

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9577 SENATE JUDICIARY

STATE & AGE OF MINORITY (under __)	POSSESSION	POSSESSION WITH INTENT TO DISTRIBUTE	PRODUCTION, CREATION, PROMOTION, or KNOWING DUPLICATION	FILM PROCESSORS *Duty To Report
<p>Ohio</p> <p>18 §2907.01(M)</p> <p>Inference of Age §2907.321(B)(3) & 322(B)(3).</p> <p>Mistake of Age not a Defense §2907.321(B)(2) & 322(B)(2).</p>	<p>§2907.321(A)(5) (obscene material) 4th Degree Felony; Subsequent Offense is a 3rd Degree Felony.</p> <p>§ 2907.322(A)(5) (sexually explicit material) 5th Degree Felony Subsequent offense is a 4th Degree Felony.</p> <p>§ 2907.323(A)(3) (nudity) 5th Degree Felony. Subsequent offense is a 4th Degree Felony.</p>	<p>NONE</p>	<p>§2907.321(A) (obscene material) 2nd Degree Felony.</p> <p>§2907.322 (A) (1996) (sexually explicit material), 2nd Degree Felony.</p> <p>§2907.323(A)(1)-(2) (nudity) 2nd Degree Felony.</p>	<p>NONE</p>
<p>Oklahoma</p> <p>18 21 §1021.2.</p>	<p>21 § 1021.2 Felony: 20 Years and/or \$25K</p>	<p>NONE</p>	<p>21 § 1021.2 Felony: 20 Years and/or \$25K</p>	<p>21 § 1021.4 (LTR)</p>
<p>Oregon</p> <p>18 §163.665</p> <p>Mistake of Age Defense §163.690.</p>	<p>§ 163.672 Class C Felony</p>	<p>§ 163.673(1)(b) Class B Felony §163.684(1)(A)(a) (encouraging child sex abuse) Class B Felony</p>	<p>§163.673(a) Class B Felony §163.670 Class A Felony §163.684 Class B Felony</p>	<p>§ 163.693</p>
<p>Pennsylvania</p> <p>17 18 §6312(B).</p>	<p>18 §6312(D) 3rd Degree Felony</p>	<p>18 §6312(C) 3rd Degree Felony</p>	<p>18 §6312(B) 2nd Degree Felony</p>	<p>NONE</p>

STATE & AGE OF MINORITY (under ___)	POSSESSION	POSSESSION WITH INTENT TO DISTRIBUTE	PRODUCTION, CREATION, PROMOTION, or KNOWING DUPLICATION	FILM PROCESSORS *Duty To Report
Rhode Island 18	NONE	NONE	NONE	NONE
South Carolina 18 No Mistake of Age Defense. §16-15-405(c). Inference of Age. §16-15-410(B).	§16-15-410(A) Felony (max 5 years)	§16-15-405(A)(2) (receipt with intent to distribute) Felony (min 2 years)	§16-15-405(A)(1) Felony (min 2 years) §16-15-335 Felony (max 5 years)	§ 16-3-850
South Dakota 18--possession 16--production	§22-22-23.1 Class I Misdemeanor	NONE	§22-22-23 Class 4 Felony	NONE
Tennessee 18 §39-17-1002(3). Inference of age. §§39-17-1004-1005.	§39-17-1003(a) Class B Felony	§39-17-1004(a)(1) & (b)(1) Class C Felony; and if obscene, is a Class B Felony	§39-17-1005 Class B Felony §39-17-902(b) Class E Felony (min \$10K fine) §39-17-1004 Class C Felony; and if obscene is a Class B Felony	NONE
Texas 18 §43.25. Mistake of Age allowed. §43.25(f).	Penal Code §43.26(a) 3rd Degree Felony	§43.26(c) 3rd Degree Felony (possession of 6 or more creates presumption of intention to promote)	§43.25(b) 2nd Degree Felony. §43.25(d) 3rd Degree Felony.	NONE

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Utah 18 §76-5a-2(4)	§76-5a-3(1)(a) 2nd Degree Felony	§76-5a-3(1)(a) 2nd Degree Felony	§76-5a-3(1)(a) 2nd Degree Felony	NONE
Vermont 16 §§2821(1) & 2801(1). Mistake of Age Defense. §§2805, 2822(b) & 2824(b)(3). Inference of Age. §2826.	NONE	NONE	§2822, §2823 §2824 1st Offense up to 10 yrs. + \$20K fine; Subsequent Offense min of 1-15yrs, up to \$50K fine	NONE
Virginia 18 §18.2-374. Presumption of minority. §18.2- 374.J.D.	§18.2-374.1:1 Class 3 Misdemeanor; Subsequent Offense: Class 1 Misdemeanor	18.2-374.1.B.4 Class 4 Felony	§18.374.1.B Class 5 Felony	NONE
Washington 16 §9.68A.011(1).	§9.68A.070 Class C Felony	9.68A.050 Class C Felony	§9.68A.050 Class C Felony §9.68A.060 (sending, bringing into state) Class C Felony	§ 9.68A.080 Gross Misdemeanor
West Virginia 18 §61-8C-1(a).	§61-8C-3-- Felony §61-8D-6-- possession by parent or guardian	NONE	§61-8C-2 Felony	NONE

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Wisconsin 18 §948.01(1). Mistake of Age Defense. §948.05.	§948.12 Class E Felony	§ 948.05(1)(c) Class C Felony	§948.05 Class C Felony	NONE
Wyoming 18 §14-3-202.	NONE	NONE §6-4-302 prohibits the possession of <i>obscenity</i> with intent to distribute	§27-6-114(n)(i)(C) (employment of children under 16 for any business...injurious to the morals, health or safety of a child) No specific production statutes exist	NONE

Senate Passes Child Porn Bill

Possession of such materials would be fourth-degree felony under proposed law

By Peter Eichstaedt
Journal Capitol Bureau

SANTA FE -- Possession of child pornography would be a felony under a bill passed Monday by the state Senate after three hours of debate.

Senate Bill 15, sponsored by Sen. Phil Maloof, D-Albuquerque, was approved first by a vote of 34 to 5. The bill now goes to the House.

The Senate rejected a number of amendments, including one to make possession of child pornography punishable by death, but adopted others to exclude "erotic clothed dancing" and viewing of child pornography on a computer screen.

As the bill stands, possession of child pornography would be a fourth-degree felony, punishable by a fine and up to 18 months in jail.

"I think it is long overdue," Maloof said of the bill.

Current law bans the production and distribution of child pornography, but not the possession of such material Maloof said.

New Mexico is one of only eight states that does not ban possession of such material, Maloof said. Police need the new law to help control such material, he said.

The bill bans possession of material that depicts sex acts or the simulation of sex acts if a person knows the subjects are under the age of 18.

Sen. Tim Jennings, D-Roswell, was among several senators who complained that because the bill included "simulation" of sex acts, it was too broadly written. Jennings said the bill apparently would ban the possession of a tape of the late Elvis Presley as a teen-ager shaking his hips.

Despite his concerns, Jennings attempted to make the crime subject to the death penalty.

"I think we should kill them," Jennings said. People who deal in child pornography cannot be rehabilitated, he said.

"You can't fix people who exploit children," Jennings said. "I don't want them around. What this does is solve a problem and solve it once and for all."

Sen. Joe Carraro, R-Albuquerque, agreed, saying that once a child is subjected to sexual exploitation that child's spirit and self-worth are killed. "What you've done is kill that child," he said.

Sen. Bill Davis, R-Albuquerque, said Jennings' proposal was out of line because it would make possession of pornography subject to a more stiff

penalty than production and distribution of it.

Jennings' amendment failed by vote of 14 in favor and 26 against.

The Senate also narrowly rejected, 19 to 20, an amendment by Sen. Manny Aragon, D-Albuquerque, to make "simulated" sex acts permissible and to reduce the penalty for possession to a misdemeanor rather than a felony.

Aragon complained that the bill was so broadly worded that legitimate films such as "Blue Lagoon," which is about a teen-age boy and girl shipwrecked on an island, could be banned.

Aragon said that most people have a good idea what is defined as child pornography but more specific definitions need to be put in the law.

Maloof argued that Aragon's amendment would tie the hands of law enforcement officials and make the law unenforceable. "This amendment really waters the bill down," Maloof said, before the amendment was killed.

Voting against the bill were Aragon and Sens. William Davis, R-Albuquerque; Michael Sanchez, D-Belen; Arthur Rodarte, D-Ojo Caliente; and Leonard Tsosie, D-Crownpoint.

Material from The Associated Press was used in this report.

Ontario County Man Who Transmitted Child Porn Nets Jail Time

Wednesday, December 17, 1997

Attorney General Dennis C. Vacco announced that an Ontario County man who transmitted pornographic images of children over the Internet was sentenced today to 30 days in jail and 5 years probation.

Martin Dano, 35, of West Bloomfield, was arrested last August by investigators from Attorney General Vacco's office and the New York State Police and charged with sending and receiving child pornography via America Online.

In October, Dano pleaded guilty to a single count of Possession of a Sexual Performance by a Child, a class "E" felony.

In addition to the jail sentence, Ontario County Court Judge James R. Harvey ordered Dano to pay a \$1,000 fine and required him to register as a sex offender under Megan's Law.

Judge Harvey, who today Dano had used the Internet for "despicable purposes," furthermore ordered Dano to stay away from children under 17 years of age, and to undergo sex counseling.

"Martin Dano and others who trade in these graphic images create and perpetuate the demand for child pornography, one of the vilest forms of child abuse," said Attorney General Vacco.

"Judge Harvey's decision to sentence Martin Dano to jail time sends a clear message to others on the Internet that the degradation and exploitation of children will not be tolerated," Attorney General Vacco continued.

The first Ontario County man nabbed in Attorney General Vacco's sting, called "Operation Rip Cord," Dano is also the first in the state to be sentenced to jail.

"I strongly urge other judges around the state to follow Judge Harvey's lead and dole out even stiffer sentences to those who trade in child pornography," said Attorney General Vacco.

"Operation Rip Cord," based in Attorney General Vacco's Buffalo office, is already credited with being the nation's largest and most successful on-line kiddie porn investigation.

The 20-month investigation has identified over 120 individuals who are suspected of sending child pornography over the Internet, resulting in at least fourteen arrests in New York, plus dozens of prosecution referrals to other law enforcement agencies across the United States and abroad.

"Employing traditional undercover tactics combined with state-of-the-art technology, my investigators have tapped into the child pornographers' on-line chat rooms, where graphic images are brazenly traded," explained Attorney General Vacco, who was recently named chairman of a nationwide task force to combat child porn.

"As the father of two young boys myself, these pornographic images are too disturbing to describe," Attorney General Vacco said. "In fact, one of my investigators became so upset over one particularly vile image that he ripped the computer's cord from the wall -- and that's how 'Operation Rip Cord' got its name."

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-2105

MEMORANDUM

February 24, 1998

SUBJECT: Sectional Summary of SB 323

TO: Senator Drue Pearce
Attn: Kristy Tibbles

FROM: Gerald P. Luckhaupt *JPL*
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill adds indecent exposure in the first degree to the list of offenses covered by this limitation of actions provision.

Section 2 of the bill adds indecent exposure in the first degree to the definition of sexual abuse regarding this tolling provision for youthful victims of sexual abuse.

Section 3 of the bill creates the new offense of indecent exposure in the first degree,¹ committed when a person violates AS 41.460 (indecent exposure in the second degree) by knowingly masturbating within the observation of a person under 16 years of age.

Section 4 of the bill makes the existing offense of indecent exposure, indecent exposure in the second degree and reduces the mental state required to commit the offense from intentionally² to knowingly.³

Section 5 of the bill increases the penalty for distribution of child pornography to a class B felony from a class C felony.

Section 6 of the bill increases the penalty for possession of child pornography to a class B penalty from a class A misdemeanor.

Section 6 of the bill

¹A class B felony.

²"Intentionally" is defined at AS 11.81.900(a)(1).

³"Knowingly" is defined at AS 11.81.900(a)(2).

Section 7 of the bill provides that a prosecution for indecent exposure in the first degree may be commenced at any time.

Section 8 of the bill allows a peace officer to arrest without a warrant a person the officer has reasonable cause to believe has violated the conditions of the person's release before trial on a charge of indecent exposure in the first degree.

Section 9 of the bill allows the use of hearsay testimony before the grand jury when the offense in indecent exposure in the first degree and a child under 10 years of age is the victim of the offense.

Section 10 of the bill requires a sentencing court to impose some period of consecutive sentence when the defendant has two or more previous convictions for various sex offenses, including indecent exposure in the first degree, committed against minors.

Section 11 of the bill provides an aggravating factor for a person convicted of indecent exposure in the first degree with previous sexual offense convictions.

Section 12 of the bill adds indecent exposure in the first and second degree and possession of child pornography to the list of sex offenses requiring sex offender registration.

Sections 13 and 14 of the bill adds the offenses of incest and indecent exposure in the first degree to the list of offenses that disqualify a person from receiving or holding a teaching certificate.

Section 15 of the bill adds the offenses of sexual assault in the third degree and indecent exposure in the first and second degrees to the list of offenses disqualifying a person from being a school bus driver.

Section 16 of the bill requires Department of Health and Social Services to notify the nearest law enforcement when the department receives a report that a child may have been a victim of indecent exposure in the first degree.

Section 17 of the bill amends Alaska Rule of Criminal Procedure 5 to correspond to the change made in sec. 9 of the bill.

Section 18 of the bill provides an applicability section necessary to cover the new offenders required to register as sex offenders under sec. 12 of the bill.

Section 19 of the bill provides an applicability section.

Section 20 of the bill provides an immediate effective date.

SB

329

0-LS1505B
Bannister
3/23/98

CS FOR SENATE BILL NO. 329()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the regulation authority, exemptions, and definitions of the**
2 **Alaska Business License Act."**

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

4 *** Section 1. AS 16.10.265(d) is amended to read:**

5 (d) The commissioner of [COMMERCE AND ECONOMIC DEVELOPMENT
6 MAY SUSPEND OR REVOKE A BUSINESS LICENSE ISSUED UNDER
7 AS 43.70.020 AND THE COMMISSIONER OF] revenue may suspend or revoke a
8 license to engage in the business of processing or buying raw fish if the licensee or
9 an officer, director, or employee in a policy-making position of the licensee has been
10 convicted of three offenses under this section. Proceedings to suspend or revoke a
11 license are governed by AS 44.62 (Administrative Procedure Act).

12 *** Sec. 2. AS 43.70.090 is amended to read:**

13 **Sec. 43.70.090. Regulations.** The department may adopt regulations necessary
14 to implement [DETERMINE AND COLLECT THE FEES IMPOSED BY] this

1 chapter.

