ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9201 HOUSE JUDICIARY

HB
234

HOUSE COMMITTEE REPORT

(7).

Date Referred to Committee: April 4, 1997 **FURTHER REFERRALS:** **Finance**

Date of Committee Action: 4/29/97

The JUDICIARY Committee considered: **HB 234**

HOUSE BILL NO. 234 **ABORTIONS UNDER GENERAL RELIEF PROGRAM**

"An Act relating to assistance for abortions under the general relief program; and relating to financial responsibility for the costs of abortions."

recommends it be replaced
with the following committee substitute ______ [ ] the same title
[ ] a new title

[ ] additional referral to ______ Committee
[ ] attached amendment(s)

ADOPTS: ______ Letter of Intent

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

[/] fiscal note(s) HSS [ ] fiscal note(s) ______

[ ] zero fiscal note(s) ______ [ ] zero fiscal note(s) ______

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
[signature] CROFT		✓		
[signature] RUKEBERG				✓
[signature] PORTER				✓
[signature] GREEN				✓
[signature] JAMES				✓
[signature] BUNDE		✓		
[signature] BERKOWITZ		✓		

CHAIR'S SIGNATURE [signature]

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 234

Revision Date:
Title: relating to assistance for abortions under the general relief program
Sponsor: Martin
Requestor: Judiciary

Dept. Affected: Health and Social Services
BRU: Medical Assistance
Component: Medicaid Non-Facility
COMPONENT SERIAL NO. 229
See also (SN#):

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	5,385.2	7,109.6	8,036.9	9,081.5	10,253.9	11,586.3
MISCELLANEOUS						
TOTAL OPERATING	5,385.2	7,109.6	8,036.9	9,081.5	10,253.9	11,586.3
CAPITAL EXPENDITURES						
CHANGES IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

	FY98	FY99	FY00	FY01	FY02	FY03
1002 Federal Receipts	2,692.6	3,554.8	4,018.4	4,540.7	5,127.0	5,793.2
1003 GF Match	2,692.6	3,554.8	4,018.5	4,540.8	5,126.9	5,793.1
1004 GF						
1005 GF/Program Receipts						
1037 GF Mental Health						
Other (please specify)						
TOTAL	5,385.2	7,109.6	8,036.9	9,081.5	10,253.9	11,586.3

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: $0.0

ANALYSIS: (Attach a separate page if necessary)

While this bill requires significant administrative action on the part of the division to recoup expenditures for abortions, it effectively eliminates funding for abortions under section 3, which places abortion procedures as number one on the priority list of services in AS 47.25.205. All services numbered 1 through 7 have not been funded under General Relief Medical Assistance since 1986.

This fiscal note assumes that 80% of the pregnant women eligible for Medicaid would give birth and remain on Medicaid should abortion funding become unavailable. This would account for 590 women, and their children, being added to Medicaid annually (newborns receive automatic Medicaid coverage through the first year of life if the mother is receiving Medicaid at the time of birth). FY 98 assumes only partical funding for newborns as their births will be scattered throughout the year, with some children born in the next fiscal year.

Prepared by: Nancy Weller NW
Division: Medical Assistance
Phone: 465-3355
Date: 04/10/97

4/11/97

Approved by Commissioner: Karen Perdue, Commissioner
Agency: Department of Health & Social Services
Date: 4/21/97

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0-LS0848\B.2
Lauterbach
4/18/97

not offered

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: HB 234

1 Page 1, line 5, following "**costs.**":

2 Insert "(a)"

3 Page 1, following line 7:

4 Insert a new subsection to read:

5 "(b) A parent or legal guardian of a minor liable under (a) of this section for

6 the medical costs of an abortion is also liable for the medical costs of the abortion."

0-LS0848\B.3
Lauterbach
4/18/97

A M E N D M E N T #1

Fails 4/29/97

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: HB 234

1 Page 2, line 7, through page 3, line 10:
2 Delete all material and insert:
3 "**Sec. 47.25.205. Priority of general relief medical assistance.** If the
4 department finds that the cost of medical assistance for all persons eligible under
5 AS 47.25.120 - 47.25.300 will exceed the amount allocated in the state budget for that
6 assistance for the fiscal year, the department shall eliminate coverage for medical
7 services in the following order:
8 (1) **abortions where the pregnancy did not result from rape or**
9 **incest and related services and supplies, such as medical supplies and equipment,**
10 **transportation, laboratory and x-ray services, physician services, hospital services,**
11 **and pharmaceuticals, used for an abortion where the pregnancy did not result**
12 **from rape or incest;**
13 (2) treatment of speech, hearing, and language disorders;
14 (3) [(2)] optometrists' services and eyeglasses;
15 (4) [(3)] occupational therapy;
16 (5) [(4)] emergency dental services for adults;
17 (6) [(5)] prosthetic devices not including dentures;
18 (7) [(6)] medical supplies and equipment **other than those used to**
19 **perform an abortion described in (1) of this section**;
20 (8) [(7)] physical therapy;
21 (9) [(8)] outpatient laboratory and outpatient x-ray services **other than**
22 **those used for an abortion described in (1) of this section**;
23 (10) [(9)] ambulatory surgical center services **other than services to**
24 **perform an abortion described in (1) of this section**;
25 (11) [(10)] nonemergency medical transportation **other than**

1 transportation to obtain an abortion described in (1) of this section;

2 (12) [(11)] outpatient physician services other than services to

3 perform an abortion described in (1) of this section;

4 (13) [(12)] outpatient hospital services other than services to perform

5 an abortion described in (1) of this section;

6 (14) [(13)] intermediate care facility services;

7 (15) [(14)] skilled nursing facility services;

8 (16) [(15)] emergency medical transportation other than

9 transportation for an abortion described in (1) of this section;

10 (17) [(16)] pharmaceuticals other than those used in an abortion

11 described in (1) of this section;

12 (18) [(17)] inpatient physician services other than services to

13 perform an abortion described in (1) of this section;

14 (19) [(18)] inpatient hospital services other than services to perform

15 an abortion described in (1) of this section."

TCN
#
70740

0-LS0848\B.4
Lauterbach
4/26/97

AMENDMENT #2 Fails 4/29/97

OFFERED IN THE HOUSE

TO: HB 234

BY REPRESENTATIVE ROKEBERG

1 Page 1, line 5, following "costs.":

2 Insert "(a)"

3 Page 1, following line 7:

4 Insert a new subsection to read:

5 "(b) A parent or legal guardian of a minor liable under (a) of this section for

6 the medical costs of an abortion is also liable for the medical costs of the abortion

7 unless the department determines that a statutory or constitutional right of

8 confidentiality would be infringed by a disclosure to the parent or guardian that the

9 abortion had occurred."

0-LS0848\B.5
Lauterbach
4/26/97

AMENDMENT #3 Fails 4/29/97

OFFERED IN THE HOUSE — BY REPRESENTATIVE ROKEBERG

TO: HB 234

1 Page 1, line 7, following "child.":
2 Insert "The liability established under this section may not be enforced if enforcement
3 would violate a statutory or constitutional right of confidentiality related to abortion
4 decisions."

5 Page 4, following line 6:
6 Insert a new bill section to read:
7 "* Sec. 7. AS 47.25 is amended by adding a new section to read:
8 **Sec. 47.25.267. Protection of confidentiality.** Notwithstanding
9 AS 47.25.150, 47.25.220, and 47.25.240, the department may not implement
10 AS 47.25.150, 47.25.220, or 47.25.240 to the extent that implementation would violate
11 a statutory or constitutional right of confidentiality related to abortion decisions."

12 Renumber the following bill section accordingly.

REPRESENTATIVE
TERRY MARTIN
VICE-CHAIRMAN
BUDGET & AUDIT COMMITTEE
MEMBER
HOUSE FINANCE COMMITTEE

Alaska State Legislature

MAY 15 - JAN 15 258-8169
716 W. 4TH, SUITE 650
ANCHORAGE, AK 99504

JAN 15 - MAY 15 465-3783
STATE CAPITOL
JUNEAU, AK 99801-1182

Sponsor Statement

HB 234

"Relating to assistance for abortions under the general relief program; and relating to financial responsibility for the costs of abortions."

House Bill 234 provides a new measure of logic and consistency to the state's abortion law in two areas -- first, in establishing the procedure's priority on the official list of medical procedures the state will pay for under the general relief medical program; and second, by creating a mechanism by which the state can identify and hold financially responsible the would-be father.

The Governor has complained that the Legislature has not appropriated adequate funding in the general relief medical program to provide for the lowest priority items on the list. These include such necessities as eyeglasses and emergency dental care for the poor and elderly. Obviously, the Legislature agrees that these items should continue to be on the priority list. However, it is not logical that an elective procedure, such as abortion, should continue to hold a higher priority. HB 234 would eliminate the priority status that abortions have enjoyed at the expense of other, more essential demands.

HB 234 also allows the state to require payment from the pregnant woman, either partially or in full, for an elective abortion it has paid for under the general relief medical program.

And consistent with other provisions of state law, HB 234 would require that the male responsible for the pregnancy be identified and held financially responsible for an abortion sought under the general relief medical program. Curre ly, under Title 47, the state requires a woman seeking financial assistance from the sta to identify the father of her dependent children. The state then recovers any costs it can from the father through the Child Support Enforcement Division. It is logical that if a father of a born child should be made to reimburse the state for state-funded services, so should the father of an unborn one that is aborted.

House Bill 234 represents a new benchmark in requiring accountable parties to accept the full responsibility for their actions. For too long, women have been able to obtain free abortions, courtesy of the state and at the expense of others who have medical needs that go unmet. At the same time, their male partners have had little more burden than to drive the woman to the abortion clinic, if that; often they simply abandon the woman.

If we are to continue to have a policy in Alaska of publicly-funded abortion, the state should do all it can to collect from the responsible persons.

<u>**Sectional Analysis**</u>

HB 234

"Relating to assistance for abortions under the general relief program; and relating to financial responsibility for the costs of abortions."

Sec. 1 establishes the financial responsibility of both parents for the costs of an abortion.

Sec. 2 would require a pregnant woman who is seeking an abortion under the general relief program to assign to DHSS the right to recover the costs of the abortion from the other parent and to cooperate in establishing who and where the other parent is.

Sec. 3 revises the priority list to give abortion services the lowest priority when funding is insufficient for the general relief program.

Sec. 4 clarifies that the state has a claim against the pregnant woman for abortion costs and that the permanent fund dividend of the woman is a resource the state can pursue.

Sec. 5 amends the current statute that already allows the state to pursue third parties to recover the cost of general relief cash assistance so that the statute also includes recovery of abortion costs from third parties, including the other parent.

Sec. 6 adds an authorization for the state to take a permanent fund dividend to recover the costs of an abortion from a third party.

Sec. 7 contains a revised definition of "abortion."

HB 234 has no effective date clause and would, therefore, become effective 90 days after it is signed or allowed to become law.

Official Business

COMMITTEE: HOUSE JUDICIARY - 8:30 A.M.

DATE: April 25, 1997

Subject of meeting: HB 234 - Abortions Under General Relief Program

SIGN-IN

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
~~KRISTEN BOMENGEN~~	NOT AVAILABLE	3600	Dept. LAW	Yes
NANCY Weller	ON THEIR WAY	3355	Dept H&SS	Yes
Peter Nakamura		3090	DPH	Yes

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

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

to be read across today 4/4/97

MEMORANDUM April 2, 1997

SUBJECT: General Relief Abortions (Work Order No. 20-LS0848\B)

TO: Representative Terry Martin

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a new draft of your bill on the above topic.

Section 1 establishes the financial responsibility of both parents for the costs of an abortion.

Section 2, largely borrowed from AS 47.27.040(b), would require a pregnant woman who is seeking an abortion under the general relief program to assign to DHSS to right to recover the costs of the abortion from the other parent and to cooperate in establishing who (and where) the other parent is.

Section 3 revises the priority list to give abortion services the lowest priority when funding is insufficient for the general relief program.

Section 4 clarifies that the state has a claim against the pregnant woman for abortion costs and that the permanent fund dividend of the woman is a resource the state can pursue. In my opinion, the state could pursue the PFD without this new language, but I have included it because you seemed to want a specific reference.

Section 5 amends the current statute that already allows the state to pursue third parties to recover the cost of general relief cash assistance so that the statute also includes recovery of abortion costs from third parties, including the other parent.

Section 6, like sec. 4, contains a specific reference to the permanent fund dividend of these third parties, which is probably unnecessary, but which I have, nevertheless included because it seemed important to you.

Section 7 contains the revised definition of "abortion."

Please let me know if I can be of further assistance on this matter.

TML:jdr
97-233.jdr
Enclosure

cc:Mail for: Representative Terry Martin

Subject: [Fwd: Abortion Bill]
From: wolfe@corecom.net ("david c. wolfe") at CC2MHS1 4/9/97 7:12 PM
To: Representative Terry Martin at LAA_TRANS

Message-ID: <334:58C6.6634@corecom.net>
Date: Wed, 09 Apr 1997 19:04:38 -0800
From: "david c. wolfe" <wolfe@corecom.net>
X-Mailer: Mozilla 3.01 (Win95; I)
MIME-Version: 1.0
To: Representative_Terry_Martin@legis.atate.ak.us
Subject: Abortion Bill
Content-Type: text/plain; charset=us-ascii
Content-Transfer-Encoding: 7bit

Representative Martin:
Finally, a bill that makes sense. Let me applaud your efforts for introducing the bill to have women who receive a state funded abortion give up their Permanent Fund Dividend. Also allow me to applaud your efforts and your committment to stand up for those of us who feel we have been being punished by our government by being taxed to fund these kind of unnecessary procedures. It is time to make people responsible for themselves, one way or another. Thank you for the introduction of this legislation and I will support the legislation and yourself and hope that it can become law.

David C. Wolfe
8211 Pioneer Dr
Anchorage, AK 99504 Home Phone 338-1133 Work 269-6019

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAL ASSISTANCE

P.O. BOX 110660
JUNEAU, ALASKA 99811-0660
PHONE: (907) 465-3355
FAX: (907)465-2204

April 29, 1997

The Honorable Joe Green, Chair
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Green:

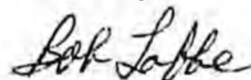
Representative Rokeburg requested information on the statutory basis for paternity establishment, and the number of persons applying for state assistance who request a good cause waiver of paternity establishment during the April 25, 1997 hearing on HB 234, relating to abortions under the General Relief Medical Program.

