

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672

6347 SENATE • JUDICIARY

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Applied in *State v. R.H.*, Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Quoted in *Granato v. Oochipintu*, Sup. Ct. Op. No. 1952 (File No. 3756), 602 P.2d 442 (1979).

Collateral references. — 43 C.J.S., *Infants*, §§ 71, 72.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR3d 605.

Sexual abuse of child by parent as

ground for termination of parent's right to child, 58 ALR3d 1074.

Validity of state statute providing for termination of parental rights, 22 ALR4th 774.

Sec. 47.17.040. Central registry; confidentiality. (a) The department shall maintain a central registry of all investigation reports but not of the reports of harm.

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who makes public information contained in confidential reports is guilty of a misdemeanor. (§ 1 ch 100 SLA 1971; am § 2 ch 222 SLA 1976)

NOTES TO DECISIONS

Psychotherapist/patient privilege. — Child abuse reports are not open to the public, and are therefore not within A.R.E.R. 504(d)(5), which provides that there is no physician or psychotherapist/patient privilege "as to information that the physician or

psychotherapist is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection." *State v. R.H.*, Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.050. Immunity. A person who, in good faith, 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. (§ 1 ch 100 SLA 1971)

Sec. 47.17.060. Evidence not privileged. Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter. (§ 1 ch 100 SLA 1971)

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§ 47.17.064 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.17.070

NOTES TO DECISIONS

For discussion of constitutional problems in interpreting this section to abrogate psychotherapist privilege in criminal proceedings, see State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Applicability to psychologists. — The court assumed but did not decide that this section applies to psychologists who are not physicians. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

"Judicial proceeding". — This section only applies to child protective proceedings instituted under AS 47.10 and not to criminal proceeding for sexual abuse. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Giving the Department of Health and Social Services primary control of the abused child again indicates a legislative intent that the "judicial proceedings"

referred to in this section occur through the department in relation to protective services, and are civil rather than criminal. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Since AS 47.17.025 refers to the Department of Law, without reference to the criminal division, AS 47.17.025 does not, standing alone, necessarily resurrect the requirement of former AS 11.67.040 that the district attorney receive child abuse reports; nor does it establish an intent that child abuse reports result in criminal prosecutions; and consequently, the Court of Appeals could not find that a criminal prosecution for child sexual abuse is necessarily "a judicial proceeding related to a report made under this chapter" pursuant to this section. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.064. Photographs and x-rays. The department or a person required under AS 47.17.020(a)(1) to report that a child suffered substantial harm as a result of physical abuse or neglect may without the permission of the parents

- (1) take or have taken photographs of the areas of trauma visible on the child; and
- (2) if medically indicated, have a radiological examination of the child performed. (§ 7 ch 104 SLA 1982)

See Supplement

Sec. 47.17.068. Penalty for failure to report. A person required to file a report of abuse or neglect under AS 47.17.020 who wilfully or knowingly fails or refuses to report the harm required under AS 47.17.020 is guilty of a class B misdemeanor. (§ 7 ch 104 SLA 1982)

See Supplement

Cross references. — For penalties for misdemeanors, see AS 12.55.135.

Sec. 47.17.070. Definitions. In AS 47.17.010 — 47.17.070

- (1) "child abuse or neglect" means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;
- (2) "child" means a person under 18 years of age;
- (3) "department" means the Department of Health and Social Services;

See Supplement

(4) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(5) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(6) "practitioner of the healing arts" includes chiropractors, dentists, health aides, nurses, optometrists, osteopaths, physical therapists, physicians, psychiatrists, psychologists, religious healing practitioners, and surgeons;

(7) "sexual exploitation" means

(A) permission or encouragement to a child for prostitution prohibited by AS 11.66.100 — 11.66.150 by a person responsible for the child's welfare;

(B) permission, encouragement, or activity involved in the unlawful exploitation of a minor prohibited by AS 11.41.455 by a person responsible for the minor's welfare. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 3 ch 222 SLA 1976; am §§ 56, 57 ch 94 SLA 1980; am §§ 8, 9 ch 104 SLA 1982)

See Supplement

Effect of amendments. — The 1980 amendment substituted "18" for "eighteen" near the middle of paragraph (1), and substituted "18" for "16" in paragraph (2).

The 1982 amendment inserted "or neglect" and "sexual exploitation" in paragraph (1) and added paragraph (7).

NOTES TO DECISIONS

Where parents refuse permission for blood transfusion because of religious conviction, the state may intercede and make the child a dependent minor by the parents' failure to provide medical

attention under paragraph (5) of this section, obtaining custody and thereafter consenting to the operation. In re Lausterer, Superior Court, 3rd Jud. Dist., No. C2720 (1972).

Chapter 20. Exceptional Children.

Section
05. Purpose
10. Assistance authorized

Section
20. Standards for assistance
50. Definitions

Sec. 47.20.005. Purpose. It is the purpose of AS 47.20.005 — 47.20.050 to provide appropriate public education and training for the exceptional children in this state who have not reached the age of three. To the maximum extent possible, the department shall establish a learning program which emphasizes individual needs, is home based, and involves parents in the education and training of their children. (§ 1 ch 77 SLA 1978)

Sec. 47.20.010. Assistance authorized. (a) The department shall provide professional guidance and financial assistance to organized groups of parents, nonprofit corporations, school districts, and regional educational attendance areas according to regulations adopted by the

- (1) after being informed of the minor's right to privacy, the minor consents in writing to the disclosure of the records;
- (2) the records are relevant to an investigation or proceeding involving child abuse or neglect or a child in need of aid petition; or
- (3) disclosure of the records is necessary to protect the life or health of the minor. (§ 4 ch 144 SLA 1988)

Sec. 47.10.350. Immunity from liability. (a) The officers, directors, and employees of a licensed program for runaway minors are not liable for civil damages as a result of an act or omission in admitting a minor to the program.

(b) This section does not preclude liability for civil damages as a result of recklessness or intentional misconduct. (§ 4 ch 144 SLA 1988)

Sec. 47.10.360. Municipal powers. Authority to establish and operate a licensed program for runaway minors is granted to municipalities that do not otherwise have that authority. (§ 4 ch 144 SLA 1988)

Sec. 47.10.390. Definitions. In AS 47.10.300 — 47.10.390

- (1) "licensed program for runaway minors" means a residential or nonresidential program licensed by the department under AS 47.10.310;
- (2) "runaway minor" means a person under 18 years of age who
 - (A) is habitually absent from home;
 - (B) refuses to accept available care;
 - (C) has no parent, guardian, custodian, or relative able or willing to provide care; or
 - (D) has been physically abandoned by
 - (i) both parents;
 - (ii) the surviving parent; or
 - (iii) one parent if the other parent's rights and responsibilities have been terminated under AS 25.23.180(c) or AS 47.10.080 or voluntarily relinquished. (§ 4 ch 144 SLA 1988)

Chapter 17. Child Protection.

Section	Section
20. Persons required to report	68. Penalty for failure to report
22. Training	69. Protective injunctions
23. Reports regarding child pornography	70. Definitions
64. Photographs and x-rays	

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§ 47.17.010 WELFARE, SOCIAL SERVICES & INSTITUTIONS § 47.17.020

Sec. 47.17.010. Purpose.

NOTES TO DECISIONS

Cited in Gerlach v. State, Ct. App. Op.
No. 468 (File No. A-501), 699 P.2d 358
(1985).

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their occupational duties, have cause to believe that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

- (1) practitioners of the healing arts;
- (2) school teachers and school administrative staff members of public and private schools;
- (3) social workers;
- (4) peace officers, and officers of the Department of Corrections;
- (5) administrative officers of institutions;
- (6) child care providers;
- (7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900.

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has cause to believe is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

(d) This section does not require a religious healing practitioner to report as neglect of a child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(e) A person listed in (a) of this section, who in the performance of the person's occupational duties has cause to believe that a child has suffered harm as a result of abuse, shall promptly report the harm to the nearest law enforcement agency if the person making the report (1) has cause to believe that the harm was caused by a person who is not responsible for the child's welfare; or (2) is unable to determine (A)

who caused the harm to the child; or (B) whether the person who is believed to have caused the harm has responsibility for the child's welfare. If a person making a report under this subsection cannot reasonably contact the nearest law enforcement agency, and immediate action appears necessary for the well-being of the child, the person shall make the report to the nearest office of the department. The department shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest law enforcement agency. In this subsection, "abuse" means the physical injury, sexual abuse, sexual exploitation, or maltreatment of a child by any person under circumstances that indicate that the child's health or welfare is harmed or threatened. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984); am §§ 8 — 10 ch 39 SLA 1985; am § 2 ch 114 SLA 1986)

Effect of amendments. — The 1985 amendment rewrote subsections (a) and (b) and added subsection (d). The 1986 amendment added subsection (e).

Sec. 47.17.022. Training. (a) A person employed by the state who is required under this chapter to report abuse or neglect of children shall receive training on the recognition and reporting of child abuse and neglect.

(b) Each department of the state that employs persons required to report abuse or neglect of children shall provide

(1) initial training required by this section to each new employee during the employee's first six months of employment, and to any existing employee who has not received equivalent training; and

(2) appropriate in-service training required by this section as determined by the department.

(c) Each department that must comply with (b) of this section shall develop a training curriculum that acquaints its employees with

(1) laws relating to child abuse and neglect;

(2) techniques for recognition and detection of child abuse and neglect;

(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect; and

(4) procedures for required notification of suspected abuse or neglect.

(d) Each department that must comply with (b) of this section shall file a current copy of its training curriculum and materials, with the Council on Domestic Violence and Sexual Assault. A department may seek the technical assistance of the council or the Department of Health and Social Services in the development of its training program. (§ 1 ch 1 SLA 1986)

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§ 47.17.023 WELFARE, SOCIAL SERVICES & INSTITUTIONS § 47.17.064

Sec. 47.17.023. Reports regarding child pornography. A person who, in the course of processing or producing visual or printed matter, either privately or commercially, has reason to believe that the matter visually depicts a child engaged in conduct described in AS 11.41.455(a) shall promptly report this to the nearest law enforcement agency, and provide the law enforcement agency with all information known about the nature and origin of the matter. (§ 11 ch 39 SLA 1985)

Sec. 47.17.025. Duties of public authorities.

NOTES TO DECISIONS

Reliance on sexual abuse report for State, Ct. App. Op. No. 638 (File No. purposes of initiating prosecution is A-717), P.2d (1986). not prohibited by this section. Strehl v.

Sec. 47.17.030. Action on reports; termination of parental rights.

NOTES TO DECISIONS

Cited in Gerlach v. State, Ct. App. Op. No. 468 (File No. A-501), 699 P.2d 358 (1985).

Sec. 47.17.040. Central registry; confidentiality.

NOTES TO DECISIONS

Cited in Gerlach v. State, Ct. App. Op. No. 468 (File No. A-501), 699 P.2d 358 (1985).

Sec. 47.17.060. Evidence not privileged.

NOTES TO DECISIONS

"Judicial proceeding". — The phrase "judicial proceeding related to a report made under this chapter" in this section only refers to child protection proceedings under AS 47.10.010 State v. Wetherhorn, Ct. App. Op. No. 375 (File No. 7768), 683 P.2d 269 (1984).

Sec. 47.17.064. Photographs and x-rays. (a) The department or a practitioner of the healing arts may, without the permission of the parents, guardian, or custodian, take the following actions with regard to a child believed to have suffered physical harm as a result of child abuse or neglect:

(1) take or have taken photographs of the areas of trauma visible on the child; and

(2) if medically indicated, have a radiological examination of the child performed by a person who is licensed to administer a radiological examination:

(b) The department or a practitioner of the healing arts shall notify the parents, guardian, or custodian of a child as soon as possible after taking action under (a) of this section with regard to the child. (§ 7 ch 104 SLA 1982; am § 12 ch 39 SLA 1985)

Effect of amendments. — The 1985 amendment rewrote this section.

Sec. 47.17.068. Penalty for failure to report. A person who knowingly fails or refuses to report as required under AS 47.17.020 or 47.17.023 is guilty of a class B misdemeanor. (§ 7 ch 104 SLA 1982; am § 13 ch 39 SLA 1985)

Effect of amendments. — The 1985 amendment rewrote this section.

Sec. 47.17.069. Protective injunctions. (a) A court may enjoin or limit a person from contact with a child if the attorney general establishes by a preponderance of the evidence that the person

(1) has sexually abused a child;

(2) has physically abused a child; or

(3) has engaged in conduct that constitutes a clear and present danger to the mental, emotional, or physical welfare of a child.

(b) This section does not limit the authority of the attorney general or the court to act to protect a child. (§ 14 ch 39 SLA 1985)

Sec. 47.17.070. Definitions. In this chapter

(1) "child" means a person under 18 years of age;

(2) "child abuse or neglect" means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

(3) "child care provider" means an adult individual, or an employee of an organization, who provides care and supervision to a child for compensation;

(4) "department" means the Department of Health and Social Services;

(5) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(6) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(7) "organization" means a group or entity that provides care and supervision for compensation to a child not related to the caregiver,

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§ 47.17.070 WELFARE, SOCIAL SERVICES & INSTITUTIONS § 47.17.070

and includes a child care facility, pre-elementary school, head start center, child foster home, residential child care facility, recreation program, children's camp, and children's club;

(8) "person responsible for the child's welfare" means the child's parent, guardian, foster parent, a person responsible for the child's care at the time of the alleged child abuse or neglect, or a person responsible for the child's welfare in a public or private residential agency or institution;

(9) "practitioner of the healing arts" includes chiropractors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, religious healing practitioners, and surgeons;

(10) "sexual exploitation" includes

(A) allowing, permitting, or encouraging a child to engage in prostitution prohibited by AS 11.66.100 — 11.66.150, by a person responsible for the child's welfare;

(B) allowing, permitting, encouraging, or engaging in activity prohibited by AS 11.41.455(a), by a person responsible for the child's welfare. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 3 ch 222 SLA 1976; am §§ 56, 57 ch 94 SLA 1980; am §§ 8, 9 ch 104 SLA 1982; am §§ 15, 16 ch 39 SLA 1985; am § 8 ch 56 SLA 1986; am § 3 ch 114 SLA 1986; am § 14 ch 131 SLA 1986; am § 31 ch 2 FSSLA 1987)

Revisor's notes. — Reorganized in 1985 to alphabetize the defined terms.

Effect of amendments. — The 1985 amendment rewrote paragraph (9) and added paragraphs (3), (7), and (8).