2 * Sec. 3. AS 43.70 is amended by adding a new section to read:

3 **Sec. 43.70.105. Exemptions.** This chapter does not apply to

4 (1) a fisheries business;

5 (2) the sale of liquor under a license issued under AS 04.11;

6 (3) an insurance business;

7 (4) a mining business;

8 (5) sales through coin-operated amusement and gaming machines;

9 (6) supplying services as an employee;

10 (7) furnishing goods or services by a person who does not represent to
11 be regularly engaged in furnishing goods or services;

12 (8) the activities of an investment club; in this paragraph,

13 (A) "investment club" means a group of individuals,
14 incorporated or otherwise organized, that engages primarily in investing in
15 securities, that does not sell investment services to another person, and the
16 primary purpose of which is educational;

17 (B) "security" has the meaning given in AS 45.55.990.

18 * Sec. 4. AS 43.70.110(1) is repealed and reenacted to read:

19 (1) "business" means engaging or offering to engage in a trade, a
20 profession, or an activity with the goal of receiving a financial benefit in exchange for
21 the provision of services or goods or other property;

Alaska State Legislature

Senate



Official Business

State Capitol
Juneau, AK. 99801-1182

Senate Labor & Commerce Committee

Sponsor Statement SB 329: Investors Corporations

The Senate Labor & Commerce Committee introduced Senate Bill 329: Investors Corporations, at the request of the Alaska Regional Council, National Association of Investors Corporation.

Current Alaska law defining "business" is so broad, that it is unclear whether nonprofit, educational organizations like investment clubs must apply for a business license. This bill amends AS 43.70.110 to exclude investment clubs members from the business license requirement.

There are over 108 investment clubs in Alaska, consisting of on average 15 individuals. These clubs are formed for the purpose of making group investments in a learning atmosphere. The monthly contributions are around \$10 to \$50 per month per student.

Investment clubs do not advertise, offer any product or service to the general public and do not have a place of business since they usually meet in members' homes.

No other state requires a business license fee, according to the National Association of Investors Corporation.

Alaska State Legislature

Senate



Official Business

State Capitol
Juneau, AK. 99801-1182

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Alaska Human Services

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April 16, 1998

Senator Robin Taylor, Chairman
Senate Judiciary Committee
AK State Capital
Juneau, Alaska 99801-1182

Re: SB 331

Dear Senator Taylor:

As a former Nationally Certified Counselor who decided to go back and pursue a Ph.D. in Clinical Psychology, I believe I am in a unique position to comment on SB 331. The bill as it stands, allows a broader scope of practice than most professional counselors are prepared to do. Proponents of this legislation have listed the typical core curriculum for counseling programs. These courses are not sufficient to prepare a counselor to work with serious mental disorders or sophisticated psychological testing - both of which would be allowed if the legislation is passed as currently written. The traditional scope of practice for counselors, based on their curriculum, focuses on helping people with normal phase of life and adjustment issues and uses non-diagnostic testing to further the counseling process or help develop treatment plans. SB 331 would allow counselors to diagnose and work with all mental disorders and do all psychological-diagnostic testing except projective testing, which is a very minor component of psychological-diagnostic testing. The allowance to do psychological testing is especially of harmful potential, given that course work in testing is apparently not even part of the core curriculum for counselors.

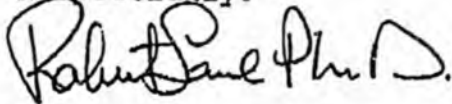
This is more than a "guild issue." As you may be aware, a case is ongoing now on the Kenai Peninsula, where an individual held himself out to be a psychologist, but in fact was a pastoral counselor, is being sued by former patients who allegedly went to him for help and ended up being further victimized. Counselors are not psychologists, when they act like they are, the public is at risk. Legislation to license counselors with a scope of practice commiserate with their education and training may well help protect the public, but I am afraid that SB 331 as it is written, does not do that. I did not even know how much I didn't know until I pursued the Ph.D. in Clinical Psychology. Counselors who say their education and training are substantially the same are likely not to know as well. Additionally such claims beg the question



Page 2

of why they aren't seeking licensure as psychological associates, clinical social workers, or marriage and family therapists if their education and training are substantially the same. I urge to insist on appropriate language for scope of practice in this legislation.

Respectfully.

A handwritten signature in cursive script that reads "Robert Lane Ph.D.".

Robert Lane, Ph.D.

Alaska State Legislature

Senator Gary Wilken, Chairman
Senator Loren Leman, Vice Chairman
Senator Lyda Green
Senator Jerry Ward
Senator Johnny Ellis



State Capitol
Room 510
Juneau, Alaska 99801
(907) 465-3762

Senate Committee on Health, Education and Social Services

SB 331

An Act regulating licensed professional counselors; regulating use of the titles 'Licensed Professional Counselor' and 'Licensed Counselor'; amending Rule 504(a)(3), Alaska Rules of Evidence; and providing for an effective date.

Sponsor Statement

The Licensed Professional Counselor bill establishes a board to license and regulate experienced Masters and Doctoral level professional counselors whose education and experience do not fall within the existing behavioral health specializations of Licensed Clinical Social Worker, Licensed Marriage and Family Therapist, Psychologist, or Psychological Associate.

This legislation is good for counselors and good for consumers. For counselors, the option to obtain a license in their field puts them on par with other professionals in the behavioral health field, and opens doors to employee assistance programs that currently require that service providers have a license to qualify for their program. Furthermore, the opportunity to obtain licensure in their field increases job security and enhances employment opportunities for professional counselors who wish to practice beyond the scope of a private practice. This bill does not bar professional counselors who are already practicing without a license and who wish to continue doing so, from continuing their practice within the State of Alaska.

SB 331 also benefits the Alaskan consumer by identifying competent counselors who have met standards of quality established by the Legislature and the board. It institutes grievance procedures and legal recourse for clients of Licensed Professional Counselors who believe they are victims of fraudulent, unethical or negligent practices. With employee assistance needs met, SB 331 has the potential to give consumers more choice in the selection of mental health service providers.

Currently 44 other states already license or certify professional counselors. There are over 48,000 Licensed Professional Counselors nationwide. Within Alaska there are hundreds of people who are eligible for this license. Because most individuals who are eligible for licensure are already working with clients who are appropriate under this license, licensing them should not significantly impact other licensed mental health professionals.

The fees that Licensed Professional Counselors pay will cover the cost of the board and licensing process.

A full sectional analysis is available from my office.

Alaska State Legislature



Senator Gary Wilken, Chairman
Senator Loren Leman, Vice Chairman
Senator Lyda Green
Senator Jerry Ward
Senator Johnny Ellis

State Capitol
Room 510
Juneau, Alaska 99801
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Senate Committee on Health, Education and Social Services

CSSB 331 (HESS)

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Sectional Analysis

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The fees that Licensed Professional Counselors pay will cover the cost of the board and licensing process.

Section 1. This section amends AS 08 by creating a chapter licensing professional counselors based on specific outlined criteria. It also specifies the general make-up, duties and prerogatives of the Board of Professional Counselors.

- Page 1, line 8 through page 2, line 8 (Article 1) establishes a five member board, with one public member who is unrelated to the field, at least one private sector member, and at least one public sector member.
- Page 2, line 9 through 20 (Article 1) outlines the duties of the board, consistent with language in AS 08.01, with the addition of duties that relate specifically to licensing professional counselors, supervisor criteria and certification, establishing continuing education requirements, and adopting a code of ethics.
- Page 2, line 22 through 30 (Article 2) specifies that this is a "title" restriction bill, not a "practice" restriction bill. This language prohibits the use of the titles "Licensed Professional Counselor" or "Licensed Counselor" by unlicensed counselors. Violation of this prohibition is a class B misdemeanor.
- Page 2, line 31 through page 4, line 2 (Article 2) outlines the qualifications needed to be a Licensed Professional Counselor.
- Page 4, line 3 through 11 (Article 2) gives the board the ability to license an individual from another state if that other state's licensing requirements are equal to or greater than those of Alaska.
- Page 4, line 12 through 20 (Article 2) gives the board the ability to license an applicant who is educated in a foreign country providing the individual meets the requirements listed in AS 08.29.110 (excepting AS 08.29.110(a)(5)),

has earned a degree that is equal to one earned through an accredited United States program, and speaks the English language.

- Page 4, line 21 through 24 (Article 2) requires that licenses be renewed every two years based on the completion of continuing education requirements as outlined by the board.
- Page 4, line 26 through page 5, line 16 (Article 3) prohibits Licensed Professional Counselors from revealing to another person communications made to them by clients about a matter which the client has divulged to the counselor in a professional capacity. This section also lists exceptions where the standard practice of confidentiality of communications may not apply.
- Page 5, line 17 through line 31 (Article 3) allows the board to certify licensed mental health workers as supervisors for the purpose of supervising professional counselors who are seeking their 3,000 hours of supervised experience as mentioned in Section 08.29.110(6).
- Page 6, line 1 through 16 (Article 3) requires Licensed Professional Counselors supply each client with a disclosure statement including information listed in 1-5 of Sec. 08.29.220 before the performance of services and before the client may be charged a fee.
- Page 6, line 17 through 20 (Article 3) prohibits Licensed Professional Counselors from performing practices that are not covered within the scope of their training or education. This is true even if that practice is stated in the definition of the "practice of professional counseling."
- Page 6, line 22 through page 7, line 21 (Article 4) provides grounds for denial of a license or for disciplinary sanctions by the board against a Licensed Professional Counselor or new applicant.
- Page 7, line 22 through page 8, line 8 (Article 4) defines the scope of "practice for professional counseling," and "supervision." The definition for "practice of professional counseling" is very similar to the definition for "practice of marital and family therapy" (AS 08.63.900(5)), substituting some terms including "professional counseling" for "marital and family therapy," and the client population being served.

Section 2. This section adds Board of Professional Counselors to AS 08.01 010, a section listing which boards are covered under Chapter 01, *Centralized Licensing* under Title 8.

Section 3. This section amends AS 08.01.050(d) to include the Board of Licensed Professional Counselors to the list of boards that can contract out for treatment of licensed people who abuse alcohol, drugs or other substances.

Section 4. This section brings the Board of Professional Counselors under the sunset provision listed in AS 08.29.010. The Board's sunset date is June 30, 2002.

Section 5. This section amends Rule 504 to include Licensed Professional Counselors in Alaska's rules regarding confidentiality between client and psychotherapist.

Section 6. Under this transitional provision, an individual who meets the following criteria may be "grandparented" into being a licensed professional counselor. The individual must meet all of the requirements listed in Section 6.

Section 7. This section allows the board to establish regulations required in order to implement the licensing of professional counselors, providing those regulations will not take effect until the effective date of this bill. Board members appointed to the first board are not required to be licensed until March 1, 2000, but must meet the requirements of this chapter when they are appointed.

Section 8. This section creates the Board of Licensed Professional Counselors upon passage of this legislation.

Section 9. This section states that the "grandparenting" provision of this legislation will take effect on January 1, 1999.

Section 10. This section states that this legislation upon passage will take effect on March 1, 1999. This date does not apply to the dates listed in Sections 8 and 9.



of ALASKA

A Branch of the American Counseling Association

P.O. Box 21163
Juneau, Alaska 99801

March 5, 1998

Senator Gary Wilken, Chairman
Health, Education, and Social Services Committee
Room 510, Capital Building
Juneau, Alaska 99801

Dear Senator Wilken:

I am writing on behalf of the American Counseling Association of Alaska in support of SB 331, Licensure of Professional Counselors. This bill is beneficial to Alaskans for a number of reasons. Some of the ways we would benefit are:

- > **Availability of licensed mental health providers who practice statewide**, including rural and bush areas where often, no other licensed mental health providers are available.
- > **Public assurance that Licensed Professional Counselors (LPC's) have met at least a minimum standard of education and experience.**
- > **Public protection in the form of a licensure board to whom complainants could register grievances and be assured that these concerns would be investigated and if found to be legitimate, action taken to remedy the situation or in some way censure or revoke the license of the offending counselors.** (Note: the Board of Marriage and Family Therapy has expressed interest in working with Professional Counselors to develop a composite board for the purpose of efficiency and economy, so this would not necessitate the development of a completely separate, new board.
- > **Greater opportunities for employment for graduates of the Alaska university system.** Currently, graduates of some Master's level behavioral-health university programs are denied employment because they are not eligible for any of the other more specialty-oriented licenses. Others who are currently employed, are being denied opportunities for advancement due to a lack of licensure. Some have even been threatened with job loss for this reason. The changing world of managed care has increased this pressure on our behavioral-healthcare providers.
- > **Licensed Professional Counselors have greater opportunities for mobility should they decide to move out-of-state. Forty-four other states have counselor licensure or credentialing. Alaska is one of six that do not. Many states have reciprocity, accepting licensure from other states having similar licensure requirements.**

These are just a few of the reasons why licensure for Professional Counselors makes sense for Alaskans. At present, there are approximately 600 counselors who would be eligible for this license. It is estimated that approximately 200 would seek licensure in the first year the bill is passed. **I urge you to support the passage of SB 133 for the benefit of Alaskans. Thank you!**

Sincerely,

A handwritten signature in cursive script that reads 'Pamela L. Watts'.

Pamela L. Watts, M.Coun., N.C.C.
President

RECEIVED
MAR 28 1998

Ans'd.....

Box 153
Wrangell, Alaska 99929

RECEIVED
MAR 7 1998

Ans'd.....

Senator Robin Taylor
Chairman of Senate Judiciary Committee
Room 30, State Capitol Building
Juneau, Alaska 99801

Dear Senator Taylor,

I am the school counselor at Wrangell Public Schools. I am writing to encourage you to quickly pass Senate Bill # 331, the Counselor's Licensure Bill, through your committee. I believe that passage of this bill will be very beneficial to all Alaskans, but especially beneficial to Alaskans in small and rural communities like Wrangell.

As it does with many other professionals, licensure for counselors will give them the therapist /client privilege so very necessary to assure the public of confidential services. Passage of the bill will also provide accountability measures for counselors whereby protecting the quality of services to Alaskans.

I find that my services or my commitment can't always stop at the school door. This bill will help me be a stronger community asset. Please contact me if I can provide any additional information.

