately be used to terminate employment status even though it may not constitute a criminal act or be otherwise reportable under Title 47. Teacher tenure statutes and procedures require that the school district, as employer, develop its own independent factual

[1] The inclusion in the purpose section of references to "mental injury" and to "maltreatment," will be addressed in the remarks pertaining to Section 20, below.

basis for taking personnel action. AS 14.20.180. These statutes place a heavy burden on school districts to prove misconduct in terminating a tenured teacher. The District also has an obligation to protect students.

The school district cannot legally rely upon investigations done by other agencies and have any hope of prevailing in contested employment proceedings. Accordingly, the implication in the Senate Bill that social services and law enforcement authorities are the only agencies which should be investigating child abuse or neglect does not accommodate a school district's important interest in removing an abuser from contact with students and terminating the employment relationship. Instead, school districts have vital interest in developing information which will enable them to take effective employment action to protect students. Hopefully, in cases involving criminal wrongdoing, such investigations can be done jointly with appropriate law enforcement agencies.

The suggestion that school districts are incapable of conducting appropriate and effective investigations in this area for purposes of successfully undertaking employment action is contradicted by Section 7 of the Bill which requires school districts to conduct training programs of their employees concerning the laws relating to abuse and neglect, techniques for recognizing and detecting abuse and neglect and other related subjects. Additionally, the school district has counselors, nurses, and administrators who have experience in and responsibility for investigating a range of matters that require

fair and effective interview techniques. In addition to employment matters, school district personnel must investigate student misconduct that might result in serious discipline or suspension.

It is clear that there is a distinction between the right and necessity of investigating on the one hand and the obligation to report on the other. This is the valid point which should be made clear in an Amendment to AS 47.17.010. Accordingly, that section should be amended to read as follows:

> [In lieu of the language in Senate Bill No. 450 beginning, "it is not the intent . . .", AS 47.17.010 should be amended to read as follows:
>
> The Legislature recognizes that social service agencies, law enforcement authorities, and school districts, all share the common goal of protecting children and all have different primary purposes whose achievement is designed to promote that common goal. The Legislature further recognizes that in achieving their primary purposes, social service agencies, law enforcement authorities, and school districts must be able to obtain accurate and reliable information concerning child abuse and neglect, and that such information frequently must be obtained from the same source or sources. It is the intent of the Legislature that all social service agencies, law enforcement authorities, and school districts should recognize the legitimacy of each others' functions, accept the commitment of each other to the common goal of protecting children, and do everything possible to facilitate a professional and cooperative working relationship among themselves. It is the intent of the Legislature that persons required to report under this Title shall make such reports after the earliest time at which they develop the basis and belief required by law that abuse or neglect has occurred. Thereafter, whatever investigations are necessary should be undertaken in a cooperative spirit and in the best interest of the children concerned.

SECTION 2 (AMENDMENT TO AS 47.17.020(a))

The "Cause to believe" standard contained in present AS 47.17.020(a) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" standard should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 3 (AMENDMENT TO AS 47.17.020(b))

The "Cause to believe" standard contained in present AS 47.17.020(b) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 4 (AMENDMENT AS 47.17.020(c))

No comment required.

SECTION 5 (REPEAL AND RE-ENACTMENT as 47.17.020(e))

No comment required.

SECTION 6 (AMENDMENT ADDING NEW SECTION (f) TO AS 47.17.020)

There are two major problems with this proposed subsection. First, if a law enforcement agency knows of school-related abuse or neglect of a child, no legislation should suggest that it is appropriate for the agency to wait until the conclusion of its investigation to notify the Chief Administrative Officer of the school or district in which the child is enrolled. Yet, that

is precisely the implication contained in the proposed subsection. This implication flies in the face of the grand jury's recognition of the need for inter-agency cooperation. It also threatens substantial harm to other students in cases where law enforcement agencies are conducting a confidential investigation of school-related abuse or neglect without notifying school authorities so they can take immediate personnel action to suspend, reassign, or remove the cause of the suspected abuse or neglect. Accordingly, the first sentence of proposed subsection (f) should be modified to read as follows:

> . . . "The Law Enforcement Agency shall [delete "At the conclusion of its investigation"] notify the Chief Administrative Officer of the school or district in which the child is enrolled at the earliest possible time after the agency determines that a child has been abused or neglected and the circumstances set forth above, and in no event later than 24 hours after having made such a determination."