The first 1986 amendment in paragraph (9) inserted "naturopaths."

The second 1986 amendment rewrote paragraph (10).

The third 1986 amendment inserted "audiologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55," near the end of paragraph (9).

The 1987 amendment, effective January 1, 1988, in paragraph (9) inserted "occupational therapists, occupational therapy assistants" and "physical therapy assistants."

Chapter 23. Child Support Enforcement Agency.

Section

- 20. Duties and responsibilities of the agency
- 22. Enforcement requests from other states
- 25. Rates of interest
- 45. Determination of support obligation
- 60. Order of support
- 62. Income withholding order for support

Section

- 75. Employment information
- 100. All persons may use agency
- 105. Audit of collections
- 125. Accounting and disposition of federal receipts and agency collections
- 135. Limitation on actions to establish child support obligation
- 140. Power of agency to administratively

ANCHORAGE SCHOOL DISTRICT
Health Services Department

REFERRAL TO: DIVISION OF FAMILY AND YOUTH SERVICES
550 W. 8th Avenue Suite 201 OR 11723 Old Glenn Hwy. #113
Anchorage, AK. 99501 Eagle River, AK. 99577
Telephone: 276-1450 Telephone: 694-9546

Telephone report made to: _____ on _____
(circle title: intake person, caseworker, supervisor) (date/time)

Name of student referred: _____

Birthdate: _____ Sex _____ Grade in school: _____

Parent names: _____

Home address: _____

Home telephone: _____ Work telephone: _____

Siblings if known: _____

Briefly state reason for the referral:

Circle service requested: home assessment, parent contact, meeting at school, immediate investigation

Referral made by: _____ (name and title) _____ (phone number)

Name of Reporter to remain confidential: Yes _____ No _____
(School)

To be completed by the principal or designee:

A written report was mailed to the Division of Family and Youth Services.

Oral ^{and written} report to Police _____
Yes _____ No _____ (Principal/designee signature) (Date/Time)

- Distribute copies to:
1. Original to Division of Family and Youth Services
 2. Copy to principal's child abuse neglect file
(do not place in student file; do not transfer the report)

A.S.D. Policy ManualStudents and Student Personnel Services

471.2 List of Names of Students

Senior high school principals may prepare a list of the names and addresses of potential graduates each year. This list may be released to organizations, agencies, institutions, or groups who, in the judgment of the Superintendent may offer opportunities or benefits to students. A student who does not wish to have his/her name and/or address on this list may prevent its inclusion as provided by Section 344.34 (h) of this policy manual.

471.3 Supervision of Students After Regular School Hours

No student or group of students shall remain in the school building after dismissal time except when under the supervision of an authorized person.

471.4 Student Interviews

- a. Any person who seeks to confer with a student in school or on the school grounds or to take a child from school, or who telephones or leaves directions as to where a student must meet another person, must provide positive identification to the principal before such a request can be granted. In every instance such requests should be referred to the principal or his/her assistant in charge. Principals are responsible for the enforcement of this regulation and for informing clerks, custodians, and teachers concerning the full implications of this rule. . . .
- b. Individual students may not be interviewed by any person, except an employee of the District, without the approval of the principal, the permission of the parent/ guardian, if possible, and in the presence of the principal or his/her representative.
- c. No principal shall grant such an interview unless he/she deems it essential to the welfare of the student or as may be required by police, official agency, or court officials. When interviews are conducted by police, official agency, or court officials the principal should be present.

- d. In cases where a properly identified agency of the Alaska Department of Health and Social Services or other law enforcement agency seeks to interview a student who is believed to be the victim of abandonment, neglect, abuse, or sexual abuse as defined in AS 47.10.142(a) or is believed to be a child in need of aid as defined in AS 47.10.010 (a) (2), the principal may permit the student to be interviewed without prior notification to the student's parent or guardian and without the principal being present. Such an interview may be granted pursuant to procedures established by the superintendent.

(Section 471.4 (d) - Approved by School Board on January 10, 1983)

- e. Parental custody is limited to officially listed parents or guardians. A child may not be interviewed by a legally estranged parent except in the presence of the principal and with the consent of the legal parent or guardian.

471.5 Student Messengers

Students may not perform errands or act as messengers between buildings during school hours without the approval of the principal and without the permission of the parents/guardians. This permit must be in writing and kept on file in the principal's office. Student messenger service is permitted only for a very specific need such as the transmission of emergency reports, etc., that would take too much time to go through the regular District mail.

(Section 471.6 Deleted by School Board on June 25, 1984 - See Section 451)

472 The School's Responsibility to Needy Children

472.1 Extent of the School's Responsibility

It is the policy of the Board that no child shall be deprived of any of the opportunities or benefits offered by the program of instruction of the public schools because of the financial difficulties of his/her family. Therefore, provisions shall be made for assistance to such students for materials for instruction, extracurricular activity fees, etc.

MEMORANDUM OF AGREEMENT

WHEREAS, the State of Alaska, Department of Health & Social Services, Division of Family and Youth Services has the duty to investigate suspected cases of child abandonment, neglect, abuse, and sexual abuse; and

WHEREAS, various employees of the Anchorage School District are required by statute (AS 47.17.020(a)(2)) and school board policy (School Board Policy Section 474.1) to report cases of suspected abuse or neglect; and

WHEREAS, the District has responsibility to protect students and their parents from unwarranted invasions of privacy or interference with the parent/child relationship; and

WHEREAS, child abuse and neglect (including sexual abuse) are recognized as significant societal problems which are very difficult to detect and investigate; and

WHEREAS, the School District and the Division desire to cooperate to the end of protecting children from abuse and neglect without interfering unnecessarily with the parent/child relationship;

NOW, THEREFORE, the parties agree as follows:

1. Reports Initiated by the School District. In cases where employees of the school district have cause to believe that a child has suffered harm as the result of abuse or neglect, a report shall be made immediately to the Department of Health & Social Services, Division of Family and Youth Services in Anchorage. The District will cooperate with the Division in the Division's investigation. The student who is

believed to have been abused or neglected may be interviewed at school without prior notification to or permission from the student's parent/guardian, where in the opinion of the Division, such an interview appears to be in the best interests of the child. A representative of the District (i.e. the principal or designee) shall be present at any interview unless the Division informs the District in writing of its belief that the presence of the District representative would be detrimental to the interview. Where the interview occurs without the prior knowledge of the student's parent/guardian, it shall be the responsibility of the Division to make a diligent effort to notify the parents of the interview regardless of the conclusions drawn from the interview as soon as feasible after the interview but not later than 10:00 p.m. on the day when the interview occurs.

2. Investigations Initiated by Non-District Sources. In cases where the Division has received a report indicating that a student may be the victim of abuse or neglect based upon information and reports not originating with School District employees, the District will permit an interview of the student without permission of the parent/guardian only upon written certification by the Department as to the following:

- a. That the Division has received a report indicating that the student may be the victim of abuse or neglect.
- b. That the interview is necessary to make a determination as to whether or not abuse or neglect has occurred.
- c. That the proposed interview is in the best interest of the child.

d. That the Division will make a diligent effort to notify the parent/guardian that the interview occurred as soon as feasible after the conclusions of the interview but not later than 10:00 p.m. on the day when the interview occurs.

A representative of the School District (i.e. the principal or designee) shall be permitted to be present at any such interview unless the Division informs the District in writing of its belief that the presence of the District representative would be detrimental to the interview.

3. In any case where a representative of the Department informs the District in writing that emergency custody of a student is being asserted pursuant to AS 47.10.142, the District shall immediately relinquish custody of the student to the representative of the Division. In all such cases, it shall be the responsibility of the Division to notify the parent/guardian as soon as practicable that the Division has assumed custody of the child.

4. 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.

5. Nothing in this agreement is intended to limit the Division's authority under AS 47.10.142 to take emergency custody of children who are the victims of abuse or neglect.

6. The State of Alaska agrees to defend and hold the School District, its officers, employees, agents, and insurers, harmless from any claim pertaining to an interview or assumption of custody which

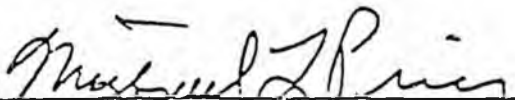
might be asserted by or on behalf of any student who is interviewed or taken into custody at school without the presence of a district representative under Section 1 hereof or who is interviewed or taken into custody at school without the presence of a district representative or without prior parental notification pursuant to Section 2 or 3 hereof.

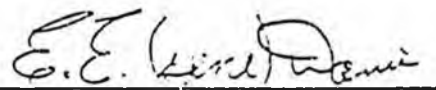
7. This agreement may be terminated at any time upon written notification by either party to the other party. The agreement may be amended in writing upon mutual agreement of the parties.

DATED at Anchorage, Alaska this 11 day of February, 1983.

STATE OF ALASKA
Department of Health &
Social Services

ANCHORAGE SCHOOL DISTRICT

By: 
Title: Assistant

By: 
E. E. (Gene) Davis
Superintendent of Schools

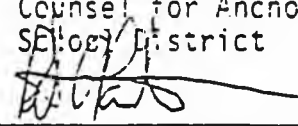
Approved as to form.

Approved as to form.

Department of Law

Hellen & Partnow, P.C.
Counsel for Anchorage
School District

By: 
Assistant Attorney General

By: 
Peter C. Partnow

ANCHORAGE SCHOOL DISTRICT

CHILD ABUSE TRAINING

Child Abuse Training was provided at _____
(Name of School)

on _____ by _____
(Date) (Nurse/Trainer)

for the following individuals:

FIRST NAME LAST NAME

Please return this form to Staff Development.

ATTACHMENT 6

(CHILD ABUSE & NEGLECT REPORTING FORM)

- SAMPLE -

§ 11.65.010

CRIMINAL LAW

§ 11.66.100

Chapter 65. Offenses Against Public Convenience.

Secs. 11.65.010 — 11.65.020. [Renumbered as AS 30.50.020 and 30.50.010.]

Sec. 11.65.030. Tampering with posted notices. [Repealed, § 21 ch 166 SLA 1978.]

Chapter 66. Offenses Against Public Health and Decency.**Article**

1. Prostitution and Related Offenses (§§ 11.66.100 — 11.66.150)
2. Gambling Offenses (§§ 11.66.200 — 11.66.280)

Article 1. Prostitution and Related Offenses.**Section**

100. Prostitution
110. Promoting prostitution in the first degree
120. Promoting prostitution in the second degree

Section

130. Promoting prostitution in the third degree
140. Corroboration of certain testimony not required
150. Definitions

NOTES TO DECISIONS

Municipal ordinances not prohibited. — The enactment of this article does not prohibit municipal ordinances penalizing the solicitation of prostitutes by putative customers. *Municipality of Anchorage v. Afualo*, 657 P.2d 407 (Alaska Ct. App. 1983).

There is nothing in this article which

would support an inference that the legislature sought to encourage men to patronize prostitutes nor is there any indication in this article that the legislature sought statewide uniformity in regulating commercial sexual relations. *Municipality of Anchorage v. Afualo*, 657 P.2d 407 (Alaska Ct. App. 1983).

Collateral references. — 53A Am. Jur. 2d, Prostitution, § 1 et seq.

27 C.J.S., Disorderly Houses, § 1 et seq.; 73 C.J.S., Prostitution, § 1 et seq.

Constitutionality and construction of pandering acts, 74 ALR 311.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

Sec. 11.66.100. Prostitution. (a) A person commits the crime of prostitution if the person engages in or agrees or offers to engage in sexual conduct in return for a fee.

(b) Prostitution is a class B misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law, whereas fornication and prostitution were not. *Eleazar v. United States*, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956). (Decided under former AS 11.40.220.)

This section is not irreconcilable with a municipal ordinance prohibiting the solicitation of prostitutes by putative customers. *Municipality of Anchorage v. Afualo*, 657 P.2d 407 (Alaska Ct. App. 1983).

Actual payment of a fee is not required; an act of prostitution is complete

when an offer is extended or an agreement made to engage in sexual conduct in return for a fee. *Garibay v. State*, 658 P.2d 1350 (Alaska Ct. App. 1983).

Proof. — Customer's testimony that he agreed to purchase sexual favors for sum of \$200, his testimony that he charged the purchase price using his VISA card, and the VISA charge slip itself, were all highly probative of whether an agreement or offer to engage in sexual conduct in return for a fee was in fact made. *Garibay v. State*, 658 P.2d 1350 (Alaska Ct. App. 1983).

Collateral references. — Prostitution as vagrancy, 14 ALR 1501.

Entrapment to procure women for im-

moral purposes, 18 ALR 186; 66 ALR 478; 86 ALR 263.

Sec. 11.66.110. Promoting prostitution in the first degree.
(a) A person commits the crime of promoting prostitution in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

(b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person induced or caused to engage in prostitution was 16 years of age or older.

(c) Except as provided in (d) of this section, promoting prostitution in the first degree is a class B felony.

(d) A person convicted under (a)(2) of this section is guilty of a class A felony. (§ 8 ch 166 SLA 1978; am §§ 1, 2 ch 50 SLA 1983)

NOTES TO DECISIONS

Promoting prostitution and managing prostitution enterprise. — Punishment for inducing or causing a person under the age of 16 to engage in prostitution (AS 11.66.110(a)(2)) and for managing, supervising, controlling or owning a prostitution enterprise (AS 11.66.120(a)(1)) did not violate double jeopardy since the offenses proscribed by the two statutes involve different intents and different conducts and differing societal interests are

furthered. *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

Precluding mistake of age as defense. — Subsection (b) of this section, which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law. *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

Under the Revised Alaska Criminal Code, it is defendant's intentional pro-

curement of a person under the age of 16 years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

The act of procuring another for purposes of prostitution is malum in se, without regard to the age of the person procured, and thus, in a prosecution for procuring a person under the age of 16 years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

For case construing former statute prohibiting importing or exporting females for immoral purposes, see *State v. Adkerson*, 403 P.2d 673 (Alaska 1965).

For case construing former procurement statute, see *Johnson v. State*, 501 P.2d 762 (Alaska 1972).

Sentence for procurement upheld. — See *Price v. State*, 565 P.2d 858 (Alaska 1977).

For case construing former statute concerning necessary evidence for prostitution or seduction, see *Johnson v. State*, 501 P.2d 762 (Alaska 1972).

Collateral references. — Transporting female for purpose of prostitution, 74 ALR 330.