Sincerely submitted,


Lenny Church
School Counselor

States Offering Licensure or Certification to Professional Counselors

State	1st Tier License/Certificate	2nd Tier License/Certificate	3rd Tier License/Certificate
Alabama	Certified Counselor Associate		
Arizona	Certified Counselor Associate		
Arkansas	Certified Counselor Associate		
California	Registered Marriage, Family & Child Counselor Intern		
Colorado	Licensed Professional Counselor		
Delaware	Licensed Associate Counselor of Mental Health	Licensed Professional Counselor of Mental Health	
District of Columbia	Licensed Professional Counselor		
Florida	Licensed Mental Health Counselor		
Georgia	Licensed Professional Counselor		
Idaho	Licensed Professional Counselor	Licensed Professional Counselor - Private Practice	
Illinois	Licensed Professional Counselor	Licensed Clinical Professional Counselor	
Indiana	Licensed Professional Counselor		
Iowa	Licensed Mental Health Counselor		
Kansas	Licensed Professional Counselor		
Kentucky	Certified Professional Counselor		
Louisiana	Licensed Professional Counselor		
Maine	Licensed Professional Counselor	Licensed Clinical Professional Counselor	
Maryland	Certified Professional Counselor		
Massachusetts	Licensed Mental Health Counselor		
Michigan	Licensed Professional Counselor		
Mississippi	Licensed Professional Counselor		
Missouri	Licensed Professional Counselor		
Montana	Licensed Clinical Professional Counselor		
Nebraska	Licensed Mental Health Practitioner	Certified Professional Counselor	Licensed Professional Counselor

States Offering Licensure or Certification to Professional Counselors

State	1st Tier License/Certificate	2nd Tier License/Certificate	3rd Tier License/Certificate
New Hampshire	Certified Mental Health Counselor		
New Jersey	Licensed Associate Counselor	Licensed Professional Counselor	Clinical Mental Health Counselor
New Mexico	Registered Mental Health Counselor	Professional Mental Health Counselor	Professional Clinical Mental Health
North Carolina	Licensed Professional Counselor		
North Dakota	Licensed Associate Counselor	Licensed Professional Counselor	
Ohio	Licensed Professional Counselor	Licensed Clinical Professional Counselor	
Oklahoma	Licensed Professional Counselor		
Oregon	Licensed Professional Counselor		
Rhode Island	Licensed Counselor in Mental Health		
South Carolina	Licensed Associate Counselor	Licensed Professional Counselor	
South Dakota	Licensed Associate Counselor	Licensed Professional Counselor	Licensed Professional Counselor - Mental Health
Tennessee	Licensed Professional Counselor	Licensed Professional Counselor - Mental Health Service Provider	
Texas	Counselor Intern	Licensed Professional Counselor	
Utah	Licensed Professional Counselor		
Vermont	Licensed Clinical Mental Health Counselor		
Virginia	Licensed Professional Counselor		
Washington	Certified Mental Health Counselor		
West Virginia	Licensed Professional Counselor		
Wisconsin	Professional Counselor in Training	Certified Professional Counselor	
Wyoming	Licensed Professional Counselor		

Jurisdictions Without Licensure

Alaska
Hawaii
Guam

Minnesota
Nevada
New York

Pennsylvania
Puerto Rico
Virgin Islands

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Alaska State Legislature



Senator Gary Wilken, Chairman
Senator Loren Leman, Vice Chairman
Senator Lyda Green
Senator Jerry Ward
Senator Johnny Ellis

State Capitol
Room 510
Juneau, Alaska 99801
(907) 465-3762

Senate Committee on Health, Education and Social Services

SB 331

An Act regulating licensed professional counselors; regulating use of the titles 'Licensed Professional Counselor' and 'Licensed Counselor'; amending Rule 504(a)(3), Alaska Rules of Evidence; and providing for an effective date.

Sectional Analysis

The Licensed Professional Counselor bill establishes a board to license and regulate experienced Masters and Doctoral level professional counselors whose education and experience do not fall within the existing behavioral health specializations of Licensed Clinical Social Worker, Licensed Marriage and Family Therapist, Psychologist, or Psychological Associate.

This legislation is good for counselors and good for consumers. For counselors, the option to obtain a license in their field puts them on par with other professionals in the behavioral health field, and opens doors to employee assistance programs that currently require that service providers have a license to qualify for their program. Furthermore, the opportunity to obtain licensure in their field increases job security and enhances employment opportunities for professional counselors who wish to practice beyond the scope of a private practice. This bill does not bar professional counselors who are already practicing without a license and who wish to continue doing so, from continuing their practice within the State of Alaska.

SB 331 also benefits the Alaskan consumer by identifying competent counselors who have met standards of quality established by the Legislature and the board. It institutes grievance procedures and legal recourse for clients of Licensed Professional Counselors who believe they are victims of fraudulent, unethical or negligent practices. With employee assistance needs met, SB 331 has the

potential to give consumers more choice in the selection of mental health service providers.

Currently 44 other states already license or certify professional counselors. There are over 48,000 Licensed Professional Counselors nationwide. Within Alaska there are hundreds of people who are eligible for this license. Because most individuals who are eligible for licensure are already working with clients who are appropriate under this license, licensing them should not significantly impact other licensed mental health professionals.

The fees that Licensed Professional Counselors pay will cover the cost of the board and licensing process.

Section 1. This section amends AS 08 by creating a chapter licensing professional counselors based on specific outlined criteria. It also specifies the general make-up, duties and prerogatives of the Board of Licensed Professional Counselors.

- **Page 1, line 8 through page 2, line 8 (Article 1)** establishes a five member board, with one public member who is unrelated to the field, at least one private sector member, and at least one public sector member.
- **Page 2, line 9 through 20 (Article 1)** outlines the duties of the board, consistent with language in AS 08.01, with the addition of duties that relate specifically to licensing professional counselors, supervisor criteria and certification, establishing continuing education requirements, and adopting a code of ethics.
- **Page 2, line 22 through 30 (Article 2)** specifies that this is a "title" restriction bill, not a "practice" restriction bill. This language prohibits the use of the titles "Licensed Professional Counselor" or "Licensed Counselor" by unlicensed counselors. Violation of this prohibition is a class B misdemeanor.
- **Page 2, line 31 through page 3, line 31 (Article 2)** outlines the qualifications needed to be a Licensed Professional Counselor.
- **Page 4, line 1 through 9 (Article 2)** gives the board the ability to license an individual from another state if that other state's licensing requirements are equal to or greater than those of Alaska.
- **Page 4, line 10 through 18 (Article 2)** gives the board the ability to license an applicant who is educated in a foreign country providing the individual meets the requirements listed in AS 08.29.110 (excepting AS 08.29.110(a)(5)),

has earned a degree that is equal to one earned through an accredited United States program, and speaks the English language.

- **Page 4, line 25 through 28 (Article 2)** requires that licenses be renewed every two years based on the completion of continuing education requirements as outlined by the board.
- **Page 5, line 2 through 23 (Article 3)** prohibits Licensed Professional Counselors from revealing to another person communications made to them by clients about a matter which the client has divulged to the counselor in a professional capacity. This section also lists exceptions where the standard practice of confidentiality of communications may not apply.
- **Page 5, line 24 through page 6, line 7 (Article 3)** allows the board to certify licensed mental health workers as supervisors for the purpose of supervising professional counselors who are seeking their 3,000 hours of supervised experience as mentioned in Section 08.29.110(6).
- **Page 6, line 8 through 22 (Article 3)** requires Licensed Professional Counselors supply each client with a disclosure statement including information listed in 1-5 of Sec. 08.29.220 before the performance of services and before the client may be charged a fee.
- **Page 6, line 23 through 26 (Article 3)** prohibits Licensed Professional Counselors from performing practices that are not covered within the scope of their training or education. This is true even if that practice is stated in the definition of the "practice of professional counseling."
- **Page 6, line 28 through page 7, line 30 (Article 4)** provides grounds for denial of a license or for disciplinary sanctions by the board against a Licensed Professional Counselor or new applicant.
- **Page 7, line 31 through page 8, line 16 (Article 4)** defines the scope of "practice for professional counseling," and "supervision." The definition for "practice of professional counseling" is nearly identical to the definition for "practice of marital and family therapy" (AS 08.63.900(5)), substituting some terms including "professional counseling" for "marital and family therapy," and the client population being served.

Section 2. This section amends AS 08.01.050(d) to include the Board of Licensed Professional Counselors to the list of boards that can contract out for treatment of licensed people who abuse alcohol, drugs or other substances.

Section 3. This section amends Rule 504 to include Licensed Professional Counselors in Alaska's rules regarding confidentiality between client and therapist.

Section 4. Under this transitional provision, an individual who meets the following criteria may be "grandparented" into being a licensed professional counselor. The individual must meet all of the requirements listed Section 4.

Section 5. This section allows the board to establish regulations required in order to implement the licensing of professional counselors, providing those regulations will not take effect until the effective date of this bill. Board members appointed to the first board are not required to be licensed until March 1, 2000, but must meet the requirements of this chapter when they are appointed.

Section 6. This section creates the Board of Licensed Professional Counselors upon passage of this legislation.

Section 7. This section states that the "grandparenting" provision of this legislation will take effect on January 1, 1999.

Section 8. This section states that this legislation upon passage will take effect on March 1, 1999. This date does not apply to the dates listed in Sections 6 and 7.

SENATE COMMITTEE REPORT

DATE: 3/23/98

FURTHER: Finance

DATE TURNED IN TO OFFICE: 4-17-98

Judiciary Committee considered

SENATE BILL NO. 331

"An Act regulating licensed professional counselors/regulating use of the titles 'licensed professional counselor' and 'licensed counselor'; amending Rule 504(a)(3), Alaska Rules of Evidence; and providing for an effective date."

and recommends:

be replaced with _____ CS _____ ()

adopt previous _____ CS FOR SB 331 (HES)

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to the _____ Committee

Senate Bill:
 same title
 new title
 House Bill:
 same title
 technical title
 new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>J. Ellis</i>	<input checked="" type="checkbox"/>	<i>Alan Parnell</i>	<input checked="" type="checkbox"/>		
<i>Luke Miller</i>	<input checked="" type="checkbox"/>				
CHAIR: <i>Adrian L. Taylor</i>	<input checked="" type="checkbox"/>	CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
<i>CIGD-OCUP. LIC.</i>			<input checked="" type="checkbox"/>

#1

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

March 23, 1998

RECEIVED

MAR 26 1998

Ans'd.....

Senator Robin Taylor
Alaska State Legislature
State Capitol (MS 3100), Room 30
Juneau, AK 99801-1182

Re: Licensed Professional Counselor Bill, SB#331

Dear Senator Taylor:

I am strongly encouraging you and my legislative representatives to support the Licensed Professional Counselor (LPC) Bill, SB#331, for several reasons, including the following:

- 1) LPC's have impeccable credentials for providing mental health/substance abuse services, including having completed a Bachelor's Degree, a 3-4 year graduate Master's level program (usually CACREP-accredited), and at least 2 years' experience with more than 3,000 hours of face-to-face work with clients while under clinical supervision. The clinical training for LPC's often exceed that required for completion of a social work program. The LPC is trained to work with communities, families, groups, and with individuals—to assess, evaluate, and provide professional treatment services under strict, ethical guidelines.
- 2) Licensure can help protect consumers by identifying qualified, professional counselors and by establishing legal recourse for clients.
- 3) Licensure can encourage qualified graduates from our university systems to stay and practice in Alaska. Most agencies that hire counselors could tap into a pool of highly qualified, employable counselors from our own state.
- 4) Many Master's and Doctoral level counselors are now providing services throughout Alaska and are denied professional advancement due to their inability to be licensed in any of the existing licensing categories, which are quite narrow in scope.
- 5) The LPC Bill is non-restrictive; it does not restrict other professionals who offer counseling services from doing so. Its purpose is to ensure that counseling services are offered only by people qualified to do so, while also ensuring the inclusion of professional counselors as qualified service providers.
- 6) Forty-four states either license or certify professional counselors. There are over 48,000 Licensed Professional Counselors nationwide.

- 7) An obvious benefit of licensing professional counselors (and offering reciprocity for those already working and licensed by another state) is found in servicing the rural areas of our state. These professionals could augment a rich pool of mental health/substance abuse providers and help make services into remote, as well as urban, areas more accessible.

The Alaska branch of the American Counseling Association (ACAak) is an active, professional organization. This group is dedicated to the advocating of its members' professional status to the Alaska legislature. Some of the members who are working diligently for the licensure passage during this legislative session include Anne Henry, Dave Reeves, and Pam Watts. If you are approached by these persons on behalf of the Licensed Professional Counselor Bill, please regard them as representatives of a large body of professional counselors and as voices for those of us who are wanting the passage of the LPC Bill this session.

At the present time, I am a Licensed Professional Counselor (State of Texas) and National Certified counselor. I have worked in bush Alaska (Nome and villages in the region) as a mental health clinician for almost four years. I have been responsive to a variety of needs, including community crisis response; individual and group therapy with adults, families, and children; community education; training; consultation; emergencies; and peer supervision. Being unable to have my licensure reciprocated in Alaska has continued to be problematic, both in terms of my own professional advancement and administratively.

Please give careful consideration to the Licensed Professional Counselor Bill, and support the passage of reciprocated licensure for the LPC's who are working to help promote a healthier Alaska.

Sincerely,



Barbara (Toni) Chrestman, MS, LPC, NCC
Mental Health Clinician
P.O. Box 1802
Nome, AK 99762
(907) 443-5206 w.
(907) 443-4940 h.

S B

3 4 8

SENATE COMMITTEE REPORT

DATE: 4/17/98

FURTHER:

DATE TURNED
IN TO OFFICE: 4-30-98

Judiciary Committee considered

SENATE BILL NO. 348

"An Act relating to rights of conscience protection for persons who directly or indirectly provide or perform health care services."

and recommends:

- be replaced with CS FOR SB 348 (JUD)
- adopt previous CS _____
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

- Senate Bill:
 - same title
 - new title
- House Bill:
 - same title
 - technical title
 - new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>Mike Miller</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
		<i>[Signature]</i>	<input checked="" type="checkbox"/>		
		<i>[Signature]</i>	<input checked="" type="checkbox"/>		
		<i>[Signature]</i>	<input checked="" type="checkbox"/>		
CHAIR:		CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
<i>LAW-CIVIL DIV.</i>	<i>4-17-98</i>	<input checked="" type="checkbox"/>	

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

FISCAL NOTE

**STATE OF ALASKA
1998 LEGISLATIVE SESSION**

BILL NO. CSSB 348 (STA)

Revision Date (Note if correction) _____	Dept. Affected <u>Law</u>	_____
Title <u>An Act relating to rights of conscience protection</u>	BRU	<u>Civil Division</u>
<u>for persons w.o. ... provide or perform health care services.</u>	Component	<u>Governmental Affairs,</u>
Sponsor <u>Senate State Affairs Committee</u>		<u>Human Svcs, Special Litigation</u>
Requester <u>Senate State Affairs Committee</u>	Component Serial No.	<u>2207/08/13</u>

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

CSSB 348 (STA) states as its purpose to establish as a statutory right the right for all persons and institutions to refuse to counsel, advise, pay for, provide, perform, assist, or participate directly or indirectly in providing or performing health services that involve the end of a life or abortion if it would violate the persons' or institution's religious or moral convictions and to prohibit all forms of discrimination, disqualification, coercion, disability, or liability of the persons by reason of their refusals.