Attached, please find copies of two sections from the Social Security Act. Section 402(a)(26)(B) requires a person applying for Aid to Families with Dependent Children (AFDC) to cooperate in establishing the paternity of a child born out of wedlock unless good cause is requested. This law also applies to application for Medicaid; note that (C) of this section is directed at the receipt of a medical support order through Child Support Enforcement in order to avail the child of any health insurance the absent parent may possess. Also attached, is Section 454(4) that implements the paternity establishment requirement in Child Support Enforcement.

When a woman applies for assistance, she is requested to identify the father of her children on the application form. The Division of Public Assistance workers inform the applicants of the benefits of child support, and generally receive cooperation. This information is passed to the Child Support Enforcement Division (CSED) in the Department of Revenue, who pursues paternity establishment in accordance with their federal rules and procedures. CSED has the authority to compel the putative father to submit to paternity testing. A copy of federal report SSA-4680 is attached for you review; this form documents the number of persons claiming good cause for refusing to cooperate in establishing paternity. As you can see, there were 26 claims of good cause for the six month reporting period in 1996; these claims are broken out by reason for the claim.

Please contact me if you need additional information.

Sincerely,



Bob Labbe
Director

06-F145LH

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month the corrective payment is made and in the following month;

except that no recovery need be attempted or carried out under subparagraph (B) in any case, other than a case involving fraud on the part of the recipient, where (as determined by the State agency in accordance with criteria for determining cost-effectiveness, and with dollar limitations, which shall be prescribed by the Secretary in regulations) the cost of recovery would equal or exceed the amount of the overpayment involved;

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted;

(24) provide that if an individual is receiving benefits under title XVI or his costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made to his or her minor parent as provided in section 475(4)(B), then, for the period for which such benefits are received or such costs are so covered, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the family under this title and his income and resources shall not be counted as income and resources of a family under this title;

(25) provide that information is requested and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of this Act;

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to clauses (A) through (D) of such section) unless the State agency, after making reasonable efforts, is unable to

locate an appropriate individual to whom such payments can be made; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the State's plan for medical assistance under title XIX, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; but the State shall not be subject to any financial penalty in the administration or enforcement of this subparagraph as a result of any monitoring, quality control, or auditing requirements;

(27) provide that the State has in effect a plan approved under part D and operates a child support program in substantial compliance with such plan;

(28) provide that, in determining the amount of aid to which an eligible family is entitled, any portion of the amounts collected in any particular month as child support pursuant to a plan approved under part D, and retained by the State under section 457, which (under the State plan approved under this part as in effect both during July 1975 and during that particular month) would not have caused a reduction in the amount of aid paid to the family if such amounts had been paid directly to the family, shall be added to the amount of aid otherwise payable to such family under the State plan approved under this part;

[(29) Repealed.[17]]

(30) at the option of the State, provide for the establishment and operation, in accordance with an (initial and annually updated) advance automated data processing planning document approved under subsection (e), of an automated statewide management information system designed effectively and efficiently, to assist management in the administration of the State plan for aid to families with dependent children approved under this part, so as (A) to control and account for (i) all the factors in the total eligibility determination process under such plan for aid (including but not limited to (I) identifiable correlation factors (such as social security numbers, names, dates of birth, home addresses, and mailing addresses (including postal ZIP codes), of all applicants and recipients of such aid and the relative with whom any child who is such an applicant or recipient is living) to assure sufficient compatibility among the systems of different jurisdictions to permit periodic screening to determine whether an individual is or has been receiving benefits from more than one jurisdiction, (II) checking records of applicants and recipients of such aid on a periodic basis with other agencies, both intra- and inter-State, for determination and verification of eligibility and payment pursuant to requirements imposed by other provisions of this Act), (ii) the costs, quality, and delivery of funds and services furnished to applicants for and recipients of such aid, (B)

[17] P.L. 98-369, §2651(b)(2); 98 Stat. 1149.

the files and records maintained by such department, agency, or instrumentality with a view to determining whether the information requested is contained in any such files or records. If such search discloses the information requested, such individual shall immediately transmit such information to the Secretary, except that if any information is obtained the disclosure of which would contravene national policy or security interests of the United States or the confidentiality of census data, such information shall not be transmitted and such individual shall immediately notify the Secretary. If such search fails to disclose the information requested, such individual shall immediately so notify the Secretary. The costs incurred by any such department, agency, or instrumentality of the United States or of any State in providing such information to the Secretary shall be reimbursed by him. Whenever such services are furnished to an individual specified in subsection (c)(3), a fee shall be charged such individual. The fee so charged shall be used to reimburse the Secretary or his delegate for the expense of providing such services.

(3) The Secretary of Labor shall enter into an agreement with the Secretary to provide prompt access for the Secretary (in accordance with this subsection) to the wage and unemployment compensation claims information and data maintained by or for the Department of Labor or State employment security agencies.

(f) The Secretary, in carrying out his duties and functions under this section, shall enter into arrangements with State agencies administering State plans approved under this part for such State agencies to accept from resident parents, legal guardians, or agents of a child described in subsection (c)(3) and to transmit to the Secretary requests for information with regard to the whereabouts of absent parents and otherwise to cooperate with the Secretary in carrying out the purposes of this section.

STATE PLAN FOR CHILD AND SPOUSAL SUPPORT

SEC. 454. [42 U.S.C. 654] A State plan for child and spousal support must—

(1) provide that it shall be in effect in all political subdivisions of the State;

(2) provide for financial participation by the State;

(3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan;

(4) provide that such State will undertake—

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 402(a)(26) or section 1912 is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this title determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) that it is against the best interests of the child to do so, or, in the case of such a child with respect to whom an assignment under section 1912 is in effect, the State agency administering the plan approved under title XIX determines pursuant to section 1912(a)(1)(B) that it is against the best interests of the child to do so, and

(B) in the case of any child with respect to whom such assignment is effective, including an assignment with respect to a child on whose behalf a State agency is making foster care maintenance payments under part E, to secure support for such child from his parent (or from any other person legally liable for such support), and from such parent for his spouse (or former spouse) receiving aid to families with dependent children or medical assistance under a State plan approved under title XIX (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan), utilizing any reciprocal arrangements adopted with other States (unless the agency administering the plan of the State under part A or E of this title determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) that it is against the best interests of the child to do so), except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support;

(5) provide that (A) in any case in which support payments are collected for an individual with respect to whom an assignment under section 402(a)(26) is effective, such payments shall be made to the State for distribution pursuant to section 457 and shall not be paid directly to the family, and the individual will be notified on a monthly basis (or on a quarterly basis for so long as the Secretary determines with respect to a State that requiring such notice on a monthly basis would impose an unreasonable administrative burden) of the amount of the support payments collected; except that this paragraph shall not apply to such payments for any month following the first month in which the amount collected is sufficient to make such family ineligible for assistance under the State plan approved under part A; and (B) in any case in which support payments are collected for an individual pursuant to the assignment made under section 1912, such payments shall be made to the State for distribution pursuant to section 1912, except that this clause shall not apply to such payments for any month after the month in which the individual ceases to be eligible for medical assistance;

(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, including support collection services for the spouse (or former spouse) with whom the absent parent's child is living (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan), (B) an application fee for furnishing such services shall be imposed, which shall be paid by the individual applying for such services, or recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and shall be considered income to the

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Form Approved
OMB No.: 72-R1082

REPORT ON CLAIMS OF GOOD CAUSE FOR REFUSING TO COOPERATE IN ESTABLISHING PATERNITY AND SECURING CHILD SUPPORT

This report is required by Section 402(a) (26) (B) and 454(4) and (B) of the Social Security Act (45 CFR 232.48). Failure to report can result in no further monies or other benefits being paid under this program.

SOCIAL SECURITY ADMINISTRATION
OFFICE OF POLICY
OFFICE OF RESEARCH AND STATISTICS
DIVISION OF FAMILY ASSISTANCE STUDIES

From: (State) ALASKA

Period Covered: 4/1/96 - 9/30/96

1. Claims made during period:	26
a. Claims made during period without corroborative evidence, where the claim is based on anticipation of physical harm to the child or to the parent or caretaker relative	10
2. Claims found to be valid during the period:	14
a. Claims found to be valid, by circumstances:	
1. Potential physical harm to child	10
2. Potential emotional harm to child	3
3. Potential physical harm to parent or caretaker relative	0
4. Potential emotional harm to parent or caretaker relative	0
5. Conception result of incest or forcible rape	1
6. Legal adoption before court	0
7. Parent receiving pre-adoption services	0
b. Claims found to be valid during the period without corroborative evidence, where the claim is based on anticipation of physical harm to the child or to the parent or caretaker relative.	0
c. Claims found to be valid based solely on an examination of the corroborative evidence supplied by the applicant or recipient with no investigation	11
d. Claims found to be valid but there was a determination made that child support enforcement may proceed without the participation of the caretaker relative	0
3. Claims made by an applicant prior to receiving AFDC and the final determination that good cause did not exist was made after the applicant was determined to be eligible for AFDC	2

James

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

PLANNED PARENTHOOD OF ALASKA INC., et al.,

Plaintiffs,

v.

THEODORE A. MALA, Commissioner, Department of Health and Social Services, and the DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF ALASKA,

Defendants.

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APR 13 199?
... of the ...

Case No. 3AN-93-01228 Civil

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated and agreed to by and between the parties, by and through their respective counsel, that the above-captioned matter may be dismissed with prejudice in its entirety, each party to bear its own costs and attorney's fees, on the grounds and for the reason that all issues raised therein between these said parties have been fully and finally compromised and settled to the satisfaction of each.

A copy of the parties' Settlement Agreement is attached hereto and the parties request the court to approve the settlement with an order of dismissal.

DATED: April 12, 1994

Joyce E. Bamberger
Attorney for Plaintiffs
Planned Parenthood of Alaska, Inc., National Organization of Women, Fairbanks Chapter, Juneau Coalition for Pro-Choice, Pro-Choice Voters-Ketchikan, Mat-Su Coalition for Choice, Sitkans for Choice, Fairbanks Coalition for Choice, and Jane Does I-X

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PHONE: (907) 269-5100

BRUCE M. BOTELHO
ATTORNEY GENERAL
For the Defendants

DATED: March 30, 1994 BY: Cheri C. Jacobus

Cheri C. Jacobus
Assistant Attorney General

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CORRECTION

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HAVE BEEN REFILMED TO
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State of Alaska

Rev. 6/98

Form Approved
OMB No.: 72-R1082

REPORT ON CLAIMS OF GOOD CAUSE FOR REFUSING TO COOPERATE IN ESTABLISHING PATERNITY AND SECURING CHILD SUPPORT

This report is required by Section 402(a) (26) (B) and 454(4) and (B) of the Social Security Act (45 CFR 232.48). Failure to report can result in no further monies or other benefits being paid under this program.

SOCIAL SECURITY ADMINISTRATION
OFFICE OF POLICY
OFFICE OF RESEARCH AND STATISTICS
DIVISION OF FAMILY ASSISTANCE STUDIES

From: (State) ALASKA

Period Covered: 4/1/96 - 9/30/96

1. Claims made during period:	26
a. Claims made during period without corroborative evidence, where the claim is based on anticipation of physical harm to the child or to the parent or caretaker relative	10
2. Claims found to be valid during the period:	14
a. Claims found to be valid, by circumstances:	
1. Potential physical harm to child	10
2. Potential emotional harm to child	3
3. Potential physical harm to parent or caretaker relative	0
4. Potential emotional harm to parent or caretaker relative	0
5. Conception result of incest or forcible rape	1
6. Legal adoption before court	0
7. Parent receiving pre-adoption services	0
b. Claims found to be valid during the period without corroborative evidence, where the claim is based on anticipation of physical harm to the child or to the parent or caretaker relative.	0
c. Claims found to be valid based solely on an examination of the corroborative evidence supplied by the applicant or recipient with no investigation	11
d. Claims found to be valid but there was a determination made that child support enforcement may proceed without the participation of the caretaker relative	0
3. Claims made by an applicant prior to receiving AFDC and the final determination that good cause did not exist was made after the applicant was determined to be eligible for AFDC	2

James

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

PLANNED PARENTHOOD OF ALASKA INC., et al.,

Plaintiffs,

v.

THEODORE A. MALA, Commissioner, Department of Health and Social Services, and the DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF ALASKA,

Defendants.

Case No. 3AN-93-01228 Civil

COPY
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Clerk of the Trial Courts

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated and agreed to by and between the parties, by and through their respective counsel, that the above-captioned matter may be dismissed with prejudice in its entirety, each party to bear its own costs and attorney's fees, on the grounds and for the reason that all issues raised therein between these said parties have been fully and finally compromised and settled to the satisfaction of each.

A copy of the parties' Settlement Agreement is attached hereto and the parties request the court to approve the settlement with an order of dismissal.

DATED: April 12, 1994

Joyce E. Bamberger
Attorney for Plaintiffs
Planned Parenthood of Alaska, Inc., National Organization of Women, Fairbanks Chapter, Juneau Coalition for Pro-Choice, Pro-Choice Voters-Ketchikan, Mat-Su Coalition for Choice, Sitkans for Choice, Fairbanks Coalition for Choice, and Jane Does I-X

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BRUCE M. BOTELHO
ATTORNEY GENERAL
For the Defendants

DATED: March 30, 1994 BY: [signature]
Cheri C. Jacobus
Assistant Attorney General

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

PLANNED PARENTHOOD OF ALASKA INC., et al.,

Plaintiffs,

v.

THEODORE A. MALA, Commissioner, Department of Health and Social Services, and the DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF ALASKA,

Defendants.

Case No. 3AN-93-01228 Civil

COPY Original Received APR 13 199? of the ...

SETTLEMENT AGREEMENT

This settlement agreement ("Agreement") is entered into by and among the plaintiffs (hereinafter "Plaintiffs") and the defendants (hereinafter "Defendants") in the case captioned Planned Parenthood of Alaska, Inc. et al. v. Theodore A. Mala, et al., Case No. 3AN-93-01228 Civil, in the Superior Court for the State of Alaska, Third Judicial District.

RECITALS

A. On January 20, 1993 the State of Alaska Department of Health and Social Services ("DHSS") promulgated regulations affecting eligibility for State medical assistance for abortion services.

B. On February 9, 1993 Plaintiffs filed suit as referred to above seeking a judgment declaring the regulations unlawful and void. In addition they asked the court to enjoin implementation of the regulations.

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C. On February 25, 1993 the parties entered into a Stipulation approved by order of the court on the same day, which set forth certain agreements of the parties. This document shall hereinafter be referred to as the "Stipulation."

D. The parties have now reached agreement on terms for settling the litigation which effectively adopt the substantive terms of the Stipulation.