Woman conniving or consenting to own transportation, 84 ALR 376.

Sec. 11.66.120. Promoting prostitution in the second degree.
(a) A person commits the crime of promoting prostitution in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution; or

(2) procures or solicits a patron for a prostitute.

(b) Promoting prostitution in the second degree is a class C felony. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Promoting prostitution and managing prostitution enterprise. — Punishment for inducing or causing a person under the age of 16 to engage in prostitution (AS 11.66.110(a)(2)) and for managing, supervising, controlling or owning a prostitution enterprise (AS 11.66.120(a)(1)) did not violate double jeopardy since the offenses proscribed by the two statutes involve different intents and different conducts and differing societal interests are furthered. *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

For case construing former statute prohibiting soliciting or procuring for purpose of prostitution, see *Plas v. State*, 598 P.2d 966 (Alaska 1979).

Instruction. — Trial court did not err in refusing to give instruction requiring state to prove that prostitution enterprise involved in case was of an ongoing nature. *Garibay v. State*, 658 P.2d 1350 (Alaska Ct. App. 1983).

Collateral references. — Separate acts of taking earnings of or support from

prostitute as separate or continuing offenses of pimping, J ALR4th 1195.

Sec. 11.66.130. Promoting prostitution in the third degree.

(a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) Promoting prostitution in the third degree is a class A misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.260, 11.40.300, 11.40.330, 11.40.410, and 11.40.420.

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law. *Eleazar v. United States*, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956).

Lessor may be guilty as keeper. — If a man leases his house to a woman to be kept as a bawdyhouse for purposes of prostitution, and it is kept for such purposes, with his knowledge, he is guilty as keeper. *Rosencranz v. United States*, 155 F. 38 (9th Cir. 1907).

As well as agent of lessor. — The agent of an owner, who rents a house knowing that it is to be used as a house of prostitution, and that it is so used, may be

found guilty as a keeper. *Rosencranz v. United States*, 155 F. 38 (9th Cir. 1907).

For case construing former statute prohibiting employment in a house of prostitution or living on the earnings of a prostitute. see *Johnson v. State*, 501 P.2d 762 (Alaska 1972).

For case construing former statute prohibiting importing or exporting females for immoral purposes. see *State v. Adkerson*, 403 P.2d 673 (Alaska 1965).

For case construing former statute prohibiting pimping. see *Johnson v. United States*, 260 F. 783 (9th Cir. 1919).

For case construing former statute prohibiting a male's living with or on the earnings of a prostitute. see *Dunn v. State*, 426 P.2d 993 (Alaska 1967).

Quoted in *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

Collateral references. — 27 C.J.S., *Disorderly Houses*, §§ 1 to 18; 73 C.J.S., *Prostitution*, §§ 6, 7.

Constitutionality of statute conferring on chancery courts power to abate bawdyhouses as nuisances. 5 ALR 1474; 22 ALR 542; 75 ALR 1298.

Number of females who reside in house or resort thereto for immoral purposes as

affecting disorderly character thereof. 12 ALR 529.

Entrapment to commit offense as to house of prostitution or as to pandering. 52 ALR2d 1194.

Construction of provision of pandering statute as to placing a female in charge or custody of another. 5 ALR2d 1178.

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under AS 11.66.110 — 11.66.130, it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

For case construing former rule as to corroboration of prostitute's testimony, see *Johnson v. State*, 501 P.2d 762 (Alaska 1972).

keeping a bawdyhouse, see *Botts v. United States*, 155 F. 50 (9th Cir. 1907); *Hall v. United States*, 155 F. 52 (9th Cir. 1907).

For cases construing former statute providing that common fame was competent evidence in a prosecution for

Cited in *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

Sec. 11.66.150. Definitions. In AS 11.66.100 — 11.66.150, unless the context requires otherwise,

(1) "place of prostitution" means any place where a person engages in sexual conduct in return for a fee;

(2) "prostitution enterprise" means an arrangement in which two or more persons are organized to render sexual conduct in return for a fee;

(3) "sexual conduct" means genital or anal intercourse, cunnilingus, fellatio, or masturbation of one person by another person. (§ 8 ch 166 SLA 1978)

Cross references. — For definition of terms used in this title, see AS 11.81.900.

NOTES TO DECISIONS

Quoted in *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

Article 2. Gambling Offenses.

Section
 200. Gambling
 210. Promoting gambling in the first degree
 220. Promoting gambling in the second degree
 230. Possession of gambling records in the first degree

Section
 240. Possession of gambling records in the second degree
 250. Affirmative defenses
 260. Possession of a gambling device
 270. Forfeiture
 280. Definitions

Collateral references. — 38 Am. Jur. 2d, Gambling, § 1 et seq.

27 C.J.S., Disorderly Houses, § 1 et seq.; 38 C.J.S., Gaming, § 1 et seq.

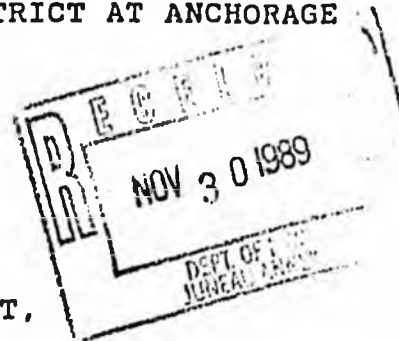
Racing as a game within statute, 45 ALR 998.

Constitutionality of statutes forbidding or regulating dissemination of betting

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ANCHORAGE SCHOOL DISTRICT and
in its Representative Capacity
for Students, Teachers, Parents,
Administrators, and its Other
Employees, DR. WILLIAM COATS,
DR. WILLIAM MELL, III, MRS.
ESTHER COX, RICHARD MIZE,
LELAND WILSON, and DR. TOM EVERITT,



Plaintiffs,

vs.

ANCHORAGE POLICE DEPARTMENT, a
Department of the Municipality of
Anchorage, CHIEF OF POLICE,
KEVIN O'LEARY, officially and
individually, CAPTAIN THOMAS WALKER,
officially and individually,
INVESTIGATOR PRESTON W. CHAPMAN,
officially and individually,
STEPHEN BRANCHFLOWER, ASSISTANT
DISTRICT ATTORNEY FOR THE
STATE OF ALASKA, officially and
individually, and DWAYNE McCONNELL,
DISTRICT ATTORNEY FOR THE STATE OF
ALASKA, officially and individually,

AND

DOES I-XXX, Anchorage Police Officers
who Executed the Searches in
Violation of Law, in their Official
and Individual Capacities.

Defendants.

/ Case No. 3AN-89-08687-Civil

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT AND/OR DECLARATORY JUDGMENT
REGARDING OBLIGATIONS AND DUTIES
UNDER THE CHILD PROTECTION ACT (AS 47.17)

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INTRODUCTION

This dispute arises as a result of an ongoing criminal "investigation" of school administrators who made a report under the Child Protection Act. This investigation demonstrates the uncertainty as to the meaning of certain provisions of Title 47, Chapter 17, the child abuse reporting statute. This motion seeks to have the operative statutory terms declared unconstitutional. As an alternative, this court may define the meaning of certain provisions in a manner which excludes plaintiffs' conduct from penal consequences.

Title 47, Chapter 17 concerns "child protection" and sets up a reporting system where danger of harm to children must be immediately or promptly reported to state authorities under AS 47.17.020. The statute allows authorities to intervene and protect the child from further harm. AS 47.17.050 confers immunity from criminal and civil liability if a good faith report is made to state authorities. Conversely, AS 47.17.068 imposes criminal liability in the form of a Class B misdemeanor for "knowingly failing or refusing" to report as required by AS 47.17.020.

At present, the administrators and employees of the Anchorage School District must guess as to the meaning of the statutes in the context of complex and unique factual situations which arise frequently. Under the circumstances, the Anchorage School District and the individual defendants have the right to request court declarations as to the validity and meaning of the statute.

This memorandum initially sets forth, in Section I, the basis for this court's jurisdiction to determine and to declare certain issues in a declaratory judgment action. Section II.A. then briefly summarizes the few relevant facts which are not in dispute and which pertain to this motion. The legislative history of the statute is summarized in Section II.B. Section III identifies numerous due process infirmities in the statute. This section discusses void for vagueness, unconstitutional means, and unexpected construction issues as they relate to the statutory terms "sexual abuse," "maltreatment" and "cause to believe." Finally Section IV. discusses the self-incrimination issues which plague the reporting requirement, and relates these issues to the immunity provisions of the statute. The immunity provisions should play a critical role in the statutory scheme. At present, however, the defendants would ignore or emasculate the immunity provision and compound the inherent uncertainties in the statute for thousands of Alaskans who are governed by its requirements. Accordingly, this court must provide a declaration under the Alaska Declaratory Judgment Act to assist the plaintiffs and thousands of others who are subject to this unusual and uncertain statutory scheme.

SUMMARY OF ARGUMENT

Plaintiffs know of only one reported case where a person who made a report of potential child abuse to state authorities under a child abuse reporting statute was criminally prosecuted for failing to report sooner. See Sheriff, Washoe County v. Sferrazza,

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766 P.2d 896, 897-98 (Nev. 1988). In that case the Supreme Court of Nevada held that the requirement of an "immediate" report was unconstitutionally vague and denied substantive due process.

On September 7, 1989, some of the individual plaintiffs, officials of the Anchorage School District, made a report of possible child abuse or neglect arising from a consensual sexual relationship between a teacher and a former seventeen year old student to the Department of Family and Youth Services, pursuant to AS 47.17.020. The Department advised law enforcement authorities of the report as mandated by the protection statutes. The plaintiffs fully expected that all the circumstances regarding the teacher's conduct would be investigated by law enforcement agencies for purposes of a criminal prosecution. Police and prosecutors then took the report made by school officials and initiated an investigation not only into possible sexual abuse by the teacher, but also in an effort to develop a basis to prosecute the educators/reporters for the criminal offense of failing to report immediately upon having cause to believe the child had been neglected or abused. AS 47.17.068. The privilege against self-incrimination, guaranteed by the Alaska Constitution, absolutely prohibits compelling an individual to make a self-incriminating statement. Legislation, such as that contained in the reporting statute, which purports to compel an individual to make statements or reports which in turn may provide the first, indispensable link in the chain of evidence against him, are facially unconstitutional unless they also provide statutory

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immunity which is co-extensive with the privilege against self-incrimination. The reporting statute fails to provide the constitutionally required immunity. It offers transactional immunity to persons who report, but limits the availability of that immunity to those who report in "good faith." Because the good faith standard is nowhere defined, and because its application may deny immunity to individuals who reasonably believe they are required to report suspicions of possible misconduct by others which they do not personally believe, the statutory immunity is not co-extensive with the privilege against self-incrimination. Accordingly, the section of the statute which purports to impose criminal liability for failing to report as required is invalid and must be severed from the remainder of AS 47.17 in order to avoid having to declare the entire Act unconstitutional. See Section IV., pp. 79-96, infra.

As a separate basis for constitutional infirmity, a construction of the statute which sustains the constitutionality of the good faith limitation and narrowly construes the category of reports which are made in good faith, constitutes an independent violation of due process clause. This alone requires severance of the criminal sanction provided in AS 47.17.068, or a declaration that the entire reporting act is unconstitutional. See Section IV., pp. 79-96, infra.

Self-incrimination problems aside, many provisions of AS 47.17 are unconstitutionally vague. The first area of vagueness problems attaches to the question of what must be reported under

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the Act. Child abuse and neglect is defined, inter alia, to include "sexual abuse." However, no further definition of sexual abuse is provided in Title 47. "Sexual abuse," without further definition, is so vague and broad that persons of reasonable intelligence cannot know what it means. Additionally, it constitutes a broad and vague definition which provides excessive discretion to police and prosecutors in determining how and when to enforce the law. For these reasons, the term "sexual abuse" is unconstitutionally vague unless some more specific meaning is attributed to it. Legislative history, principles of statutory construction, and admissions by the Attorney General all indicate that the "sexual abuse" referred to in Title 47 is meant to be one and the same as the offenses categorized under the sexual abuse of a minor provisions of Title 11. If such a construction is accepted, the vagueness problems are avoided. Accepting such a construction, it becomes apparent that plaintiffs had no obligation to report consensual sexual activity between a teacher and a student over the age of general consent and over the age of compulsory school attendance, because such consensual activity, while unprofessional and reprehensible, is not sexual abuse within the meaning of Title 11. Therefore, it is not sexual abuse which must be reported under Title 47. See Section III.B.1., pp. 31-56, infra. While the teachers career may be ended for such unprofessional conduct, by termination of his employment, as occurred here, the teacher has not engaged in criminal wrongdoing.

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Alternatively, consensual sexual activity between a teacher and a student over the age of consent and over the age of compulsory school attendance is not reportable as "maltreatment" under Title 47. The term "maltreatment" is not further defined in Title 47 or in any other section of the Alaska Statutes. However, the timing and sequence of its inclusion in Title 47 indicates that it was adopted as part of an ongoing effort to maintain substantial conformity between Title 47 and federal law and regulations so that the state could continue to receive federal funding for various programs. "Maltreatment" has a specific definition in the comparable federal statutes, consisting of a failure to provide adequate shelter, clothing, food, or medical treatment. The phrase "maltreatment" without further definition is unconstitutionally vague and denies due process. If given the definition attributed to it by the parallel federal provisions, however, the term is sufficiently specific to provide notice to individuals of what "maltreatment" constitutes abuse or neglect. Significantly for present purposes, that definition can in no way be construed to include otherwise lawful consensual sexual activity. See Section III.B.1, pp. 56-61, infra.

Accordingly, the terms contained in Title 47 which define the sort of child abuse or neglect which must be reported are unconstitutionally vague, or must be construed as having more specific meanings. In turn, those more specific meanings exclude the consensual sexual activity which occurred here from the ambit of the reporting requirement. Accordingly, the court should either

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declare that the statute is unconstitutionally vague or that the terms in question have the specific meanings suggested, and, further, that the plaintiffs had no duty under Title 47 to report consensual sexual conduct between a teacher and a student over the general age of consent and over the age of compulsory school attendance.

The statute also runs afoul of constitutional due process provisions in its efforts to define when reportable conduct must be provided to the authorities. The statutory language requiring "immediate" or "prompt" reports is unconstitutionally vague. In the absence of some time parameters or more specific definition, persons of reasonable intelligence cannot know how fast a report must be in order to be "prompt" or "immediate." The same lack of certainty provides law enforcement officials with too much discretion in investigating and prosecuting the timeliness of a report with the benefit of twenty-twenty hindsight. See Section III.B.2., pp. 61-63, infra.