The second problem with proposed subsection (f) is that it inefficiently places a burden upon the Chief Administrative Officer of the school or district in which the child is enrolled to forward the law enforcement agency's information to Professional Teaching Practices Commission. This is an unnecessary step since the law enforcement agency, or any other person or organization, can and should make a report to PTPC in the event it believes a person involved in the teaching profession has committed an act of child abuse or neglect. Administrators in school districts should, of course, file reports with PTPC when, in their professional judgment, they believe such reports are warranted. If a law enforcement agency, or some other person or agency, feels a report

is warranted, then they should make such a report. But it is unnecessary to obligate one individual to forward the report of another, particularly since the proposed legislation does not take account of circumstances in which the Chief Administrative Officer might have reason to doubt the accuracy or creditability of the "determination" made by some law enforcement officer. Simply put, whoever has a reason to believe their referral to PTPC would be appropriate should make such a referral.

SECTION 7 (AMENDMENTS TO AS 47.17.022)

The Anchorage School District concurs in the amendments to the statute which specifically set forth the obligation of school districts to provide appropriate training in this area. Indeed, the Anchorage School District has been providing such training for years at the direction of the Department of Education.

The only problem with the amendments arises from the addition of new subparagraph (6) which purports to obligate school districts to instruct their employees concerning "the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies after a report of suspected abuse or neglect." The manner of investigation by other agencies is, of course, something known to them and not within the immediate knowledge of school districts. Subsection (d) provides that a department or school district may seek technical assistance from the Department of Health & Social Services in the development of its training program, but does nothing to insure the Department of Health & Social Services will provide assistance when it is requested. Moreover, no such obligation is created with respect to

law enforcement agencies. School districts cannot very will be required to train employees concerning the manner in which DFYS and police investigate without being provided information as to how those agencies conduct their investigations. Accordingly, either AS 47.17.022(c)(6) should be deleted from the amended statute, or AS 47.17.022(d) should be amended to add the following sentences after the language contained in the Senate Bill:

> "If a department or school district makes such a request, the Department of Health & Social Services shall respond by providing the necessary or requested technical assistance within 45 days of the filing of the request. Additionally, the department and law enforcement agencies shall prepare and disseminate to the school district in the jurisdictions in which they operate written materials describing the manner in which cases of child abuse or neglect are investigated by them after reports of suspected abuse or neglect have been made. These materials shall be prepared and disseminated to the appropriate school districts within 60 days of the effective date of this legislation, and in the event any modification, amendment, or change occurs with respect to the manner of investigation conducted by the department or law enforcement agencies, they shall provide written notification of the change and of the new current procedures for investigations in such cases to the appropriate school districts within 30 days of the making of any such changes."

SECTION 8 (AMENDMENTS TO AS 47.17.023)

The reason to believe standard should be retained, and the proposed "reasonable cause to suspect" standards should be rejected for the reasons discussed fully in the remarks to Section 20 below. Moreover, use of the term "immediately" should be deleted for the reasons discussed in the remarks to Section 20 below.

SECTION 9 (AMENDMENTS TO AS 47.17.025(a))

No comment required.

SECTION 10 (AMENDMENT BY ADDING NEW SECTION TO AS 47.17.027)

This new section is another good example of the Bill's failure to promote cooperation in favor of the imposition of legal obligations. If the Legislature elects to proceed in that manner, then it should impose obligations in a fair fashion which take due regard of the interests of all of the agencies with a common stake in the information to be obtained concerning child abuse or neglect and to share in the common goal of protecting children. Instead, this proposed section of the Senate Bill disregards the legitimate interest and the role of school districts, providing social services and law enforcement investigators to use children in the school setting for pursuit of their own purposes without regard for the legitimate interest and functions of the schools. Accordingly, Section 47.17.027 should not be enacted. Instead, social services and law enforcement agencies should work out Memoranda of Understanding with school districts at the local level.

If the legislature is intent upon replacing cooperation with legal requirements, then the proposed Section 47.17.027 should be discarded in favor of the following provisions, derived from a Memorandum of Understanding between the Anchorage School District and the Division of Family and Youth Services of the Department of Health & Social Services:

> In cases where the department or a law enforcement agency determines that there is cause to believe that a child has been abused or neglected by a person responsible for the child's welfare, or as a result of conditions created by a person responsible for the

child's welfare, and based upon information and reports which did not originate with school district employees, then school officials shall permit an interview of the student without prior permission having been obtained from a parent/guardian, if the parent/guardian, is the person responsible for the child's welfare who is suspected of committing the abuse or neglect. Before such an interview is authorized, the department or law enforcement agency shall provide written certification to the school official of the following:

a. That the department or agency has cause to believe that the student is a victim of abuse or neglect by a person responsible for the child's welfare or as a result of conditions created by a person responsible for the child's welfare;

b. That the interview is necessary to determine the existence of the alleged abuse or neglect;

c. That the proposed interview is in the best interest of the child;

d. That the department or law enforcement agency will make a diligent effort to notify the parent/guardian that the interview occurred as soon as feasible after the conclusion of the interview, but in no event later than 10:00 p.m. on the day on which the interview occurs.