E. The regulations at issue in the litigation are 7 AAC 43.140, 7 AAC 43.825, 7 AAC 43.835, 7 AAC 47.170(b), 7 AAC 47.200, 7 AAC 47.210(7), 7 AAC 47.290(3), 7 AAC 47.290(5), 7 AAC 47.290(7), and 7 AAC 290(8) (herein collectively referred to as "the regulations").

WHEREFORE, the parties agree to settle the litigation on the following terms:

1. The DHSS will continue to abide by the provisions of the Stipulation dated February 25, 1993, a copy of which is a attached hereto as Exhibit A. Specifically the DHSS will continue to abide by the provisions of paragraphs 3, 4, and 5 of the Stipulation. The parties agree and acknowledge that the DHSS has complied with the provisions of paragraph 6 of the stipulation.

2. The Plaintiffs will dismiss the above referenced case with prejudice, each party to bear its own costs including attorney's fees. The Plaintiffs hereby release the Defendants and the State of Alaska from any claims they have or reasonably

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1 could have relating in any way to the promulgation and adoption
2 of the Regulations.
3 3. This Agreement constitutes the full agreement of the
4 parties. No modification of this agreement is enforceable unless
5 set forth in writing and signed by the parties. Each party
6 agrees to execute such documents or take such other action as are
7 necessary to effectuate the terms of this Agreement.
8 4. Each of the parties has been represented by legal
9 counsel and fully understands the responsibilities and legal
10 effect of this Agreement.
11 The parties, having first read and fully understood the
12 terms of this agreement, date and sign below.

13 DATED: April 12, 1994

Joyce E. Bamberger
Attorney for Plaintiffs
Planned Parenthood of Alaska, Inc., National Organization of Women, Fairbanks Chapter, Juneau Coalition for Pro-Choice, Pro-Choice Voters-Ketchikan, Mat-Su Coalition for Choice, Sitkans for Choice, Fairbanks Coalition for Choice, and Jane Does I-X

BRUCE M. BOTELHO
ATTORNEY GENERAL
For the Defendants

21 DATED: March 30, 1994 BY: Cheri C. Jacobus
Cheri C. Jacobus
Assistant Attorney General

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23 STATE OF ALASKA)
24) ss.
THIRD JUDICIAL DISTRICT)

25 THIS IS TO CERTIFY that on the 12 day of April,
26 1994, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn as such,

personally appeared Joyce E. Bamberger, to me know and known to be the identical individual named in and who executed the foregoing Settlement Agreement and acknowledged and verified to me that she had full legal authority and direction from her clients to sign the Settlement Agreement and that she signed the same freely and voluntarily with full knowledge of effect thereof.

WITNESS my signature and notarial seal the day and year last written.

Notary Public in and for Alaska
My Commission Expires: 2-25-94

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on the 30th day of March, 1994, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn as such, personally appeared Cheri C. Jacobus, to me know and known to be the identical individual named in and who executed the foregoing Settlement Agreement and acknowledged and verified to me that she had full legal authority and direction from her clients to sign the Settlement Agreement and that she signed the same freely and voluntarily with full knowledge of effect thereof.

WITNESS my signature and notarial seal the day and year last written.

Notary Public in and for Alaska
My Commission Expires: 3-13-98

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

PLANNED PARENTHOOD OF ALASKA INC., et al.,

Plaintiffs,

v.

THEODORE A. MALA, Commissioner, Department of Health and Social Services, and the DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF ALASKA,

Defendants.

Case No. 3AN-93-01228 Civil

COPY

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STIPULATION

The State of Alaska, by and through its attorneys, and the Plaintiffs, by and through Joyce Bamburger, attorney for the Plaintiffs hereby agree and stipulate for the following. This stipulation shall become effective upon entry of an order by the Superior Court approving this Stipulation and will remain in effect until a final judgment on the merits is entered by the Superior Court. Should the Superior Court fail to approve this Stipulation in its entirety as set forth herein by Order, the parties agree that this Stipulation constitutes inadmissible evidence of statements made in compromise negotiations. Nothing in this Stipulation shall be construed to affect the parties' positions on the merits of this action.

1. The regulations at issue in this lawsuit are 7 AAC 43.140; 7 AAC 43.825; 7 AAC 43.835; 7 AAC 47.170(b); 7 AAC 47.200;

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EXHIBIT NO. A
PAGE 1 OF 4

7 AAC 47.210(7); 7 AAC 47.290(3); 7 AAC 47.290(5); 7 AAC 47.290(7); and 7 AAC 47.290(8) (herein collectively referred to as "the regulations").

2. The State's position is that the regulations speak for themselves and the State cannot "clarify" or otherwise impose requirements that are not currently in the regulations.

3. Payments for services relating to an abortion will continue to be paid by DHSS according to the regulations upon receipt of the routine bill from the health care provider. Although the regulations state abortions are to be "certified by a physician as medically necessary . . .to ameliorate a condition harmful to the woman's physical or psychological health." DHSS will not impose a requirement that this judgment be confirmed by a psychologist or psychiatrist. The treating physician performing the abortion services may rely on his or her professional judgment of the woman's condition and no particular psychological diagnosis or test is required. For those abortions "medically necessary" due to rape, incest, sexual assault or abuse, the regulations do not require the submission of a police report or any other descriptive document. Just as in most other procedures for which state funding is provided, the physician must send his or her bill, with the appropriate procedure codes indicated, to the state in order to receive payment. While the treating physician's professional judgment is sufficient for payment, nothing in the stipulation shall be construed to waive the state's right to conduct routine fiscal audits of billing practices and procedures;

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EXHIBIT NO. A
PAGE 2 OF 4

provided, however, just as with other services for which the state provides funding no audit shall review the physician's judgment that the service was medically necessary.

4. As with all other procedures for which state funding is provided, for the purposes of reimbursement, a treating physician's medical records must continue to comply 7 AAC 47.230. However, as in all procedures, the level of assessment and evaluation, as well as the instruments for assessment and evaluation, are left to the professional judgment of the treating physician. In any event, the records must contain that information customarily kept in the normal course of the treating physician's practice.

5. The State will continue to pay for the reasonable travel costs associated with physician visits for prescription of services and the reasonable costs of "medically necessary" abortions for eligible women as defined in the regulations. ~~until a final judgment is issued by the Superior Court.~~

6. Within 10 days of the Superior Court approval of this Stipulation by entry of an Order, DHSS will ensure that this stipulation will be sent to all medicaid enrolled physicians and hospitals, and send a notice to all public assistance offices and

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///

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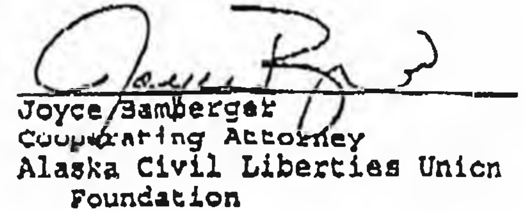
EXHIBIT NO. A

to all public health clinics, publish a public notice, and issue a press release for statewide dissemination.

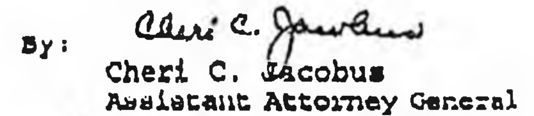
DATED: Feb. 23, 1993



Joyce Bamberger
Cooperating Attorney
Alaska Civil Liberties Union
Foundation

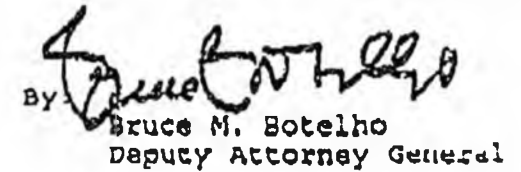
CHARLES E. COLE
ATTORNEY GENERAL
For the Plaintiff

DATED: February 23, 1993

By:


Cheri C. Jacobus
Assistant Attorney General

DATED: 2-24-93



By:
Bruce M. Botelho
Deputy Attorney General

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STIPULATION

EXHIBIT NO. A
PAGE 4 OF 4

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

PLANNED PARENTHOOD OF ALASKA INC., et al.,

Plaintiffs,

v.

THEODORE A. MALA, Commissioner, Department of Health and Social Services, and the DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF ALASKA,

Defendants.

Case No. 3AN-93-01228 Civil

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ORDER OF DISMISSAL

This court, having reviewed the stipulation of the parties and having reviewed the Settlement Agreement attached thereto, and finding good cause therefore,

HEREBY ORDERS that the Settlement Agreement of the parties is approved, and further,

HEREBY ORDERS that the captioned case is dismissed with prejudice, each party to bear its own costs including attorney's fees.

Brian C. Shortell,
Superior Court Judge

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Released 7/24/92

DIVISION OF LEGAL SERVICES

COPY

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM July 22, 1992

SUBJECT: DHSS Abortion Funding Regulations (Work Order No. 8-LS0049)

TO: Senator Arliss Sturgulewski

FROM: Terri Lauterbach
Legislative Counsel

You have asked us to review the legality of the Medicaid and General Relief Medical (GRM) abortion funding regulations proposed by the Department of Health and Social Services on July 8, 1992.

There are a number of areas where the proposed regulations are not clear. However, in our opinion, a court probably would find that the proposed changes to the Medicaid regulations are legally valid and consistent with legislative intent because they reflect federal Medicaid requirements, a result intended by the legislature. But, a court is less likely to find the proposed changes to the GRM regulations to be consistent with legislative intent because the court may view them as arbitrary changes and because they probably result in unconstitutional administration of the state's medical assistance programs.

A finding of arbitrariness could be made because the proposed regulations change a longstanding DHSS interpretation of the GRM statutes without any intervening legislative directive to do so and without any demonstrable change in the medical needs of Alaskan women. A finding of unconstitutionality could be made because the proposed regulations infringe privacy rights and the right to equal protection of the laws by treating indigent pregnant women who choose to continue their pregnancies differently from indigent pregnant women who choose not to.

In order to answer your question, this memorandum will discuss the following topics:

(1) Content of the proposed regulations.
(2) Effect of the proposed regulations.
(3) Consistency of the proposed regulations with legislative intent.
(4) Constitutionality of the proposed regulations - privacy.
(5) Constitutionality of the proposed regulations - equal protection.

(2) where termination of a pregnancy is certified by a physician as medically necessary "to prevent the death or disability of the woman"; and (3) where termination of a pregnancy is certified by a physician as medically necessary "to ameliorate a condition harmful to the woman's physical or psychological health." See proposed 7 AAC 47.290(8).[4]

"Elective abortion" is defined to mean a procedure, other than a therapeutic abortion, to terminate a pregnancy.[5] See proposed 7 AAC 47.290(7).

(2) Effect of the proposed regulations.

The effect of the proposed changes in the Medicaid regulations would be to bring the state program into compliance with current federal abortion funding restrictions.[6]

---

[3](...continued)
In cases alleging incest or sexual abuse of a minor, will DHSS simply accept the pregnant woman's statement of the occurrence, or will DHSS somehow investigate or require corroboration of the age and identity of the alleged perpetrator?

7 AAC 47.290(8)(B) should be clarified on this point. In its present form, it invites arbitrary action and leaves open the possibility of extreme invasion of privacy.

[4] 7 AAC 47.290(8) does not distinguish between previability and postviability abortions.

[5] "Elective procedure" is also defined in the proposed regulations as

> a procedure that is subject to the choice or decision of the patient or physician regarding medical services that are advantageous to the patient but **not necessary to prevent the death or disability of the patient**, and includes an elective abortion. (See 7 AAC 47.290(3).) (Underlined language is proposed as new language in the regulation. Bold face indicates emphasis added for the purposes of this memo.)

As with 7 AAC 140(a) and 7 AAC 47.290(8)(B), discussed in preceding footnotes, this proposed regulation needs clarifying.

It is obvious from the definition of "therapeutic abortion" and "elective abortion" that GRM funding will be provided for an abortion that is "not necessary to prevent the death or disability of the patient." Therefore, the definition of "elective procedure" should be rewritten to be consistent with the definition of "elective abortion." One way to achieve consistency would be to move the new language currently proposed to be appended at the end of 7 AAC 47.290(3) to the **beginning** of that definition instead so that it would read as follows:

> "Elective procedure" means (A) an elective abortion or (B) a procedure that is subject to the choice of the patient...but not necessary to prevent the death or disability of the patient.

[6] Medicaid is a joint federal-state program. The state cannot use Medicaid money for a purpose prohibited by federal law or regulation.

CORRECTION

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M — July 22, 1992

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TO: Senator Arliss Sturgulewski

FROM: Terri Lauterbach
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There are a number of areas where the proposed regulations are not clear. However, in our opinion, a court probably would find that the proposed changes to the Medicaid regulations are legally valid and consistent with legislative intent because they reflect federal Medicaid requirements, a result intended by the legislature. But, a court is less likely to find the proposed changes to the GRM regulations to be consistent with legislative intent because the court may view them as arbitrary changes and because they probably result in unconstitutional administration of the state's medical assistance programs.

A finding of arbitrariness could be made because the proposed regulations change a longstanding DHSS interpretation of the GRM statutes without any intervening legislative directive to do so and without any demonstrable change in the medical needs of Alaskan women. A finding of unconstitutionality could be made because the proposed regulations infringe privacy rights and the right to equal protection of the laws by treating indigent pregnant women who choose to continue their pregnancies differently from indigent pregnant women who choose not to.

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(3) Consistency of the proposed regulations with legislative intent.
(4) Constitutionality of the proposed regulations - privacy.
(5) Constitutionality of the proposed regulations - equal protection.

A "Conclusion" section appears after the following "Discussion" section.

DISCUSSION

(1) Content of the proposed regulations.

The proposed regulations make changes in two different DHSS programs that provide medical care for indigent women: Medicaid and General Relief Medical (GRM).

The proposed changes in the Medicaid regulations provide that payment for an abortion will "in the department's discretion" be covered if the billing invoice is accompanied by certification that "the life of the mother would be endangered if the pregnancy were carried to term."[1/] See proposed 7 AAC 43.140(a).

The proposed changes in the GRM regulations would restrict funding to "therapeutic abortions" and eliminate funding for "elective abortions." See proposed 7 AAC 47.200 and 7 AAC 47.210.

"Therapeutic abortion" is defined in the proposed GRM regulations to include three types of pregnancy terminations[2/]: (1) where the pregnancy resulted from "actions that would constitute a crime of" sexual assault, sexual abuse of a minor, or incest;[3/]

[1/] It is not clear what the proposed regulations mean by "in the department's discretion." Will the DHSS second-guess the physician's certification?