Additionally, and independently, the "prompt" or "immediate" report must be triggered by the reporter concluding that he or she has "cause to believe" child abuse or neglect has occurred. It is debatable whether or not the plain meaning of "cause to believe" has sufficient content to withstand constitutional scrutiny. However, the Attorney General has taken the position that "cause to believe" is a term of art which departs from its dictionary meaning of having a good or adequate reason to take a fact as true or valid. Instead, the Attorney General

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construes the term to mean any inkling, intimation or bare suspicion based on "something, however nebulous." Plainly reasonable educators, administrators, and other persons required to report have received no fair notice of what quantity or quality of information and justification the statute requires them to have before the immediate or prompt report requirements are triggered. See Section III.B.2., pp. 63-71, infra.

Taking the vagueness of the terms "prompt" and "immediate" together with the contentlessness of an inkling-based-on something-however-dubious standard, it is apparent that the statute is unconstitutionally vague.

An entirely separate constitutional flaw is that the imposition upon reporters of a legal obligation to turn in their fellow citizens on the basis of inklings or based on something, however dubious, which they do not believe to be true, on pain of being prosecuted themselves if they fail to report, violates the reporter's rights to liberty, privacy, and due process under the Alaska Constitution. Given the lack of content in the statutory standard of justification, and the Attorney General's boundless expansion of the plain meaning of that contentless standard, the legislation purports to require thousands of Alaskan citizens to become compelled informers against their colleagues, neighbors, and fellow citizens of virtually any suspicion or suggestion of misconduct involving children. Basically the statute requires reporters to elect between their own liberty and the liberty and privacy of others. However commendable its ultimate goal, the

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statute employs constitutionally intolerable means which are wholly irreconcilable with the premises of a free society. See Section III.B.2., pp. 71-74, infra.

Finally, for many of the same reasons discussed above, the statute compels citizens to violate the privacy rights of fellow citizens. Because of the laxness and contentlessness of the standard which triggers the reporting obligation, thousands of citizens are required to report largely innocent actions by thousands of other citizens to law enforcement authorities or authorities who are required to report to law enforcement. Not only will this occasion massive violations of the privacy of those with respect to whom reports are made, but the reporters may find themselves held liable in civil or criminal courts for making reports which turn out to be false. If the "good faith" limitation on the immunity provision of the reporting act is sustained, reporters could be placed in the intolerable position of having to report claims and intimations which they do not believe, on pain of going to jail for failing to report, only to be sued by the aggrieved persons against whom false reports were lodged, and then to find that they have no statutory immunity because they did not believe the report they were required to make.

The constitutional infirmities of AS 47.17, when employed as a penal statute, are legion. Some of those infirmities can be addressed by narrowing constructions -- such as by providing appropriate definitions for "sexual abuse" and "maltreatment." Other provisions -- such as the purported good faith limitation on

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immunity -- will have to be stricken and severed if any of the statute is to be saved. But some of the most fundamental problems with the statute -- such as the compelled violation of privacy rights of reportees, the substantive due process violation inherent in requiring individuals to inform state investigators of accusations against their fellow citizens which they do not believe, and the contentlessness of the immediate report on cause to believe requirement -- require that, at a minimum, the criminal sanction be deleted from the statute altogether, and, perhaps, that the statute be declared invalid in its entirety.

I.

THE COURT HAS POWER TO PROVIDE DECLARATORY
JUDGMENT TO CONSTRUE THE STATUTE AS
UNCONSTITUTIONAL OR TO NARROW THE CONSTRUCTION
OF THE STATUTE (AS 47.17.010 et seq.).

This motion seeks a declaration of the rights and legal relations of the parties under the reporting requirements of the Child Protection Act (AS 47.17). This court can reach these core issues through declaratory judgment under Civil Rule 57 and AS 22.10.020(g). The Anchorage School District has standing to initiate such an action seeking declaration that the reporting statute is unconstitutional.^{1/} See, School District of East Grand

^{1/}In addition the standing of school boards and school board members to seek clarification of their rights and duties has frequently been recognized. See Snider v. Sharpp, 405 A.2d 602 (Penn. 1979); Board of Education of Central School District v. Allen, 20 L.ed.2d 1060 (1968); Regents of the University of Minnesota v. National Collegiate Athletic Association, 560 F.2d 52 (8th Cir. 1977) (allowed the Board of Regents to assert constitutional rights of student athletes while seeking clarification of the Board's duties).

Rapids, Kent County v. Kent County Tax Allocation Board, 330 N.W.2d 7, 12 (Mich. 1982); School District, City of Independence v. Jones, 653 S.W.2d 178, 184 (Missouri 1983) (standing where School District is challenging the construction of a statute); Seattle School District No. 1 of King County v. State, 585 P.2d 71, (Wa. 1978). "The [School District] and the members of the school board are charged with the responsibility of providing education to the children of [the District] and are tangibly injured if the statutes which guide their hands disenable them from so providing." Washakie County School District No. One v. Herschler, 606 P.2d 310 (Wyo. 1980).

Specifically, the declaratory judgment statute empowers the court "to declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is, or could be, sought".^{2/} AS 22.10.020 (emphasis added). The historical antecedents of the Alaska Declaratory Judgment Act

^{2/} AS 22.10.020, Jurisdiction of the Superior Court provides in pertinent part:

(g) In the case of an actual controversy in the states, the Superior Court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

are discussed in Jefferson v. Asplund, 458 P.2d 995 (Alaska 1969). There can be no dispute that there is a "case in controversy" under AS 22.10.020(g) in this matter. The issues presented here arise from an actual situation and concern a continuing threat of prosecution. The issues are justiciable, not hypothetical or abstract in character. Id. at 998-99. The circumstances show a substantial controversy between parties having adverse legal interests and having sufficient immediacy, uncertainty and reality to warrant issuance of a declaratory judgment. Id. The District must advise its 2,700 administrative, teaching, counseling, and nursing employees what is reportable, when the duty to report arises, and whether reporters are subject to civil and/or criminal consequences. Given defendants threatened prosecution of the individual plaintiffs even though they reported conduct which was not, in all likelihood, within the reporting requirement, the District is unable to give appropriate guidance or establish policies and procedures to comply with the present statute without judicial guidance.

The Colorado Supreme Court has commented on the necessity for declaratory relief where there is anxiety and uncertainty about a criminal statute:

A person affected by a criminal statute need not, however, necessarily take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. Relief in the nature of a declaratory judgment will be afforded in appropriate circumstances to those persons who claim uncertainty and insecurity with respect to their rights under a penal statute or law.

Rathke v. MacFarlane, 648 P.2d 648, 653 (Colo. 1982). Specifically with reference to this case, declaratory relief may be sought to determine the validity and construction of statutes and public acts. Jefferson v. Asplund, supra, 458 P.2d, at 999. There are two additional, principal criteria present here which favor declaratory judgment. First, the judgment would serve a useful purpose in clarifying and settling the legal relations between the School District and the Anchorage Police Department. Second, it would afford relief from uncertainty, insecurity and hostility between two branches of local government that must work together based on clearly defined rules. Id. at 998. ^{3/}

II.

THE KEY FACTS TO WHICH THE REPORTING
STATUTE IS BEING APPLIED
ARE NOT IN DISPUTE.

A. The Report.

There are only a few facts that need to be considered by the court for purposes of this motion, and these facts are not in dispute. These facts are drawn primarily from the affidavits

^{3/}This very controversy, and other similar incidents now pending, show that guidance and clarification from the Alaska courts is imperative if these controversies are to be resolved and future controversies avoided. Whether or not defendants enjoy some immunity with respect to the recovery of damages, it is well established that the official immunity defense cannot be asserted in an action for injunctive or declaratory relief. State v. Haley, 687 P.2d 305, 322 (Alaska 1984); Liffiton v. Keuker, 850 F.2d 73, 78 (2nd Cir. 1988); Dugan v. Rank, 372 U.S. 609, 621-22, 10 L.Ed. 15 (1963).

previously filed with the court. These affidavits are incorporated by reference.

S1 and S2 were students at Bartlett High School and T1 was a teacher at that same school during the spring of 1989.^{4/} T1 and S1 had consensual sexual relations during the period she was a student at the school. S1 was seventeen years of age at the time of the alleged consensual sexual acts. Bartlett school administrators were told by S2 that her friend might be having a relationship with T1 in May 1989. Both T1 and S1 repeatedly denied the rumor at that time. S1 denied ever going to T1's home after school or doing anything inappropriate with him during school or outside of school. S1's parents heard similar rumors in May and did not believe them either. Before the school year ended, T1 threatened to file a suit for slander. S1's parents invited T1 to their home for dinner to celebrate their daughter's graduation. Bartlett School officials concluded that they did not have the "cause to believe" which necessitated that a report be made in May, 1989.^{5/}

^{4/} S2 identifies the student from whom the rumor of the alleged sexual activity was received. S1 identifies the student allegedly involved.

^{5/} Discovering consensual sexual activity which the participants want to keep private and will be about to conceal the secret relationship is extremely difficult. Yet the defendants assert the building administrators should have seen through the denials of the relationship made by S1 and T1 even though the parents had not.

S1 graduated from Bartlett High School in May of 1989. In August 1989, the father of S1 contacted district officials about the matter, indicating that he then ^{met S1 told them about sex} suspected S1 and T1 had been involved. The district then followed up on the matter. In mid-August, the District succeeded in obtaining a statement from S1, acknowledging that she had sexual relations with T1 during the final semester of her senior year and that her prior denials were false. In August 1989, S1 was attending college in Utah and T1 was in Europe. There was therefore no threat of further sexual contact at that time.

After his return, T1, represented by counsel, agreed to resign on or about August 28, 1989, rather than be fired from his teaching position. A report under AS 47.17.020 concerning the conduct occurring between T1 and S1 was made by the district, in good faith and on the advice of counsel, to the Division of Youth and Family Services (hereinafter "DYFS") on September 7, 1989. The report was made with the full expectation that T1's conduct would be reviewed for possible criminal prosecution. See Affidavits of Mell, Hahn and Cox.

B. Legislative History of the Reporting Act.

The Alaska Child Protection Act (AS 47.17), which mandates reporting, first became law in 1971. See Appendix A. Appendix A includes the basic documents in the legislative history of the Act and summarizes this legislative history for the court. Since 1971, there have been numerous amendments. Many of the changes were made to comply with federal statutes and regulations

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concerning child abuse prevention and treatment. Compliance with federal statutes is necessary for the State of Alaska to remain eligible for federal funding for child abuse assistance and treatment programs. Many of the provisions in the reporting statute were adopted in response to a federal assistance program adopted by Congress in 1974. In order to be eligible for funding, state laws must be in compliance with federal statutes and regulations. 45 CFR 1340.1 et. seq. Since its inception, the purpose of the Child Protection Act has been to protect children from abuse. Of course, this is the purpose of requiring "immediate" or "prompt" reports.

Although mandatory reporting has been part of the statute since 1971, criminal penalties for failure to report did not become part of the statute until 1982. Defendants have seized on this recent provision and focused on the Act as a penal statute. They have threatened prosecution under this section of the top administrators in the Anchorage School District for not reporting a non-reportable incident soon enough. The statute was amended in 1985 to cover abuse outside the home or custodial relationship. While passing these amendments, several legislators expressed concern over the constitutionality of the terms in the Child Protection Act (AS 47.17). One such concern was whether "maltreatment" was sufficiently delineated to withstand constitutional challenges. On the whole, AS 47.17 has been constructed in a piecemeal fashion, which has created a lack of cohesion and glaring inconsistency within the Act. There has yet

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to be a judicial interpretation, consideration, or construction on the application of the criminal penalties under this statute in the Alaska courts.

While there are a host of other facts which relate to the present controversy, these few facts are all that is necessary to resolve the legal issues at the core of this matter. Civil Rule 56 allows for partial disposition of issues in a suit where there are no disputes as to the material underlying facts.

III.

EITHER THE REPORTING STATUTE IS VOID FOR VAGUENESS, DENIES SUBSTANTIVE DUE PROCESS TO REPORTERS, AND VIOLATES REPORTEES' PRIVACY RIGHTS, OR IT MUST BE CONSTRUED IN A WAY WHICH EXCLUDES PLAINTIFFS' CONDUCT FROM PENAL CONSEQUENCES.

A. Principles of Law.

This section of the memorandum sets forth the fundamental constitutional rules of due process which apply to the construction and application of penal statutes. Thereafter, these due process rules are applied to the terms of this statute.

1. Vague Provisions Violate Due Process of Law.

This memorandum will show that the terms "promptly", "immediately", "cause to believe," and "maltreatment" are fatally ambiguous under the statutory scheme and as applied to the report made by School District administrators. Because there is a penal sanction involved, this vagueness violates the due process clause of the Alaska Constitution.

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Analysis of vague criminal statutes under substantive due process principles has a central and profound place in the American system of justice. Citizens must be able to determine if their conduct would be deemed by the state to be illegal before they act. A vague statute frustrates the ability of well-meaning citizens to determine what is prohibited. It also confers too much discretion upon law enforcers, raising the constitutionally unacceptable spectre of arbitrary, selective and/or bad faith prosecution. The due process clause provides a substantive protection for all citizens of our society against these dangers.

It is well-established that 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 -- fair notice of what is illegal. Connally v. General Construction Co., 269 US 85, 391 (1926) as cited in State v. O'Niell Investigations, 609 P.2d 520, 531 (Alaska 1980); Bouie v. City and Columbia, 378 U.S. 347, 351 (1965). Accord, United States v. Harris, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, (1939); McBoyle v. United States, 283 U.S. 25, 22 (1931). In dealing with the due process notice requirement, the Alaska Supreme Court has stated:

The current approach to defining criminal conduct is that of specifying in objective terms the acts and intent prohibited . . . [W]here the conduct to be prohibited by a criminal statute is capable of objective definition by language descriptive of precise physical acts and events, it simply will not do to use language so ambiguous as to be

capable of expansion or contraction at the whim of the reader.

Harris v. State, 457 P.2d 638 (Alaska 1969) (term "crime against nature" were held unconstitutionally vague and standardless), cited in Anderson, 562 P.2d 351, 357 (Alaska 1977) ("lewd and lascivious" upheld because explained within the statute).

