



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

Department of Law

CIVIL DIVISION

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March 15, 2020

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

Re: HB 206: Mental Health; Supplemental  
Budgets (SCS CSHB 206(FIN))  
Our file: 2020200259

Dear Governor Dunleavy:

At the request of your legislative director, we have reviewed CSHB 206, making appropriations for the operating and capital expenses of the state's integrated comprehensive mental health program and making supplemental appropriations for the state's response to and mitigation of the risk of a COVID-19 virus outbreak. We have reviewed all appropriations set out in this bill and included comments on general legal issues affecting the bill overall. Unless specifically noted, we found no legal issues with the appropriations in this bill.

**I. Supplemental appropriations to address COVID-19**

Section 8(a) of the bill includes supplemental appropriations for fiscal year 2020 of the amount of federal receipts received during fiscal year 2020, estimated to be \$9,000,000, to the Department of Health and Social Services, division of public health, emergency programs for the purpose of responding to and mitigating the risk of a COVID-19 outbreak in the state during fiscal years 2020 and 2021. Section 8(b) of the bill appropriates an additional amount not to exceed \$4,091,000 from the general fund to the Department of Health and Social Services, Division of Public Health emergency programs for the same purpose. This additional sum is appropriated if the amount necessary to respond to a COVID-19 outbreak exceeds the amount appropriated in subsection (a). We note that the appropriation in section 8 is in response to the supplemental budget amendment submitted by the governor seeking authority to expend these federal and state funds in order to respond to the impacts of the COVID-19 virus.

## **II. Mental Health Budget**

### **A. Required Reports and Veto issues when considering Mental Health Budget.**

As noted above, this bill also serves as the fiscal year 2021 mental health budget bill. There are statutory provisions that address the process relating to the adoption of the mental health budget. It is our understanding that with the transmittal of the first version of HB 206, 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). A similar report from the legislature is required by AS 37.14.005(c) if the appropriations in the bill passed by the legislature differ from the appropriations proposed by the trust authority. It is our understanding that the appropriations in HB 206 are consistent with the appropriations proposed by the trust authority. OMB can confirm that information.

If you decide to veto all or part of the mental health appropriations, 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 art. II, sec. 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 a mental health appropriation 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.

### **B. Legislative Intent.**

This bill includes expressions of legislative intent accompanying certain appropriation items. We believe that most expressions of legislative intent are not binding on the executive branch because such expressions violate the confinement clause in art. II, sec. 13, of the Alaska Constitution: “[b]ills for appropriations shall be confined to appropriations.” The Alaska courts have used a five factor test to determine whether language added to an appropriations bill violates the confinement clause. Under this test (the *Hammond factors*), the qualifying language must (1) not administer the program of expenditures; (2) not enact law or amend existing law; (3) be the minimum necessary to explain the legislature’s intent regarding how the money appropriated is to be spent; (4)

be germane, that is, appropriate, to an appropriations bill; and (5) not extend beyond the life of the appropriation.<sup>1</sup>

In the past, we have advised that expressions of intent may generally be ignored or followed as a matter of comity. We continue to offer this advice; however, in the event your office or a recipient agency is disinclined to follow intent language, we recommend further consultation with this office so that we may advise as to the extent the language may be enforceable under the *Hammond* factors. Finally, as we advised in our reviews of intent language in previous appropriations bills, an expression of legislative intent may not be vetoed by the governor as a line item veto separate from the appropriation itself. On this point, the Alaska Supreme Court has ruled that expressions of intent do not constitute “items” subject to your veto power.<sup>2</sup>

In the appropriation to the Department of Health and Social Services, sec. 1, p. 4, there is an expression of legislative intent that the Department produce a report regarding the 1915(c) Intellectual and Developmental Disabilities waiver waitlist and how to move individuals into the program during FY2021. The report would include various information set forth in the bill.