A representative of the school district shall be permitted to be present at any such interview unless the department or law enforcement agency provides case-specific reasons in writing specifically setting forth why the presence of a representative from the school would be detrimental to the interview. A student who is believed to possess information relative to child abuse or neglect, but who is not believed to be the object of such abuse or neglect may not be interviewed in school relative to such information without a court order or without prior notification to and approval from the student's parent/guardian.

SECTION 11 (AMENDMENT TO AS 47.17.040(b))

The amendment to subsection (b) should be expanded to include the provision of investigative reports and reports of harm to school districts as well as to "governmental agencies with child-protection functions." If the legislature opts to impose legal obligations and limits on the roles to be played by various agencies in the area of child abuse and neglect, then it must make provision for sharing of information between agencies. The grand jury's report specifically recommends that this subsection be amended to permit the sharing of information beyond governmental agencies with the child-protection functions. Accordingly, subsection (b) should be amended to include the following sentence prior to the sentence beginning . . . "a person, not acting . . .:

> ". . . investigation reports of harm filed under this chapter which involves (1) suspected abuse or neglect caused by a teacher or other employee of the school district, (2) which occurred during an activity sponsored by a school, or (3) which occurred on the premises of a school shall be provided to the Chief Administrative Officer of the school or school district at the earliest possible time after the information or reports are prepared."

SECTION 12 (AMENDMENTS TO AS 47.17.050)

The proposed amendment to the immunity provision of the statute renders the provision of the criminal penalty for failing to report unconstitutional. The United States Supreme Court has recognized for decades that legislation which requires an individual to make a report which is then used as the first step in prosecuting the individual for a law violation constitutes a clear violation of the privilege against self-incrimination.

Accordingly, such statutes are unconstitutional unless they provide immunity from prosecution which is co-extensive with the privilege. Under the Senate Bill, a teacher could make a good faith report on Friday, believing that she has cause to believe that child abuse or neglect has occurred. DFYS could then forward the report to a law enforcement agency, and if some police officer concluded that the teacher should have had enough information to report on Tuesday, then the report could be deemed "untimely." Assuming a prosecutor agreed with this assessment, the teacher could then be prosecuted for failing to report "immediately" or "promptly" as required by the statute. Of course the prosecution of the teacher would not have occurred but for the teacher's making a good faith report. Essentially, the teacher incriminates herself by making a report in good faith, only to be second-guessed by the police and prosecutors later who, in hindsight, concluded that she had sufficient information to make the report at an earlier point. According to the Senate Bill, this teacher lacks immunity from prosecution, can be hauled into court, prosecuted, convicted of a crime, sentenced to jail, and suffer the ignominy of a criminal record, all because she made a good faith report, the timing of which was second-guessed by others in hindsight. The Alaska and the United States Constitutions will not permit such a result.

The Anchorage School District believes that the purpose of the statute is to encourage people to make reports so that intervention can occur to protect children. This provision in the Senate Bill creates a priority in prosecution of reporters over the

creation of incentives to promote reports to protect children. AS 47.17.050 should be amended to read as follows:

> (a) a person who makes a report under this chapter, or who participates in judicial proceedings related to the submission of reports under this chapter, is immune from any civil or criminal liability which might otherwise be incurred or imposed, unless the person makes a report which the person knows to be false at the time the report is made, or unless the person intentionally delays making a report for the purpose of preventing the discovery of child abuse or neglect which the person believes to have occurred.

SECTION 13 (AMENDMENT BY ADDING NEW SUBSECTION TO AS 47.17.050)

No comment required.

SECTION 14 (AMENDMENT TO AS 47.17.064)

No comment required.

SECTION 16 (AMENDMENTS TO AS 47.17.068)

The proposed amendments to the criminal penalty section which applies to failure to report, can only be described as a punitive and misguided overreaction to the Carlson matter. Existing law, undoubtedly in recognition of the fact that the obligation to make a report on such a vague standard as cause to believe or, worse, reason to suspect, purports to impose a criminal penalty for failing to report only when an individual "knowingly" fails to make a required report. The section as amended purports to impose strict liability upon persons who fail to make reports, irrespective of their own good faith and absence of any criminal intent. The proposed amendments further evidence the peculiar agenda underlying many of the proposals contained in Senate Bill 450. Nothing in these modifications will improve the protection of children. However, they will make it infinitely easier for police

and prosecutors to target, investigate, and prosecute health practitioners, educators, and others required to report who, notwithstanding their good faith and best efforts, are determined through the hindsight of police and prosecutors to have miscalculated the moment at which cause to believe or reason to suspect arose. Unfortunately, the Anchorage School District must observe that in the face of a grand jury report calling for inter-agency cooperation, proponents of this section of Senate Bill 450 are apparently set on a course of hardening adversary relationships between law enforcement authorities and potential reporters. It is incomprehensible why the proponents of this section of the Senate Bill conclude that the radical step of imposing strict criminal liability could possibly be an appropriate response to an after-the-fact determination that somebody made a highly discretionary judgment call the wrong way or a little bit too late.