A statute is also vague and violates the due process guarantee if its indefinite contours confer unbridled discretion on government officials and thereby raises the possibility of arbitrary, uneven and discriminatory enforcement. Brown v. Municipality of Anchorage, 584 P.2d 35, 37 (Alaska 1978) (loitering for solicitation held void for vagueness); Levshakoff v. State, 565 P.2d 504, 507 (Alaska 1977); Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972).

Where a statute fails to give notice of prohibited conduct or raises the specter of arbitrary enforcement, the court must sever the offending language, strike the provision, or construe the statute narrowly to protect those potential defendants not put on notice. Weaver v. State, 736 P.2d 781, 782 (Alaska App. 1987), citing Summers v. Anchorage, 589 P.2d 863, 866-67 (Alaska 1979) (the court noted that "lewdness" had been removed from the penal ordinance and in dicta noted that "lewdness" must be defined, severed, or narrowly construed); Stock v. State, 526 P.2d 3, 7-9 (Alaska 1974). As the Alaska Supreme Court has explained,

We cannot allow criminality to depend only upon the moral sentiment or idiosyncrasies of the tribunal before which a defendant is tried. Vague terms in a statute, if permitted to stand, might be used to cover varieties of

conduct not ordinarily regarded as criminal by vast portions of the public affected by it.

Harris v. State, 457 P.2d 638, 641 (Alaska 1969) (finding statutory language "crime against nature" void for vagueness). These standards of due process will guide the court when it reviews the statute on vagueness grounds in Section III.B.1., 2.a.-c., infra.

The next section of this memorandum discusses the due process infirmities of a broad requirement that citizens report other citizens to the government on pain of incarceration. Such a requirement is an unconstitutional anathema to a free society. This basic problem exacerbate the vague provisions of the statute. The factual issues surrounding on the vagueness problems are discussed at length in the remainder of this memorandum. Regardless, when citizens, prosecutors and policemen do not know what should be reported or prosecuted or when, fundamental problems arise. This controversy is testimony to the dangers of undefined prosecutorial discretion coupled with improper police conduct.^{5/}

2. Imposing Criminal Consequences Upon a Person For Failing to Report His Bare Suspicions Concerning Another's Conduct to Law Enforcement Violates Substantive Due Process.

Article I, § 7 of the Alaska Constitution guarantees all persons the right to due process of law prior to deprivation of property or liberty. Substantive due process of law is a

^{6/}As to the nature of the police conduct, the court should refer to the factual discussion in the Motion for Preliminary Injunction and the Opposition to the First Motion for Summary Judgment.

recognized constitutional guarantee of respect for those personal liabilities rooted in the concept of ordered liberty that protects one from arbitrary governmental action. The statutory scheme here imposes criminal sanctions for the failure to report suspicions concerning others to the government. The defendants apparently argue that reports must be made on the first suspicion or rumor, and that if the report is delayed to look into the accusation, then the immunity in the statute is lost. Virtually all of the well-recognized aspects of substantive due process are offended by legislation requiring certain classes of people to report mere suspicions of improper conduct by fellow citizens to state authorities lest they face criminal penalties themselves.

The historical roots of substantive due process were described by Justice William Johnson in 1819 as follows:

As to the words from the Magna Charter . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to service the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okley, 4 Wheat. 235, 244 (1819). This concrete restraint on government has been described by the Alaska Supreme Court as follows:

The term 'due process of law' is not susceptible of precise definition or reduction to a mathematical formula. But in the course of judicial decisions it has come to express a basic concept of justice under law, such as 'our traditional conception of fair play and substantial justice' the 'protection of the individual from arbitrary action',

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'fundamental principles of liberty and justice', whether there has been a [denial of] fundamental fairness, shocking to the universal sense of justice', 'that whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct', and a 'respect for those personal immunities which * * * are "so rooted in the traditions and conscience of our people as to be ranked as fundamental", * * * or are "implicit in the concept of ordered liberty."'

Green v. State, 462 P.2d 994, 996-997 (Alaska 1969), citing Northern Supply, Inc. v. Curtis-Wright, 397 P.2d 1013, 1017 (Alaska 1965) (long arm statute); Slochower v. Higher Board of Education of New York, 350 U.S. 551, 559 (1956) (protection of the individual from arbitrary action); In re Grobar, 352 U.S. 330, 334 (1957) (fundamental principles of liberty and justice); Kinsella v. United States, 361 U.S. 234, 264 (1960) (denial of fundamental fairness shocking to the universal sense of justice); Breifhaupt v. Abram, 352 U.S. 432, 436 (1957) (that whole sense of decency and fairness that has been woven by common experience into the fabric of common conduct); Rochin v. California, 342 U.S. 165, 169 (1952) (so rooted in the traditional and conscience of our people as to be rooted fundamental or implicit in the concept of ordered liberty).

In Rochin v. California the United States Supreme Court held that due process limits the means which the state can use in pursuing even legitimate and important ends. Speaking for the majority, Justice Frankfurter stated:

Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Justice Cardozo twice wrote for the court, are "so rooted in the traditions and conscience of our people as

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to be ranked as fundamental" . . . "or are implicit in the concept of ordered liberty."

342 U.S. at 169. And in discussing the ambit of the due process, Justice Harlen has stated:

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute [prohibiting sale of contraceptives to married couples] infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palkco v. Connecticut, 302 U.S. 319, 325, 82 L.Ed. 298, 292 58 S.Ct. 49. For reasons stated at length in my dissenting opinion in Poe v. Ulman, *supra*, I believe it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Griswold v. Connecticut, 381 U.S. 479, 500 14 L.Ed.2d 510 (1965) (Harlen concurring). In these and other opinions the due process clause of the Fourteenth Amendment -- which is identical to Article I, § 7 -- has been regarded as a source of prohibition for liberty interests not specifically set forth in the Bill of Rights.^{1/}

In criminal cases, the flexible concept of due process has developed in a series of consistent doctrinal manifestations.

^{1/}The Supreme Court has articulated several other fundamental "liberty" rights which are protected by the Due Process Clause of the Fourteenth Amendment. See, e.g. Meyer v. Nebraska, 262 U.S. 390, 399 (1925) (right to marry, establish a home and bring up children); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1932) (right to direct the upbringing and education of children); Griswold v. Connecticut, 381 U.S. 479, (1965) (privacy of the marital relation); Roe v. Wade, 410 U.S. 113 (1973) (right to choose whether to have children); see also Olmstead v. United States, 277 U.S. 438, 478 (Brandies, dissenting) ("the right to be left alone").

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The Alaska appellate courts have recognized and applied the due process doctrines on numerous occasions in criminal cases. Substantive due process requires that in any criminal prosecution the state must bear the burden of proving all elements of the offense beyond a reasonable doubt. Huitt v. State, 678 P.2d 415, (Alaska App. 1984); Huf v. State, 675 P.2d 268, 271 (Alaska App. 1984). Accord In re Windship, 397 U.S. 358 (1970).

An essential element of virtually every criminal prosecution is a demonstration by the state that the accused acted with a culpable state of mind, known as "mens rea." See Mullaney v. Wilbur, 421 U.S. 684 (1975). The Alaska Supreme Court has repeatedly emphasized the basic requirement under the state Constitution that the imposition of criminal sanctions requires proof beyond a reasonable doubt that the accused acted with criminal intent, sometimes referred to as an awareness or consciousness of wrongdoing. State v. Guest, 583 P.2d 836, 838 (Alaska 1978) ("it would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent"); Jager v. State, 748 P.2d 1172, 1178 (Alaska App. 1988) (Guest "infer[ed] a requirement of criminal intent in order to avoid the imposition of strict criminal liability for an offense not involving the public welfare"); Bell v. State, 668 P.2d 829, 833-35 (Alaska App. 1983) ("Well-recognized rule" criminal intent required and "one charged with criminal conduct must have an awareness or consciousness of wrongdoing"); Andrew v. State, 653 P.2d 1063, 1065 (Alaska App. 1982) ("Alaska

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Supreme Court has been consistent in holding that serious criminal offenses must include a requirement of criminal intent as an essential element of the offense and that the imposition of strict liability in all but a limited category of criminal offenses violates due process"); Hentzner v. State, 613 P.2d 821, 827 (Alaska 1980). Alaska appellate courts have consistently implied intent requirements into criminal statutes and ordinances in order to save them from constitutional challenge under the due process clause. See, e.g., Morris v. Municipality of Anchorage, 652 P.2d 503 (Alaska App. 1982); Smith v. Municipality of Anchorage, 652 P.2d 499 (Alaska App. 1982).

Criminal jurisprudence also contains many examples where the state's pursuit of proper ends by employing improper means were struck down as violations of substantive due process. These cases establish the principle that even the most legitimate ends, such as successfully prosecuting a murder or drug dealing suspect, cannot be accomplished by constitutionally intolerable means. Of course, a leading case is Rochin v. California, supra, where use of a stomach pump was held to be a violation of substantive due process. The use of an accused's coerced or involuntary confession or testimony in a criminal trial is also a violation of due process of law. New Jersey v. Portash, 440 U.S. 450, 459 (1979) (testimony); Mincey v. Arizona, 437 U.S. 385, 398 (1978) (confession). The prosecution may not comment on the silence of the accused after he has been apprised of his Miranda rights. Doyle v. Ohio, 426 U.S. 610 (1976); Stork v. State, 559 P.2d 99,

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103 (Alaska 1977) ("We do note, however, that substantive due process is violated when the prosecution calls attention to the silence of the accused at the time of his arrest").

Due process also prohibits imposition of a criminal consequence in the absence of a criminal act or for innocent conduct. Robinson v. California, 370 U.S. 660, 667 (1962) (status of "addict" cannot be criminalized by statute); Reynolds v. State, 664 P.2d 621, 623-25 (Alaska App. 1983). Justice Douglas has stated, regarding a statute that criminalized the status of being an "addict," "[c]ontrary to my [dissenting] Brother Clark, I think the means must stand constitutional scrutiny, as well as the end achieved." Robinson v. California, 370 U.S. at 677 (Douglas J., concurring).

Finally, substantive due process and the state guarantees against imposition of cruel and unusual punishment are both offended where criminal consequences are imposed wholly out of proportion to the culpability of the actions said to be criminal. Robinson v. California, *supra*, 370 U.S., at 667 ("Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold"). Accord Dancer v. State, 715 P.2d 1174, 1180-81 (Alaska App. 1986); Faulkner v. State, 445 P.2d 815 (Alaska 1968); Green v. State, 390 P.2d 433, 435 (Alaska 1964).^{8/}

^{8/} Similar protections are vouchersafe by Amendments VIII and XIV o. the United States Constitution. See e.g., Solem v. Helm, 463 U.S. 277 (1983); Weems v. United States, 217 U.S. 349, 377 (1910).

This case presents the issue of the state's use of unconstitutional means to attain a salutary goal. Just as it is inconsistent with the concept of ordered liberty to be compelled to provide evidence against yourself in a criminal prosecution, no matter how great the societal interest in conviction, it is also a violation of substantive due process to be compelled on pain of prosecution to report mere suspicions of improper conduct by fellow citizens to the state. If there is anything that is anathema to a free society, it is the compelled reporting to the government of rumor, innuendo or suspicions regarding neighbors under threat of incarceration. Indeed, this is a quintessential trait of a totalitarian society. It is the characteristic of the repressive governments of Eastern Europe, whose people are refusing daily to submit to the continuation of such outrages. It is the "law" of Orwell's 1984, not the law of a land committed to the preservation of individual freedom. Just as a statute which "required" admission of coerced confessions at trials involving charges of sex abuse would be struck down as violative of due process, so too AS 47.17.068 violates the due process clause in Article I, § 7 of the Alaska Constitution. Such a criminal^{9/} statute also violates the

^{9/}The Alaska Supreme Court has stated that "liberty" is an "elusive concept, incapable of definitive, comprehensive explanation. Yet at the core of this concept is the notion of total personal immunity from governmental control: 'the right to be left alone.'" Breeze v. Smith, 501 P.2d 159, 168 (Alaska 1972). In Breeze, the court held that the right to determine one's own hair style or personal appearance was a fundamental right contained in the concept of "liberty" in Article I, § 1 of the Alaska Constitution. See also Ravin v. State, 537 P.2d 494, 497-498 (Alaska 1975). The Breeze court cited Stull v. School Board of Western River Jr.-Sr.

(continued...)

reporter's rights to liberty (Article I, § 1) and to privacy (Article I, § 22) under the Alaska Constitution, and must be declared unconstitutional.^{10/}

3. Principles of Statutory Construction Will Guide This Court In Its Construction and Review of a Penal Statute.

This controversy apparently arises because the defendants are under the erroneous view that the report by the Anchorage School District to DYFS under AS 47.17.020 was not satisfactory.^{11/}

^{9/}(...continued)
H.S., 459 F.2d 339, 347 (3rd Cir. 1972) in support of this conclusion. Of course, the Stull court found "the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment." Id.

^{10/} Not surprisingly, statutes threatening to jail citizens who fail to report their suspicions about other citizens' possible misconduct to the state have found no home in American jurisprudence. The closest, and indeed only, analogue, consists of the offense of misprison of felony. 18 U.S.C. § 4 prescribes punishment for any person having knowledge of the actual commission of a felony who conceals the offense and fails to make it known to an appropriate authority. The cases are uniform in reversing convictions and/or vacating guilty pleas where the evidence in support of the conviction under this section consists solely of the failure to report a felony. Actual concealment, thereby making detection more difficult, has consistently been held to be an indispensable element of the offense. See, e.g., United States v. Goldberg, 862 F.2d 101, 104 (6th Cir. 1988) ("Mere knowledge of the commission of the felony or failure to report the felony, standing alone, is insufficient to support a conviction for misprison of a felony"); United States v. Graves, 720 F.2d 821, 822 n. 2 (5th Cir. 1983) (same).

^{11/}The State of Alaska has filed what is really a motion for "partial" summary judgment as to certain issues and attached the lengthy Affidavit of defendant McConnell. These documents provide some insight as to the State's most recent position:

The intent of the mandatory reporting statute is to protect children from harm and maltreatment, by assuring that state agencies with expertise in evaluating and

(continued...)

As a result, this court will be required to construe a host of terms in the statutes. These terms include "cause to believe", "suffered harm", "sexual abuse", "maltreatment", "child's health or welfare is harmed or threatened", "immediately report", "promptly report", "knowing failure or refusal to report", and "a person who, in good faith, makes a report. . .is immune from any civil or criminal liability". In determining the meaning of these provisions, the court must follow recognized guidelines for statutory interpretation.