According to the Anchorage Daily News, the commissioner intends to leave "the final call" to "doctors, not bureaucrats." However, that comment was, according to the ADN, made in reference to the definitions of "elective" and "therapeutic" in the GRM regulations, not the use of "in the department's discretion" in the Medicaid regulations. See ADN, Thursday, July 9, 1992, at Page A10, Col. 5.

The proposed Medicaid regulations should be clarified in regard to this language about DHSS's "discretion."

[2/] In using the phrase "termination of pregnancy," the regulations make no attempt to distinguish procedures like induced labor or Caesarian sections. Most likely, these would be covered under Medicaid as childbirth procedures, so they need not be covered under the GRM regulations.

[3/] The regulations do not state who will determine whether actions leading to the pregnancy "would constitute" the specified crimes. Short of a conviction (which would usually take so long as to moot the question of abortion), who is in a position of determining that any of the specified crimes has occurred?

In cases alleging sexual assault, for instance, the lack of consent of the victim is often at issue. Will DHSS personnel, after questioning a pregnant woman, determine whether or not there was consent?

(continued...)

(2) where termination of a pregnancy is certified by a physician as medically necessary "to prevent the death or disability of the woman"; and (3) where termination of a pregnancy is certified by a physician as medically necessary "to ameliorate a condition harmful to the woman's physical or psychological health." See proposed 7 AAC 47.290(8).[4]

"Elective abortion" is defined to mean a procedure, other than a therapeutic abortion, to terminate a pregnancy.[5] See proposed 7 AAC 47.290(7).

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The effect of the proposed changes in the Medicaid regulations would be to bring the state program into compliance with current federal abortion funding restrictions.[6]

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7 AAC 47.290(8)(B) should be clarified on this point. In its present form, it invites arbitrary action and leaves open the possibility of extreme invasion of privacy.

[4] 7 AAC 47.290(8) does not distinguish between previability and postviability abortions.

[5] "Elective procedure" is also defined in the proposed regulations as

> a procedure that is subject to the choice or decision of the patient or physician regarding medical services that are advantageous to the patient but **not necessary to prevent the death or disability of the patient**<u>, and includes an elective abortion</u>. (See 7 AAC 47.290(3).) (Underlined language is proposed as new language in the regulation. Bold face indicates emphasis added for the purposes of this memo.)

As with 7 AAC 140(a) and 7 AAC 47.290(8)(B), discussed in preceding footnotes, this proposed regulation needs clarifying.

It is obvious from the definition of "therapeutic abortion" and "elective abortion" that GRM funding will be provided for an abortion that is "not necessary to prevent the death or disability of the patient." Therefore, the definition of "elective <u>procedure</u>" should be rewritten to be consistent with the definition of "elective <u>abortion</u>." One way to achieve consistency would be to move the new language currently proposed to be appended at the end of 7 AAC 47.290(3) to the **beginning** of that definition instead so that it would read as follows:

> "Elective procedure" means <u>(A) an elective abortion or (B)</u> a procedure that is subject to the choice of the patient...but not necessary to prevent the death or disability of the patient.

[6] Medicaid is a joint federal-state program. The state cannot use Medicaid money for a purpose prohibited by federal law or regulation.

Although federal restrictions have varied from time to time, current federal restrictions prohibit Medicaid payments for an abortion unless the life of the pregnant woman would be endangered by a completed pregnancy.

Because of the proposed definitions of "therapeutic abortion" and "elective abortion," the effect of the proposed changes in the GRM regulations is less clear. How many abortions will be considered "elective," if any, and therefore not be funded? And what kind of physician statement will be considered sufficient by DHSS to satisfy the requirement that a physician certify the abortion as medically necessary?[7]

It is possible that the definitions, by including situations involving the woman's "physical or psychological health," would permit any abortion to be funded as long as the woman could find a physician willing to provide the appropriate certification.[8] After an initial dip in abortion funding caused by confusion on the part of both patients and their physicians about coverage, the department could well discover that the requirement of physician certification will become a pro forma bit of paperwork with no actual effect of restricting funding.

However, for the sake of analyzing the regulations from the perspective of whether they are consistent with legislative intent, this memorandum will assume that the fiscal note accompanying the proposed regulations is basically accurate. The fiscal note predicts increased costs to the state and federal government of over $1,000,000 in fiscal year 1993 and almost $2,000,000 by fiscal year 1997.[9] According to DHSS spokesperson Ed Wicher, the prediction of increased costs is based on an anticipated decrease in abortions and a concomitant increase in live births of indigent children

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[7] These questions are crucial not just as matters of clarity but as matters of constitutionality. If, in practice, all types of abortions will wind up being funded without significant procedural obstacles for different types, the proposed regulations would probably not be construed to violate either privacy rights or the right to equal protection of the law.

[8] See, for instance, the statement attributed to Thomas Moffatt, executive director of Alaska Right to Life Inc., in the Anchorage Daily News, July 9, 1992, page A1, Col. 5:

> [The definition of "therapeutic abortion"] opens the barn door. In my opinion that definition would permit any abortion. I would imagine any one of a dozen abortionists could certify anyone who walked through their doors.

Whether one ascribes good faith to "abortionists" or not, we agree with Mr. Moffatt that the definition of "therapeutic abortion" could encompass all abortions since an unwanted pregnancy probably always has, at a minimum, adverse psychological effects on a woman.

[9] See page 2 of the "NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES" that accompanied the actual language changes proposed for 7 AAC 43 and 7 AAC 47, issued 7/8/92.

who, with their indigent mothers, will be eligible for public medical and financial benefits.[10]

<u>(3) Consistency of the proposed regulations with legislative intent.</u>

Given the content and the assumed effect[11] of the proposed regulations, one aspect of our analysis is whether DHSS's decision to distinguish among types of abortions, funding some and not others, is consistent with legislative intent.

According to Alaska case law, the intention of the legislature must be determined from the words used in the statute being implemented by the agency, construed with reference to the purpose of the program of which the statute is a part.[12] If an administrative regulation is consistent with a statute's purposes and reasonably necessary to carry them out, the Alaska Supreme Court will not overturn it, provided it is reasonable and not arbitrary.[13] Since a regulation is presumptively valid, the burden of proving the invalidity of a regulation is on the party challenging it.[14] Furthermore, since these proposed regulations involve policy-making and the particularized expertise and experience of administrative personnel, a court will be inclined to defer to the administrative decision expressed in the regulation, and will inquire only whether it has a reasonable basis.[15]

In light of these standards that the court has developed for its review of administrative regulations, it is clear that the proposed changes to the Medicaid regulations would be upheld if challenged. It is much less clear whether the proposed changes to the GRM regulations would be upheld.

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[10] It is not clear exactly what percentage of abortions currently funded will be considered "elective" (and unfunded) under the new regulations. However, the fiscal note is substantial, indicating that DHSS believes a significant percentage of abortions will no longer qualify for public funding and will not be covered by nonpublic funds either. An "educated guess," based on the fiscal note, would be that 35 - 40 percent of abortions currently funded under Medicaid and GRM will no longer be funded under those programs nor by private means.

[11] For a discussion of the "assumed effect" see the preceding three paragraphs of this memorandum.

[12] <u>State v. City of Anchorage</u>, 513 P.2d 1104 (Alaska 1973).

[13] <u>Kalmakoff v. State, Commercial Fisheries Entry Com'n</u>, 693 P.2d 844 (Alaska 1985).

[14] <u>State v. Alyeska Pipeline Service Co.</u>, 723 P.2d 76 (Alaska 1986).

[15] <u>Hood v. State</u>, 574 P.2d 811 (Alaska 1978). However, this deference may be more applicable to new regulations than to changes in old regulations.

With respect to the proposed Medicaid regulations, the court would no doubt look at the legislative intent expressed in AS 47.07.040, where the legislature gave DHSS the authority to

> make those arrangements or regulatory changes, not inconsistent with law, as may be required under federal law to obtain and retain approval of the United States Department of Health and Human Services to secure for the state the optimum federal payment under the provisions of 42 U.S.C. 1396 - 1396p (Title XIX, Social Security Act, Medical Assistance). (Emphasis added.)

In order to retain the approval of the federal government for the state's Medicaid program, the state must not use Medicaid money for an abortion unless the pregnant woman's life would be endangered by carrying the pregnancy to term. DHSS's proposed changes in the Medicaid regulations would simply insert that federal restriction into the state's program.[16] Therefore, we have no doubt that a court would uphold the new state Medicaid restriction as consistent with legislative intent because it is necessary to keep the state program in compliance with federal requirements, a result clearly intended by the legislature.

We have more doubt about whether the GRM restrictions would be upheld. Most of our doubt stems from issues that the proposed regulations raise under the state constitution.[17] However, there is also some room for doubt about the validity of the proposed regulations because of issues raised about their consistency with the legislative intent involving the GRM statutes.

To determine legislative intent under the GRM program, a court would look at AS 47.25.120 and 47.25.130 and the definition of "assistance" in AS 47.25.300. These statutes indicate that the legislature intended to leave implementation of the GRM program largely within the discretion of DHSS. The three statutes read as follows:

> Sec. 47.25.120. ELIGIBILITY FOR ASSISTANCE. Financial assistance may be given under AS 47.25.120 - 47.25.300, so far as practicable under the conditions in this state, to a needy person **who is eligible under the regulations of the department**. (Emphasis added.)

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[16] It would also make the regulations match reality. It is my understanding from DHSS that the federal Medicaid restriction (life endangerment) already has been implemented on the state level for over a decade, even though 7 AAC 43.140(a) has continued to list two other situations (health effects, and rape/incest) as being covered by Medicaid during that time. These other two situations have been covered under GRM, instead of Medicaid, during the last decade.

[17] See the next two sections of this memo.

> Sec. 47.25.130. AMOUNT AND TYPE OF ASSISTANCE. (a) The amount of assistance for a needy person shall be **determined by the department** with regard to the resources and needs of the person and the conditions existing in each case. Where possible, assistance shall be sufficient to provide the applicant with reasonable subsistence **according to standards of assistance established by the department.** However, the amount of assistance for subsistence needs may not exceed $120 a person a calendar month. (Emphasis added.)
>
> Sec. 47.25.300. DEFINITIONS. In AS 47.25.120 - 47.25.300
>
> (1) "assistance" means financial assistance to or on behalf of a needy person, including subsistence (food, shelter, fuel, clothing, and utilities) and transportation, medical needs **(including, but not limited to, hospitalization, nursing, and convalescent care)**, burial, and other determined needs;

These statutes give broad discretion to DHSS. After a person is determined to be "eligible under regulations of the department," the amount of assistance must be "determined by the department" with regard to the "needs" of the person and "the conditions existing in each case." Assistance must be reasonable "according to standards of assistance established by the department." While assistance is supposed to include "medical needs," the legislature has not defined that term except to say that it includes a minimum of "hospitalization, nursing, and convalescent care." In essence, the proposed regulations are an exercise of DHSS's authority to interpret the term "medical needs."

As a general matter, we think that the GRM statutes give very wide discretion to DHSS to interpret the term "medical needs." "Need" is an ambiguous term according to the dictionary, meaning both "necessary or required" and "useful or desired."[18] Considering the legislature's limitation of general relief financial assistance to $120 a month, we doubt that a court would have considered it unreasonable for DHSS to limit general relief medical assistance to procedures necessary to prevent the death or disability of the patient when initially implementing the GRM program. This would have restricted the medical aspect of the program to a very basic level of assistance like the legislature restricted the financial aspect of the program.

However, the proposed regulations are not the initial regulations to implement the GRM program. Rather, the proposed regulations would change implementation of a program that is almost 40 years old[19] and that has probably covered all abor-

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[18] Webster's New World Dictionary.

[19] The general relief program was enacted by ch. 110, SLA 1953.

tions not covered under Medicaid for most, if not all, of those 40 years.[20] When determining whether the proposed GRM regulations are reasonable, a court might evaluate whether there is a reasonable basis for the change, not whether the regulations would have been reasonable initially.

When evaluating the reasonableness of the changes made by the regulations, a court might note, first of all, that there have been no legislative changes in the definition of "assistance" or "medical needs" since 1953. Furthermore, the court would probably note that DHSS itself has had a longstanding interpretation that GRM "medical needs" include all types of abortions.[21] And, the court would probably note that, despite the longstanding DHSS policy of covering abortions under GRM, there has never been a legislative change indicating disapproval of that policy.[22] Finally, the agency will probably be unable to demonstrate to the court that the medical needs of Alaskan women have changed with respect to pregnancy options. Therefore, DHSS probably cannot point to any legislative or medical reason for interpreting "medical needs" differently now than they have been determined over the past few decades. Thus a court could, in our opinion, find the proposed GRM changes to be arbitrary, with no reasonable basis.

We are not alone in this opinion. The question of whether the GRM regulations could be changed to prohibit funding for "elective" abortions was put to Attorney General Wilson Condon in 1981 by then Governor Jay Hammond.

Condon acknowledged that a "strong argument" could be made that DHSS has absolute discretion to change its definition of "medical needs" in the GRM regulations, but explained at length that there definitely would be "legal difficulties" with this approach. He wrote

> AS 47.25 gives the agency broad discretion to determine whether there is a need for specific types of medical treatment [for persons who are eligible for general relief]. . . By [previously] adopting regulations

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[20] We base this latter conclusion on written evidence from the mid-1970's and oral anecdotal evidence dating back to the 1960's.

[21] We do not know if the court will grant "deference" to DHSS's longstanding interpretation or to DHSS's current desire to change the interpretation.

[22] Abortions were singled out by DHSS for continued coverage under GRM regulations in the summer of 1986 when the legislature cut the GRM appropriation by 50 percent for fiscal year 1987. Before that time, they had been covered along with other "physician services." Contemporaneously with the GRM funding cut, the legislature enacted a priority system for eliminating GRM services when appropriations were insufficient to cover them all. Thus, there has been fairly recent legislation about services under GRM, but no indication that different types of abortions should be treated differently.

Under the state constitution, a regulation impinging on the right to privacy may be upheld only if it is necessary to further a compelling state interest.[27]

A challenge based on the state's privacy clause would contend that the proposed regulations interfere with an indigent woman's right to privately determine whether to continue her pregnancy. Challengers would probably say that the regulations force a state-sponsored inquiry into the woman's reasons for her choice (if the choice is abortion) and place a substantial obstacle (by denying funding) in the way of implementing the woman's choice (if the choice is abortion and for a reason not supported by the state).