Because the legislation will include public facilities in the definition of health care institutions, the state anticipates litigation would arise from passage of the bill. Litigation potentially will take the form of employee challenges to termination or disciplinary actions and claims against health care institutions for injuries alleged based on the failure to provide services. The fiscal impact of this litigation is very speculative and it is difficult to assign any rational cost estimate at this time. The department has not included any fiscal note costs; however, if numerous cases arise a result of the bill's enactment, we would seek to reassess our budget position at that time.

Prepared by Joan M. Kasson *Joan M. Kasson*
 Division Attorney General's Office
 Approved by Commissioner Bruce M. Botelho, Attorney General
 Agency Department of Law

Phone 465-5370
 Date 4/17/98
 Date 4/17/98

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FISCAL NOTE

No. 1
 Bill Version: CS SB 348 (STN)
 (S) Publish Date: 4-17-98

STATE OF ALASKA
 1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____	Dept. Affected <u>BRU</u>	Law <u>Civil Division</u>
Title <u>An Act relating to rights of conscience protection</u>	Component <u>Governmental Affairs,</u>	
for persons who ... <u>provide or perform health care services.</u>	Component Serial No. <u>2207/08/13</u>	
Sponsor <u>Senate State Affairs Committee</u>		
Requester <u>Senate State Affairs Committee</u>		

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personnel Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

SB 348 states as its purpose to establish as a statutory right the right for all persons and institutions to refuse to counsel, advise, pay for, provide, perform, assist, or participate directly or indirectly in providing or performing health services that violate the persons' or institution's religious or moral convictions and to prohibit all forms of discrimination, disqualification, coercion, disability, or liability of the persons by reason of their refusals.

Because the legislation will include public facilities in the definition of health care institutions, the state anticipates litigation would arise from passage of the bill. Litigation potentially will take the form of employee challenges to termination or disciplinary actions and tort claims against health care institutions for injuries alleged based on the failure to provide services. The fiscal impact of this litigation is very speculative and it is difficult to assign any rational cost estimate at this time. The department has not included any fiscal note costs; however, if numerous cases arise a result of the bill's enactment, we would seek to reassess our budget position at that time.

Prepared by <u>Joan M. Kasson</u> <i>Joan M. Kasson</i>	Phone <u>465-5370</u>
Division <u>Attorney General's Office</u>	Date <u>4/3/98</u>
Approved by <u>Commissioner</u> <i>Bruce M. Botelho</i>	Date <u>4/3/98</u>
Agency <u>Department of Law</u>	

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VERSION

H

CS FOR SENATE BILL NO. 348()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to certain rights of conscience protection for persons who
2 directly or indirectly provide or perform health services."

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

4 * Section 1. AS 18 is amended by adding a new chapter to read:

5 Chapter 17. Rights of Conscience Protection.

6 Sec. 18.17.010. Policy. It is the public policy of the state to respect and
7 protect the rights of conscience of all persons who are involved in providing health
8 services. It is the purpose of this chapter to protect as a basic civil right the right of
9 all persons to refuse to counsel, advise, pay for, provide, perform, assist, or participate
10 directly or indirectly in providing or performing certain health services that violate the
11 persons' religious or moral convictions and to prohibit all forms of discrimination,
12 disqualification, coercion, disability, or liability of the persons by reason of their
13 refusals.

14 Sec. 18.17.020. Civil rights of conscience. (a) Subject to AS 18.12.050, a

1 person has the right not to counsel, advise, pay for, provide, perform, assist, or
2 participate directly or indirectly in providing or performing a health service if the
3 service includes a procedure that violates the person's religious or moral convictions
4 and the procedure is intended to end the life of an individual or involves an elective
5 abortion.

6 (b) Subject to AS 18.12.050, a person may not be required to counsel, advise,
7 pay for, provide, perform, assist, or participate directly or indirectly in providing or
8 performing a health service if the service includes a procedure that violates the
9 person's religious or moral convictions and the procedure is intended to end the life
10 of an individual or involves an elective abortion.

11 **Sec. 18.17.030. Individual rights of conscience.** (a) Subject to
12 AS 18.12.050, an individual may not be required to counsel, advise, pay for, provide,
13 perform, assist, or participate directly or indirectly in providing or performing a health
14 service if the service includes a procedure that violates the individual's religious or
15 moral convictions and the procedure is intended to end the life of an individual or
16 involves an elective abortion.

17 (b) An individual is not civilly, criminally, or administratively liable to a
18 person for refusing, upon request or assignment and except as provided under
19 AS 18.12.050, to counsel, advise, pay for, provide, perform, assist, or participate
20 directly or indirectly in providing or performing a health service if the service includes
21 a procedure that violates the individual's religious or moral convictions and the
22 procedure is intended to end the life of an individual or involves an elective abortion,
23 and if

24 (1) before the request or assignment, the individual notified the person
25 making the request or assignment of the individual's refusal to provide or perform that
26 type of health service and, if requested to do so, the individual stated the refusal in
27 writing; or

28 (2) within 24 hours after being asked or assigned to provide or perform
29 the health service, the individual notified the person making the request or assignment
30 of the individual's refusal.

31 (c) A person may not discriminate against, penalize, discipline, or retaliate

1 against an individual in employment; privileges; benefits; remuneration; promotion;
2 termination of employment; eligibility for admission to, renewal or participation in, or
3 graduation from an educational, study, or training program; or a grant, contract, or
4 other program because of the individual's refusal or unwillingness to counsel, advise,
5 pay for, provide, perform, assist, or participate directly or indirectly in providing or
6 performing a health service if the service includes a procedure that violates the
7 individual's religious or moral convictions and the procedure is not required under
8 AS 18.12.050 and is intended to end the life of an individual or the procedure involves
9 an elective abortion.

10 **Sec. 18.17.040. Institutional rights of conscience.** (a) A health care
11 institution may not be required to counsel, advise, pay for, provide, perform, assist, or
12 participate in providing or performing a health service if the service includes a
13 procedure that violates the religious or moral convictions of a majority of the board
14 of directors or other administrative head of the institution or of a majority of its
15 owners or partners and the procedure is intended to end the life of an individual or
16 involves an elective abortion. A health care institution is not required to admit or keep
17 a patient for the purpose of providing to that patient a health service if the service
18 includes a procedure that violates the religious or moral convictions of a majority of
19 the board of directors or other administrative head of the institution or of a majority
20 of its owners or partners and the procedure is intended to end the life of an individual
21 or involves an elective abortion.

22 (b) A health care institution is not civilly, criminally, or administratively liable
23 to a person for refusing to participate directly or indirectly in providing or performing
24 a health service if the service includes a procedure that violates the religious or moral
25 convictions of a majority of the board of directors or other administrative head of the
26 institution or of a majority of its owners or partners and the procedure is intended to
27 end the life of an individual or involves an elective abortion, and if the institution

28 (1) posted notice of its refusal policy in plain sight in the admission
29 area of the institution before the health service is requested; or

30 (2) within 24 hours after receiving the request, notified the person
31 requesting the health service of its refusal and there has been no irreversible change

1 in the circumstances of the patient or person making the request during the time
2 between making the request and the institution's refusal that would make it unjust for
3 the institution to refuse the request.

4 (c) A person may not discriminate or retaliate against a health care institution
5 in a grant, contract, or program because of the institution's refusal to counsel, advise,
6 pay for, provide, perform, assist, or participate directly or indirectly in providing or
7 performing a health service if the service includes a procedure that violates the
8 religious or moral convictions of a majority of the board of directors or other
9 administrative head of the institution or of a majority of its owners or partners and the
10 procedure is intended to end the life of an individual or involves an elective abortion.

11 **Sec. 18.17.050. Exceptions.** (a) This chapter does not relieve a person from
12 liability to pay for a health service, for which the person freely and knowingly
13 contracted to pay, that was performed before a timely conscientious objection was
14 asserted by the person.

15 (b) A health care institution or a department or division of the institution that
16 is established for the sole or primary purpose of providing specific types of health
17 services may exclude an individual who objects to a procedure from employment in
18 a position for which the performance of the services is a necessary and substantial
19 responsibility if the individual's moral or conscience rights cannot be reasonably
20 accommodated by diligent effort. In this paragraph, "procedure" means a medical
21 procedure intended to end the life of an individual or involving an elective abortion.

22 **Sec. 18.17.060. Remedies.** (a) Notwithstanding other provisions of law, a
23 person injured by an act or omission that violates a provision of this chapter may
24 obtain an injunction and is entitled to receive three times the actual damages sustained
25 by the person or \$3,000 for each violation, whichever is greater.

26 (b) Remedies provided for under this section are in addition to other remedies
27 that may be available under federal or state law.

28 **Sec. 18.17.070. Federal requirements not affected.** Nothing in this chapter
29 changes, modifies, or otherwise affects requirements of 42 U.S.C. 1395cc, 42 U.S.C.
30 1395dd, or 42 U.S.C. 1396a (a)(57) or (58).

31 **Sec. 18.17.080. Definitions.** In this chapter,

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(1) "elective abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "elective abortion" does not include the termination of a pregnancy

(A) if done with the intent to save the life or preserve the health of the unborn child;

(B) if done with the intent to deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child;

(C) if done with the intent to remove a dead unborn child;

(D) if done with the intent to save the life of the pregnant woman whose life is endangered by a physical disorder, illness, or injury if no other medical procedure would save the life of the woman;

(E) that is a result of incest; or

(F) that is the result of ~~(a reported act of forcible rape);~~

(2) "health care institution" means a public or private corporation, partnership, association, organization, agency, or other entity that is involved in providing health care; in this paragraph, "entity" includes a hospital, clinic, physician's office, medical school, nursing school, other health care training institution, insurance organization, or financing organization;

(3) "health service" means a phase or type of service performed at a health care institution or by a health professional, paraprofessional, or pharmacist or by an employee of a health professional, paraprofessional, or pharmacist; in this paragraph, "service" includes testing, diagnosis, prognosis, research, counseling, therapy, treatment, family planning, referral, prescription, medication, surgery, the termination of or failure to perform a procedure, and any necessary support services.

* Sec. 2. Under AS 01.10.030, if any provision of AS 18.17.010 - 18.17.080 or the application of AS 18.17.010 - 18.17.080 to any person or circumstance is held invalid, the remainder of AS 18.17.010 - 18.17.080 or the application of those statutes to other persons or circumstances is not affected.

PROPOSED AMENDMENT

Attw: CYNW

1

2029

AMENDMENT

By Senate State Affairs Committee

TO: Work Draft for CSSB 348, version 0-LS1707\H

- 1 Page 5, line 15 after "result of"
- 2 Delete "a reported act of forcible rape;"
- 3 Insert "an act of sexual assault that has been reported to a peace officer;"

Alaska State Legislature

Senator Lyda Green, Chairman
Senator Jerry Ward, Vice Chairman
Senator Jerry Mackie
Senator Mike Miller
Senator Jim Duncan



State Capitol
Room 125
Juneau, Alaska 99801
(907) 465-4522

Senate State Affairs

Sponsor Statement

SB 348

“An Act relating to certain rights of conscience protection for persons who directly or indirectly provide or perform health care services.”

The Alaska Constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry. Increasingly health care providers are finding that pressure to participate in certain health care practices against their consciences is robbing them of these rewards.

In Alaska, we have been careful to articulate the rights of the individual, through both the Alaska Constitution and law. In 1970, when the state legalized abortion, the legislature added AS 18.16.010, which protected hospitals and persons from being required to provide or participate in this procedure. The protection was based on an individual's moral conscience, not religious belief.

In 1972, we added the right of privacy to the Constitution to shield citizens from intrusive government information collecting. A recent court ruling under the right to privacy has removed the protection that health care providers had relied upon under state law. The court ruled that the constitutional right to obtain a certain medical procedure outweighed the statutory right of conscience. The ruling forced a hospital to allow procedures against their policy and gave the individual right of conscientious refusal only to 'direct' participants.

Indirect participants including nurses, orderlies, radiologists, and lab technicians are now particularly vulnerable to pressure because they occupy subordinate positions in the hospital/medical hierarchy and they have no constitutional right to refuse.

Their jobs may now present them with grave moral problems that rob them of the happiness and rewards of their industry. Other social and medical developments such as assisted suicide and infanticide may soon become governmental policy as well.

House Bill 348, in concert with Senate Joint Resolution 35 restores the intent of the Constitution and State law to protect the rights of conscience of health care providers. Everyday people and community institutions should not be compelled by another person's exercise of the right to privacy to act in a manner that violates their convictions of conscience.

Alaska State Legislature

Senator Lyda Green, Chairman
Senator Jerry Ward, Vice Chairman
Senator Jerry Mackie
Senator Mike Miller
Senator Jim Duncan



State Capitol
Room 125
Juneau, Alaska 99801
(907) 465-4522

Senate State Affairs

Sectional Analysis SB 348

"An Act relating to certain rights of conscience protection for persons who directly or indirectly provide or perform health care services."

Section 1 adds a new chapter (Chapter 17) to Title 18 (Health, Safety and Housing):

Sec. 010 (Policy) makes the statement that it is the public policy of the state that the rights of conscience of all persons involved in providing health care are protected; describes what actions are covered; and prohibits all forms of retaliatory action for refusing to participate in an action that violates the person's conscience.

Sec. 020 (Civil rights of conscience) states that a person has a right to refuse to do certain procedures that are intended to end the life of an individual or involves an abortion; subject to AS 18.12.050.

Sec. 030 (Individual rights of conscience) states that an individual may not be required to participate in certain actions that violate the individual's religious or moral convictions and involves a procedure intended to end the life of an individual or involves abortion; that the individual may not be held civilly, criminally, or administratively liable for the individual's refusal, if certain conditions of notice are met and except as provided under AS 18.12.050; and provides a list of retaliatory actions that another person is prohibited from engaging in if an individual refuses to participate in certain actions that violate the individual's religious or moral convictions.

