June 28, 1999

The Honorable Tony Knowles
Governor
State of Alaska
P. O. Box 10001
Juneau, Alaska 99811-0001

Re: CCS HB 51 – Making appropriations for the operating and capital expenses of the state's integrated comprehensive mental health program
A.G. file: 883-99-0070

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed CCS HB 51, making appropriations for the operating and capital expenses of the state's integrated comprehensive mental health program.

This version of the bill is similar to the original version of HB 51, which was introduced by the House Rules Committee at your request at the beginning of this year's legislative session. However, the legislature deleted general fund/mental health funds in the total amount of $580,600 and Mental Health Trust administration funds in the total amount of $17,400. These reductions were offset by substitutions and additions of Mental Health Trust Authority authorized receipts in the total amount of $1,180,300. As a result, the state's integrated comprehensive mental health program is funded at $582,300 more than was requested in your fiscal year 2000 budget, with Mental Health Trust Authority authorized receipts accounting for a greater share of the funding than in your recommended budget.

I. Required Reports

With the transmittal of HB 51, your administration submitted a report in accordance with AS 37.14.003(b) explaining the reasons for the differences between the proposed appropriations in that bill and the recommendations of the Alaska Mental Health Trust Authority for expenditures from the general fund for the state's integrated comprehensive mental

health program. AS 37.14.005(c) requires the legislature to provide a similar report explaining the reasons for the differences between the appropriations in the bill and the Alaska Mental Health Trust Authority's recommendations.

Accompanying this version of the bill is a report from the legislature outlining and explaining the reasons why the appropriations in the passed bill differ from your recommended budget. Although it would have been preferable for the legislature's report to directly explain the reasons for differences between the appropriations in the bill and those recommended by the Alaska Mental Health Trust Authority, we believe that the legislature's report, when read in conjunction with your own, substantially complies with AS 36.14.005.

Please note that if you veto all or a part of an appropriation in this bill for the integrated comprehensive mental health program, AS 37.14.003 requires that your veto message must explain the vetoes in light of the Alaska Mental Health Trust Authority's recommendations.[1]

II. Analysis

Section 1 of the bill sets out the purpose of the bill, which is to make appropriations for the state's integrated comprehensive mental health program.

The legislature retained sec. 2 of HB 51, providing that Alaska Mental Health Trust Authority authorized receipts or administration receipts that exceed the amounts appropriated by the bill are appropriated conditioned upon compliance with the program review provisions of AS 37.07.080(h). Without this provision state agencies could not expend Alaska Mental Health Trust Authority authorized receipts or administration receipts in excess of the amounts appropriated by this bill.

Section 3 of the bill sets out the appropriations, funding sources, and other items for the fiscal year 2000 operating budget.

Section 3 also addresses "unallocated reductions," which are negative allocation items in certain appropriations. Section 3 provides (page 3, lines 4-7) that department-wide unallocated reductions based on travel and personal services authorizations set out in the state's general operating appropriations bill, which is incorrectly identified as sec. 44, SCS CSHB 50

[1] Both of these statutes were enacted by the 1994 legislature, in special session, as part of the settlement of *Weiss v. State*, 4FA-82-2208 Civil, the mental health trust litigation. They are intended to assure special consideration of appropriations for the state's mental health program, and thereby to improve the state's ability to meet the special needs of Alaskans who utilize any part of the state's integrated comprehensive mental health program.

(FIN)[2] may be applied to the general fund, general fund program receipts, general fund match, or general fund mental health fund sources in the section.

The legislature has included unallocated reductions in prior appropriations bills.[3] We have in past years expressed the view that the use of these allocations would probably survive legal challenge.[4] However, the legislature is using unallocated reductions this year in a different manner than it has in past operating budgets, and that different manner presents serious new questions.

In the past it was clear that an unallocated reduction was to be confined to the appropriation in which it appeared: i.e., it was not the intent of the legislature that an unallocated reduction in one appropriation be applied to reduce another. That is not the case this year. The unallocated reductions this year are generally included in the appropriation for each department that includes the allocation for the department's commissioner's office. But the legislature has made it clear that its intent, in placing these reductions where they are, is to allow the departments to take the reductions anywhere in the departmental budget. See the language at the beginning of sec. 43, CCS HB 50 (the main part of the budget), which refers (at page 17, line 5) to "department-wide unallocated reductions."[5]

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[2] The correct citation for the passed operating appropriations bill is sec. 43, CCS HB 50.

[3] Our research indicates that the first negative allocation appeared in the FY 1992 operating budget, as part of the appropriation to the University of Alaska. In the FY 1993 operating budget the legislature for the first time used them widely, inserting them in many of the appropriations to the agencies. (The term "unallocated reduction" first appeared in this budget as well.) They have appeared in every operating budget since then, though there are never more than six or eight of them in each budget.