Defenders of the proposed regulations would probably use arguments like those made in federal decisions that have upheld Medicaid abortion funding restrictions. They would argue that it will be a woman's poverty, not the state, that will stand in the way of an "elective" abortion under the proposed regulations. They would also point out that the right to privacy is not absolute[28] and can be outweighed by the state's "important and legitimate interest in potential life."[29] Defenders would probably claim that by not funding "elective" abortions, the state would simply be expressing its legitimate preference to financially support childbirth. The woman's right of privacy would not be violated because, according to the regulations' defenders, she can still get an abortion, just not at state expense.

In rebuttal, the regulations' challengers would probably note that the state itself has acknowledged that lack of state funding will be more than an obstacle in the path of many indigent pregnant women; it will be an absolute bar. DHSS's own fiscal note projects that a significant number of indigent women who cannot get publicly-funded

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[26](...continued)

As long ago as 1942 and as recently as June 1992, federal decisions have recognized that the federal "[c]onstitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood," including "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear...a child." See, Casey v. Planned Parenthood of Southeastern Pennsylvania, ___ U.S. ___ (1992), 1992 WestLaw 142546, page 11, which cites a string of cases extending back to 1942.

And, while the contours of Alaska's right to privacy are not yet firmly established, it is clear that the right to privacy guaranteed to Alaskans is broader in scope than that guaranteed in the federal constitution. State v. Glass, 538 P.2d 872 (Alaska 1978).

[27] Gray v. State, 525 P.2d 524 (Alaska 1974).

[28] Gray v. State, supra; Ravin v. State, 537 P.2d 494 (Alaska 1975); and State v. Erickson, 574 P.2d 1 (1978).

[29] Casey, supra, at page 24.

> providing for the coverage of abortion expenses the agency implicitly made a finding that there is a general need for that type of medical treatment, i.e., that abortions are "medical needs" under the terms of the statute. It could be argued that before the regulations could be amended to exclude elective abortions, there would have to be a finding that conditions within Alaska had changed to such an extent that there is no longer a need for that type of medical treatment. Without such a finding, the change [in the regulations] might be considered an arbitrary agency action. It should also be noted that the legislature has not taken action to change the original agency determination.
>
> Such a finding would be most difficult to make in this case. Neither the Hyde Amendment nor the United States Supreme Court decision in Harris alter[s] "medical needs." Nor has any other event occurred in the state which suggests a change in medical needs. Absent changed circumstances, we believe a court might not permit the deletion of elective abortions from the list of medical needs covered by the General Relief Medical Assistance program.[23]

We agree with Attorney General Condon's opinion that changes in the GRM regulations without a change in either the underlying statute or in the medical circumstances of indigent women in the state would likely be viewed as unlawful arbitrary action by the agency. Such arbitrariness would be inconsistent with legislative intent. In addition, the regulations would be inconsistent with legislative intent if they resulted in unconstitutional administration of the state's medical assistance programs. This memo will now discuss the constitutional issues raised by the proposed regulations.

(4) Constitutionality of the proposed regulations - privacy.

Given the content and the assumed effect[24] of the proposed regulations, it is clear that the privacy clause of the state's constitution[25] could be the basis of a challenge to the constitutionality of the regulations.[26]

[23] Op. Att'y Gen., January 12, 1981, File No. J-66-413-81, at pages 5 - 6.

[24] For a discussion of the "assumed effect" see footnotes 6 - 10 and accompanying text.

[25] Article 1, sec. 22, Constitution of the State of Alaska.

[26] It cannot reasonably be argued that a woman's decision about whether to continue a pregnancy fails to involve a privacy right.

(continued...)

is a legitimate governmental goal, the court could point out that it is not a compelling interest until viability. And, since a compelling interest is needed to override a fundamental privacy right, the court could strike down the regulations with respect to abortions performed before viability.

We believe it is more likely that the Alaska Supreme Court will adopt the challengers' view of reality and the applicable law rather than the defenders' view. We doubt that the court will find the regulations to be neutral, in reality, on the issue of reproductive choice when it is faced with the fiscal note and the acknowledged antipathy of the Administration toward abortion, as exemplified in the Governor's press release. More likely, the court will see a reality where an indigent woman has no real choice concerning her pregnancy if her eligibility for medical care is conditioned on the result desired by the state - childbirth.[33] As to the applicable case law to form the legal underpinnings of its decision, the Alaska court need only point to the explicit (and stronger) privacy right granted under the state constitution and the lack of a compelling governmental interest to override that right before viability.

(5) Constitutionality of the proposed regulations - equal protection.

The proposed regulations also implicate the equal protection clause of the state constitution[34] because the regulations treat some indigent pregnant women differently from other indigent pregnant women. Otherwise eligible pregnant women who choose childbirth will receive state assistance with medical procedures while some otherwise eligible pregnant women who choose abortion will not.

Whether the different treatment of pregnant women under the regulations is constitutional under the state's equal protection clause will be determined by the following test: the court will assess the legitimacy of the state purpose purportedly furthered by the different treatment and the extent to which the relationship between the asserted purpose and the different treatment is fair and substantial; then the court will determine the nature and the extent of the infringement of individual rights allegedly caused by the disparate treatment.[35] Depending on the importance of

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[33] The court will probably make clear that its decision would be the same if the state were seeking to encourage population control by funding abortions and not childbirth. The constitutional question before the court will not involve the weighing of the value of abortion as against childbirth, but instead will concern the protection of either procreative choice from discriminatory governmental treatment. See, Doe v. Director of the Michigan Dept. of Social Services, 468 N.W.2d 862 (Ct.App. Mich. 1991), appeal granted at 472 N.W.2d 638 (MI 1991).

[34] Article I, sec. 1, Constitution of the State of Alaska.

[35] Williams v. Zobel, 619 P.2d 448 (Alaska 1980), rev'd on other grounds, 457 U.S. 55 (1982).

abortions under the new restrictions will, in effect, be forced to carry their pregnancies to term. Challengers would probably contend that this is not only the effect, but also the purpose of the new regulations. The challengers can point to the governor's own press release that says the purpose of the new restrictions is "to save lives." They would probably say that the intent of the restrictions clearly goes beyond promoting childbirth, which could be achieved by less intrusive means like educational outreach, and, instead, strikes at the heart of the right to privacy itself, by using the power of the state to impose an "undue burden" on the right of an indigent woman to freely decide how to manage her pregnancy.[30/]

The Alaska Supreme Court's resolution of these arguments is as likely to be affected by its view of reality as by case law, and it may well be determined by the strength of the record before it at the time it makes its decision.[31/] If the court views the Medicaid and GRM changes separately, from the point of view of the programs themselves, the court could uphold the Medicaid regulations as requirements of federal law and uphold the GRM changes as treating all "elective" procedures the same.[32/] However, if the court views the programs from the point of view of an indigent pregnant woman, the court could find that the two programs, in the way that they operate together to support a pregnant woman's choice to give birth but not, in all cases, her choice to have an abortion, impermissibly interfere with her fundamental right of reproductive choice. While acknowledging that protection of potential life

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[30/] "Undue burden" appears to be the test developing under the federal constitution for testing the validity of a state's abortion restrictions. While the test under the state constitution will probably be even more stringent, requiring a compelling state interest, it is instructive to note the following language from the most recent abortion decision based on the federal constitution:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of the woman's choice cannot be considered a permissible means of serving its legitimate ends. (Casey, supra, at page 27) (Emphasis added.)

[31/] See, Casey, supra, where the U.S. Supreme Court acknowledges that the strength of the record before the court on spousal and child abuse convinced it to strike down the "husband-notice" provision of Pennsylvania's abortion restrictions.

[32/] Of course, to do this, the court would have to overlook the fact that "therapeutic abortion" includes an abortion that would be an "elective procedure" if it were not an abortion. That is, a "therapeutic abortion" includes abortions that are not necessary to prevent the death or disability of the patient, which is the determining factor for other "elective" procedures. So, actually, the regulations do not treat all "elective" procedures the same.

fundamental right of reproductive choice. The court could find that the women affected by the regulations are similarly situated because they are pregnant and that the state may not interfere with a woman's choice on how to treat that pregnancy by reserving to itself the power to define that some abortions are "elective" while childbirth is not. The court could find the protection of potential life to be a legitimate state interest, but not compelling enough before fetal viability to override a woman's right of reproductive choice. As a legal underpinning for resolving the equal protection arguments differently from similar cases decided under the federal constitution, an Alaska court would point to the more stringent standard developed under the state constitution for testing the constitutionality of classifications made by government actions.

CONCLUSION

The regulations making changes in the Medicaid program clearly comply with the legislative intent that Alaska participate in the federal Medicaid program. However, the regulations that propose restrictions on funding "elective" abortions under the GRM program may be viewed by a court as unlawful arbitrary changes because they change a long history of contrary agency interpretation without apparent statutory or medical justification. The GRM regulations also raise substantial issues under the state constitution's privacy clause and equal protection clause.[38]

Whether a court would find the GRM changes to be arbitrary will probably depend on whether the court analyzes the new regulations apart from the history of the GRM program or as changes to a longstanding interpretation by the agency. Viewed in isolation, the proposed regulations appear to fall within the broad discretion granted to DHSS by the legislature. However, viewed as changes to a longstanding agency policy, the changes may be viewed as somewhat arbitrary.

How a state court would resolve the constitutional issues and whether the restrictions would be upheld under the constitution will depend not only on purely legal arguments but on the view of social and economic reality demonstrated in the record before the court and adopted by the court as the reality it is willing to recognize. To the extent that the court is convinced that an indigent pregnant woman's privacy right or right to equal protection is actually interfered with by the regulations (and not merely by her own poverty or by her election of a "nonmedically necessary" procedure), the court has legal precedents available to it to support a decision striking down the regulations. If the court is convinced, despite the Governor's press release and the DHSS fiscal note, that the regulations are neutral with regard to privacy rights and do not treat similar medical conditions differently, the court also has legal precedents available to it to support a decision upholding the regulations.

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[38] They also raise issues involving clarity. See footnotes 1, 3, 5, and 7.

the individual interest involved, a greater or lesser burden will be placed on the state to show this fair and substantial relationship.[36]

In light of this equal protection test, challengers of the regulations would probably contend, first of all, that the individual interest being affected by the disparate treatment is a fundamental interest, the right of reproductive choice.[37] Secondly, given the importance of the individual right affected, the challengers would probably contend that the state's purpose in treating the classes of pregnant women differently (based on whether they choose childbirth or abortion) needs to be not only legitimate but must approach being a compelling interest that is virtually unachievable by means that would have less impact on the affected right. The challengers would no doubt point out that the state's interest in potential life is not compelling until viability, and argue that the effect of the regulations on reproductive choice before viability cannot be justified.

Defenders of the regulations would probably counter that the regulations will result not in disparate treatment, but in equal treatment. Instead of funding some "elective" procedures (i.e., "elective" abortions) under the GRM program and not other elective procedures, as was the past practice, the state will be treating all "elective" procedures the same. Alternatively, the regulations' defenders may argue that equal protection analysis should not apply because women who need a "therapeutic abortion" are not similarly situated to those who merely want an "elective abortion." Therefore, the regulations can validly treat them differently. Defenders would probably also contend that the right to reproductive choice remains with the woman because she can seek an abortion without state funds. Therefore, according to potential defenders, since there is no fundamental right being affected, the government's purpose in treating the women differently need only be legitimate, not compelling. And that legitimate right is the right to protect potential life.

As with the arguments based on the state constitution's privacy clause, a state court's resolution of the differing arguments about equal protection will depend as much on the strength of the record before it and the court's view of reality as on case law. The court could uphold the GRM regulations as validly treating "elective abortions" differently from "therapeutic abortions." Alternatively, the court could strike down the GRM regulations because they work in conjunction with the Medicaid regulations to treat pregnant women differently based on whether they choose to exercise their

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[36] Wilson v. Municipality of Anchorage, 669 P.2d 569 (Alaska 1983).

[37] Since the fundamental nature of the interest rests, at least in part, on the state constitution's privacy clause, the privacy right arguments described in the previous section of this memo and the equal protection arguments described in this section stem from some of the same reasoning. However, the legal analysis is a bit different, and either or both could be used by an Alaska court to strike down the regulations, so this memo treats them separately.

In our opinion, the issue of the regulations' arbitrariness is a toss-up, but we think the Alaska Supreme Court is likely to be convinced that the regulations are not neutral with regard to privacy (in either their effect or purpose), do impermissibly treat the choice of childbearing differently from the choice of not bearing a child, and are not justified by a sufficient governmental interest with respect to previability abortions. Therefore, we think there is a substantial probability that the court will find the regulations to be unconstitutional with regard to previability abortions, but constitutional with regard to postviability abortions.[39/]

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[39/] We are not alone in our view that Alaska courts will probably take a different view than the federal courts have on the constitutionality of restricting public funding of abortions for indigent women. Opinions and memoranda from the Alaska Attorney General's Office under three different Administrations over the last 14 years have consistently indicated that the Alaska Supreme Court is likely to share the view of the dissenters in the federal cases that have upheld restrictions on public funding of abortions. See Op. Att'y Gen., March 31, 1978. Op. No. 15, pages 2 - 3; Op. Att'y Gen., Jan. 12, 1981, File No. J-66-413-81, pages 6 - 7; Op. Att'y Gen., April 17, 1981, page 6; and Memorandum of Assistant Attorney General Elizabeth Shaw to Representative Mark Boyer, January 19, 1990, page 1.

Moreover, state courts in at least six other states have refused to follow federal precedent in this area and have struck down various abortion funding restrictions under their state constitutions, citing state privacy clauses, state due process clauses, or state equal protection clauses. See, Moe v. Secretary of Administration and Finance, 417 N.E.2d 387 (Mass. 1981); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (CA 1981); Right to Choose v. Byrne, 450 A.2d 925 (NJ 1982); Planned Parenthood Association v. Department of Human Resources of the State of Oregon, 663 P.2d 1247 (Or. App. 1983), affirmed at 687 P.2d 785 (OR 1984); Doe v. Maher, 515 A.2d 134 (Conn. Super. 1986); and Hope v. Perales, 571 N.Y.S.2d 972 (Sup. 1991).

For a more complete discussion of these A.G. opinions and other states' cases, refer to our memorandum to you dated July 7, 1992.

