MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Karen Perdue
Commissioner
Department of Health and Social Services

The Honorable Shirley Holloway
Commissioner
Department of Education

DATE: October 20, 1997

FILE NO.: 663-97-0229

TELEPHONE NO.: 465-3600

SUBJECT: Youth Risk Behavior Survey

FROM: Doug Gardner
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In a memorandum from Commissioner Perdue dated August 20, 1997, the Department of Health and Social Services ("DHSS") expressed concern that ambiguities in AS 14.03.110 might, as a practical matter, prevent DHSS from conducting the 1997 Youth Risk Behavior Survey ("YRBS") and asked for advice from the Department of Law. The YRBS is an anonymous survey of a randomly selected group of Alaska middle school and high school students which asks questions in six subject areas: (1) behaviors that result in unintentional and intentional injuries; (2) tobacco use; (3) alcohol and other drug use; (4) sexual behaviors; (5) dietary behaviors; and (6) physical activities. Commissioner Perdue described the YRBS as a survey conducted through the collaborative efforts of the Alaska Department of Education ("DOE") and DHSS. As part of Commissioner Perdue's request for interpretation of AS 14.03.110, a copy of the 1997 YRBS has been provided to our office.[1]

A. Ambiguity in AS 14.03.110

Alaska Statute 14.03.110 provides:

> **Questionnaires and surveys administered in public schools.** A school district, principal or other person in charge of a public school, or teacher in a public school may not administer or permit to be administered in a school a questionnaire or survey, whether anonymous or not, that inquires into private family affairs of the student not a matter of public record or

[1] Commissioner Perdue's memorandum of August 20, 1997, indicated that DHSS implemented the YRBS in 1995 but has not conducted the survey in 1997 because of ambiguities in the interpretation of AS 14.03.110.

> subject to public observation unless written permission is obtained from the student's parent or guardian.[2]

Alaska Statute 14.03.110 requires written permission from a student's parent or guardian only in situations where the survey asks questions about "private family affairs of the student . . . ." The phrase "private family affairs of the student" is not defined anywhere in the statute. In 1979, when House Bill 98 (sec. 1, ch. 23, SLA 1979) was signed into law, our office advised that the phrase "private family affairs of the student" was subject to many potential interpretations.[3] Since its enactment into law, AS 14.03.110 has never been interpreted by an Alaska court or our office.[4] In light of the possible interpretations regarding AS 14.03.110, our

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[2] Sec. 1, ch. 23, SLA 1979.

[3] On April 24, 1979, Attorney General Avrum Gross provided Governor Jay S. Hammond with the following concerns regarding the ambiguity in the phrase "private family affairs of the student" in AS 14.03.110:

> While the apparent intent of this bill (to protect the family's right to privacy) is laudable, the right to privacy is already guaranteed by the general language of Art. 1, § 22 of the Alaska Constitution. To that extent, the bill may be regarded as superfluous. Apart from the general concept of the bill, we note additional difficulties. While the bill does not address the sanctions, if any, that might be imposed against an educator who violates the provision of the bill, it would arguably subject the educator to liability in tort. Also, the bill makes no attempt to define what may be characterized as "private family affairs of the student."
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> We have discussed with officials of the Department of Education certain policy objections regarding this bill--in particular the possibility that this bill would undermine legitimate inquiry by school officials into areas such as family health history which could affect other children (e.g., incidence of tuberculosis in the family). Similarly, use of broadly based anonymous surveys of school-age children and youth to determine the frequency of alcohol, drug and child abuse--tools used in determining the efficiency of government programs--would also be precluded by this bill.

Legislative Review Case File, Alaska State Archives, RG03, Box 12241.

[4] In 1996, Assistant Attorney General Jan Levy provided advice on the comparison between the requirements of AS 14.03.110, 20 U.S.C. § 1232(h) (as amended) (Protection of Pupil Rights) and a recently adopted policy of the Anchorage School Board regarding administration of student surveys.

(continued...)

office has been requested to provide advice on the meaning of the phrase "private family affairs of the student" contained in the statute. DHSS and DOE need to know whether the 1997 YRBS inquires into "private family affairs of the student" so that you can determine whether written permission from a student's parent or guardian must be obtained prior to administration of the survey.

