



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law

CIVIL DIVISION

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June 26, 2019

The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HB 40 - Mental Health Budget
(CCS SSHB 40)
Our File: 2019200496

Dear Governor Dunleavy,

At the request of your legislative director, we have reviewed CCS SSHB 40, making appropriations for the operating and capital expenses of the state's integrated comprehensive mental health program. The final bill raises some relatively minor legal issues.

I. Required Reports and Veto

With the transmittal of the first version of HB 40 to the House of Representatives, you submitted a report explaining the differences between your proposed mental health appropriations and the appropriation requests proposed by the Alaska Mental Health Trust Authority (trust authority). Your transmittal letter explained generally the reasons for the differences (AS 37.14.003(b)). A similar report from the legislature is required by AS 37.14.005(c), which provides that if the appropriations in the bill passed by the legislature differ from the appropriations proposed by the trust authority, "the bill must be accompanied by a report explaining the reasons for the differences between the appropriations in the bill and the authority's recommendations for expenditures from the general fund." The appropriations in CCS SSHB 40 do differ from the appropriations proposed by the trust authority, and the legislature has provided a letter and reports describing the differences. We have reviewed your and the legislature's letters and reports and believe that they satisfy the statutory requirements.

If you decide to veto all or part of an appropriation in the bill, AS 37.14.003(c) requires that you must explain the veto “in light of the authority’s recommendations for expenditures from the general fund for the state’s integrated comprehensive mental health program.” There is some question as to whether this statutory provision actually requires a more vigorous explanation of a veto than does article II, section 15, of the Alaska Constitution, which requires that any vetoed bill be returned to the house of origin with a statement of objections. If you determine that a veto of an item in this bill is desirable, the Department of Law would be available to advise you further with regard to the wording of a veto message.

II. Analysis

This bill contains a number of expressions of legislative intent. In the past, we have advised that most expressions of intent are not binding on the executive branch because the expressions violate the confinement clause of the Alaska Constitution.¹ Therefore, we previously have advised that expressions of legislative intent may generally be ignored or followed as a matter of comity. We continue to offer this advice; however, we note that under limited circumstances expressions of intent in an appropriations bill might be legally enforceable. We refer you to a complete discussion of this issue in our review of the fiscal year 2020 operating budget, CCS SSHB 39.

Accordingly, if your office or a recipient agency is not inclined to follow any intent language as a matter of comity, and we have not specifically addressed such language herein, we recommend further consultation with this office so that we can advise as to the extent such language might be enforceable. As we have previously advised in our reviews of appropriations bills, under *Alaska Legislative Council v. Knowles*² a statement of intent accompanying an appropriation is not an “item” and may not be vetoed separately from the appropriation to which it applies.

In the appropriation to the Department of Health and Social Services, sec. 1, p. 5, there are multiple expressions of legislative intent, including:

- that long-term care facilities be exempt from Medicaid provider rate reductions;
- that no Medicaid services appropriation funds be expended for an abortion that is not a mandatory service required under AS 47.07.030(a);
- that the department work with the statewide professional hospital association to develop strategies and methodologies for implementing hospital diagnosis

¹ “Bills for appropriations shall be confined to appropriations.” Art. II, sec. 13.

² 21 P.3d 367 (Alaska 2001).

- related groups, acuity-based skilled nursing facility rates, rate reductions, and timely filing provisions to mitigate unintended consequences;
- that the department submit quarterly progress reports on cost containment efforts to the co-chairs of the House and Senate Finance Committees and the Legislative Finance Division.

Regarding the Medicaid Services appropriation, the legislature provides that no money may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a), and that the money appropriated may be expended only for mandatory services under Title XIX of the Social Security Act and for optional services provided by the state under the state medical assistance plan approved by the federal Department of Health and Human Services. As we have opined previously, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions; however, the department is under a superior court order to operate its Medicaid program in a constitutional manner by providing payment for therapeutic or medically necessary abortions. That superior court order has been upheld by the Alaska Supreme Court which specifically rejected an argument that the separation of powers doctrine precluded the superior court from ordering the state to pay.³ Thus, the department is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while the department is ostensibly without the money available to pay for services to operate the program legally.⁴

Over ten years ago, the plaintiffs in the Planned Parenthood case asked the superior court to clarify how similar budget restrictions impacted its judgment. Three days after the Alaska Supreme Court affirmed the judgment, the superior court issued an opinion ordering the department not to comply with the restrictions. Therefore, to date, the department has obeyed the superior court's order to continue to pay for these

³ *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001).

⁴ The obligation of the State to pay for abortion services under the Medicaid program was reaffirmed in *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (2019). In that case, the Alaska Supreme Court struck down a statute and a regulation that attempted to define what a medically necessary abortion was. The Court concluded that the statute and regulation both violated the Equal Protection Clause of the Alaska Constitution.

medically necessary abortions until such time as a court reverses the order that is now in effect.