Sec. 040 (Institutional rights of conscience) is essentially the same as the preceding section, except that it applies to the rights of conscience of a majority of an institution's board of directors or an administrative head and the procedure is intended to end the life of an individual or involves abortion. Also allows an

institution not to admit or keep a patient who seeks a medical procedure that is against the religious or moral convictions of a majority of the board or the administrative head.

Sec. 050 (Exceptions) provides exceptions if the patient is in danger of imminent death, the success of the medical procedure requires the participation of the person asserting religious or moral objections, and the procedure would have to be performed before a replacement staff can be obtained. Does not relieve a person from paying for a medical procedure the person freely contracted for, and that was performed before the person asserted a conscientious objection. Also allows a health care institution to refuse to employ a person who objects to the type of health care services primarily or solely performed at the institution, if the person's religious or moral objections cannot be accommodated.

Sec. 060 (Remedies) provides that a person injured by a violation of this chapter may obtain an injunction and is entitled to damages of \$3,000 or three times actual damages for each violation, whichever is greater, in addition to other remedies available under federal or state law.

Sec. 070 (Federal requirements not affected) states that nothing in this chapter changes, modifies, or otherwise affects requirements of 42 U.S.C. 1395cc, 42 U.S.C. 1395dd, or 42 U.S.C. 1396a (a)(57) or (58).

Sec. 080 (Definitions) provides comprehensive definitions for the phrases, "abortion," "health care institution," and "health service."

Section 2 provides a severability clause so that if any part of the above chapter is held invalid, the remainder is not affected.

Sec. 18.16.090. Definitions.

In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

(A) save the life or preserve the health of the unborn child;

(B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or

(C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

(A) entered the armed services of the United States;

(B) become employed and self-subsisting;

(C) been emancipated under AS 09.55.590; or

(D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

Sec. 18.12.050. Transfer of patients.

(a) An attending physician who is unwilling to comply with the requirements of AS 18.12.030 or who is unwilling to comply with the declaration of a qualified patient under AS 18.12.040 shall withdraw as attending physician but the withdrawal is effective only when the services of another attending physician have been obtained.

(b) If the policies of a health care facility preclude compliance with the declaration of a qualified patient under this chapter or a do not resuscitate order issued by an attending physician, or the facility is unwilling to accept DNR identification as evidence of the existence of a declaration or do not resuscitate order, that facility shall take all reasonable steps to notify the patient or, if the patient is not able to make treatment decisions, the patient's guardian, of the facility's policy and shall take all reasonable steps to effect the transfer of the patient to the patient's home or to a facility where the provisions of this chapter can be carried out.

Sec. 18.12.030. Recording determination of terminal condition and contents of declaration. When an attending physician who has been provided a copy of a declaration determines that the declarant is in a terminal condition, the physician shall record that determination and the contents of the declaration in the declarant's medical record.

Sec. 18.12.035. Do not resuscitate orders and protocols.

(a) An attending physician may issue a do not resuscitate order for a patient of the physician. The physician shall document the grounds for the order in the patient's medical file.

(b) The Department of Health and Social Services shall, by regulation, adopt a do not resuscitate protocol that sets out a standardized method of procedure for the withholding of cardiopulmonary resuscitation by physicians and other health care providers. The regulations may not be adopted unless they have been approved by the State Medical Board.

(c) A health care provider other than a physician shall comply with the do not resuscitate protocol adopted under (b) of this section when presented with any of the following: DNR identification, an oral do not resuscitate order issued directly by a physician, or a written do not resuscitate order entered on a form prescribed by the Department of Health and Social Services.

(d) Notwithstanding (c) of this section, if a person has made an anatomical gift of an organ under AS 13.50 or this chapter, and is in a hospital when a do not resuscitate order is to be implemented for the person, the do not resuscitate order may not be implemented until the donated organ can be evaluated to determine if it is suitable for donation.

(e) A physician may not revoke a do not resuscitate order at the request of a person, and a person may not make a do not resuscitate order ineffective, unless the person making the request or proposing to make the order ineffective is the person for whom the order has been issued, or, if the person for whom the order has been issued is not capable of expressing an opinion on the subject,

(1) the parent or guardian of the person for whom the order has been issued if the person for whom the order has been issued is under 18 years of age; or

(2) a person to whom the person for whom the order has been issued has communicated the decision to make the order ineffective.

Sec. 18.12.037. Living will, organ donation, and DNR identification.

The Department of Health and Social Services shall develop standardized designs and symbols for DNR identification cards, forms, necklaces, and bracelets that signify, when carried or worn, that the possessor has executed a declaration under this chapter, that the declaration contains an anatomical gift, or that the possessor is a patient for whom a physician has issued a do not resuscitate order.

Sec. 18.12.040. Treatment of qualified patients.

(a) A qualified patient or a patient for whom a physician has issued a do not resuscitate order has the right to make decisions regarding use of cardiopulmonary resuscitation and other life-sustaining procedures as long as the patient is able to do so. If a qualified patient or patient for whom a physician has issued a do not resuscitate order is not able to make these decisions, the declaration or do not resuscitate protocol governs decisions regarding use of cardiopulmonary resuscitation and other life-sustaining procedures, unless the do not resuscitate order is revoked or made ineffective under AS 18.12.035(e).

(b) This chapter does not prohibit the application of any medical procedure or intervention, including the provision of nutrition and hydration, considered necessary to provide comfort care or alleviation of pain. The declaration may provide that the declarant does not want nutrition or hydration administered intravenously or by gastric tube.

(c) The declaration of a qualified patient known to the attending physician to be pregnant is given no effect as long as it is probable that the fetus could develop to the point of live birth with continued application of life-sustaining procedures.

42 § 1395bb

PUBLIC HEALTH AND WELFARE

PUBLIC HEALTH AND WELFARE

Subsec. (c). Pub.L. 104-134, § 101(d)(Title V, § 616(b)(2)), redesignated former fourth sentence of subsec. (a) as subsec. (c).

Subsec. (d). Pub.L. 104-134, § 101(d)(Title V, § 616(b)(1)), redesignated former subsec. (b) as (d).

Pub.L. 104-134, § 101(d)(Title V, § 616(c)(2)(A)), substituted "a provider entity for "a hospital", "the entity" for "the hospital", wherever appearing, and "the conditions or requirements the entity has been treated as meeting pursuant to subsection (a) or (b)(1) of this section" for "the requirements of the numbered paragraphs of section 1395x(a) of this title".

Subsec. (e). Pub.L. 104-134, § 101(d)(Title V, § 616(c)(2)(B)), added subsec. (e).

1994 Amendments. Subsec. (a). Pub.L. 103-432, § 145(c)(4), struck from someone com-

mencing "In addition" reference to "1395m(c)(3)," following "section 1395k(a)(2)(X)(U)".

Effective Dates

1994 Acts. Amendment of subsec. (a) by section 145(c)(4) of Pub.L. 103-432 applicable to mammography furnished by a facility on and after the first date that the certificate requirements of section 263b(f) of this title apply to such mammography conducted by such facility, see section 145(d) of Pub.L. 103-432, set out as a note under section 1305m of this title.

1987 Acts. For effective date of amendment by section 4072(d) of Pub.L. 100-203, see section 4072(a) of Pub.L. 100-203, set out as a note under section 1395a of this title.

located) or with a utilization and quality control peer a contract with the Secretary under part B of subch chapter XI of this title, under which the hospital is located, under which functions under that part with respect to the review information provided by such hospital, the complete care provided, the appropriateness of admissions an atness of care provided for which additional paym 1395ww(d)(5) of this title, with respect to inpatient payment may be made under part A of this subchapter under this subchapter, the cost of such ag considered a cost incurred by such hospital in pri part A of this subchapter, and (I) shall be paid di organization on behalf of such hospital in acco established by the Secretary, (II) shall be transf Insurance Trust Fund, without regard to amou appropriation Acts, in the same manner as tran services provided directly to beneficiaries, and aggregate for a fiscal year than the aggregate am for direct and administrative costs (adjusted for administrative costs incurred as a result of review subsequent fiscal year) of such reviews),

(II) in the case of hospitals, critical access hospi home health agencies, to maintain an agreeme control peer review organization (which has a ce part B of subchapter XI of this chapter for the are agency is located) to perform the functions descri

(G) in the case of hospitals which provide inpatient payment may be made under subsection (b) or (not to charge any individual or any other person which such individual would be entitled to have p subchapter but for a denial or reduction of paym this title,

(H) in the case of hospitals which provide se made under this subchapter and in the case of provide rural primary care hospital services, to than physicians' services as defined in regu 1395y(a)(14) of this title, and other than services of this title, certified nurse-midwife services, c services of a certified registered nurse anesth individual who is a patient of the hospital, and (ii to have payment made under this subchapter, wise under arrangements (as defined in section the hospital,

(I) in the case of a hospital or critical access l (i) to adopt and enforce a policy to ensu of section 1395dd of this title and to mee (ii) to maintain medical and other recor to or from the hospital for a period of five and

(iii) to maintain a list of physicians whr examination to provide treatment necessa emergency medical condition;

(J) in the case of hospitals which provide payment may be made under this subchapter medical care under any health plan contract Title 10, or under section 1718 of Title 38, in payment methodology, and amounts as prescri the Secretary and by the Secretaries of Defens tion of sections 1079 and 1080 of Title 10,

(K) not to charge any individual or any o which payment under this subchapter is deni title by reason of a determination under i

§ 1395cc. Agreements with providers of services

(a) Filing of agreements; eligibility for payment; charges with respect to items and services

(1) Any provider of services (except a fund designated for purposes of section 1395f(j); and section 1395n(o) of this title) shall be qualified to participate under this subchapter and shall be eligible for payments under this subchapter if it files with the Secretary an agreement—

(A) (i) not to charge, except as provided in paragraph (2), any individual or any other person for items or services for which such individual is entitled to have payment made under this subchapter (or for which he would be so entitled if such provider of services had complied with the procedural and other requirements under or pursuant to this subchapter or for which such provider is paid pursuant to the provisions of section 1395f(a) of this title), and (ii) not to impose any charge that is prohibited under section 1395a(n)(3) of this title,

(B) not to charge any individual or any other person for items or services for which such individual is not entitled to have payment made under this subchapter because payment for expenses incurred for such items or services may not be made by reason of the provisions of paragraph (1) or (9) of section 1395y(c) of this title, but only if (i) such individual was without fault in incurring such expenses and (ii) the Secretary's determination that such payment may not be made for such items and services was made after the third year following the year in which notice of such payment was sent to such individual; except that the Secretary may reduce such three-year period to not less than one year if he finds such reduction is consistent with the objectives of this subchapter,

(C) to make adequate provision for return (or other disposition, in accordance with regulations) of any moneys incorrectly collected from such individual or other person,

(D) to promptly notify the Secretary of its employment of an individual who, at any time during the year preceding such employment, was employed in a managerial, accounting, auditing, or similar capacity (as determined by the Secretary by regulation) by an agency or organization which serves as a fiscal intermediary or carrier (for purposes of part A or part B, or both, of this subchapter) with respect to the provider,

(E) to release data with respect to patients of such provider upon request to an organization having a contract with the Secretary under part B of subchapter XI of this chapter as may be necessary (i) to allow such organization to carry out its functions under such contract, or (ii) to allow such organization to carry out similar review functions under any contract the organization may have with a private or public agency paying for health care in the same area with respect to patients who authorize release of such data for such purposes,

(F)(i) in the case of hospitals which provide inpatient hospital services for which payment may be made under subsection (b), (c), or (d) of section 1395ww of this title, to maintain an agreement with a professional standards review organization (if there is such an organization in existence in the area in which the hospital is

42 § 1395cc

PUBLIC HEALTH AND WELFARE

(L) in the case of hospitals which provide inpatient hospital services for which payment may be made under this subchapter, to be a participating provider of medical care under section 1703 of Title 88, in accordance with such admission practices, and such payment methodology and amounts, as are prescribed under joint regulations issued by the Secretary and by the Secretary of Veterans Affairs in implementation of such section.

(M) in the case of hospitals, to provide to each individual who is entitled to benefits under part A of this subchapter (or to a person acting on the individual's behalf), at or about the time of the individual's admission as an inpatient to the hospital, a written statement (containing such language as the Secretary prescribes consistent with this paragraph) which explains—

(i) the individual's rights to benefits for inpatient hospital services and for post-hospital services under this subchapter,

(ii) the circumstances under which such an individual will and will not be liable for charges for continued stay in the hospital,

(iii) the individual's right to appeal denials of benefits for continued inpatient hospital services, including the practical steps to initiate such an appeal, and

(iv) the individual's liability for payment for services if such a denial of benefits is upheld on appeal,

and which provides such additional information as the Secretary may specify.

(N) in the case of hospitals and critical access hospitals—

(i) to make available to its patients the directory or directories of participating physicians (published under section 1395u(h)(4) of this title) for the area served by the hospital or critical access hospital,

(ii) if hospital personnel (including staff of any emergency or outpatient department) refer a patient to a nonparticipating physician for further medical care on an outpatient basis, the personnel must inform the patient that the physician is a nonparticipating physician and, whenever practicable, must identify at least one qualified participating physician who is listed in such a directory and from whom the patient may receive the necessary services,

(iii) to post conspicuously in any emergency department a sign (in a form specified by the Secretary) specifying rights of individuals under section 1395d of this title with respect to examination and treatment for emergency medical conditions and women in labor, and

(iv) to post conspicuously (in a form specified by the Secretary) information indicating whether or not the hospital participates in the medical program under a State plan approved under subchapter XIX of this chapter, and²

(O) to accept as payment in full for services that are covered under this subchapter (less any payments under sections 1395ww(d)(11) and 1395ww(h)(3)(D) of this title) and are furnished to any individual enrolled with a Medicare+Choice organization under part C of this subchapter or with an eligible organization (i) with a risk-sharing contract under section 1395mm of this title, under section 1395mm(j)(2)(A) of this title (as in effect before February 1, 1985), under section 1395b-1(a) of this title, or under section 222(a) of the Social Security Amendments of 1972, and (ii) which does not have a contract establishing payment amounts for services furnished to members of the organization the amounts that would be made as a payment in full under this subchapter if the individuals were not so enrolled;¹

(P) in the case of home health agencies which provide home health services to individuals entitled to benefits under this subchapter who require catheters, catheter supplies, ostomy bags, and supplies related to ostomy care (described in section 1395x(m)(6) of this title), to offer to furnish such supplies to such an individual as part of their furnishing of home health services,

(Q) in the case of hospitals, skilled nursing facilities, home health agencies, and hospice programs, to comply with the requirement of subsection (f) of this section (relating to maintaining written policies and procedures respecting advance directives);¹ and

(R) to contract only with a health care clearinghouse (as defined in section 1320d of this title) that meets each standard and implementation specification adopted or established under part C of subchapter XI of this chapter on or after the date on

PUBLIC HEALTH AND WELFARE

which the health care clearinghouse is required to meet such specification.