Your request for assistance in determining the meaning of "private family affairs of the student" in AS 14.03.110 is a question of statutory interpretation. In Alaska, statutory interpretation begins with consideration of the language of the statute construed in the light of the purpose of its enactment. *Konecky v. Camco Wireline, Inc.,* 920 P.2d 277, 281 (Alaska 1996) (quoting *J&L Diversified Enter. v. Municipality of Anchorage,* 736 P.2d 349, 351 (Alaska 1987)). Where a statute is unambiguous and expresses the legislature's intent, and where the legislative history does not reveal any ambiguity, Alaska courts will not modify or extend a statute by judicial construction. *Konecky* at 281 (quoting *Alaska Pub. Employees' Assn. v. City of Fairbanks*, 753 P.2d 725, 727 (Alaska 1988)). If, however, an Alaska court finds some ambiguity in AS 14.03.110, the court will apply a sliding scale approach when interpreting the statute. *Id.* If the court utilizes the sliding scale approach to statutory interpretation, the court will employ the rule that "'the plainer the language, the more convincing contrary legislative history must be.'" *Konecky* at 281 (quoting *State v. Alex,* 646 P.2d 203, 208-09 n.4 (Alaska 1982)). In the end, the purpose of statutory construction " . . . is to give effect to the intent of the legislature, with due regard for the meaning that the statutory language coveys to others." *City of Dillingham v. CH2M Hill Northwest,* 873 P.2d 1271, 1277 (Alaska 1994).

Reading the language in AS 14.03.110, it is our view that "family" would likely be interpreted as a limit on the types of student affairs that require prior parental permission before a survey can be given to a student. Put another way, the legislature could easily have required prior parental permission for surveys inquiring into any affairs of a student, but, instead, it merely opted to require permission for questions relating to the private family affairs of the student. The meaning conveyed by the term "family" is simply the student's actual observations, opinions, and interaction with other family members. Thus, a student's private family affairs--as opposed to all of the private affairs of the student--is a more limited subset of a student's affairs, and probably would not be given an interpretation to include a student's own private affairs. There is a very strong argument that "private family affairs of the student" in AS 14.03.110 is unambiguous on its face.

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[4] (...continued)
Attorney General File No. 663-97-0229. However, our office was not asked to provide an interpretation of the phrase "private family affairs of the student" contained in AS 14.03.110, and thus we expressed no view on that issue.

However, if a court found that the phrase "private family affairs of the student" was somewhat ambiguous, the court would look to the following legislative history and require convincing legislative intent before the court would accord an expansive interpretation to allow the "private family affairs of the student" to include matters that are simply the student's own private affairs. Accordingly, out of an abundance of caution, we have reviewed the legislative history of AS 14.03.110 to determine how a court engaged in such an interpretation exercise might resolve this matter.

B. Legislative History of AS 14.03.110

1. House Health, Education and Social Services Committee

House Bill 98 was introduced by Representative Nels A. Anderson on January 30, 1979. Representative Anderson introduced House Bill 98 in response to a survey (Exhibit 1) conducted in the Juneau School District during 1978. Representative Anderson described the need for the restrictions in House Bill 98 before the House Health, Education and Social Services Committee on February 17, 1997:[5]

> I have got children in the City and Borough of Juneau School District, and I'm not necessarily too happy about how deeply they pry into my private home. I don't think it's any of the district's business and neither did I feel it was any of the Dillingham School District's business to get into the some of the areas that they did. On page 4, question number 13, "In the past year, which of the persons listed below moved in or out of your home." Then they get into, well on page 7 you have the statement, "Am I often left without an adult at home, yes or no, if yes is it usually overnight, over a weekend or for several days?" "Have police been helpful to me?" "My parents are at home, yes or no, once or twice, sometimes, always, not." "My parents or foster parents argue." "My parents or foster parents fight." "I have needed counseling about pregnancy and abortion." "I need more information about birth control and venereal disease." "I have needed more information about alcohol and drugs." "Some of my friends have a problem with alcohol." It goes on and on and gets into whether or not your mother and father use alcohol excessively.

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[5] We note that generally statements made by a sponsor of a bill are sometimes cautiously considered as indicative of legislative intent. *Alaska Public Employees' Association v. State,* 525 P.2d 12 (Alaska 1974). Thus, Representative Anderson's statements as the sponsor of House Bill 98 regarding the scope of the bill require consideration.

> The intent is to prohibit this kind of survey from being administered unless written permission is obtained from the student's parent or guardian. And this may prove to be, or may be looked at as an excessively prohibitive bill, but I think it does give the school district and the principals and/or the administration the right to give this but only if they have the permission of the student's parent or guardian.[6]

In response to Representative Anderson's statement regarding the intent of House Bill 98, a committee member observed that some of the questions might be permissible notwithstanding the proposed restrictions in the bill. Further, the committee member asked Mr. Anderson whether the bill was designed only to restrict questions about inquires made into the private family affairs of the student without the permission of a parent or guardian. In response, Representative Anderson said "[t]hat's the way the bill reads now."[7]

In addition to Representative Anderson's testimony, Mr. Terry Thetford[8] testified at Representative Anderson's invitation in support for House Bill 98. Mr. Thetford testified that House Bill 98 was designed to prevent school districts from asking questions:

> [O]f our children that evaluate how we raise our children. Evaluate how we act in our homes. Evaluate how we interact in our homes. You can't do that. You can't invade our privacy.[9]

Mr. Thetford went on to testify,

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6 House Health Education and Social Services Committee, Recorded Testimony, Alaska State Archives, RG 405, February 17, 1979.