The Alaska Supreme Court has rejected the mechanical application of the plain meaning rule for statutory construction,

!!/(...continued)

investigating child abuse are notified in a timely manner. The plaintiffs cannot deny that a teacher's sexual intercourse with students can be harmful.

Even if they were uncertain of its criminality, the administrators should have been advised to report this as "maltreatment . . . under the circumstances that indicate that the child's health or welfare is harmed or threatened". AS 47.17.020(c) and 070(2). (emphasis added).

Even if the conduct of the teacher is not criminal, it was nonetheless conduct of the type which should have been reported. The goal of the reporting statutes is to enable state authorities to quickly (sic) provide protective services "to prevent further harm to the child". AS 47.17.010. . .Their duty is to pass the information along to responsible authorities "immediately". AS 47.17.020(a). Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 15-17.

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and instead has adopted a sliding scale approach. See Alaska Public Enqs. v. City of Fairbanks, 753 P.2d 725,727 (Alaska 1988). As the court stated in State v. Alex, 646 P.2d 203, 208-09, n.4 (Alaska 1982) when the sliding scale approach was adopted:

Part of the problem stems from ambiguity being a relative concept. Words have no intrinsic meaning; what is clear to one person is ambiguous and obscure to another. . . .As one court stated: "we think the statute is plain on its face, but since words are necessarily inexact and ambiguity is a relative concept, we now turn to legislative history, mindful that the plainer the language, the more convincing ~~contrary legislative history~~ must be."

Id. at n. 4, citing Sutherland § 45.02 at 4-5 and United States v. United States Steel Corp., 482 F.2d 439, 444 (7th Cir. 1973), cert. denied 414 U.S. 909, 94 S. Ct. 229, 39 L.Ed. 2nd 147. As such, legislative history must be considered, and the various methods of statutory construction must be employed by the court. Id.

In construing a statute, the court must reconcile the different provisions so as to make them consistent, harmonious and sensible. United States v. Hardcastle, 10 Alaska 254 (Alaska 1942). When one section of the statute deals with a subject in general terms and another deals with a part in a more detailed way, "[i]t is established principle. . .that all sections of an act are to be construed together so that all have meaning and no section conflicts with another". Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978); Hugo v. City of Fairbanks, 658 P.2d 155, (Alaska App. 1983).

Statutory interpretation in this matter is also guided by the fact that AS 47.17.068 is a penal statute. Because this

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subsection imposes criminal liability for a knowing failure or refusal to report, the statute "must be read strictly and construed against the government". See Kinnish v. State, 777 P.2d 1179 (Alaska App. 1989); Hilger v. Municipality of Anchorage, 1989 WL 125647 (Alaska App. 1989); Newsom v. State, 726 P.2d 561 (Alaska App. 1986); Causell v. State, 645 P.2d 219, 222 (Alaska App. 1982); C. Sands, Sutherland Statutory Construction, § 59.04 at 13 (4th ed. 1974) (hereinafter "Sutherland"). Ambiguous penal statutes are to be construed strictly in favor of the accused. See State v. Robertson, 749 P.2d 902, 905 (Alaska App. 1988); Conner v. State, 696 P.2d 680, 682 (Alaska App. 1985).

Finally, statutory construction is also affected by the existence of the numerous and diverse constitutional problems which attend the reporting requirement and its criminal penalty. Courts must reasonably construe statutes, whenever possible, to avoid possible unconstitutionality. See, e.g., State v. Sundberg, 611 P.2d 44, 50 n. 16 (Alaska 1980); Hoffman v. State, 404 P.2d 644, 646 (Alaska 1965). Alaska appellate courts have frequently interpreted statutes, sometimes even reading in provisions, in order to avoid possible due process infirmities. See, e.g., State v. Guest, 583 P.2d 836 (Alaska 1978); Morris v. Municipality of Anchorage, 652 P.2d 503 (Alaska App. 1982); Smith v. Municipality of Anchorage, 652 P.2d 499 (Alaska App. 1982).

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B. Application of Law to the Reporting Requirements of Title 47.

1. AS 47.17.020 Does Not Require That The Allegations Of Consensual Conduct At Issue Be Reported.

A primary term that gives rise to the need for a declaratory judgment is the term "sexual abuse" as that term is used in AS 47.17. Since a report of certain conduct was made, the apparent disagreement is as to when a report should have been made. However, this issue is moot if there is no requirement that the consensual activity here at issue need have been reported at all. In this regard, there must be no misunderstanding that the School District regards consensual sexual relations between a teacher and a seventeen year old student to be unprofessional and reprehensible on the part of the teacher. Such conduct would subject the teacher to termination. However, whether such conduct is also "sexual abuse" as that term is used in AS 47.17.070(1) -- and thus reportable under AS 47.17.020(a) - - is a potentially dispositive threshold issue.^{12/}

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^{12/}AS 47.17.010 et. seq. does not contain a definition of "sexual abuse." In fact, Governor Sheffield's letter to Rep. Grusendorf states "Although the term "sexual abuse" is now used in AS 47, it is not defined." 1985 House Journal at 77. (emphasis added) Instead, AS 47.17.020(a) requires a report of "child abuse or neglect," and AS 47.17.070 defines "child abuse" to include "sexual abuse".

a. "Sexual abuse" Is Unconstitutionally Vague Or Must Be Given the Same Construction in Title 47 As It Has Been Given in Title 11.

(1) "Sexual Abuse" Without Further Definition Is Unconstitutionally Vague.

Due process requires that penal statutes define criminal offenses with sufficient definiteness so that ordinary people can understand what conduct is prohibited, and so that arbitrary and discriminatory enforcement is precluded. See Section III.A.1., supra. If "sexual abuse" means something for purposes of a criminally enforceable reporting statute other than the specific meanings attributed to it in Title 11 -- which defines sexual offenses -- then it is a concept which is too vague to permit enforcement by criminal sanction.

Just what constitutes "sexual abuse" if it is something other than the sexual abuse offenses for which a perpetrator can be punished? Does it have a necessary physical component? Could suggestive statements or leers constitute "sexual abuse" which would have to be reported by observant officials? Is kissing or holding hands or hugging enough? If there is sexual contact which occurs in the school, but not during school hours and which is otherwise lawful, is that "sexual abuse"? If there is sexual contact between a teacher and a student over the age of consent and over the age of compulsory attendance which occurs not on school property, not during school hours, and not as part of any school, ordained activity, is that reportable "sexual abuse"? Is it sex abuse if the seventeen year old student is not in the teacher's

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class? Does parental knowledge or permission affect the legality of the acts? Persons of fair intelligence cannot know the answers to these questions. Accord Harris v. State, 457 P.2d 638, 647 (Alaska 1969) (term "crime against nature" void for vagueness; term "unnatural carnal copulation by means of the mouth, or otherwise, either with a beast or human being" also likely void for vagueness).

Accordingly, to avoid having to strike the reporting requirement of Title 47 as unconstitutionally vague on its face, the "sexual abuse" which is reportable must be defined as being the same conduct which is prohibited by the substantive "sexual abuse" provisions of Title 11.

Significantly, defendants do not attempt to argue in any of their motions to dismiss or for partial summary judgment that "sexual abuse" means anything more in Title 47 than the specifically defined meanings attributed to it in Title 11.

Moreover, the Alaska Attorney General has previously indicated that the phrase "sexual abuse" for purposes of Title 47 is coextensive with the state's definition of sexual offenses in response to an inquiry from the Commissioner of the Department of Health and Social Services. The Commissioner had requested advice from the Attorney General to determine, inter alia, whether or not the absence of a definition of "sexual abuse" in Title 47 made the state ineligible for funds by virtue of noncompliance with 42 U.S.C. § 5101 et. seq. (the Child Abuse Prevention and Treatment Act of 1974) (hereinafter CAPTA). After reviewing the federal

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definition of "sexual abuse," which included "rape, incest, and sexual molestation as those acts are defined by State law, by a person responsible for the child's welfare," 45 CFR 1340.2(d)(1), the Attorney General advised the Commissioner that the federal definition of "sexual abuse" "can only be construed as an intent by the United States Department of Health and Human Services to allow each state to employ its own definitions of sexual offenses, including, but not limited to, those listed in the regulation . . .". Appendix A, Memorandum from Attorney General Harold M. Brown to John R. Pugh, Commissioner, Department of Health and Social Services, No. 366-186-86, December 5, 1985. Accordingly, it is clear from the Attorney General's Opinion that sexual abuse under Title 47 consists of state's "own definitions of sexual offenses," which are contained in Title 11.

Finally, principles of statutory construction support the conclusion that "sexual abuse" has the same meaning in Titles 11 and 47. A traditional maxim of statutory interpretation is that ". . . whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter, and all should be construed together." Hafling v. Inland Boatman's Union of the Pacific, 585 P.2d 870, 877 (Alaska 1978); see also Sutherland, § § 51.01 at 287-89, 51.02 at 290. The only place that the Alaska Statutes define "sexual abuse" is in Title 11.

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Accordingly, this court must look to the provisions of Title 11 in order to define reportable "sex abuse" under Title 47.^{13/}

(2) "Sexual Abuse" As Defined in Title 11 Is Sufficiently Specific.

AS 11.41.434 - 11.41.440 specifically define four degrees of "sexual abuse" of a minor. The statutory definitions are specific in their descriptions, both of the individuals affected and of the conduct proscribed. The terms used therein are either specifically described in that section in the general definitions pertaining to the Criminal Code, or by judicial construction. With the exception of the defendants' tortured reconstruction of the phrase "entrusted to the offender's care by authority of law," AS 11.41.434(a)(2), .436(a)(3)(A), there is little to argue with respect to the meaning of the provisions of the statutory sections. Accordingly, the sections of Title 11 provide specific and extensive definitions of the meaning of the phrase "sexual abuse" with respect to minors.

^{13/}Should the court construe "sexual abuse" for purposes of Title 47 as not being limited to the definitions of "sexual abuse" contained in Title 11, an unconstitutional and unexpected construction of Title 47 would occur which would itself constitute a due process violation. Given that Title 11 specifically defines sexual abuse in terms of substantive offenses, and given that Title 47 specifically incorporates the provisions Title 11 with respect to the "sexual exploitation" which must be reported, all reasonable people will turn to title 11 in an effort to understand exactly what "sexual abuse" must be reported pursuant to Title 47. In the event a court, without any precedent, legislative history, or other support would conclude that the phrase "sexual abuse" imposes a broader reporting duty which stretches beyond the "sexual abuse" prohibited in Title 11, then the due process principles discussed in Section III.B.1.b.(9) would preclude prosecution of the first individuals to face that unexpected construction.

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b. The Consensual Sexual Conduct Here At Issue Is Not "Sexual Abuse" Under Title 11 or Title 47.

Under Title 11, the general age for consent to sexual intercourse is 16 years of age. The Alaska Legislature raised the applicable age of consent to certain narrowly defined situations. AS 11.41.434(a) is such a statute. It provides in relevant part:

An offender commits the crime of sexual abuse of a minor in the first degree if

* * * * *

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

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child or stepchild, . . .

Accord AS 11.41.436(a)(3)(A).

In the following sections, plaintiffs will demonstrate that the structure of Alaska's sexual abuse and related statutes and the legislative history to AS 11.41.434 make clear that the legislature's intent in enacting this statute was to prohibit sexual conduct between adults and individuals over 16 and under 18 years of age only in circumstances where the adult has assumed parental/caretaker responsibilities for the individual, by virtue of the existence of a parent-child type of relationship created by blood, by marriage or by law.

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(1) The Legislative History of AS 11.41.434(a)(2) Establishes That the Statute Applies Only Against An Individual Who Acts In A Parental Caretaking Capacity.

The legislative commentary to the former AS 11.41.410(a)(4)^{14/} provides in part:

Subsection (a)(4) provides that the final form of sexual assault in the first degree occurs when a person 18 years or older engages in sexual penetration with a person under 18 who is entrusted to his care by authority of law (i.e., ward) or who is his son or daughter.

See Commentary to the Alaska Revised Criminal Code, 1978 Senate Journal Supplement No. 47, at 23 (emphasis added). The use of the term "ward" in the legislative commentary evidences that the legislature intended the words "authority of law" to encompass a category of persons that includes only parents, step-parents, adoptive parents and other individuals who act as legal guardians, such as court appointed guardians, court ordered foster parents, and juvenile detention authorities acting upon a court order of commitment. See AS 13.26.005(10) (defining "ward" in the context of the probate code as "a person for whom a guardian has been appointed").

Thus, AS 11.41.434 is intended to, and has the effect of, escalating and broadening the traditional prohibition against incest. The Criminal Code still includes an incest statute (AS 11.41.450), but the statute does not address the age of the victim

^{14/}AS 11.41.410(a)(4) was the predecessor to AS 11.41.434(a)(2). The statutes were re-numbered during the 1983 revisions to the code.

and it is limited to sexual conduct between individuals who share a blood relationship. The Sexual Abuse of a Minor statute has the effect of escalating the penalty for incest, which is a Class C felony, to an unclassified felony in instances in which the victim is under 18 years of age. It also extends the incest prohibition past the blood relationship, to include any relationship which is characterized by a parental caretaking responsibility, whether imposed by blood, marriage, or law.

This reading of the statute is confirmed by its legislative history. A 1977 tentative draft of the Alaska Criminal Code revision provided in part:

A person commits the crime of sexual assault in the first degree if . . . being 18 years of age or older, he knowingly engages in sexual penetration with a person under 18 years of age who is related to him, either legitimately or illegitimately, as

(A) his ancestor or descendant of the whole or half blood, or by adoption;

(B) his brother or sister of the whole or half blood;

(C) his uncle, aunt, nephew or niece of the whole or half blood, or by adoption; or

(D) his stepchild, while the marriage creating the relationship exists.

Alaska Criminal Code revision, Tentative Draft, Part I, at 69-70 (1977). The commentary to the tentative draft states that the new provision "expands the coverage of the existing incest statute by recognizing the potential for abuse of adoptive relatives and stepchildren." Id. at 74. The final draft of the Criminal Code

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enacted in 1978, replaced this language with the language now used in AS 11.41.434(a)(2). Chapter 166, § 1, 1978 Session Laws of Alaska. Of the new language, the legislative commentary states: "Subsection (a)(4) provides that the final form of sexual assault in the first degree occurs when a person 18 or older engages in sexual penetration with a person under 18 who is entrusted to his care by authority of law (i.e, ward) or who is his son or daughter." 1978 Senate Journal Supplement No. 47, at 23 (emphasis added).