In the case of a hospital which has an agreement in effect under subsection (f) in subparagraph (F), which organization's contract under subchapter XI of this chapter is terminated on or shall not be determined to be out of compliance with such paragraph during the six month period beginning on the date of such termination of the contract.

(2)(A) A provider of services may charge such amount of any deduction or coinsurance amount (under section 1395b(b), or section 1395x(y) items and services (not in excess of the amount due for such items and services by such provider), and (ii) an amount equal to the amount of any such charge for such items and services (not in excess of the amount customarily charged for such items and services by such provider) made under part B of this subchapter or which are (i) as home health services (but in the case of items and services with end-stage renal disease, an amount equal to the amount of such items and services calculated on the basis of the case of items and services described in section 1395d of this title) preceding sentence shall be applied by substituting in appropriate under such section. A provider of services under clause (ii) of the first sentence of this subparagraph described in section 1395x(e)(10)(A) of this title (diagnostic laboratory tests for which payment is made under part B of this subchapter) notwithstanding the first sentence of this subparagraph charge such an individual or person, with respect to such items and services under section 1395m(a) of this title, the amount of 1395(b) of this title and 20 percent of the amount of 1395m(a)(1)(B) of this title. In the case of items and services under part B of this subchapter under the provisions of section 1395k(t) of this title, clause (ii) of the first sentence of this subparagraph shall be applied by substituting for 20 percent of the reasonable charge established under section 1395k(t)(5) of this title. In the case of items and services under section 1395k(a)(8) of this title or 1395k(a)(9) of this title under part B of this subchapter under section 1395k first sentence shall be applied by substituting for 20 percent of the lesser of the actual amount (as defined in such section) for such service

(B) Where a provider of services has furnished items or services which are in excess of or more than the amount for which payment may be made under this subchapter, such provider may also charge such individual or other person for such items or services to the extent that the amount customarily charged for such items or services furnished at such request exceeds the amount for which payment may be made under this subchapter.

(C) A provider of services may in accordance with this subchapter appropriately charge any such individual for any such item or service which is a packed red blood cell, as defined under regulation which a deductible is imposed under section 1395d of this title in excess of such charge over the cost to such provider of such quantities of packed red blood cells, as so defined, to such provider under this subchapter, (ii) no such charge for administration of such blood (or equivalent quantities of packed red blood cells, as so defined), and (iii) such charge may not be made to such individual or arrangements have been made for purposes of this subparagraph, whole blood (or equivalent quantities of packed red blood cells, as so defined) furnished an individual shall be given one pint of blood for each pint of packed red blood cells, as so defined) furnished a deduction is imposed under section 1395o(a)(2) of this title.

42 § 1395cc

PUBLIC HEALTH AND WELFARE

(E) to provide (individually or with others) for education for staff and the community on issues concerning advance directives.

Subparagraph (C) shall not be construed as requiring the provision of care which conflicts with an advance directive.

(2) The written information described in paragraph (1)(A) shall be provided to an adult individual—

(A) in the case of a hospital, at the time of the individual's admission as an inpatient.

(B) in the case of a skilled nursing facility, at the time of the individual's admission as a resident.

(C) in the case of a home health agency, in advance of the individual coming under the care of the agency.

(D) in the case of a hospice program, at the time of initial receipt of hospice care by the individual from the program, and

(E) in the case of an eligible organization (as defined in section 1395mm(b) of this title) or an organization provided payments under section 1395(a)(1)(A) of this title or a Medicare + Choice organization, at the time of enrollment of the individual with the organization.

(3) In this subsection, the term "advance directive" means a written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated.

(4) For construction relating to this subsection, see section 14400 of this title (relating to clarification respecting assisted suicide, euthanasia, and mercy killing).

(g) Penalties for improper billing.

Except as permitted under subsection (a)(2) of this section, any person who knowingly and willfully presents, or causes to be presented, a bill or request for payment inconsistent with an arrangement under subsection (a)(1)(B) of this section or in violation of the requirement for such an arrangement, is subject to a civil money penalty of not to exceed \$2,000. The provisions of section 1320a-7n of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(h) Dissatisfaction with determination of Secretary; appeal by institutions or agencies; single notice and hearing

(1) Except as provided in paragraph (2), an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 406(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 406(g) of this title, except that, in so applying such sections and in applying section 406(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

(2) An institution or agency is not entitled to separate notice and opportunity for a hearing under both section 1320a-7 of this title and this section with respect to a determination or determinations based on the same underlying facts and issues.

(i) Intermediate sanctions for psychiatric hospitals

(1) If the Secretary determines that a psychiatric hospital which has an agreement in effect under this section no longer meets the requirements for a psychiatric hospital under this subchapter and further finds that the hospital's deficiencies—

(A) immediately jeopardize the health and safety of its patients, the Secretary shall terminate such agreement; or

(B) do not immediately jeopardize the health and safety of its patients, the Secretary may terminate such agreement, or provide that no payment will be made

PUBLIC HEALTH AND WELFARE

under this subchapter with respect to any individual the effective date of the finding, or both.

(2) If a psychiatric hospital, found to have deficiencies has not complied with the requirements of this subchapter

(A) within 8 months after the date the hospital is with such requirements, the Secretary shall provide under this subchapter with respect to any individual the end of such 8-month period, or

(B) within 0 months after the date the hospital is with such requirements, no payment may be made respect to any individual in the hospital until the Secretary in compliance with the requirements of this subchapter

(Aug. 14, 1983, c. 581, Title XVIII, § 1866, as added July 30, 1982 Stat. 827, and amended Jan. 2, 1983, Pub.L. 90-248, Title I, § 1 851, 852; Oct. 20, 1972, Pub.L. 92-603, Title II, § 227(a), § 278(a)(17), (b)(18), 231(c), 88 Stat. 1324, 1400, 1409, 1427, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 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Sec. Sec. Act §1867 EXAMINATION AND TREATMENT FOR EMERGENCY MEDICAL CONDITIONS AND WOMEN IN LABOR

42 U.S.C. §1395dd

Sec. 1867(a) MEDICAL SCREENING REQUIREMENT.—In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this title) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

(b) NECESSARY STABILIZING TREATMENT FOR EMERGENCY MEDICAL CONDITIONS AND LABOR.—

(1) IN GENERAL.—If any individual (whether or not eligible for benefits under this title) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c).

(2) REFUSAL TO CONSENT TO TREATMENT.—A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual's behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) REFUSAL TO CONSENT TO TRANSFER.—A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such transfer, but the individual (or a person acting on the individual's behalf) refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) RESTRICTING TRANSFERS UNTIL INDIVIDUAL STABILIZED.—

(1) RULE.—If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B)), the hospital may not transfer the individual unless—

(A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1861(r)(1)) has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1861(r)(1)), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the risks and benefits upon

which the certification is based.

(2) **APPROPRIATE TRANSFER.**—An appropriate transfer to a medical facility is a transfer—

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility—

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (1)(C)) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) **ENFORCEMENT.**—

(1) **CIVIL MONETARY PENALTIES.**—

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than \$50,000 (or not more than \$25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1128A (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1128A(a).

(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who—

(i) signs a certification under subsection (c)(1)(A) that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks; or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than \$50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this title and State health care programs. The provisions of section 1128A (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1128A(a).

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1866(a)(1)(1)) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not

be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) CIVIL ENFORCEMENT.—

(A) PERSONAL HARM.—Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) FINANCIAL LOSS TO OTHER MEDICAL FACILITY.—Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(C) LIMITATIONS ON ACTIONS.—No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) CONSULTATION WITH PEER REVIEW ORGANIZATIONS.—In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1), the Secretary shall request the appropriate utilization and quality control peer review organization (with a contract under part D of title XI) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting a sanction under paragraph (1) and shall provide a period of at least 60 days for such review.

(e) DEFINITIONS.—In this section:

(1) The term "emergency medical condition" means—

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions—

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means hospital that has entered into a provider agreement under section 1866.

(3)(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(4) The term "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities in the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a critical access hospital (as defined in section 1861(mm)(1)).

(O) **PREEMPTION.**—The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) **NONDISCRIMINATION.**—A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) **NO DELAY IN EXAMINATION OR TREATMENT.**—A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) or further medical examination and treatment required under subsection (b) in order to inquire about the individual's method of payment or insurance status.

(I) **WHISTLEBLOWER PROTECTIONS.**—A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

1997 Amendments:

Sec. 4201(c)(1) of the "Balanced Budget Act of 1997," applicable to services furnished on or after October 1, 1997, replaced "rural primary care" with "critical access" in subsection (e)(5).

1990 Amendments:

Section 4008(b)(1) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, substituted "negligently" for "knowingly" in subparagraph (d)(2)(A).

Section 4008(b)(2) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, added "(or not more than \$25,000 in the case of a hospital with less than 100 beds)" after "\$50,000" in subparagraph (d)(2)(A).

Section 4008(b)(3)(A)(i) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, deleted paragraph (d)(1), which read as follows:

"(1) **AS REQUIREMENT OF MEDICARE PROVIDER AGREEMENT.**—If a hospital knowingly and willfully, or negligently, fails to meet the requirements of this section, such hospital is subject to—

"(A) termination of its provider agreement under this title in accordance with section 1866(b), or

"(B) at the option of the Secretary, suspension of such agreement for such period of time as the Secretary determines to be appropriate, upon reasonable notice to the hospital and to the public."

Section 4008(b)(3)(A)(ii) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, redesignated paragraphs (d)(2) and (d)(3) as paragraphs (d)(1) and (d)(2), respectively.

Section 4008(b)(3)(A)(iii) of the "Omnibus Budget Reconciliation Act of 1990," applicable to actions occurring on or after the first day of the sixth month beginning after November 5, 1990, substituted "(d)(1)(C)" for "(d)(2)(C)" in subparagraph (c)(2)(C).

42 § 1896

Note 2

When state voluntarily elects to participate in Medicaid program, it must comply with requirements of the Act and applicable regulations. *Morgan v. Idaho Dept. of Health and Welfare*, Idaho 1991, 818 F.2d 845, 120 Idaho 9.

a. Eligibility

Omnibus Budget Reconciliation Act does not prevent otherwise eligible pregnant women who are not permanently residing in this country under color of law (PRUCOL) from receiving Medicaid sponsored prenatal care where their children, if born in the United States, will become United States citizens. *Lewis v. Griniker*, C.A.2 (N.Y.) 1992, 965 F.2d 1808.

PUBLIC HEALTH AND WELFARE

State and federal regulations arbitrarily and capriciously limited to \$1,500 the automobile exclusion in calculating family resources for purposes of eligibility for Aid to Families with Dependent Children (AFDC) and Medicaid in that reason initially offered for automobile asset limitation, in allowing recipients to retain possession of a car, could no longer provide rational basis for the regulation in light of inflation, even though Congress did not mandate review to adjust for inflation. *Hazard v. Sullivan*, M.D.Tenn.1988, 827 F.Supp. 1848, reversed 44 F.3d 890.

§ 1896a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(2) provide for financial participation by the State equal to not less than 40 per centum of the non-Federal share of the expenditures under the plan with respect to which payments under section 1896b of this title are authorized by this subchapter; and, effective July 1, 1989, provide for financial participation by the State equal to all of such non-Federal share or provide for distribution of funds from Federal or State sources, for carrying out the State plan, on an equalization or other basis which will assure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan;

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

(4) provide (A) such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods, and including provision for utilization of professional medical personnel in the administration and, where administered locally, supervision of administration of the plan) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency, and (C) that each State or local officer or employee who is responsible for the expenditure of substantial amounts of funds under the State plan, each individual who formerly was such an officer or employee, and each partner of such an officer or employee shall be prohibited from committing any act, in relation to any activity under the plan, the commission of which, in connection with any activity concerning the United States Government, by an officer or employee of the United States Government, an individual who was such an officer or employee, or a partner of such an officer or employee is prohibited by section 207 or 208 of Title 18;

(5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan; or provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan, except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under subchapter I or XVI of this chapter (insofar as it relates to the aged) if the State is eligible to participate in the State plan program established under subchapter XVI of this chapter, or by the agency or agencies administering the supplemental security income program established under subchapter XVI or the State plan approved under part A of subchapter IV of

182

PUBLIC HEALTH AND WELFARE

this chapter if the State is not eligible to participate in the established under subchapter XVI of this chapter;

(6) provide that the State agency will make such reports containing such information, as the Secretary may from time to time require, to assure the correctness and verification of such reports;

(7) provide safeguards which restrict the use or disclosure concerning applicants and recipients to purposes directly connected with the plan;

(8) provide that all individuals wishing to make application under the plan shall have opportunity to do so, and that it be furnished with reasonable promptness to all eligible individuals

(9) provide—

(A) that the State health agency, or other appropriate (whichever is utilized by the Secretary for the purpose of section 1896aa(a) of this title), shall be responsible for maintaining health standards for private or public recipients of medical assistance under the plan may require;

(B) for the establishment or designation of a State agency which shall be responsible for establishing and maintaining those relating to health, for such institutions, and

(C) that any laboratory services paid for under such a laboratory which meets the applicable requirements of this title or paragraphs (13) and (14) of section 1896 of this title or paragraph (12)(G) of this title;

(10) provide—

(A) for making medical assistance available, including services listed in paragraphs (1) through (6), (17) and (21) of this title, to—

(i) all individuals—

(I) who are receiving aid or assistance under approved under subchapter I, X, XIV, or XVI of this chapter or part E of subchapter IV of this chapter eligible under this subchapter by reason of age or 678(b) of this title, or considered by the State as authorized under section 682(e)(6) of this

(II) with respect to whom supplemental services are being paid under subchapter XVI of this chapter qualified severely impaired individuals (as defined of this title),

(III) who are qualified pregnant women or section 1896d(n) of this title,

(IV) who are described in subparagraph (A) (i)(1) of this section and whose family income is at or below the minimum income level the State is required to establish (1)(X)(A) of this section for such a family;

(V) who are qualified family members as defined in section 1896d(m)(1) of this title;

(VI) who are described in subparagraph (C) of this section and whose family income does not exceed the State is required to establish under subchapter XVI of this chapter for such a family, or

(VII) who are described in subparagraph (D) of this section and whose family income does not exceed the State is required to establish under subchapter XVI of this chapter for such a family;

(ii) at the option of the State, to any group or individual described in section 1896d(a) of this title (or, in the case of an individual, described in section 1896d(a)(1) of this title, to any r