[4] Our most thorough discussion of unallocated reductions and the legal questions they raised appears in our bill review letter for the FY 1993 operating budget, CCS HB 405, the budget that used them most extensively. *See* 1992 Inf. Op. Att'y Gen. (June 30; 883-92-0142). (This opinion apparently is not included in the bound volumes.) We wrote then that the use of unallocated reductions would probably survive a legal challenge in light of AS 37.07.080(e), which allows the executive to transfer funds between allocations without the need for action by the legislature. We have repeated that opinion in subsequent operating budget bill review letters.

[5] For the court system and the legislature the unallocated reductions are made as their own negative appropriations. Sec. 43, CCS HB 50, page 50, line 6; page 50, line 18. It is not clear why these two entities were treated differently, especially since in several previous operating budgets, including the FY 1999 budget, the court system's unallocated reduction was placed in an appropriation, instead of being its own appropriation. (The previous operating budgets, except for the FY 1993 budget, have not included an unallocated reduction for the legislature.)

The serious new legal questions arise because each department's budget, as well as the court system's and the legislature's, consist of more than one appropriation.[6] However, we are not recommending any vetoes based on these questions, since it is not entirely clear to us that the legislature's new approach violates the Alaska Constitution or would require you, in administering the budget, to violate any such provision or any statute. Moreover, the consequences of such vetoes would be highly problematic.

The first question raised by the legislature's new approach is whether it has given you unconstitutionally broad discretion in making these reductions. The Alaska Supreme Court has ruled that the legislature cannot legally give the executive unfettered discretion to reduce appropriations after the bill making those appropriations has been enacted into law. *See State v. Fairbanks North Star Borough*, 736 P.2d 1140(Alaska 1987) (holding unconstitutional AS 37.07.080(g)(2), which allowed the governor to withhold or reduce appropriations if the governor determined that estimated revenue would be insufficient to provide for all appropriations, because the governor is provided no policy guidance as to how to distribute cuts). This bill may present similar problems, because CCS HB 50 on its face provides no policy guidance to the agencies as to how to cut their budgets, and the legislative history of the bill with regard to this question is sparse. We cannot, however give you a definitive answer as to whether the legislature's new approach is constitutional.[7]

The second question raised is whether the legislature's approach would require you to violate AS 37.07.080(e). That statute prohibits transfers between appropriations. But it is the legislature's intent, as noted above, that you do precisely that: that you take the unallocated reductions that appear in the appropriations for each commissioner's office and spread those reductions across the entire budget for each department. The budget for every executive branch department, the court system, and the legislature consist of multiple appropriations. Only the budget for the University of Alaska (Sec. 43, CCS HB 50, page 48, line 21 – page 49, line 32) consists of just one appropriation.

It can be argued that you would not be violating AS 37.07.080(e) in following the legislative intent to spread these unallocated reductions over the whole department. One possible argument is that this bill, with its clear expression of legislative intent, is the equivalent of an

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[6] Only the operating budget for the University of Alaska consists of only one appropriation.

[7] We note that the *Fairbanks North Star Borough* case involved the governor's impoundment of funds that had previously been appropriated by the legislature, whereas the question we are addressing here concerns direction by the legislature that allocations that add up to more than the total appropriated be reduced by the governor so as to match that total. The courts might find that this difference is constitutionally significant, so that the holding of the *Fairbanks North Star Borough* case would not be applicable to this situation.

"act making transfers between appropriations" within the meaning of that statute.[8] Another possible argument is that a negative appropriation is not an appropriation within the meaning of the statute. As noted above, we do not know whether the courts would accept these arguments. But, as also noted above, we believe that the answer to the question is sufficiently unclear that we are not recommending vetoes of these allocations for unallocated reductions.[9]

Section 4 of the bill sets out the funding by agency for the operating budget appropriations made in sec. 3. Section 5 of the bill sets out the appropriations and funding sources for the fiscal year 2000 capital budget. Section 6 of the bill sets out the funding by agency for the capital budget appropriations made in sec. 5.

III. Conclusion

Other than the issues addressed above, we find no constitutional or other legal issue for your consideration.

Sincerely,

Bruce M. Botelho
Attorney General

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[8] AS 37.07.080(e) provides in relevant part, "Transfers may not be made between appropriations . . . except as provided in an act making the transfers between appropriations."

[9] Because you may not raise the amount of an appropriation by vetoing a negative allocation item, the effect of vetoing the negative allocation items for unallocated reductions would be to prevent you from applying the reductions department-wide. The reductions would have to come totally out of the appropriation in which the negative item appears.