In the appropriation for the Department of Law, sec. 1, p. 6, there is an expression of intent that the department minimize the use of outside counsel.

In the appropriation for the Department of Public Safety, sec. 1, p. 6, there is an expression of intent that the department increase its efforts to combat internet child pornography in the state, with an emphasis on filling vacant positions which would enhance the detection and arrest of those trafficking in child pornography. This language also provides that a report should be sent to the legislature by January 15, 2021, detailing the progress made in protecting Alaska from purveyors of child pornography.

As set out above, these statements of legislative intent are likely not enforceable, but the department may comply as a matter of comity. Additionally, to the extent that reporting requirements are not otherwise set out in statute, the department may wish to comply as a matter of comity.

Other than as noted above, sec. 1 of the bill sets out the appropriations, funding sources, and other items for the fiscal year 2019 mental health operating budget, and is unremarkable.

Section 2 of the bill of the bill sets out the funding by agency for the appropriations made in sec. 1 of the bill. Section 3 of the bill sets out the statewide funding for the appropriations made in sec. 1 of the bill. Section 4 of the bill sets out appropriations for mental health capital projects and grants. Section 5 of the bill sets out the funding by agency for the appropriations made in sec. 4 of the bill. Section 6 of the bill sets out the statewide funding for the appropriations made in sec. 4 of the bill. Section 7 of the bill sets out the purpose of the bill, which is to make appropriations for the state's integrated comprehensive mental health program.

Section 8 of the bill includes another section of legislative intent. In this section, the intent is that within 120 days, the Alaska Mental Health Trust Authority be in full compliance with the Weiss settlement and Alaska Statutes regarding the investment in commercial real estate properties as described in the Schedule of Findings and Questions Costs, Year Ended June 30, 2018, by the legislative auditor. This section also includes a request for a written report of compliance from the trust authority by November 15, 2019, and that the report be sent to the legislative auditor, the chair of the Legislative Budget and Audit Committee, and the co-chairs of the finance committees of the legislature.

Section 9(a) of the bill provides for appropriation of mental health trust authority authorized receipts or administration receipts that are above the amounts appropriated in the bill, on the condition of compliance with the program review provisions of AS 37.07.080(h) of the Executive Budget Act. Section 9(b) provides for a reduction in an appropriation affected by a shortfall in receipts.

Section 10 of the bill provides that appropriations in sec. 1 of the bill include amounts for state employee salaries and benefits. Employee salary and benefits are established by direct statutory authority such as AS 39.27.011 for certain classified employees, partially exempt employees, and legislative employees; separate statutory authority for certain exempt service employees, Alaska Court system employees, legislators and other public officials; or through collective bargaining agreements authorized under AS 23.40.070 - 23.40.260 and funded by the legislature pursuant to AS 23.40.215. Section 10(a) provides that the appropriations to fund employee salary and benefits including any adjustments are included in the appropriations to agencies in sec. 1. Section 10(a) further provides that the appropriations in sec. 1 include amounts to implement monetary terms for ongoing collective bargaining agreements for the following collective bargaining units: general government unit; Teachers' Education Association of Mt. Edgecumbe; confidential employees unit; public safety employees unit; labor, trades and crafts bargaining unit; the supervisory bargaining unit; and the correctional officers unit.

Section 10(b) provides that the appropriations made to the University of Alaska in sec. 1 of the bill include amounts for salary and benefit adjustments for the fiscal year for university employees who are not members of bargaining units and to implement the monetary terms of employees covered by certain collective bargaining agreements. Section 10(c) provides that the appropriations for employees covered by collective bargaining agreements described in subsection (a) would be adjusted proportionally if a collective bargaining agreement is not ratified by the membership of the collective bargaining unit. Section 10(d) provides that the appropriations for employees covered by collective bargaining agreements described in subsection (b) would be adjusted accordingly if a collective bargaining agreement is not ratified by the membership of the collective bargaining unit and approved by the Board of Regents of the University of Alaska.

Section 10(e) of the bill provides that the appropriations in sec. 1 of the bill for employee salaries and benefits described in secs. 10(a) and 10(b) of the bill are only for the state's comprehensive mental health program and do not necessarily affect every group of nonunion employees or every collective bargaining unit listed in secs. 10(a) and

10(b) of the bill. This limitation is expressed because a number of state employees are not involved in the state's mental health program and thus appropriations for their salaries would not come from the bill.

Section 11 of the bill provides for an effective date of July 1, 2019.

III. Conclusion

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

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL
By:

Susan R. Pollard
Chief Assistant Attorney General

Samantha J. Weinstein
Assistant Attorney General

KGC/SRP/nlw