183

PUBLIC HEALTH AND WELFARE

PUBLIC HEALTH AND WELFARE

42 § 1396a

or which payment for inpatient hospital services, services in an ambulatory care facility for the mentally retarded, or inpatient mental hospital under the State plan—

(54) a physician (or, in the case of skilled nursing facility services or a care facility services, a physician, or a nurse practitioner or a specialist who is not an employee of the facility but is working in collaboration with a physician) certifies at the time of admission, or, if later, the attending physician certifies for medical assistance under the State plan (and a physician assistant under the supervision of a physician, or, in the case of skilled nursing facility services or intermediate care facility services, a nurse practitioner or clinical nurse specialist who is not an employee of the facility but is working in collaboration with a physician, where such services are furnished over a period of time, in such case as often as required under section 1396b(g)(6) of this title (or, in the case of services that are services provided in an intermediate care facility for the mentally retarded, every year), and accompanied by such supporting information appropriate to the case involved, as may be provided in regulations of the State, that such services are or were required to be given on an individual basis because the individual needs or needed such services, and that such services were furnished under a plan established and periodically reviewed and evaluated by a physician, or, in the case of skilled nursing facility services or intermediate care facility services, a physician, or a nurse practitioner or clinical nurse specialist who is not an employee of the facility but is working in collaboration with a physician;

(55) for mandatory assignment of rights of payment for medical support services for medical care owed to recipients, in accordance with section 1396k of this title;

(56) that information is requested and exchanged for purposes of income verification in accordance with a State system which meets the requirements of section 1320b-7 of this title;

(57) that the State, provide for making ambulatory prenatal care available to pregnant women during a presumptive eligibility period in accordance with section 1396r-1 of this title;

(58) that the State will provide information and access to certain records to an eligible individual who does not reside in a permanent dwelling with a fixed home or mailing address;

(59) that the State will provide information and access to certain records respecting sanctions taken against health care practitioners and provider-licensing authorities in accordance with section 1396r-2 of this title;

(60) that, in accordance with subsection (q) of this section, for a monthly allowance for certain institutionalized individuals and couples; and the requirements of section 1396r-5 of this title (relating to protection of spouses);

(61) the requirements of section 1396r-8 of this title (relating to extension of benefits for medical assistance);

(62) provide—

(a) for notifying in a timely manner all individuals in the State who are eligible to be eligible for medical assistance and who are pregnant women, prenatally or postpartum women (as defined in section 1786 of this title), or children below the age of 5, of the availability of benefits furnished by the supplemental nutrition program under such section, and for referring any such individual to the State agency responsible for administering such program;

(b) in the case of a State plan that provides medical assistance for covered drugs (as defined in section 1396r-8(k) of this title), comply with the requirements of section 1396r-8 of this title;

(c) provide for receipt and initial processing of applications of individuals for medical assistance under subsection (a)(10)(A)(IV), (a)(10)(A)(V), (a)(10)(A)(VI), (a)(10)(A)(VII), or (a)(10)(A)(IX) of this section—

(i) at locations which are other than those used for the receipt and processing of applications for aid under part A of subchapter IV of this chapter

and which include facilities defined as disproportionate share hospitals under section 1396r-4(a)(1)(A) of this title and Federally-qualified health centers described in section 1396d(l)(2)(B) of this title, and

(ii) (B) using applications which are other than those used for applications for aid under such part;

(56) provide, in accordance with subsection (a) of this section, for adjusted payments for certain inpatient hospital services;

(57) provide that each hospital, nursing facility, provider of home health care or personal care services, hospice program, or health maintenance organization (as defined in section 1396b(m)(1)(A) of this title) receiving funds under the plan shall comply with the requirements of subsection (w) of this section;

(58) provide that the State, acting through a State agency, association, or other private nonprofit entity, develop a written description of the law of the State (whether statutory or as recognized by the courts of the State) concerning advance directives that would be distributed by providers or organizations under the requirements of subsection (w) of this section;

(59) maintain a list (updated not less often than monthly, and containing each physician's unique identifier provided under the system established under subsection (x) of this section) of all physicians who are certified to participate under the State plan;

(60) provide that the State agency shall provide assurances satisfactory to the Secretary that the State has in effect the laws relating to medical child support required under section 1396g of this title;

(61) provide that the State must demonstrate that it operates a medical fraud and abuse control unit described in section 1396b(q) of this title that effectively carries out the functions and requirements described in such section, as determined in accordance with standards established by the Secretary, unless the State demonstrates to the satisfaction of the Secretary that the effective operation of such a unit in the State would not be cost-effective because minimal fraud exists in connection with the provision of covered services to eligible individuals under the State plan, and that beneficiaries under the plan will be protected from abuse and neglect in connection with the provision of medical assistance under the plan without the existence of such a unit; and

(62) provide for a program for the distribution of pediatric vaccines to program-registered providers for the immunization of vaccine-eligible children in accordance with section 1396s of this title.

Notwithstanding paragraph (5), if on January 1, 1965, and on the date on which a State submits its plan for approval under this subchapter, the State agency which administered or supervised the administration of the plan of such State approved under subchapter X of this chapter (or subchapter XVI of this chapter, insofar as it relates to the blind) was different from the State agency which administered or supervised the administration of the State plan approved under subchapter I of this chapter (or subchapter XVI of this chapter, insofar as it relates to the aged), the State agency which administered or supervised the administration of such plan approved under subchapter X of this chapter (or subchapter XVI of this chapter, insofar as it relates to the blind) may be designated to administer or supervise the administration of the portion of the State plan for medical assistance which relates to blind individuals and a different State agency may be established or designated to administer or supervise the administration of the rest of the State plan for medical assistance; and in such case the part of the plan which each such agency administers, or the administration of which each such agency supervises, shall be regarded as a separate plan for purposes of this subchapter (except for purposes of paragraph (10)). The provisions of paragraphs (9)(A), (81), and (83) of section 1396i(1)(4) of this title shall not apply to a Christian Science sanatorium operated, or listed and certified, by The Commission for Accreditation of Christian Science Nursing Organizations/Facilities, Inc.¹

For purposes of paragraph (10) any individual who, for the month of August 1972, was eligible for or receiving aid or assistance under a State plan approved under subchapter I, X, XIV, or XVI of this chapter, or part A of subchapter IV of this chapter and who for such month was entitled to monthly insurance benefits under subchapter II of this chapter shall for purposes of this subchapter only be deemed to be eligible for financial aid or assistance for any month thereafter if such individual would have been eligible for financial aid or assistance for such month had the increase in monthly insurance benefits

available to individuals whom it finds to be blind or disabled and who are determined otherwise eligible for such assistance during the period of time prior to which a final determination of disability or blindness is made by the Social Security Administration with respect to such an individual. In making such determinations, the State must use the definitions of disability and blindness found in section 1882c(a) of this title.

w) Maintenance of written policies and procedures respecting advance directives

(1) For purposes of subsection (a)(57) of this section and sections 1896b(m)(1)(A) and 190r(e)(3)(E) of this title, the requirement of this subsection is that a provider or organization (as the case may be) maintain written policies and procedures with respect to all adult individuals receiving medical care by or through the provider or organization—

(A) to provide written information to each such individual concerning—

(i) an individual's rights under State law (whether statutory or as recognized by the courts of the State) to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives (as defined in paragraph (3)), and

(ii) the provider's or organization's written policies respecting the implementation of such rights;

(B) to document in the individual's medical record whether or not the individual has executed an advance directive;

(C) not to condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive;

(D) to ensure compliance with requirements of State law (whether statutory or as recognized by the courts of the State) respecting advance directives; and

(E) to provide (individually or with others) for education for staff and the community on issues concerning advance directives.

Subparagraph (C) shall not be construed as requiring the provision of care which conflicts with an advance directive.

(2) The written information described in paragraph (1)(A) shall be provided to an adult individual—

(A) in the case of a hospital, at the time of the individual's admission as an inpatient;

(B) in the case of a nursing facility, at the time of the individual's admission as a resident;

(C) in the case of a provider of home health care or personal care services, in advance of the individual coming under the care of the provider;

(D) in the case of a hospice program, at the time of initial receipt of hospice care by the individual from the program; and

(E) in the case of a health maintenance organization, at the time of enrollment of the individual with the organization.

(3) Nothing in this section shall be construed to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which as a matter of conscience cannot implement an advance directive.

(4) In this subsection, the term "advance directive" means a written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated.

x) Physician identifier system; establishment

The Secretary shall establish a system, for implementation by not later than July 1, 1991, which provides for a unique identifier for each physician who furnishes services for which payment may be made under a State plan approved under this subchapter.

y) Intermediate sanctions for psychiatric hospitals

(1) In addition to any other authority under State law, where a State determines that a psychiatric hospital which is certified for participation under its plan no longer meets

the requirements for a psychiatric hospital (referred to in section 1899 and further finds that the hospital's deficiencies—

(A) immediately jeopardizes the health and safety of its patient terminate the hospital's participation under the State plan; or

(B) do not immediately jeopardize the health and safety of its patient may terminate the hospital's participation under the State plan, no payment will be made under the State plan with respect to any inpatient in such hospital after the effective date of the finding, or both.

(2) Except as provided in paragraph (8), if a psychiatric hospital paragraph (1)(B) has not complied with the requirements for a patient under this subchapter—

(A) within 3 months after the date the hospital is found to be in compliance with such requirements, the State shall provide that no payment will be made under the State plan with respect to any individual admitted to such hospital during such 3-month period; or

(B) within 6 months after the date the hospital is found to be in compliance with such requirements, no Federal financial participation shall be made under section 1899b(a) of this title with respect to further services provided until the State finds that the hospital is in compliance with the requirements of this subchapter.

(3) The Secretary may continue payments, over a period of not longer than the date the hospital is found to be out of compliance with such requirements—

(A) if the State finds that it is more appropriate to take alternative action to ensure compliance of the hospital with the requirements than to terminate the hospital;

(B) if the State has submitted a plan and timetable for corrective action to the Secretary for approval and the Secretary approves the plan of correction;

(C) if the State agrees to repay to the Federal Government the amount of such payments under this paragraph if the corrective action is not taken in accordance with the approved plan and timetable.

z) Optional coverage of TB-related services

(1) Individuals described in this paragraph are individuals not described in section 1899(a)(10)(A)(i) of this section—

(A) who are infected with tuberculosis;

(B) whose income (as determined under the State plan under this section with respect to disabled individuals) does not exceed the maximum income a disabled individual described in subsection (a)(10)(A)(i) of this section may have and obtain medical assistance under the plan; and

(C) whose resources (as determined under the State plan under this section with respect to disabled individuals) do not exceed the maximum resources a disabled individual described in subsection (a)(10)(A)(i) of this section may have and obtain medical assistance under the plan.

(2) For purposes of subsection (a)(10) of this section, the term "TB-related services" means each of the following services relating to treatment of infection—

(A) Proscribed drugs.

(B) Physicians' services and services described in section 1899d.

(C) Laboratory and X-ray services (including services to confirm infection).

(D) Clinic services and Federally-qualified health center services.

(E) Case management services (as defined in section 1899n(g)(2)).

(F) Services (other than room and board) designed to encourage adherence to regimens of prescribed drugs by out-patients, including services to monitor the intake of prescribed drugs.

(Aug. 14, 1985, c. 531, Title XIX, § 1902, as added July 30, 1965, Pub.L. 89-97, § 2 Stat. 344, and amended Jan. 2, 1968, Pub.L. 90-248, Title II, §§ 210(a)(6), 223(a), 228(a), 231, 234(a), 235(a), 236(a), 237, 238, 241(f)(1) to (4), Title III, § 302(c) to 306, 908, 911, 917, 919; Aug. 9, 1969, Pub.L. 91-56, § 2(c), (d), 83 Stat. 99; Dec. 22, 1972, § 4(b), 85 Stat. 803; Oct. 30, 1972, Pub.L. 92-503, Title II, § 203(a), 86 Stat.

A rebuttal to the 'myths' of Valley Hospital theory

1. The hospital is ordered to allow abortions:

"It is therefore ordered, adjudged, and decreed that Valley Hospital, its Operating board, medical staff members, officers, agents, servants, and employees, any of their successors, and all persons acting in concert, participation, or cooperation with them, or at their direction, or under their control, are hereby permanently restrained and enjoined as follows:

1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure which is not based on accepted, established medical practices or requirements with respect to such procedures." (page 2 of Superior Court Final Judgment).

2. Personnel are required to participate in the procedure. Only the direct participants may refuse on the basis of conscience. No more protection, as we once had, for the nurses, orderlies, radiologists, lab technicians, and others involved:

"Nothing in the permanent injunction granted as part of this Final Judgment shall require any member of the medical staff of Valley Hospital, to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so." (Final Judgment).

(Note: nothing in this bill exempts those who must participate indirectly and who object by reason of conscience or belief. There is no definition of 'direct' participant

Nurses, radiologists, lab technicians and other health care workers are particularly vulnerable to pressure because they occupy subordinate positions in the hospital/medical hierarchy.

3. There is not much chance on a religious basis exemption for other hospitals. The Supreme Court says that nothing in the decision

"should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state

interest. Recognizing such a policy as 'compelling' could violate the Establishment Clause of the First Amendment to the United States Constitution." (Valley Hospital, Supreme Court decision page 19).

4. And there is no reliance on being a private hospital. There probably are no hospitals in Alaska which do not accept State or Federal money. And, further, as the decision reads:

"We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the Superior Court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public'". (Page 17, Alaska Supreme Court decision).

Alaskan health care providers do need the option of a Right of Conscience so that everyday people and community institutions are no longer compelled by another person's exercise of the right to privacy to act in a manner that violates their convictions of conscience.

Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

VALLEY HOSPITAL ASSOCIATION,)
INC., and JAMES G. WALSH,) Supreme Court No. S-7417
Valley Hospital Executive)
Director,) Superior Court No.
) 3PA-92-01207 CI

Appellants,)

v.)

O P I N I O N

MAT-SU COALITION FOR)
CHOICE, DR. SUSAN LEMAGIE,)
and JANE DOES I-X,)

[No. 4906 - November 21, 1997]

Appellees.)

Appeal from the Superior Court of the State of
Alaska, Third Judicial District, Palmer,
Dana Fabe, Judge.