Released 7/7/92

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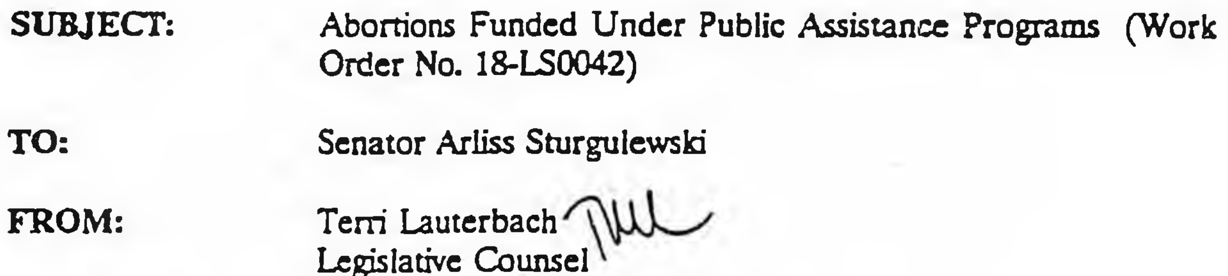
M E M O R A N D U M   July 7, 1992



SUBJECT: Abortions Funded Under Public Assistance Programs (Work Order No. 18-LS0042)

TO: Senator Arliss Sturgulewski

FROM: Terri Lauterbach
Legislative Counsel

You have asked whether it would be legal for the Department of Health and Social Services to adopt regulations that would prohibit funding for "elective" abortions under the state's public assistance programs, Medicaid and General Relief Medical, thereby limiting state funding to "therapeutic" abortions.[1/]

In our opinion, it would probably not be constitutional under our state constitution's privacy and equal protection clauses to prohibit funding for "elective" abortions under our public assistance programs even though the restriction would be upheld under the federal constitution. It is more likely than not that the Alaska Supreme Court would join the courts of Massachusetts, California, New Jersey, Oregon, Connecticut, Michigan, and New York in declining to follow federal precedent in the area of abortion rights. Although there are no Alaska abortion decisions to date, the Alaska Supreme Court has consistently construed our state constitution to offer broader rights of privacy and equal protection than the federal constitution in a variety of other areas. Alaska Attorney General opinions under three different Administrations over the last 13 years have consistently predicted that this broader construction of rights would be applied by the Alaska Supreme Court in the abortion area as well.

In addition, because of the long history of administrative interpretation of our statutes to include funding of "elective" abortions, new regulations establishing an abortion funding restriction raises the issue of arbitrariness. Since there have been no relevant changes in the underlying statutes and no demonstrable change in the medical needs

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1/ "Elective" and "therapeutic" are the terms used in the Governor's press release of July 1, 1992. Their meanings will not be clear until the implementing regulations are released. This memo is based on the assumption that the regulations will place new restrictions on the types of abortions funded under the two programs.

of Alaska women, a court may well strike down, on grounds of arbitrariness, an administrative change through regulations in this area.

Part I:
CONSTITUTIONALITY, IN GENERAL, OF RESTRICTIONS ON STATE FUNDING OF ABORTIONS

Before addressing the specific method of using regulations to place restrictions on state funding of abortions, this memo will discuss the question of whether it would be constitutional to do so by any means. Therefore, this section discusses relevant federal court cases, court cases from other states, and opinions issued by the Alaska Attorney General's Office.

The conclusion of this section is that singling out funding of "elective" abortions for elimination in public assistance programs would probably be unconstitutional under Alaska's constitution even though it would not be unconstitutional under the federal constitution.

FEDERAL CASE LAW

Cases decided by federal courts in the 1970's determined that the federal constitution protects the right of a woman to decide whether or not she will beget or bear a child. Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services International, 431 U.S. 678 (1977).

After these cases, the federal courts wrestled with questions about whether state and federal governments are required to pay for an indigent woman's exercise of this right when abortion is involved. In several close decisions, the U.S. Supreme Court determined that the federal constitution does not require public financial support of the right to choose an abortion. Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980); Webster v. Reproductive Health Services, 492 U.S. 490 (1989). [2]

The federal courts ruled in these cases that governments are not required to provide money to help people exercise their constitutional rights; governments are only prohibited from placing obstacles in the way of exercising those rights. Withdrawing funding, said the federal courts, is not an obstacle to the indigent woman who seeks an abortion. Her poverty may be an obstacle, but the government did not create the

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[2] There has also been a very recent U.S. Supreme Court ruling that upheld certain restrictions on abortions in Pennsylvania. However, it is my understanding that abortion funding was not at issue under the Pennsylvania law, so this case is not discussed in this memo.

poverty. She is still free to have an abortion, but not with public money. The federal courts suggested other private money might be available.

In light of these federal decisions, it is clear that state funding for "elective" abortions under public assistance programs is not required under the federal constitution.

CASE LAW FROM OTHER STATES

After the federal decisions of the 1970's that upheld restrictions on public abortion funding, courts in a number of states looked at their own laws and constitutions to see if they supported the same conclusion. In contrast to the federal decisions, several state decisions determined that funding for "elective" abortions cannot be singled out for elimination under public assistance programs. See, Moe v. Secretary of Administration and Finance, 417 N.E. 2d 387 (Mass. 1981); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (CA 1981); Right to Choose v. Byrne, 450 A.2d 925 (NJ 1982); Planned Parenthood Association v. Department of Human Resources of the State of Oregon, 663 P.2d 1247 (Or. App. 1983), affirmed at 687 P.2d 785 (OR 1984); Doe v. Maher, 515 A.2d 134 (Conn. Super. 1986); Doe v. Director of Michigan Dept. of Social Services, 468 N.W.2d 862 (Ct.App. Mich. 1991), appeal granted at 472 N.W.2d 638 (MI 1991); and Hope v. Perales, 571 N.Y.S.2d 972 (Sup. 1991); contra, Fischer v. Department of Public Welfare, 502 A.2d 114 (PA 1985).

Except for the Pennsylvania case cited above (Fischer), these state courts weighed the private and state interests involved with abortions and struck a different balance than the federal courts. They considered state desires to save money, state policies to promote childbirth, state claims that poor women can still choose to find private money to fund their abortions, state interests in protecting unborn life, and state arguments that they are not required to provide money for the exercise of constitutional rights. Most of these arguments had been successful in federal courts. Not so in the state courts of Massachusetts, California, New Jersey, Oregon, Connecticut, Michigan, and New York .

In Moe v. Secretary of Administration and Finance, supra, the highest state court in Massachusetts determined that the Massachusetts constitution afforded a greater degree of protection for the right to choose an abortion than the federal constitution.[3] In upholding the right of Medicaid recipients to have their abortions paid for, the court observed

> [T]he Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses

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[3] Moe, at 400.

> to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to "achieve with carrots what [it] is forbidden to achieve with sticks." [citation omitted] . We are therefore in agreement with the views expressed by Justice Brennan, writing in dissent to Harris v. McRae, [when he wrote] "In every pregnancy, [either medical procedures for its termination, or medical procedures to bring the pregnancy to term are] medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with [those] procedure[s]. But under [this restriction], the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in Roe v. Wade."[4]

In Committee to Defend Reproductive Rights v. Myers, supra, the highest court in California made a determination similar to Massachusetts'. The court noted that the state had no constitutional obligation to provide medical care to the poor or to fund the exercise of all constitutional rights, but held

> Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion.[5]

In Right to Choose v. Byrne, supra, the highest court in New Jersey also came to a similar conclusion, using an equal protection analysis. The court struck down a restrictive abortion funding statute, stating

> [T]he Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy. . . Once it undertakes to fund medically necessary care attendant upon pregnancy, however, government must proceed in a neutral manner. Given the high priority accorded in this State to the rights of privacy and health, it is not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions. . . The statute affects

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[4] Moe, at 402.

[5] Myers, at 798 and footnote 31 accompanying the text.

> the right of poor pregnant women to choose between alternative necessary medical services. No compelling state interest justifies that discrimination, and the statute denies equal protection to those exercising their constitutional right to choose a medically necessary abortion.[6]

In Planned Parenthood Association v. Department of Human Resources of the State of Oregon, supra, the court struck down an Oregon Medicaid regulation that would have restricted funding of abortions, saying

> [I]t is difficult to understand the rational basis for denying one medically necessary surgical procedure to a pregnant woman solely because it involves an abortion while, at the same time, funding all other medically necessary services relating to pregnancy.[7]

In Doe v. Maher, supra, a Connecticut court struck down a state Medicaid regulation that prohibited funding for medically necessary abortions, saying

> This court is unable to reconcile the mandate and logic of the United States Supreme Court in Roe v. Wade... with the McRae... decision. Medicaid reimbursement funds are made available for all the health care costs of women, including the medical costs necessary to carry the fetus to term, but not for the medically necessary abortion. Surely, this constitutes infringement on the right to an abortion... In adopting the regulation,... the state has ceased to preserve its neutrality at least under our state constitution... And since that one exception also is a subject of a woman's constitutional rights, the regulation impinges upon those constitutional rights to the same practical extent as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion.[8]

In Doe v. Director of the Michigan Department of Social Services, supra, the Michigan Court of Appeals joined the state courts of Massachusetts, California, New Jersey, Oregon, and Connecticut in declining to follow federal precedent in the area of public abortion funding restrictions.

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[6] Byrne, at 935 - 936.

[7] Planned Parenthood, at 1255.

[8] Doe, at 151 and 152.

Even though the Michigan Court found its constitutional clause on equal protection rights to be semantically identical to the corresponding federal clause and found its privacy protection to be a penumbral right like the corresponding federal privacy right, it nevertheless independently construed both of those rights to be broader than the corresponding federal rights. Hence, the Michigan Court declined to follow the federal precedents of Maher and Harris, saying

> We recognize that, while the women's indigency also acts as a barrier to her freedom of choice, the state is not required to remedy that condition. But the state itself, by adoption of [the Michigan funding restriction] has created a direct barrier to the woman's exercise of her right to an abortion.
>
> There is thus an inequality within the program, with the distinction based on an indigent pregnant woman's exercise of an option which the constitution vouchsafes to her individually. If she exercises her constitutional right to abortion, she is excluded from a program for which she is otherwise qualified; if she elects not to exercise that constitutional option, she may continue to receive the benefits of this statutory program. . . [I]ndigent pregnant women are [thus] burdened in the exercise of their constitutional right of procreative choice. 9/

The court went on to find that the differential treatment of the indigent woman in this case was not justified by a compelling state interest since the unfunded abortion would have been a first trimester abortion because, said the court,

> The protection of potential human life is not a compelling state interest which may constitutionally impinge upon a woman's right to an abortion before the fetus is a "child," or constitutes viable human life. . . 10/

In reaching its conclusion, the Michigan court said that it found persuasive the reasoning in the Massachusetts, California, New Jersey, Oregon, and Connecticut cases cited in the previous portion of this memo.11/

9/ Doe, at 876.

10/ Doe, at 877.

11/ It is instructive to note that the Michigan court did not believe it was making a decision about the morality of abortion. The privacy and equal protection rights under the Michigan constitution, according to the court, would also prohibit the state government from choosing to support population control by funding Medicaid abortions but not childbirth services. Quoting, with approval, from the (continued...)

In Hope v. Perales, supra, a lower court in New York considered the validity of a Prenatal Care Assistance Program (PCAP) that provided medical care for the expenses of childbirth but not for abortions for women with incomes between 100 and 185 percent of the federal poverty line. The court found PCAP to be contrary to the constitutional right of privacy guaranteed by the due process clause of the New York state constitution, saying

> A medical assistance program that conditions the availability of medical assistance on the state-preferred choice of childbirth effectively precludes an eligible woman from any real choice in the fundamental decision of whether "to bear or beget a child." [Internal citations omitted.][12/]. . . [M]edical care is required by virtue of the pregnancy; to condition the medical assistance on the result desired by the State and not on the medical condition of the pregnant woman effectively wrests control from the pregnant woman over her body and health. . . [PCAP] violates the due process right of a pregnant eligible woman[13/]

The New York court also found PCAP to be in violation of the state's equal protection clause, saying

> Although the poverty of eligible women is not of the State's creation . . . and there is no constitutional obligation to pay for the medical care of the poor, the New York State equal protection clause guarantees equal participation in state benefits once such benefits are extended. . . In this regard PCAP is underinclusive. PCAP exempts eligible women

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11/(...continued)
Myers decision in California, the Michigan court stated

> this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child. Indeed, although in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature -- as a population control measure, for example -- funded Medi-Cal abortions but refused to provide comparable medical care for poor women who choose childbirth. Thus, the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment. (Doe, at 880.)

12/ Hope, at 979.

13/ Hope, at 980.

> for whom an abortion is medically prescribed... While reducing the incidence of low birth weight and infant mortality are legitimate state interests they can never outweigh the superior state interest in preserving the life and health of the mother. (Internal citations omitted.)[14/]

In each of the state cases quoted in this section, the state court struck down an abortion funding restriction that would have been upheld by a federal court.[15/] These cases clearly demonstrate that any state that relies only on federal decisions to justify an abortion restriction would be pursuing a risky course of action. A state's own constitution and court decisions must also be considered. [16/]

ATTORNEY GENERAL OPINIONS IN ALASKA

It would be particularly ill-advised in Alaska to rely only on federal abortion decisions to justify an abortion funding restriction according to a number of Alaska Attorney General opinions.[17/] Opinions of that office have been uniform in citing our state constitution's privacy and equal protection clauses as substantial reasons for predicting that Alaska courts probably would not follow federal precedents in the area of abortion rights, including state funding of abortions.

14/ Hope, at 982.

15/ While the cases cited in this section all concerned Medicaid programs, their reasoning is equally applicable to the GRM program. Like the Medicaid program, the GRM program is designed to meet "medical needs." While some abortions are termed "elective" by some observers, they still meet a medical need, as determined by the physician who performs the abortion procedure. Distinguishing among types of abortions in the GRM program would infringe the same privacy and equal protection interests as courts have determined are infringed when abortion funding restrictions are imposed under the Medicaid program.

16/ The New York case may be distinguishable on the grounds that PCAP excluded funding for all abortions while the Governor's press release indicates that "therapeutic" abortions will still be funded under the new Alaska regulations. Since the programs at issue are already limited to medical needs, it is not clear at this time which types of abortions will lose funding. In this context, the New York decision is included in this memo for two reasons: (1) it shows that New York has declined to follow federal precedents in the area of abortion funding and (2) it indicates that the right to choose an abortion to protect the "health" of the mother will be protected in New York as well as the right to choose when the mother's life is at issue. If "therapeutic" abortions under the new Alaska regulations do not include protection of the mother's "health," this New York case is highly relevant. Otherwise, it is relevant only to the extent that it indicates New York's reluctance to follow federal precedents.

17/ There have been no court cases in Alaska pertaining to abortion, so Attorney General opinions are particularly instructive in this area.