Thus, the legislative history reflects that the final draft of the Criminal Code revision remained on the course charted by the tentative draft. The legislature intended to expand the incest statute only to prohibit sexual activity by those whose relationship to the child was that of a parent, whether a natural parent, foster parent, adoptive parent, or legal guardian. Nothing in the legislative history remotely suggests that the legislature made an abrupt turn and sought to include teachers in its formulation of the section.

(2) Other Sexual Offense Statutes Similarly Reflect the Legislature's Intent That the Sexual Abuse Statute Apply to Those Exercising A Parental Role.

A comparison of the language used by the legislature in defining sexual abuse with that used by the legislature in defining other sexual offenses further supports the conclusion that the legislature did not intend the relationship between a high school teacher and a seventeen year old student to fall within under the "entrusted. . . by authority of law" classification. In construing

statutory language, "[i]t is an established principle. . .that all sections of an act are to be construed together so that all have meaning and no section conflicts with another." Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978). Additionally, "in order that effect may be given to every part of an act in accordance with the legislative intent, all of the language of the act must be considered and brought into accord." United States v. Hardcastle, 10 Alaska 254 (1942), quoting 25 R.C.L. § 247, p. 1006.

The legislature used different language to define different classes of individuals for the purpose of determining when sexual conduct constitutes an offense, focusing on the nature of the act, the ages of the participants, and the relationship involved. If the victim is under 16 and the offender is 18 or older, an offense is committed if the victim is merely "residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim, or. . .is temporarily entrusted to the offender's care." See AS 11.41.436(a)(5)(A) and (B). This category is broader than the category defined in AS 11.41.434(a)(2) (applicable where, as here, the victim is over 16 years of age). Subsection (a)(2) requires an actual, parental caretaker relationship (where (a)(5) only requires residence in the same household) and requires a permanent entrustment of care by authority of law (where (a)(5) only requires a temporary entrustment of care, with or without authority of law). The legislature also created an offense entitled Unlawful Exploitation of a Minor "which applies to [a]

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parent, legal guardian, or person having custody or control of a child under 18 years of age." See AS 11.41.455(b) (emphasis added).

Thus, the legislature distinguished in the various sexual offense statutes those individuals who have "custody or control" of a minor, from those to whom a minor is "temporarily entrusted" to care, from those who "reside in the minor's household and (have) a position of authority," from those to whom a minor is "entrusted to . . . care by authority of law."

The rules of statutory construction presume that these various definitions and categories of offenders and relationships, most of which were enacted by the legislature at the same time, have meaning. See Section III.A.3., supra. If the legislature had intended the sexual abuse of a minor statute to apply to sexual conduct between high school teachers and seventeen year old students, the legislature could easily have used the "control" language or the "position of authority" language used in other sections of the same chapter. More specifically, the legislature could explicitly have provided that sexual conduct between persons under 18 and educators, teachers or individuals over the age of 18 who undertake limited supervision of a person under the age of 18 is prohibited. However, the legislature did not elect any of these alternatives. Instead, the legislature elected to use the "entrusted to . . . care by authority of law" language in the sexual abuse statute, and that election cannot be ignored in construing the statute.

Viewing the "authority of law" language in its proper context, the legislature's use of the different phrases clearly reflects its intent to assign them different meanings and to recognize that they apply to different categories of individuals. Any other interpretation wholly ignores the legislature's efforts to specifically define the groups to whom the conduct prohibitions apply, and assumes that the legislature's use of different terms and definitions was random and unintended. Such a position finds no support in any principle of statutory construction. Moreover, it ignores the extensive legislative consideration accorded these statutes when they were revised in 1983.

The commentary to these statutes explains that the legislature collected "statutes dealing with sexual offenses against children [that] appeared in several different areas of the code and covered many different types of conduct." See Criminal Law Manual, Alaska Department of Law, pp. 3-64 (Alaska 1985). In Chapter 78, SLA 1983, the legislature consolidated these laws into one area of the code -- Title 11. Id. Most of this conduct was labeled "sexual abuse of a minor," and was "divided into four degrees of seriousness." Id.

These classifications manifest a coherent internal logic. The younger the minor, the broader the category of people with whom sexual conduct is prohibited. For example, the "temporary entrustment" and "position of authority" language applies where the victim is under the age of 16. When the minor is between the ages of 16 and 18, the legislature prohibited a much narrower group of

people from engaging in sexual conduct, limited to natural, adoptive, or step-parents, or those with parental caretaking responsibilities imposed by "authority of law." The legislature created a different category of offense for minors over the age of 16 because it recognized that only certain people hold "position[s] of power such that even older children often find it impossible to thwart their advances." See House Judiciary Committee, Letter of Intent for CSHB 237, P. 2331 (February 2, 1988). The legislature added that "[t]he cut-off of 16 years of age was specifically chosen instead of the 18 year old cut-off in other subsections dealing with person with legal or biological ties to the victim." Id. at 2331. High school teachers are not such persons. See Pennsylvania State Educ. Ass'n. v. Com. Dept. of Pub., 449 A.2d 89, 92 (Penn. 1982) (declaratory judgment that public school teachers are not responsible for a child's welfare as defined by State Child Protective Services law). The structure of these sections and their intent reflect that "authority of law" refers to legal ties which confer the authority and impose the responsibilities of relationships created by "biological ties." Examples of this type of relationship could include a foster parent, legal guardian or juvenile detention authority.

(3) The Department of Law's "Criminal Law Manual" Recognizes That "Entrusted" . . . By Authority of Law" Means to A "Parent" or "Guardian".

Provisions in the Department of Law's Criminal Law Manual (1985) confirm the above conclusion. Attachment 2. The Manual discusses AS 11.41.436(a)(3)(A), a provision which is directed to

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sexual contact rather than sexual penetration, but which is otherwise identical to AS 11.41.434(a)(2)(A). Analyzing the "entrusted. . .by authority of law" language, the Manual states that AS 11.41.436(a)(3)(A) makes it a Class B Felony "for a parent or guardian to engage in sexual contact with a child under 18 who is under his care" (emphasis added). See Attachment 2. If such is the intent and meaning of the "entrusted to . . . care by authority of law" language in the sexual contact statute, then a fortiori the language must have the same meaning in the sexual penetration statute.^{15/} The intent and meaning of Alaska's sexual abuse statute is, on its face, clear. A penal statute such as this must be narrowly read, construed strictly against the state and interpreted to avoid constitutional vagueness problems. See Section III.A.3.1, supra. Such a construction cannot include teachers in a category otherwise comprised of parents and legal guardians.

(4) Prosecutors Have Explicitly and Publicly Stated That Students Over Age 16 Are Not Entrusted to Their Teacher's Care by Authority of Law.

Given that the Department of Law has memorialized its construction of "entrusted to . . . care by authority of law" as limited to situations involving parents or guardians, it is hardly surprising that the custom and practice of defendants has been to refuse prosecution under the sexual abuse statutes in cases where

^{15/}The Manual itself specifically directs the reader's attention to the Commentary on the sexual contact statute for the meaning of the "entrusted to . . .care by authority of law" subsection of the sexual penetration statute. Manual, at 3-52.

teachers have had sexual relations with students who are over the age of 16. Indeed, defendant Dwayne McConnell, now the district attorney for Anchorage, specifically declined to prosecute a case involving an even younger student in 1986 when he was the district attorney for Palmer, stating that such conduct was not illegal. See Attachment 1. The Palmer case and the present case are distinguishable only in that the student involved here was a year older than the 16 year old out in Palmer. See Affidavit of Rollie Port. Moreover, this interpretation is not simply a matter of local custom and practice. The Department of Law has taken the same position in the Lower Kuskokwim area. See Affidavit of Susan Hare.^{16/}

(5) Alaska Courts Recognize That Students Are Not Entrusted to Their Teacher's Care By Authority of Law.

The Alaska courts have addressed the "entrusted to . . . care by authority of law" language in Title 11 on two occasions. These discussions confirm plaintiffs' conclusion that a student over the age of majority is not entrusted to a teacher "by authority of law" within the meaning of the substantive criminal statutes.

In Goulden v. State, 656 P.2d 1218, 1221-22 (Alaska App. 1983), the Court of Appeals indicated that the teacher/student

^{16/}These interpretations of the statute by the Office of the Attorney General are a relevant and persuasive guide in statutory authoritative interpretation. See Allison v. State, 583 P.2d 813, 816 (Alaska 1978); "Sutherland", § § 49.05, 49.06.

relationship could be considered in aggravating a sentence for a Class C felony because it "approximates" the more serious felony offense of having sexual intercourse with someone who was "entrusted to the offender's care under authority of law." 656 P.2d, at 1222 (emphasis added). Definitionally, conduct which only "approximates" criminal conduct is not itself within such criminal conduct. Additionally, and independently, Goulden involved a complainant who was under the age of legal consent and was also under the age after which school attendance is no longer compelled by law. Goulden was followed in State v. Andrews, 707 P.2d 900, 911 (Alaska App. 1985). Andrews involved a public school teacher convicted of multiple counts of sexual abuse of and sexual assault on elementary school female pupils ranging from 9 to 12 years of age. These cases simply hold that the teacher/student relationship may be considered as a factor in aggravation of a sentence imposed for sexual conduct which is otherwise criminal. Neither Goulden nor Andrews addresses the defendants' novel theory that such an aggravating factor may itself be used as a basis for conviction in the first place.

Goulden establishes that even if a student is under the age of consent and under the age of compulsory school attendance, she is not "entrusted to [a teacher's or school official's] care under authority of law" within the meaning of the substantive criminal provisions of Title 11. Such a student's relationship to teachers and school officials only "pproximates" -- but is not within -- the statutory meaning of entrusted to care. A fortiori,

a student who is over the age of consent and over the age of compulsory school attendance cannot conceivably be "entrusted to care under authority of law" with respect to teachers or school officials.^{17/}

Neither the defendant in Goulden nor in Andrews was prosecuted under statutes which asserted that the underage student/complainants were entrusted to their care by authority of law by virtue of their positions as a principal/teacher and teacher, respectively. Additionally, the Goulden court specifically found that the relationship between a teacher and a pupil under the age of consent and under the age of compulsory school attendance only "approximates" those relationships included within the statutory meaning of "entrusted to. . .care by authority of law." Consequently, the reasoning of Goulden and Andrews clearly precludes an assertion that the relationship between a teacher and

17/ The relevant portion of Goulden states as follows:

It is significant that someone Goulden's age [43] who has consensual sexual relations with someone M.S.'s age [14], who is entrusted to his care under authority of law, is guilty of a Class A felony, AS 11.41.410(a)(4)(A); but only a Class C felony where she is M.S.'s age but otherwise free from the defendant's influence, AS 11.41.440(a)(1). Since Goulden's position as head of the school approximates the more serious conduct governed by AS 11.41.410(a)(4)(A), it was not unreasonable for the trial court to consider him a worst offender, AS 12.55.155(c)(10), and this case a particularly serious example of the conduct proscribed by AS 11.41.440.

Goulden v. State, supra, 656 P.2d, at 1222.

a student over the age of consent and over the age of compulsory school attendance constitutes entrustment to care by authority of law. The only judicial interpretations of the language now relied upon by the state in its novel, and previously self-contradicted theory of prosecution in this case, conclusively demonstrate that the state's interpretation is erroneous as a matter of law.

(6) Teachers Are Not Entrusted With "Care" Responsibilities by Authority of Law.

Despite the fact that students are under the supervision of their teachers during the school day, teachers have no general responsibility for the "care" of their students as that term is used in the Alaska statutes. The word care refers to providing food, shelter and the like and is used to describe a relationship such as that between parent and child. For example, AS 47.10.230, entitled "Powers and Duties of Department Over Care of Child", provides in part:

The Department of Health and Social Services shall arrange for the care of every child committed to its custody by placing the child in a foster home or in the care of an agency or institution providing care for children inside and outside the state.

See also AS 47.35.020; AS 25.23.050. Courts, too, have held that the term "care" reflects a relationship akin to physical custody of a child. See Madison v. State, 42 S.W.2d 209, 210 (Tenn. 1983); In Re Adoption of Ellis, 149 N.W.2d 804, 809 (Iowa 1967).

A teacher is not legally responsible for the "care" of his students and, even more critically, Alaska's education statutes, set forth in Title 14, contain no provision which

"entrusts" students to the care of their teachers "by authority of law", or by any other authority for that matter. There is no statutory grant of authority or entrustment of care to teachers over students. In fact, teachers have no greater authority with respect to the affairs, conduct and treatment of their students than do other adults. They are not empowered to act or make decisions on behalf of their students. They are empowered only to teach.

This distinction between "care" and "education" was acknowledged in a tentative draft of the Model Penal Code, on which many of the revisions to Alaska's criminal code were based. The draft provided:

A person who causes another to carry out or submit to an act of deviant sexual intercourse. . .commits a misdemeanor if:

(a) the victim is less than 21 years old and the actor is charged with his care, treatment, protection or education. . .

See American Law Institute, Model Penal Code, Tentative Draft 4, § 207.5 (1955). This formulation, however, was ultimately "deemed too broad in its impact." ALI, Model Penal Code and Commentaries, Part II, Vol I, Sect. 213.3 at 387-88 (1980). In the final draft of the Model Penal Code this language was replaced by a provision prohibiting such conduct by those responsible for the child's "general supervision." Id. In rejecting the tentative draft, the commentary states:

Doctor-patient and teacher-student relationships, for example, would have been included in the previous formulation, and

while one can imagine situations where such cases should be included, it seemed inappropriate to provide for general coverage.

Id. See also Penn. State Ass'n. v. Com Dept. of Pub., 449 P.2d 89, 92 (Penn. 1982) (declaratory judgment)

(7) Alaska's Compulsory Education Law Does Not Constitute Entrustment of A Seventeen Year Old Student.

One looks in vain for a significant legal tie binding the teacher to the student. Although Alaska's compulsory education statute (AS 14.30.010) could arguably be viewed as constituting an implied entrustment to teachers of the education of students who are obliged to attend school, the statute is inapplicable to the relationship between a teacher and a seventeen year old student. The statute is explicitly limited to children between the ages of 7 and 16 years of age. See AS 14.30.010(a). As a result, seventeen year old individuals are not obligated in Alaska to attend school and, therefore, cannot reasonably be said to be entrusted to their teachers by authority of the compulsory education statute. The fact that compulsory education ends at age sixteen serves only to confirm that no "authority of law" creates the relationship between a seventeen year old high school student and the school system for purposes of Title 11.