Imagine what the response of law enforcement agencies would be if such a punitive measure were focused on them. Let us suppose that the Legislature proposed a bill which would subject police officers and prosecutors to criminal prosecution if they authorized or made arrests or brought charges without adequate "probable cause." Assume that, like the proposed amendments to the criminal penalty in Title 47 no criminal intent was required. Accordingly, a police officer or prosecutor could successfully be charged and convicted of a crime for making or authorizing an arrest or filing a charge when a court later determined that there had not been probable cause to support the action. Police and prosecutors would flood the Legislature with appeals pointing out

that "probable cause" is a highly discretionary judgment, that it depends entirely upon the individual facts of a particular case, that courts are constantly disagreeing as to when probable cause exists or does not exist, and that it would be wholly unfair to subject dedicated law enforcement professionals to criminal prosecution because somebody, in hindsight, second guessed the accuracy of judgments which they made in good faith but which turned out to be erroneous. Exactly the same situation exists with respect to the proposed amendment to the penalty section of Title 47. The standard existing in the proposed Senate Bill is far lower, more discretionary, and more subject to disagreement than the well established concept of "probable cause" or the standard existing in the present law. If the Legislature would strike the criminal penalty section from Title 47 altogether, it would promote inter-agency cooperation, by having a direct effect on the normative messages concerning how people should perceive each other and their obligation. But if a criminal penalty is to remain in the statute for persons who fail to report under the vague and discretionary standards contained in this legislation, then it certainly should require at least a "knowing" failure to make a report, as exists in the present law.

Finally, adopting the amendment proposed in Senate Bill 450, and imposing strict criminal liability upon individuals who fail to make a report at the precise moment that a hopelessly discretionary standard is supposedly fulfilled will render the proposed penalty section unconstitutional. An attempt to enforce

such a section would plainly violate any accuseds' rights to due process under the Alaska and United States Constitution.

SECTION 17 (AMENDMENTS TO AS 47.17.070(2))

The inclusion of "mental injury" raises problems which are discussed in Section 20 below.

Additionally, there does not appear to be a rationale for expanding the scope of the reach of the statute beyond abuse or neglect occasioned by those who are responsible for the child's welfare, as provided for in present law.

SECTION 18 (AMENDMENTS TO as 47.17.070(3))

No comment is required.

SECTION 19 (AMENDMENT TO AS 47.17.070(9))

No comment is required.

SECTION 20 (AMENDMENTS BY ADDING NEW PARAGRAPHS TO AS 47.17.070)

The proposed definition (12) concerning the term "immediately" is self-contradictory, vague, and fails to resolve the main source of uncertainty in the reporting statute. Immediately cannot mean both "as soon as is reasonably possible" and "within 24 hours" as suggested by the definition. Circumstances can be imagined where the report as soon as is reasonably possible could not occur within 24 hours. Additionally, the ability to charge someone with a crime because they reported at 23 hours 30 minutes and were determined by someone else to have been able "reasonably" to have reported sooner indicates that Senate Bill 450 has done nothing to limit the discretion of law enforcement officials, put persons on notice as to their obligations, or otherwise resolve the problems that exist in the

present statue. Most significantly, the concept of an "immediate" or "prompt" report will always be contentless given the highly discretionary standards which trigger this timing mechanism. However precise the definition of what "immediate" or "prompt" mean, the vagueness, uncertainty, lack of guidance, and difficulty which arises from the reporting statute is that the timing mechanism is triggered by the occurrence of "cause to believe" in the present statute or "reasonable cause to suspect" in the Senate Bill. It is the combination of an immediate reporting requirement with such a vague, ad hoc, discretionary standard which makes it virtually impossible to meaningfully inform people as to the obligations which the law imposes upon them. While a sense of the intent can be discerned from the language and from the overall legislative scheme, a requirement "immediately" to report a suspicion or cause to believe can never be defined with sufficient precision to permit the imposition of a criminal penalty for the good faith failure of a person to do so.

New subsection (13) finally offers a definition of "maltreatment," a term which has not previously been specifically defined in Title 47, and which appears nowhere else in the Alaska statutes. Unfortunately, the purported definition contained in Senate Bill 450 is so amorphous that it is virtually without content or definite meaning. The range of "behavior that harms <u>or threatens</u> a child's health <u>or welfare</u>," is potentially so large and all encompassing as to frustrate the ability of reasonable people to understand what would be included and what would not be included. For example, would otherwise lawful and consensual