As the Attorney General's Office has consistently pointed out, there is an explicit right to privacy in the state constitution[18] that has been construed to be more protective than the federal right to privacy,[19] and our state equal protection clause has been interpreted to offer broader protection than the federal equal protection clause.[20]

An opinion written by Rodger W. Pegues when he was an Assistant Attorney General under Attorney General Avrum Gross discussed some 1977 federal decisions that upheld restrictions on abortion funding. These included Beal v. Doe and Maher v. Roe. After acknowledging the holdings in the federal decisions, Pegues went on to write

> [T]he rulings in. . . the Beal and Maher cases did come as a surprise to us, as they apparently did to the three dissenters on the Supreme Court and to the many judges of the United States district and circuit courts who had ruled to the contrary on the same or similar issues. Maher v. Roe, 432 U.S. 464, 483 - 484 (Brennan, J., dissenting). As Mr. Justice Brennan put it, id.,
>
>> [I]t cannot be gainsaid that today's decision seriously erodes the principles that Roe and Doe [the 1973 cases] announced to guide the determination of what constitutes an unconstitutional infringement of the fundamental right of pregnant women to be free to decide whether to have an abortion.
>
> In our view [Pegues wrote], the Alaska Supreme Court is not likely to erode those principles and is more likely to agree with the reasoning of the dissenters than with that of the majority in Beal, Maher, and Poelker. We arrive at this conclusion because the Alaska Supreme Court consistently imposes higher standards than the United States Supreme Court in privacy cases and in equal protection cases. (Examples omitted.) In each instance, the Alaska Supreme Court has provided greater protection for the individual as against governmental regulation and control under the state constitution than has the United States Supreme Court under the federal constitution . . . Given the extremely private nature of the subject here and the express provision for privacy in the Alaska constitution, art. I sec. 22, it is our best guess

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[18] Article I, sec. 22, Constitution of the State of Alaska.

[19] See, Ravin v. State, 537 P.2d 494 (Alaska 1975).

[20] See, Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255 (Alaska 1980), and State v. Erickson, 574 P.2d 1 (Alaska 1978).

> that the Alaska Supreme Court would not follow the rulings in the [federal] cases [that have upheld abortion funding restrictions].[21]

A similar conclusion was reached by Attorney General Wilson Condon in a 1981 memo he wrote to then Governor Jay Hammond. By this time, the U.S. Supreme Court had issued its decision in Harris v. McRae. which upheld a federal abortion funding restriction called the "Hyde Amendment." Condon wrote

> While the majority in Harris rejected challenges to the Hyde Amendment based on federal rights to privacy and equal protection, it did not address the Alaska Constitution. The Alaska Supreme Court has made it clear that our constitution provides broader protections than its federal counterpart... The Alaska Constitution contains an explicit guarantee of the right to privacy which has no parallel in the federal constitution. . . It also imposes a more flexible, and likewise more stringent, standard for equal protection... In light of these factors, it is possible, if not likely, that the minority position in Harris would be adopted by the Alaska Supreme Court. The minority in Harris would have struck down the Hyde Amendment on the grounds that it effectively deprives poor women of the choice of whether to have an abortion and thereby constitutes an infringement of their right to privacy and a denial of equal protection.[22]

The Attorney General's position that the federal decisions in Maher and Harris would probably not be followed by the Alaska Supreme Court was reiterated in another A.G. opinion, this one written by Assistant Attorney General Linda Scoccia under Attorney General Wilson Condon's name to then Representative Don Clocksin. Scoccia wrote

> It is doubtful that the restrictions in Maher and Harris would be upheld under the Alaska constitution, see 1981 Op. Att'y Gen., "General Relief Medical Assistance" (January 12, 1981). As noted above, our state constitution confers a greater protection of privacy than does the federal constitution, and the Alaska Supreme Court well may not require that state interference with the fundamental right of privacy actually rise to the level of placing "an obstacle" in the path of its exercise for it to be cognizable as an unconstitutional restriction.[23]

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[21] Op. Att'y Gen., March 31, 1978, Op. No. 15, pages 2 - 3.

[22] Op. Att'y Gen., Jan. 12, 1981, File No. J-66-413-81, pages 6 - 7.

[23] Op. Att'y Gen., April 17, 1981, page 6.

There were no additional Attorney General's opinions after 1981 until 1990. In 1989, the U.S. Supreme Court issued the Webster decision, which upheld a Missouri law that contained various abortion restrictions, including restrictions on public funding of abortions. The A.G.'s Office was asked if the Webster decision changed the office's previously expressed views about the legal status of abortion restrictions in Alaska. Replying in the negative, Assistant Attorney General Elizabeth Shaw, writing under Attorney General Doug Baily's name, wrote the following to Representative Mark Boyer:

> In response to your request that this office review and update any Attorney General opinions regarding AS 18.16.010, I have reviewed both formal and informal opinions. I agree with the legislative affairs analysis which you recently received which concludes that the Webster decision does not affect the attorney general opinions on AS 18.16.-010.[24]

While Ms. Shaw's memo does not specifically mention abortion funding restrictions (since there aren't any in AS 18.16.010), the memos of her office that she reviewed, the federal decision in Webster that she was asked to consider, and the legislative affairs analysis she reviewed all addressed abortion funding restrictions. Therefore, I believe it is reasonable to interpret her memo as reiterating her office's previous position on abortion funding as well as its previous position on the unconstitutionality of AS 18.16.010.[25]

In summary, all four Attorney General Opinions that are relevant to the issue of abortion funding, have supported the position that the Alaska Supreme Court is unlikely to uphold funding restrictions under the state's public assistance programs, even though federal courts might do so.

We conclude, based on court cases from other states and a consistent line of Attorney General Opinions under three different Attorneys General in Alaska, that the Alaska Supreme Court is not likely to follow federal precedents in the area of abortion funding.

An Alaska court would no doubt note that, according to the Governor's press release, the aim of the new regulations is to stop abortions that would otherwise be funded

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[24] Op. Att'y Gen., January 9, 1990, page 1.

[25] The "legislative affairs analysis" that Ms. Shaw reviewed cited the Massachusetts, California, New Jersey, Oregon, and Connecticut court cases in which abortion funding restrictions were struck down and concluded, based on Alaska's explicit privacy clause, that "It is even more likely that an Alaska court would find independent state grounds to strike down an abortion funding prohibition." Ms. Shaw did not dispute that conclusion.

under the two programs. The release quotes the Governor as saying, "We're not taking this action to save money. We're doing it to save lives." This statement demonstrates both the Administration's animosity toward exercise of the fundamental right to choose abortion and its recognition that lack of public funding will be an absolute bar on the exercise of that right by at least some indigent women.[26]

We think that the Alaska Supreme Court is likely to find that singling out "elective" abortions for elimination under either the Medicaid or GRM program would violate an indigent woman's right to privacy and her right to equal protection in at least two ways: such a restriction would treat her medical need for an abortion differently from her other medical needs and treat poor women who choose to continue a pregnancy differently from poor women who do not. The court is not likely to look with favor on limitations that are based on a woman's exercise of her fundamental right to choose abortion as a medical procedure appropriate to her situation.

This conclusion applies to any method used to restrict funding of abortions under public assistance, even if the restriction is enacted by the legislature through substantive laws that amend the programs' statutes (short of abolishing the programs entirely). An adverse ruling is even more likely if abortion funding is restricted through the regulations process. This will be discussed below.

Part II: REGULATORY AUTHORITY

The current DHSS Medicaid regulation covering abortions limits funding to three situations: (1) when the life of the mother is endangered, (2) when continuing the pregnancy would result in severe and long-lasting physical health damage to the mother, and (3) when the pregnancy is the result of rape or incest. See 7 AAC 43.140.

The current DHSS regulations covering abortions under the General Relief Medical program (GRM) are at 7 AAC 43.140(b), 7 AAC 47.200, and 7 AAC 47.290. They provide for funding of "services reasonably necessary for an abortion" as a "pregnancy-related service."

As previously noted in this memo, we do not know at this time how the new regulations will define "therapeutic" and "elective" abortions.

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[26] Because the apparent justification for the new regulations lies in stopping some abortions rather than in saving money, this memo does not address any cost savings argument that may be made in the future. However, it should be noted that there are already statutes directing DHSS to deal with budget shortfalls by eliminating nonabortion services first. See AS 47.07.035 and AS 47.25.205 for the priority listings of medical services under the two programs.

It is our best guess that the state Medicaid regulations will be amended to conform to the abortion funding restrictions in federal Medicaid law. Because the state's current GRM regulations cover all abortions not covered under Medicaid, a court would likely uphold Medicaid restrictions that are required by federal law.

Therefore, the focus of any court challenge is likely to involve changes in the GRM regulations. The key question is whether the GRM regulations can be changed to prohibit funding for "elective" abortions.

This same question was put to Attorney General Wilson Condon in 1981 by then Governor Jay Hammond. Condon's answer is as relevant now as it was then because neither the GRM statutes nor the GRM regulations have changed in any pertinent way since then.

Condon acknowledged that a "strong argument" could be made that DHSS has absolute discretion to change its definition of "medical needs" in the GRM regulations, but explained at length that there definitely would be "legal difficulties" with this approach. He wrote

> AS 47.25 gives the agency broad discretion to determine whether there is a need for specific types of medical treatment [for persons who are eligible for general relief]. . . By adopting regulations providing for the coverage of abortion expenses the agency implicitly made a finding that there is a general need for that type of medical treatment, i.e., that abortions are "medical needs" under the terms of the statute. It could be argued that before the regulations could be amended to exclude elective abortions, there would have to be a finding that conditions within Alaska had changed to such an extent that there is no longer a need for that type of medical treatment. Without such a finding, the change [in the regulations] might be considered an arbitrary agency action. It should also be noted that the legislature has not taken action to change the original agency determination.
>
> Such a finding would be most difficult to make in this case. Neither the Hyde Amendment nor the United States Supreme Court decision in Harris alter[s] "medical needs." Nor has any other event occurred in the state which suggests a change in medical needs. Absent changed circumstances, we believe a court might not permit the deletion of elective abortions from the list of medical needs covered by the General Relief Medical Assistance program.[27]

[27] Op. Att'y Gen., January 12, 1981, File No. J-66-413-81, at pages 5 - 6.

We agree with Attorney General Condon's opinion that changes in the GRM regulations without a change in either the underlying statute or in the medical circumstances of poor women in the state would likely be viewed as unlawful arbitrary action by the agency. In addition, the regulations would be subject to the same constitutional infirmity discussed above under Part I of this memo.

Part III: CONCLUSION

While restrictions on funding abortions under public assistance programs have been upheld in federal courts, state courts in Massachusetts, California, New Jersey, Oregon, Connecticut, Michigan, and New York have found independent state grounds for striking down similar restrictions. They have determined that singling out abortions from other medical needs violates a privacy right, a due process right, or an equal protection right granted under their state constitutions. They have declined to follow federal court decisions construing privacy rights and equal protection rights more narrowly under the federal constitution.

Given the long history of administrative interpretation of our statutes to include abortion funding, the history of Attorney General opinions supporting that interpretation, the reasoning of other states that have declined to follow federal precedent in the area of abortion, and our own special constitutional provisions relating to privacy and equal protection, we believe that the Alaska Supreme Court probably would adopt the reasoning of these other states' courts and strike down as unconstitutional and arbitrary the use of new regulations to single out "elective" abortions for elimination under our public assistance programs.

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I hope you find this discussion of the issues helpful. If you have any questions or comments about this memo, please let me know.

TML:mi
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DIVISION OF LEGAL SERVICES

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M E M O R A N D U M   July 22, 1992

SUBJECT: Addendum to July 7th Memo on Abortion Funding (Work Order No. 18-LS0042)

TO: Senator Arliss Sturgulewski

FROM: Terri Lauterbach TML
Legislative Counsel

I have discovered that the Michigan case discussed on pages 5 - 6 of my July 7th memo to you was overturned on appeal in June. (Doe v. Director of the Michigan Dept. of Social Services.) I used the case in that memo as an example of where a state court has struck down abortion funding restrictions by basing its decision on a state constitutional provision that was more protective of individual rights than the federal constitution is.

I bring the reversal of the case to your attention only as a point of information; the reversal does not weaken support for the conclusions reached in that memo.

According to the "State Constitutional Law Bulletin" put out by the National Association of Attorneys General (Vol. 5. No. 9. June 1992), the Michigan Supreme Court, in a 5 to 2 ruling, declared that the Michigan Court of Appeals erred when it construed the Michigan constitution's equal protection clause to be broader than its federal counterpart. Since the Michigan Supreme Court found that the state and federal equal protection clauses offer the same protection, it followed federal precedent and upheld the Michigan abortion funding restriction that had been struck down by the appeals court.

This new information in no way changes the conclusion in my July 7th memo that a decision on abortion funding could easily be different from federal decisions in a state like Alaska where the state equal protection clause has already been construed to offer broader protections than the federal constitution's equal protection clause. In fact, it confirms my conclusion.

The overruling would have weakened the support for my conclusion in the previous memo only if the Michigan Supreme Court had agreed that the state constitution offered broader protection than the federal constitution but determined that the broader protection was not broad enough to force a different conclusion than reached by the federal courts.

Please let me know if you have questions about this matter.