(8) There is No Common Law Entrustment of A Student to A Teacher's Care.

In light of the specific language used by the legislature in the sexual abuse statutes, it is doubtful that, in the absence of a statutory entrustment to teachers of the care for their

students, such an entrustment could be founded on common law principles. This is particularly true since there are no common law crimes in Alaska; conduct is now made an offense only by statute or regulation. See AS 11.81.220; AS 01.10.010. See also Perkins, Criminal Law, p. 26 (2nd Ed. 1969). While the courts occasionally rely on common law principles in interpreting statutory offenses, they do not apply such principles where they conflict with the wording of the statute or the structure of the statutory scheme. See Olp v. State, 738 P.2d 1117, 1118 (Alaska App. 1987). In Olp, a step-father was charged with criminal non-support of his step-children under AS 11.51.120. The Court of Appeals considered the common law on the question of whether a person becomes obligated to act where he or she voluntarily and gratuitously assumes a duty to a third person. Although the Alaska Supreme Court has often recognized this doctrine in negligence law, the Court of Appeals declined to import it into the field of criminal law, based on four factors:

- (1) the plain wording of the statute did not appear to apply to someone in Olp's position;
- (2) given the lack of adequate definition, the statute would run the risk of becoming void for vagueness if so interpreted;
- (3) there were no Alaska Supreme Court cases establishing such a common law civil responsibility; and
- (4) as always, penal statutes must be strictly construed against the state.

Olp, 738 P.2d at 1119. Olp establishes that common law definitions may be applied to criminal statutes only in those limited

situations where they are consistent with other factors. These factors preclude use of any common law definition in construing the Sexual Abuse of a Minor statute.

As noted above, there is nothing in Alaska's statutes which confers such care authority or responsibility on teachers. Still, even if common law principles were applied, there is no case support for the proposition that teachers are entrusted with the type of caretaking responsibilities which are the focus of the legislature's intent in enacting the sexual abuse statute. The character of the student/teacher relationship has been most thoroughly discussed in connection with two legal issues: corporal punishment by teachers and searches directed against students. Neither provides support here for the extension of the sexual abuse statute to teachers.

The power of a teacher to use corporal punishment was long premised on the assumption that the teacher acted in loco parentis; "instead of a parent; charged factitiously with a parent's rights, duties and responsibilities." Black's Law Dictionary (5th Ed. 1979). Indeed, a person who has the authority to act in place of a parent may use reasonable force for discipline and control of a child. W. Keeton, D. Dobbs, R. Keeton and D. Owen, Prosser and Keeton on Torts, Sect. 27 (5th Ed. 1984). But it has been widely recognized that the teacher does not act in the place of the parent. See Ingraham v. Wright, 430 U.S. 651, 662, 51 L.Ed.2d 711, 724 (1977). Instead, the teacher's power to discipline the student arises only from the need to maintain an

environment conducive to education. Accordingly, the Restatement (2d) of Torts, Sect. 152 provides:

One who is charged with only the education or some other part of the training of a child has the privilege of using force or confinement to discipline the child only insofar as the privilege is necessary for the education or the other part of the training which is committed or delegated to the actor.

Similarly, the IJA-ABA Joint Commission on Juvenile Justice Standards has promulgated the following standard:

In the absence of explicit legislative provisions to the contrary, schools should attempt to regulate the conduct or status of students only to the extent that such regulation is reasonably and properly related to educating the students in their charge.

The commentary to this standard further states, "schools are special purpose organizations, all the regulatory activities of which must necessarily be related to the special purpose for which they exist, which purpose is that of educating the students in their charge." See Institute of Judicial Administration, Standards Relating to Schools and Education, Sect. 3.1 (1977).

Recent cases on searches directed at students have likewise emphasized the teacher's role as educator, distinguishing it from broader parental responsibilities. The United States Supreme Court has rejected the in loco parentis doctrine, and has instead justified relaxed constitutional standards for school searches invoking "the need to maintain an environment in which learning can take place." New Jersey v. T.L.O., 469 U.S. 325, 340, 83 L.Ed.2d 720, 733 (1985). Similarly, the Alaska Court of Appeals

has stated: "We agree ... that the phrase in loco parentis, used by Blackstone to describe the relationship between teachers and students when education was predominantly private and teachers could reasonably be viewed as the agent of the student's parents, has little utility in describing contemporary public education." D.R.C. v. State, 646 P.2d 252, 255 (Alaska 1982).

Far from imposing "care" responsibilities on teachers, case law has recognized the limited authority, power and responsibility of a teacher in a public educational system, moving far from the in loco parentis view of the 19th century. Counsel knows of no authority in any jurisdiction supporting the imposition of criminal culpability for a violation of a statute like AS 11.41.434 based on a theory of common law entrustment to a teacher of the care of a student.

(9) If The Court Now Rules That The Consensual Sexual Conduct Here At Issue Is "Sexual Abuse," Such An Unexpected Construction Cannot Be Applied In A Criminal Prosecution Of Plaintiffs In This Case.

Assuming, purely for purpose of argument, that a court now construed the provisions of Title 11 such that a seventeen year old student is considered to be entrusted to her teacher's care by authority of law, and further assuming that school officials are therefore required immediately to report under Title 47 when there is cause to believe that such a seventeen year old had sexual relations with a teacher, these would be wholly novel and unexpected interpretations of the statutes, for all the reasons detailed in Sections III.B.1.b.(1)-(8), pp. 36-55, supra. The

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Alaska due process guarantee would accordingly preclude criminal prosecution of the persons first subjected to such an unexpected construction of the statute, because such a construction acts like a judicially created ex post facto law. M.O.W. v. State, 645 P.2d 1229, p. 1233, n. 8 (Alaska App. 1982), citing Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1965); Accord Marks v. United States, 430 U.S. 188, 191-92 (1977).

There could be no clearer violation of the most basic due process concept -- deprivation of fair notice that conduct is illegal -- given the same prosecutor's and the Department of Law's previous, explicit, public, and repeated statements that the consensual sexual conduct between a teacher and a student over the age of sixteen is not sexual abuse. The due process problems which confront a prosecution of the teacher multiply geometrically where, as here, prosecutors threaten to prosecute school officials who assertedly did not report soon enough conduct which the same prosecutors have said does not constitute sex abuse, and thus need not have been reported at all. Remembering that the school officials did report after consultation with counsel and in good faith, thus obtaining absolute immunity from prosecution by operation of AS 47.17.050, the outrageousness of the threatened prosecutions can be clearly seen. This is not due process. This is not equal, fair, and just treatment in an executive investigation. This is unconscionable, and the court should put an end to these egregious and unconstitutional abuses.

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c. "Maltreatment" is Unconstitutionally Vague Unless Given the Same Meaning in Title 47 That It Has In 45 C.F.R. 1340.2(d)(2)(1).

(1) "Maltreatment" Without Further Definition is Unconstitutionally Vague.

In their brief in support of the motion for summary judgment, the defendants suggest that even if the S1/T1 incident is not reportable as sexual abuse, it is reportable as "maltreatment." As with sexual abuse, "maltreatment" is not defined in AS 47.17. Nor is it anywhere defined in any other title of the Alaska Statutes.

Dictionary definitions of maltreatment do not provide satisfactory standard for the imposition of criminal sanctions. Maltreatment is a word describing the state of being maltreated. Oxford English Dictionary, 199, Vol. IX, p. 277. To maltreat someone means simply "to treat badly," (Oxford American Dictionary 1980), p. 402), or to "ill-use; to handle roughly or rudely; to ill-treat," (Oxford English Dictionary 1989), Vol. IX, p. 277).

Because criminal sanctions are the result of failing to report "maltreatment," administrators and teachers must be given specific notice of what conduct must be reported. Moreover, the definition must not vest unbridled discretion in the prosecuting agency. If maltreatment means "to treat badly," "to ill-use," "to handle roughly or rudely," or "to ill-treat," then the term is

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unconstitutionally vague.^{18/} See cases cited in Section III.A.1., supra.

First, the term does not give notice of what conduct is prohibited. Demeaning punishment, reprimanding a child in class, giving extra homework, criticizing in a harsh voice, and sending a child to the principal's office without sufficient cause could all fit within the dictionary definition of "maltreatment." In the present case, some might contend that otherwise lawful consensual sex is an "ill-use" by the teacher of the student, while conceding it is not "rough or rude." Others could argue it is within the zone of constitutionally assured personal privacy and expression. In any event, the actor is left to guess what conduct/incident he must report under the Child Protection Act.

Second, the fact that such a broad range of conduct may potentially fall within "maltreatment" leaves the prosecuting authority discretion that is too broad to withstand a constitutional due process challenge. See Section III.A.1., supra. The court should declare this term void for vagueness and sever it from the statute.^{19/}

^{18/} The definition of maltreatment was discussed briefly during a committee hearing in the House of Representatives. In that regard, Representative Pettyjohn "read the dictionary definition of 'maltreatment' as being 'roughly and rudely,'" Houses HESS meeting 3/13/86, H.P. 471, 1986.

^{19/}See Footnote 23, infra.

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(2) "Maltreatment" As Defined In 45 C.F.R. 1340.2(d)(2)(i) is Sufficiently Specific.

On numerous occasions, the Alaska Child Protection Act (AS 47.17) has been amended to come into compliance with the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. 5101 et. seq. (CAPTA), and regulations promulgated thereunder, so that federal funding of various state programs would not be lost. Indeed, there is persuasive evidence that the inclusion of the term "maltreatment" in Title 47 of the Alaska Statutes occurred simply to bring state law into compliance with CAPTA so that funding would not be endangered.

Federal regulations adopted pursuant to CAPTA have consistently included and defined the term "maltreatment." In the 1974 regulations, maltreatment was defined as "failure to provide adequate food, clothing, or shelter." Federal Register, Vol. 39, Mo. 245, P. 43937, December 19, 1974, Appendix A, Federal Legislation. Currently "maltreatment" also includes the failure to provide adequate medical treatment. 45 CFR 1340.2(d)(2)(i).

The provisions of Title 47 did not include "maltreatment" in the definition of child abuse and neglect prior to or at the time federal regulations first adopted the term. However, within about one year of the promulgation of the federal regulations, Title 47 was amended to include "maltreatment" as part of the definition of child abuse and neglect. See Appendix A, Senate Bill No. 371, Session Laws of Alaska, 1976, Chapter 222.

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Given the absence of any contemporaneous legislative history the term "maltreatment," given the continuing practice of the legislature to amend Title 47 to achieve compliance with federal regulations in order to preserve funding, and given the sequence and timing of events -- the promulgation of federal regulations including and defining maltreatment followed in the next state legislative term by an amendment to include the term in the Alaska Statutes -- it is apparent that the state legislature included the phrase "maltreatment" to maintain compliance with federal law. Accordingly, the legislature can be deemed to have accepted the federal definition along with the term.

If the court chooses to construe "maltreatment" rather than to declare the term vague and strike it from the statute, then the definition should derive from 45 CFR, § 1340.2(d)(2)(i) and its predecessor, 45 CFR, § 1340.1-2(b)(1). "Maltreatment" would then be defined as a "failure to provide adequate food, shelter, clothing or medical care."

(3) The Consensual Sexual Conduct Here At Issue Is Not "Maltreatment" As So Defined.

Obviously, the specific definition of "maltreatment" provided in 45 C.F.R. 1340.2(d)(2)(i) does not include otherwise lawful, consensual sexual activity between a teacher and a seventeen year old student. In no sense does such sexual conduct constitute the failure to provide adequate shelter, food, clothing, or medical treatment.

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If the court chooses to adopt the Code of Federal Regulations definition as the one intended by the Legislature, rather than to sever the defective term from the statute, there is no possible construction of the incident here at issue which would require Anchorage School District personnel to report it as "maltreatment." An otherwise lawful consensual sex act between a teacher and a seventeen year old student is not "maltreatment," if that term is defined with constitutionally required specificity.

(4) If the Court Now Rules That the Consensual Sexual Conduct Here At Issue Is "Maltreatment," This Unexpected Construction Cannot Be Applied in a Criminal Prosecution of Plaintiffs in this Case.

Given the legislative history discussed above, all intelligent people will assume that the inclusion of the phrase "maltreatment" in Title 47 was an adoption of a term from comparable federal legislation with respect to which the state needed to be in substantial conformity in order to continue receiving federal funds. As such, any intelligent person would conclude that the term "maltreatment," which was given no specific meaning or definition by the Alaska Legislature, has the meaning which was attributed to it by the federal regulations pertaining to the comparable federal legislation with which the state sought conformity.

To attribute a much broader meaning to the term -- including not only the failure to provide adequate shelter, food, clothing and medical care, but also otherwise lawful consensual sexual activity -- would constitute a novel and wholly unexpected

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judicial construction of the term. Due process prohibits the application of such an unexpected construction as a basis for prosecution of individuals who lacked fair notice of this meaning. M.O.W. v. State, 645 P.2d 1229, 1233, n. 8 (Alaska App. 1982), citing Accord Marks v. United States, 430 U.S. 188, 191-92 (1977). Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1965).

2. The Provisions of Title 47 Concerning When a Report Must Be Made are Unconstitutional.

a. The "Immediate" and "Prompt" Reporting Requirements Are Unconstitutionally Vague.

AS 47.17.020(a) requires a person within the statute to file a report "immediately" after determining that there is cause to believe that child abuse or neglect has occurred. Similarly, AS 47.17.020(e) requires a person within the statute to file a report "promptly" after determining that there is cause to believe a child has suffered harm as a result of abuse. Since the same infirmity inflicts both,^{20/} discussion of these terms will be combined.

The statute provides no definition or qualifying parameters to guide a potential reporter as to what is meant by "immediately" or "promptly." Without a definition or qualifying parameters, these terms necessarily leave men of common

^{20/}"Immediately" and "promptly" are both adverbs, generally meaning to do "without delay." Oxford American Dictionary (1980), pp. 326-27 and 535. The Oxford American Dictionary (1980) is frequently cited by Alaska Courts for terms of common usage. See generally, Velez v. State, 762 P.2d 1297, 1303 (Alaska App. 1988); Walsh v. State, 758 P.2d 124, 127 (Alaska App. 1988); State v. Eluska, 698 P.2d 174, 181 (Alaska App. 1985).