Appearances: Brian J. Brundin, Brundin, Inc.,
Anchorage, and James Bopp, Jr., Bopp, Coleson
& Bostrom, Terre Haute, Indiana, for
Appellants. Stephan H. Williams, Cooperating
Attorney for the Alaska Civil Liberties Union,
Anchorage, and Janet L. Crepps and Kathryn
Kolbert, Center for Reproductive Law & Policy,
New York, New York, for Appellees. Susan
Wright Mason, Atkinson, Conway & Gagnon,
Anchorage, for Amicus Curiae Alaska State
Hospital and Nursing Home Association. Paul
Benjamin Linton, Americans United for Life,
Chicago, Illinois, and Kenneth P. Jacobus,
Kenneth P. Jacobus, P.C., Anchorage, for Amici
Curiae Members of the Alaska Legislature.
Jeffrey M. Feldman and Susan Orlansky, Young,
Sanders & Feldman, Anchorage, for Amici Curiae
American College of Obstetricians and
Gynecologists and American Medical Women's
Association, Inc.

Before: Compton, Chief Justice, Rabinowitz,
Matthews, and Eastaugh, Justices. [Fabe,
Justice, not participating.]

COMPTON, Chief Justice.

functions of the Board of Directors, including establishing hospital policy.

VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated "general members," annually elect the Association Board.

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law.¹ VHA permitted lawful abortion procedures at its facility from 1970 until 1992.² In 1992 abortion opponents organized a campaign to

¹ AS 18.16.010 provides:

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

.....

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

² In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman
(continued...)

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



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Alaska, Third Judicial District, Palmer,
Dana Fabe, Judge.

Appearances: Brian J. Brundin, Brundin, Inc., Anchorage, and James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellants. Stephan H. Williams, Cooperating Attorney for the Alaska Civil Liberties Union, Anchorage, and Janet L. Crepps and Kathryn Kolbert, Center for Reproductive Law & Policy, New York, New York, for Appellees. Susan Wright Mason, Atkinson, Conway & Gagnon, Anchorage, for Amicus Curiae Alaska State Hospital and Nursing Home Association. Paul Benjamin Linton, Americans United for Life, Chicago, Illinois, and Kenneth P. Jacobus, Kenneth P. Jacobus, P.C., Anchorage, for Amici Curiae Members of the Alaska Legislature. Jeffrey M. Feldman and Susan Orlansky, Young, Sanders & Feldman, Anchorage, for Amici Curiae American College of Obstetricians and Gynecologists and American Medical Women's Association, Inc.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Fabe, Justice, not participating.]

COMPTON, Chief Justice.

I. INTRODUCTION

Valley Hospital Association (VHA) seeks to reverse the superior court's summary judgment declaring unenforceable and permanently enjoining enforcement of its policy limiting abortion. We affirm the superior court. We hold that (1) Article I, section 22 of the Alaska Constitution encompasses reproductive rights, including abortion; (2) VHA is a quasi-public institution subject to the Alaska Constitution; (3) VHA's abortion policy is an unconstitutional restriction on the right to abortion; (4) AS 18.16.010(b) is unconstitutional to the extent it applies to quasi-public institutions; and (5) the superior court's award of attorney's fees was not an abuse of discretion.

II. FACTS AND PROCEEDINGS

VHA is a nonprofit corporation organized under Alaska law. It owns and operates a thirty-six-bed hospital in Palmer. The hospital is licensed by the State of Alaska (State); it is the only hospital in the Matanuska-Susitna (Mat-Su) Valley. The hospital facility currently in use was rebuilt and expanded in the early 1980s, using \$10.7 million in State funds and five acres of land donated by the City of Palmer. VHA is not affiliated with or operated by any religious organization. The corporation "is organized to serve public interests."

VHA's Board of Directors is divided into two boards, the Association Board and the Operating Board. The Association Board raises money and acquires property for the hospital and elects the Operating Board. The Operating Board has all the other powers and

7

functions of the Board of Directors, including establishing hospital policy.

VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated "general members," annually elect the Association Board.

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law.¹ VHA permitted lawful abortion procedures at its facility from 1970 until 1992.² In 1992 abortion opponents organized a campaign to

¹ AS 18.16.010 provides:

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

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(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

² In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman
(continued...)

enlarge the membership of VHA. In April 1992 a larger-than-usual membership elected the Association Board, which then elected the Operating Board. In September 1992 the Operating Board enacted a new policy on abortion. The policy prohibits abortions at the hospital unless (1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest. All VHA Operating Board members supported this new policy.

The Mat-Su Coalition for Choice, Dr. Susan Lemagie, and ten unnamed women (Coalition) filed suit against VHA and its executive director, seeking declaratory and injunctive relief. The Coalition then filed a motion for a preliminary injunction against VHA's abortion policy. The superior court granted the motion.³ Its order temporarily enjoined enforcement of VHA's new abortion policy and restored the status quo existing before the policy was enacted. The court then granted the Coalition's motion for summary

²(...continued)
can have a second trimester elective abortion.

³ In its order granting the Coalition a preliminary injunction, the superior court determined that the Coalition had shown a clear probability of success in establishing the following propositions: (1) Valley Hospital is a quasi-public hospital; (2) the Alaska Constitution provides greater protection for individual rights than the United States Constitution; (3) the right to choose an abortion is a fundamental right guaranteed by article I, section 22 of the Alaska Constitution; (4) there is no compelling state interest in Valley Hospital's ban on abortions; and (5) AS 18.16.010(b) does not immunize Valley Hospital from violating Alaskans' constitutional right to reproductive choice, including abortions.

judgment⁴ and permanently enjoined VHA

1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure at Valley Hospital which is not based on accepted, established medical practices or requirements with respect to such procedures.

The superior court noted that nothing in the permanent injunction required anyone affiliated with the hospital "to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so."

The superior court granted full reasonable attorney's fees in the amount of \$110,000 to the Coalition in a separate order. VHA appeals the injunction, the summary judgment, and the award of attorney's fees to the Coalition.

⁴ The superior court's order granting summary judgment was

based on the reasons articulated in the Court's earlier decision granting a preliminary injunction, the protections of the right to . . . privacy contained in Article I, § 22 of the Alaska Constitution, and the fact that Valley Hospital is a non-sectarian, non-profit, quasi-public hospital.

(Citation omitted.)

III. DISCUSSION

A. Standard of Review

We apply our independent judgment in reviewing the questions of law presented in this appeal, adopting rules of law which are most persuasive in light of precedent, reason, and policy. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979). We review the award of attorney's fees for abuse of discretion. Bronley v. Mitchell, 902 P.2d 797, 804 (Alaska 1995). An abuse of discretion is established only where the court's determination is manifestly unreasonable. Id.

B. The Alaska Constitution Protects Reproductive Autonomy, Including the Right to Abortion, More Broadly Than Does the United States Constitution.

1. The United States Constitution

The Supreme Court's articulation of the United States Constitution's protection of reproductive rights establishes the minimum protection provided to women in Alaska.⁵ This protection includes the right to an abortion. Under Roe v. Wade, 410 U.S. 113, 155 (1973), this right could be limited only where required by a compelling state interest. Id. States could regulate abortions performed before a fetus became viable only when such regulation was necessary to ensure the life and health of the mother. Id. at 163.

The compelling state interest test no longer accurately reflects federal constitutional law. Arguably, the prevailing

⁵ See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Roe v. Wade, 410 U.S. 113 (1973).

federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 833, 875 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The O'Connor plurality substituted the undue burden test for the compelling state interest test in recognition of the view that there "is a substantial state interest in potential life throughout pregnancy." Id. at 876. The following paragraphs from the joint opinion in Casey suggest the current state of federal constitutional law concerning reproductive rights:

(a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a

substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65.

505 U.S. at 878-79.

2. The Alaska Constitution

We sometimes have taken a broad view of our role in defining state constitutional rights:

[W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (extending the constitutional right to a jury trial).⁶ Thus, our

⁶ VHA interprets this language as a two-prong test which must be met before we may find a constitutional right. We did not interpret this language from Baker as VHA now urges us to do when we decided either Breese v. Smith, 501 P.2d 159 (Alaska 1972) (holding that governmental control of personal appearance is antithetical to the concept of personal liberty), or Ravin v. State, 537 P.2d 494 (Alaska 1975) (holding that privacy in the home (continued...))

articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. Id. at 401 ("[This court is] at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court.").⁷

Article I, section 22 of the Alaska Constitution provides:

The right of the people to privacy is recognized and shall not be infringed.

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy

⁶(...continued)
is a fundamental right), although we found a right to exist under the Alaska Constitution in each of those cases.

⁷ Other states have interpreted their constitutions to protect reproductive rights more extensively than does the federal constitution. Committee to Defend Reprod. Rights v. Mvers, 625 P.2d 779 (Cal. 1981) (striking down legislation restricting public funding of abortions as unconstitutional under the state's constitutional privacy guarantee); American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Cal. App. 1989) (upholding an injunction preventing implementation of restrictions on abortion rights of minors, requiring a compelling state interest before invasion of minors' privacy rights); In re T.W., 551 So. 2d 1186 (Fla. 1989) (reaffirming the right to choose to terminate a pregnancy as a fundamental state constitutional right and striking down legislation restricting abortion rights); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991) (applying a strict scrutiny standard for fundamental rights and determining that state failure to fund medically necessary abortions violated state constitution); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (extending state constitutional right to privacy beyond federal right in a custody dispute over divorced couple's frozen embryos).

and free speech with the need for an informed electorate); Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring) ("Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.").

A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is "necessary for . . . civilized life and ordered liberty." Baker, 471 P.2d at 401-02. Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language. "[D]ecisions whether to accomplish or prevent conception are among the most private and sensitive." Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 479 n.42 (Alaska 1977) (holding that a physician who specialized in contraception and abortion could not be required to disclose the names of his patients); see also Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981) (holding that abortion clinic protests cause patients to "suffer emotional distress as a result of appellants' invasion of their privacy during a particularly sensitive period"); Ravin, 537 P.2d at 502 (holding that decisions about contraception involve "significantly personal areas").

We stated in Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972), that "few things [are] more personal than one's body."⁸ In Breese, a school policy regulating hair length was at issue; the regulation was held unconstitutional because the State failed to show a compelling interest that justified the policy. Id. at 170-72. Surely "few things are more personal" than a woman's control of her body, including the choice of whether and when to have children.

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to

⁸ Breese was decided before the 1972 passage of the privacy amendment now found in article I, section 22 of the Alaska Constitution. Breese relied exclusively on the inherent rights provision found in article I, section 1 of the Alaska Constitution. The Coalition argues that article I, section 1 of the Alaska Constitution protects abortion as a fundamental right. Because we hold this right is grounded in the privacy provision of the constitution, we do not address whether the right could be based solely on article I, section 1. While Breese's discussion of personal autonomy remains instructive, we choose to analyze reproductive rights under the privacy provision of our constitution, as other states have done. See, e.g., In re T.W., 551 So. 2d at 1193.

The relationship between a woman and her doctor is threatened by VHA's abortion policy, and thus privacy rights are implicated in addition to the notions of personal autonomy that were at issue in Breese. The information exchange between a woman and her doctor about the woman's health and her reproductive choices is intensely private. The reasons a doctor and patient choose a medical procedure, so long as it is legal, must not be subject to the approval of a hospital's board of directors, according to their own values.

Other privacy interests are also implicated. If a woman is unable to obtain an abortion near her home, there is an increased chance that she will have to reveal her pregnancy to others in order to arrange the necessary travel. The fact that a woman has visited a certain doctor can be intensely private, when the doctor is one who specializes in abortion services.

become the vehicle for another human being's creation; second, when and how--this time there is no question of "whether"---one's body is to terminate its organic life.

Laurence H. Tribe, American Constitutional Law 1337-38 (2d ed. 1988). We agree that "[t]he decision whether or not to have a child is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (citing Roe, 410 U.S. at 153).

For the above reasons, we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion. The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in Roe v. Wade. We do not, however, adopt as Alaska constitutional law the narrower definition or that right promulgated in the plurality opinion in Casey.

VHA argues that there can be no state constitutional protection for reproductive rights under article I, section 22, because the section was intended to encompass protection from unwarranted surveillance and data collection by the State and private businesses. It cannot extend beyond this "informational"

privacy.⁹ To support this argument, VHA cites newspaper articles and other bills introduced contemporaneously with the adoption of article I, section 22.

The only informative legislative history consists of the privacy amendment as originally proposed.¹⁰ The earliest form of the proposed amendment stated:

Section 22. Right of Privacy. The right of the people to privacy in their opinions, persons, families, reputations and property is recognized and shall not be violated. Neither warrants nor writs of investigation in abrogation of privacy shall issue, except upon probable cause and upon a showing of a legitimate and pressing need, supported by oath or affirmation, particularly describing the information or data sought and the person whose privacy may be affected, and particularly setting forth the reasons for the search or investigation. The legislature shall provide for the prosecution and punishment of public officials and private parties who act in violation of this section, and shall provide civil remedies to redress and prevent such violations. The legislature shall provide for the protection and security of information available to the State to the extent necessary to protect the rights of the individual recognized in this section and shall further provide for the protection and

⁹ The Alaska State Hospital and Nursing Home Association, argues only that the "legislative" history of the amendment prevents this court from applying the privacy provision of the constitution to private parties. We have already established that proposition. See Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989).

¹⁰ The Alaska State Hospital and Nursing Home Association argues that a summary of a House Judiciary Committee meeting during which the proposed amendment was modified is evidence that the privacy clause was intended to apply only to informational privacy. The meeting summary is largely a debate over grammar and style and provides no information which alters our interpretation of article I, section 22. See H. Jud. Comm. minutes at 318-19, 7th Leg., 1st Sess. (May 30, 1972).

security of information gathered under this section by the State.

1972 Senate Joint Resolution No. 68, 7th Leg., 2d Sess. While the initial draft of the amendment attempted to specify privacy interests to be protected, the final constitutional amendment simply protected the right of the people to privacy. The plain language of article I, section 22 is a broad protection of privacy rights. The legislative history is insufficient to limit the general language of the privacy amendment.

C. . VHA's Abortion Policy Is Subject to the Provisions of the Alaska Constitution.

We previously have determined that a hospital may be a "quasi-public" institution. Storrs v. Lutheran Hosps. and Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980). In Storrs, we held that a quasi-public hospital "cannot violate due process . . . in denying staff privileges."¹¹ Id. at 28. The hospital was quasi-public because: (1) it was the only hospital serving the community; (2) the construction of the hospital was funded in significant part by State and federal grants; and (3) over twenty-five percent of the funds received for hospital services came from governmental sources. Id. Storrs established that a quasi-public medical

¹¹ One state court has rejected this application of procedural due process to private hospitals. See Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368 (Me. 1988). At least eight other states have concluded that private hospitals must follow procedural due process for physician staffing decisions. Id. at 368 n.4.