TML:mi
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Lauterbach
4/1/97

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE MARTIN

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to assistance for abortions under the general relief program; and**
2 **relating to financial responsibility for the costs of abortions."**

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

4 * **Section 1.** AS 25.20 is amended by adding a new section to read:
5 **Sec. 25.20.035. Financial responsibility for abortion costs.** Both persons
6 who would have been the parents of the child after its birth are liable for the medical
7 costs of an abortion of their unborn child.
8 * **Sec. 2.** AS 47.25.150 is amended by adding a new subsection to read:
9 (b) A woman who applies for assistance to cover the costs of an abortion shall,
10 as part of the application for assistance,
11 (1) be considered to have assigned to the state all rights to reco[illegible]ry of
12 the costs of the abortion from the unborn child's other parent; the assignment takes
13 effect upon a determination that the woman is eligible for assistance;
14 (2) name the other parent of the unborn child and agree to cooperate

1 with the department in establishing the identity and location of the unborn child's other
2 parent, if necessary, unless the department determines that the woman has established
3 good cause for not naming the other parent and for not cooperating in establishing the
4 identity and location of the other parent; the department may not delay the provision
5 of abortion services while it investigates the parentage of the unborn child.
6 * Sec. 3. AS 47.25.205 is amended to read:
7 **Sec. 47.25.205. Priority of general relief medical assistance.** If the
8 department finds that the cost of medical assistance for all persons eligible under
9 AS 47.25.120 - 47.25.300 will exceed the amount allocated in the state budget for that
10 assistance for the fiscal year, the department shall eliminate coverage for medical
11 services in the following order:
12 (1) **abortions and related services and supplies, such as medical**
13 **supplies and equipment, transportation, laboratory and x-ray services, physician**
14 **services, hospital services, and pharmaceuticals, used for an abortion;**
15 **(2)** treatment of speech, hearing, and language disorders;
16 **(3)** [(2)] optometrists' services and eyeglasses;
17 **(4)** [(3)] occupational therapy;
18 **(5)** [(4)] emergency dental services for adults;
19 **(6)** [(5)] prosthetic devices not including dentures;
20 **(7)** [(6)] medical supplies and equipment **other than those used to**
21 **perform an abortion**;
22 **(8)** [(7)] physical therapy;
23 **(9)** [(8)] outpatient laboratory and outpatient x-ray services **other than**
24 **those used for an abortion**;
25 **(10)** [(9)] ambulatory surgical center services **other than services to**
26 **perform an abortion**;
27 **(11)** [(10)] nonemergency medical transportation **other than**
28 **transportation to obtain an abortion**;
29 **(12)** [(11)] outpatient physician services **other than services to**
30 **perform an abortion**;
31 **(13)** [(12)] outpatient hospital services **other than services to perform**

1 an abortion;
2 (14) [(13)] intermediate care facility services;
3 (15) [(14)] skilled nursing facility services;
4 (16) [(15)] emergency medical transportation other than
5 transportation for an abortion;
6 (17) [(16)] pharmaceuticals other than those used in an abortion;
7 (18) [(17)] inpatient physician services other than services to perform
8 an abortion;
9 (19) [(18)] inpatient hospital services other than services to perform
10 an abortion.
11 * Sec. 4. AS 47.25.220 is amended to read:
12 Sec. 47.25.220. **State's claim for assistance.** The total amount paid in
13 assistance to a recipient, and any amount paid on behalf of a recipient for an
14 abortion, constitutes a claim against the recipient and the recipient's estate. In
15 addition to other assets or income available to satisfy a claim under this section,
16 the permanent fund dividend of a recipient who received an abortion with funds
17 provided under AS 47.25.120 - 47.25.300 may be taken under AS 43.23.065(b)(6).
18 On the death of a person receiving assistance, the total amount paid as assistance shall
19 be allowed by the court having jurisdiction over the estate.
20 * Sec. 5. AS 47.25.240 is amended to read:
21 Sec. 47.25.240. **Action against person liable for care of recipient or for**
22 **abortion costs.** If, during the continuance of an allowance or after the provision of
23 abortion services with funds provided under AS 47.25.120 - 47.25.300, the
24 department ascertains that a person liable for the support of the recipient of assistance
25 or liable for the abortion costs, as applicable, is able to provide the necessary care
26 and support of the recipient or to reimburse the state for the abortion costs, and the
27 person liable for the care and support of the recipient or for the abortion costs fails
28 or refuses to support and care for the recipient or fails or refuses to reimburse the
29 state for the abortion costs, as applicable, the state has a claim for the assistance
30 against the person liable for it. This claim may be enforced by civil action brought
31 in the name of the state by the attorney general against the person liable for the

1 recovery of the amount of money, with interest, paid to the recipient __**or for the**__
2 __**abortion costs, as applicable**__, together with the costs and disbursements of the action.
3 * **Sec. 6.** AS 47.25.240 is amended by adding a new subsection to read:
4 (b) In addition to other assets or income available to satisfy a judgment in a
5 civil action under this section, the permanent fund dividend of a person liable for
6 abortion costs may be taken under AS 43.23.065(b)6).
7 * **Sec. 7.** AS 47.25.300 is amended by adding a new paragraph to read:
8 (5) "abortion" means the use or prescription of an instrument, medicine,
9 drug, or other substance or device to terminate the pregnancy of a woman known to
10 be pregnant, except that "abortion" does not include the termination of a pregnancy if
11 done with the intent to
12 (A) save the life or preserve the health of the unborn child;
13 (B) deliver the unborn child prematurely to preserve the life of
14 the pregnant woman; or
15 (C) remove a dead unborn child.

ALASKA
CIVIL LIBERTIES UNION
An Affiliate of the American Civil Liberties Union
P. O. Box 201844 Anchorage, AK 99520-1844
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April 22, 1997

The Honorable Joe Green, Chair
House Judiciary Committee
Alaska State House of Representatives
Juneau, Alaska

Re: House Bill 234 - GRM Assistance for Abortions

Dear Chairman Green and members of the Committee:

Thank you for an opportunity to comment on House Bill 234, which would have the effect of depriving women who are otherwise eligible for General Relief Medical assistance from obtaining an abortion under that program. The Alaska Civil Liberties Union opposes HB 234 because it would violate the Alaska Constitution's right to privacy; its guarantee of equal protection under the law; and its guarantee of freedom from discrimination based on sex.

In 1993 the Department of Health and Social Services under Commissioner Ted Mala promulgated regulations which attempted to deprive poor women of access to abortion. The AkCLU on behalf of seven other organizations and ten individuals successfully brought suit and in 1994 reached a final settlement which specified that a physician determine, based on his or her professional judgment, whether a particular abortion is medically necessary.

Any further efforts to deprive poor women of reproductive autonomy are nothing more than using the government to police a private position against abortion. As we have seen in recent weeks in this Legislature, it matters not to those who would outlaw abortion if a woman's life or her health is at stake. It matters not whether she is considering a "morning after" pill because the condom leaked or is seeking a first trimester abortion

because her birth control pills failed, she was raped, or she didn't know she could get pregnant the first time.

Nothing in HB 234's deletion of abortion indicates a similar change in the State's commitment to fund childbirth and pre- and postnatal expenses if a woman seeks to carry her pregnancy to term. In fact, the discriminatory funding scheme will prevent low-income Alaskan women from obtaining safe abortions and coerce them into continuing their pregnancies to term even when this decision is adverse to the interests of the women and their families. Women choose abortions for compelling reasons that profoundly affect their own and their families' futures. Unable to pay for her own health care, a poor woman will have little recourse but to accept the State's determination that she should carry her pregnancy to term.

Some will try to tell you that promoting childbirth while denying abortion is "pro-family." But it's not their family that will be affected and it should not be their decision. Please signal your recognition that a poor woman's decision can be as moral as anyone else's and reject HB 234.

Sincerely yours,

ALASKA CIVIL LIBERTIES UNION

Theda Pittman
Interim Executive Director

cc: The Honorable Tony Knowles

Alaskan Students Reflect on Peer Attitudes About Sexual Assault Prevention, Tolerance and Respect

MAR 24 1997

by John Lyle, School Counselor

At Woodriver Elementary, as in many elementary schools across the country, we've developed a series of connected lessons for fifth and sixth grade students addressing the issues of personal safety, human growth development, physical sexual assault prevention, and HIV AIDS. In 1989, the first year I started giving personal safety presentations, I asked four classes of sixth grade students to anonymously respond to a "Male Access Quiz" developed by Dr. E. Mahoney (McGraw Hill, 1984). I was curious how the 100 students perceived sexual assault *before* I started the lesson. Students read the following statement and marked "yes" or "no" after ten situations which, in their opinion, did or did not make the statement appropriate. The statement read:

"It 's OK for a man to hold down a woman and physically force her to have sex for the following reasons":

1. **He has spent a lot of money on her.**
2. **He's so excited that he can't stop.**
3. **He's drunk and can't control himself.**
4. **She's had sexual relations with others.**
5. **She's drunk or high on drugs.**
6. **She lets him touch her above her waist.**
7. **She gets him sexually excited.**
8. **She was going to have sex with him and then decides not to.**
9. **They have been dating for a long time.**
10. **They are married.**

When I tabulated the results of the quiz in 1989, I was shocked and dismayed. Fifty percent of the students (52% of boys and 48% of girls) considered rape to be acceptable in certain circumstances, most typically if the man and woman were married or if they have dated a long time. One thing was obvious: many students had great misunderstandings about what is appropriate behavior, and what is dangerous and illegal behavior.

The following day I went back into the classes and shared results of the access quiz with the students, who didn't seem too surprised by the figures. I asked them to anonymously respond on paper to three questions: "Why did some students feel that sexual assault was acceptable? What might account for different response rates of boys and girls? What could be done to teach students that sexual assault is not an acceptable behavior?" Their answers were powerful. Student responses to these three questions gathered over several years include the following:

"People see this on TV or in movies. It seems normal, the way people should act."
"It's not OK for women to be wild but it's almost expected that men are wild."
"People who drink or use drugs might not think they're responsible for their actions."
"Males are more controlling, they have more power. They are in charge."
"Males may be stronger and more aggressive, but it's still not OK to do this."
"Men aren't usually the ones getting raped, so they don't know what it's like."
" A lot of men probably don't really think about it."
"Some men think women are dolls to play with and do whatever they want with."
"They may see or hear about other men doing it so they think it's OK."
"I'm a male and I don't think it's OK for anyone to force another person to have sex for any reason, period."
"I have no idea why this is, but it's wrong."

In discussing with parents and teachers the results of classroom presentations and the access quiz, it was apparent to us that we needed to become more effective in reaching students about this critical human issue. Many myths and misconceptions needed to be corrected. I contacted several local community agencies which work with prevention and intervention of physical and sexual assault, and asked them for facts and figures that specifically pertained to Alaska. I began collecting articles from the local paper which described real life incidents which could be used in class presentations. I made lists of common misconceptions about assault that could be used either as a true false quiz or a large-group oral discussion tool.

Since 1989, I've asked over 800 sixth grade students (100 students year) to respond to the "Male Access Quiz", and have charted the differences in responses each year. There have been some interesting trends that in turn pose interesting questions. In 1991 the number of sixth grade boys and girls who thought it was appropriate in certain situations for men to rape women dropped to 23% (27% of boys, 20% of girls), and continued to drop for the next three years to a low of 9% of boys and girls in 1994 (10% of boys, 8% of girls). A disturbing reversal occurred during the next two years, with overall percentages climbing back up to 20% in 1995 (28% of boys, 12% of girls), and dropping slightly to 17% in 1996 (27% of boys, 6% of girls). This backsliding and widening gender gap causes concern, and provides incentive to continue improving the quality and delivery of the information.

Over the years these connected lessons have generated respectful and insightful class discussions about different facts, myths, misconceptions and scenarios pertaining to physical/sexual assault. I am careful that males are not labeled as uncaring, aggressive monsters. Both boys and girls have wanted and needed to discuss how to prevent potentially dangerous situations, how to be assertive (knowing what "no" means), and how to successfully refuse the tremendous peer and media pressures placed upon them.

Recently, the Alaska Department of Health and Social Service's Adolescent Health Advisory Committee released information concerning the influence of television programming and advertising on young people. The following are a few significant findings from several of the 1,000 studies that correlate excessive television viewing and unhealthy behavior:

*** 80% of MTV videos show sexual imagery and violence against women**
*** Many children see 200,000 violent acts on television by age 18**
*** US television contains more violence than anywhere else in the world**
*** Media violence contributes up to 15% of real-life violence**
*** More kids recognize Joe Camel than Mickey Mouse**
*** Arcade and video games target kids with violent messages**
*** Display of sex on prime-time television doubled from 1975-1988**
*** 94% of sexual activity on soap operas is between unmarried people**
*** Women are frequently depicted in the media as weak, submissive and as victims**
*** 100% of made-for-television movies in 1986 showed drinking**
*** 97% of the 10,000 television food commercials kids will see are for unhealthy foods**
*** 360,000 commercials will be seen by the average child by age 18**

In our society, many decisions that adults make on behalf of children are not, in fact, made in the best interests of children. Powerful economic factors influence media programming and advertising content. Given that the main role of media is to deliver consumers to the corporations that pay for the programming to sell their products, most people agree that much of what children see in the media is questionable. Clearly, one of our main tasks as parents and teachers is to help children learn to make good decisions. To do this they need factual information from us, as well as encouragement, trust, and our ability to listen. Good adult examples are also extremely important.

Commenting on the rise in numbers of students who condoned sexual assault in the 1995-96 samples, one educator stressed that an important question that parents and educators should be continually asking is, "What specific examples can adults provide to children that would translate into healthier attitudes of sexual respect, and increasingly lower percentages of students who thought that physical sexual assault was justified?" Each day in our own lives we have opportunities to question behavior that crosses the line of acceptablility. The behavior can manifest itself in casual conversations, consumer products on store shelves, or messages that permeate the media. As with many things, to be silent in the face of abusive or disrespectful behavior may implicitly condone it.

The results of the Male Access Quiz provides to us a window onto beliefs and perceptions of young people. Opening up classroom discussions to include real issues increases awareness of social problems that all students will confront at some time in their lives. The inter-connected issues of safety and respect need to be taught starting in kindergarten and continuing throughout high school. Truthfully, we never outgrow the need for reinforcement of these critical lessons.

We hope increasing numbers of children will be successful in differentiating between ***appropriate*** tolerance (ie:gender differences, cultural diversity, learning styles, disabilities) and behavior that should ***not*** be tolerated, such as physical and sexual assault. Obviously our goal is eventually to have 100% of male and female students asserting that sexual assault is unacceptable for any reason, by any person. We'll surely celebrate that day; however in the meantime we'll celebrate the process, and continue to ask the questions.

by John Lyle

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(907) 479-4211 474-4584 (1500 words)

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Ford
4/17/97

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: CSHB 159(L&C)

1 Page 1, line 5:
2 Delete "21"
3 Insert "19"

4 Page 1, line 6:
5 Delete "21"
6 Insert "19"

7 Page 1, line 7:
8 Delete "21"
9 Insert "19"

10 Page 1, line 8:
11 Delete "21"
12 Insert "19"

13 Page 2, line 5:
14 Delete "21"
15 Insert "19"
16 Delete "21"
17 Insert "19"

18 Page 2, line 15:
19 Delete "21"
20 Insert "19"

1 Page 2, line 31:
2 Delete "21"
3 Insert "19"

4 Page 3, line 7:
5 Delete "21"
6 Insert "19"

7 Page 3, line 21:
8 Delete "21"
9 Insert "19"

10 Page 3, line 22:
11 Delete "21"
12 Insert "19"

13 Page 3, line 30:
14 Delete "21"
15 Insert "19"

16 Page 4, line 25:
17 Delete "21"
18 Insert "19"

19 Page 6, line 22, through page 7, line 1:
20 Delete all material.

21 Renumber the following bill sections accordingly.