7 *Id.*

8 Mr. Thetford was introduced by Representative Anderson as a member of the public who supported House Bill 98 and a member of a special interest group opposed to a student survey conducted in 1978 in the Juneau School District. Generally statements of a member of a special interest group in support of legislation are considered unreliable aids when searching for legislative intent. *See generally,* 2A Norman J. Singer, *Sutherland Statutory Construction,* § 48.11 (Fifth Ed. 1992). However, to the extent that Mr. Thetford's comments are consistent with and support Representative Anderson's comments, his testimony provides some additional insight into legislative intent.

9 *Id.*

> Okay, then you start asking questions that delve right into family life. When you get past the front door of that home where people can't see from the street, people have no right to know. Unless someone is being hurt, privacy starts at that front door. Okay, and asking more questions like if your parents are divorced. How many people live in your house are related to you, etc., etc. Okay then you start asking questions that pertain to family life, asking children, fifth, sixth, seventh, eighth grade, through twelfth--to evaluate and make judgments on how well their parents take care of them. Asking how often you are left alone without adult supervision. How if you visit your parents, how much your mother and father drink. How can children of sixth and seventh grade be able to evaluate whether their parents drink too much?
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> It's a no money bill. It doesn't cost the state a thing. All it does is protect our privacy from our front door in. It does not allow the school, or any other, hopefully--you can add the language--any other governmental agency to pry into our home life by a shotgun approach, by just taking children out of the room and asking them these questions.[10]

2. Senate Health, Education and Social Services Committee

Again, on March 28, 1979, Representative Anderson described the impetus for House Bill 98 in testimony before the Senate Health Education and Social Services Committee:

> The bill is quite simple. I introduced this bill in response to what I consider to be a problem area in the administration of questionnaires and surveys. This came out of controversy that erupted in Juneau last year and would have caused some problems in the Dillingham School District, but I wrote a letter to the school board and asked them not to administer a survey that I felt inquired into private family affairs that are not any of the state's business or should not be a matter of public record; unless permission is obtained from the student's parent or guardian.[11]

Representative Anderson also testified that he objected to the survey administered in Juneau because it lacked confidentiality. Representative Anderson testified that since the

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[10] *Id.*

[11] Senate Health Education and Social Services Committee Bill File, Recorded Testimony from March 28, 1979, Alaska State Archives R. 405, SR 458, Box 6568.

survey asked students where they lived (by requiring them to identify the area in the City and Borough of Juneau), what school a student attended, the student's age, sex, ethnic group, grade, length of residency in Juneau, number of rooms in a student's family's home, it would not be difficult to determine the individual identity of each student who participated in the survey.[12]

Representative Anderson concluded his remarks, and then again introduced Mr. Terry Thetford as a supporter of House Bill 98. Mr. Thetford testified that during 1978 he was a plaintiff in a lawsuit against the Juneau School District opposing the school district's survey. Mr. Thetford provided the following remarks about the purpose and scope of the bill:

> But what really incensed us was that here was another instance where a government entity, be it a school district or anyone else, was able to invade a person's domicile without his consent. Basically just opening the door and walking around looking in the drawers.[13]

Mr. Thetford appeared to object to all questions on the survey he described in categories of "sexual activities of the youth" and "abstract questions about family life," including questions about "how well your parents took care of you" and "how much they drank." However, in his closing remarks, Mr. Thetford noted in summary:

> The bill doesn't prevent a survey from being taken, all it says is that if a survey is going to be given that pries into family life, the parents have to give consent. It's not saying something can't be done. Let's put the control back in the parents' hands; they are responsible for those children until they reach the age of majority. Let them be all the way responsible; don't let them just be responsible where it is convenient. When it comes to the home, the state has no business.[14]

The bill passed out of the committee without any further remarks by committee members regarding the definition of the term "private family affairs of the student."

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12 *Id.*

13 *Id.*

14 *Id.*

C. Definition of Private Family Affairs of the Student

The legislative history of House Bill 98 provides no definitive answer to what constitute "private family affairs of the student." However, the legislative history indicates that the legislature's intent was to limit questions that pry into the student's *private family life*, rather than survey questions which merely ask the student about the *student's own private affairs.* Representative Anderson and Mr. Thetford testified the intent of the bill was to prevent student surveys that ask questions about intra-family relationships, attitudes, and behaviors that are not of public record or subject to public observation. In short, they both stated any questions that go beyond the "front door" of the family home require prior parental permission.

In 1979, when House Bill 98 was forwarded to Governor Hammond for signature, the Attorney General interpreted the restriction in the bill to prohibit all "broad based anonymous surveys of school-age children and youth to determine the frequency of alcohol, drug and child abuse . . . ."[15] The attorney general's advice was not based on a thorough review of the legislative history included in this memorandum.

With the benefit of a thorough review of the legislative history of AS 14.03.110, it is our view that the term "private family affairs of the student" in AS 14.03.110 includes only those questions that are reasonably calculated to lead to information about a student's intra-family relationships and conduct within a student's family home that is not a matter of public record or subject to public observation. Had the legislature intended to prohibit surveys inquiring into private student affairs, it would have used a more inclusive phrase such as "that inquires into the private affairs of the student."

This interpretation is based on the meaning of the statute on its face and the previously described testimony. In addition, we base our interpretation on a long-standing tenet of statutory interpretation to construe a statute to give effect to all provisions and words so that no part of the statutory language is ignored or rendered superfluous. *Peninsula Marketing Assn. v. Rosier*, 890 P.2d 567, 573 (Alaska 1995); 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.06 (5th ed. 1992). Applying this tenet to AS 14.03.110, a central question is the effect of the legislature's inclusion of "family" to modify the "private . . . affairs of the student."

Some may argue that the legislature intended to prohibit the questions in each of the 1997 YRBS categories since these are the types of discussions parents and children *might* have at home. However, the legislature was careful to qualify and narrow "private" by adding "family," and to specifically state that questions which pry beyond the front door of the student's

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[15] *See supra* note 3.

family home cannot be asked without prior parental permission.[16] Some parents may argue that a student's dietary habits, drug and alcohol use, and other activities are family matters. That argument might be based on a parent's desire to talk about these issues with a child. Or, for example, some parents may consider what their children eat and drink to be within the family domain. It could be argued that a student's dietary habits reflect a family's diet.

We cannot predict with accuracy how a court would resolve this issue with regard to each category on the proposed 1997 YRBS. However, we believe the best answer to the interpretation of AS 14.04.110 is that as long as survey questions are limited to the student's own activities and the survey does not ask the student questions about parents or other activities occurring within a student's home, the survey does not impermissibly invade the domain of the student's private "*family*" affairs.

It is our view, based on a through review of the legislative history, that the legislature did not intend AS 14.03.110 to prohibit government agencies from asking questions about the student's own private affairs such as the questions posed by DOE and DHSS in the 1997 YRBS involving conduct outside of the home including: (1) behaviors that result in unintentional and intentional injuries; (2) tobacco use; (3) alcohol and other drug use; (4) sexual behaviors; (5) dietary behaviors; and (6) physical activities. If a student chooses to answer questions about *the student's own private affairs*, the student may do so, or if not, simply return the YRBS blank.

We have reviewed all of the questions in the middle school (Exhibit 2) and high school (Exhibit 3) versions of the 1997 YRBS. It is our view that with the exception of two questions, all questions in the 1997 YRBS are defensible pursuant to our analysis of AS 14.03.110 and may be submitted to students without prior written permission from a

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[16] Only one similar statute has been located in a search of statutes in other states to determine if a statute similar to AS 14.03.110 exists. In Colorado, C.R.S.A. § 26-4-531(4)(a)(II)(A) provides:

> Any health questionnaire or form related to services funded in part through this section shall only relate to the student's personal health, habits, or conduct and shall not include questions concerning the habits, or conduct of any other member of the student's family.

C.R.S.A. § 26-4-531(4)(II)(A) appears to explicitly draw the distinction between a student's own private affairs and the private affairs of the student's family. The legislative history of AS 14.03.110 was not based on any other state statute, and certainly not on C.R.S.A. § 26-4-531(4)(a)(II)(A). However, the Colorado statute does illustrate a way of drawing a distinction between the student's own private affairs and the private family affairs of the student that is similar to the distinction set out in the legislative history of AS 14.03.110.

student's parent or guardian. However, Question 34 on the middle school survey and Question 55 on the high school survey--which are identical--ask: "Have you ever talked about AIDS or HIV infection with your parents or other adults in your family?" It is our view that these questions probe a student for information about intra-family relationships. These are the types of questions that seek information about the private *family* affairs of the student and require prior written permission from the student's parent or guardian pursuant to AS 14.03.110. You may choose to either drop these questions from the surveys or seek prior written parental permission before administering the surveys with these questions.

If additional YRBS surveys are conducted in years following 1997, your department should provide us with copies of proposed questions so we may review the questions with your staff for compliance with AS 14.03.110.

DDG:bap