The appropriation for the Department of Law, sec. 1, p. 5-6 includes a statement of legislative intent that the amount appropriated in the personal services line should be used exclusively for personal services and that appropriated funds lapse if the actual vacancy rate exceeds the budgeted rate, and a statement of legislative intent that the appropriation not be used to fund contracts related to the implementation of the *Janus v. AFSCME* decision. As set out above, these statements of legislative intent are likely not enforceable.

We also note regarding the Department of Law that the appropriation is unusual in that it identifies the appropriation as authorizing expenditure by the “Civil Division Except Contracts Relating to Interpretation of *Janus v. AFSCME*.” The Department of Law has historically been comprised of a Civil Division and a Criminal Division and not organizationally separated by particular legal matters. An effort to restrict the spending authority of the Department of Law in such a manner raises issues under the confinement clause of the Alaska Constitution which as set forth above has been interpreted to prohibit an appropriations bill from administering a program of expenditures. The Department of Law carries out the state’s legal business and the Alaska Supreme Court has held that in carrying out those functions the Attorney General has the powers and duties ascribed to

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<sup>1</sup> *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

<sup>2</sup> *Knowles*, 21 P.3d at 371-375.

that position under the common law which includes the authority to bring actions that the Attorney General considers to be in the public interest. *See, Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975). Accordingly, language in an appropriations bill that attempts to restrict the Attorney General from entering into contracts regarding particular legal matters, which could range from outside counsel to needed experts for a case, raises significant legal issues and could impede the Attorney General's ability to fulfill the statutory duties as head legal advisor and litigator for the State. However, according to section 7 of the bill, this appropriation for the Department of Law, along with all other appropriations in section 1 of this bill, are appropriated only for the purpose of supporting the state's comprehensive mental health program. Thus, the appropriation at issue in section 1 does not relate in any way to the labor and constitutional issues presented by the implementation of the *Janus v. AFSCME* decision and the language "except contracts relating to interpretation of *Janus v. AFSCME*" would have no impact on this appropriation.

### **III. Sectional Analysis**

Section 1, pages 2-7, would make appropriations for operating expenditures from the general fund or other funds.

Section 2, pages 8-9, sets out the funding by agency for the appropriations made in sec. 1. Section 3, page 10, sets out the statewide funding for the appropriations made in sec. 1.

Section 4, pages 11-12, would make appropriations for mental health capital projects and grants. Section 5, page 13, sets out the funding by agency for the appropriations made in sec. 4. Section 6, page 13, sets out the statewide funding for the appropriations made in sec. 4.

Section 7, page 15, provides that the appropriations made in secs. 1-6, 9, and 10 of the bill are for the state's integrated comprehensive mental health program.

Section 8, as noted above, provides appropriations to the Department of Health and Social Services to address COVID-19.

Section 9(a) appropriates mental health trust authority receipts that exceed the amount appropriated in the bill subject to compliance with the provisions of AS 37.07.080(h). Section 9(b) provides that if mental health trust authority receipts are less than the estimated receipts used for the appropriations in this bill, the affected appropriation is reduced by the shortfall in receipts.

Section 10 states that the appropriations in section 1 include amounts for salary and benefit adjustments for employees in the executive, judicial and legislative branches including appropriations to implement specific collective bargaining agreements. We note that funding in this bill would not necessarily support expenditures related to all of the various employee groups identified because the appropriations in this bill, as stated in sec. 7, are for the purpose of supporting the state's mental health program.

Section 11 provides that section 8, supplemental appropriations to the Department of Health and Social Services to respond to the COVID-19 virus, takes effect immediately under AS 01.10.070(c).

Section 12 provides that except as provided in section 11, the bill takes effect July 1, 2020.

#### **IV. Conclusion**

Although we have identified no other constitutional or legal issues in the bill, please be advised that it is not always possible to identify or comment on all legal issues in a bill of this complexity. However, we will assist the agencies throughout the year in interpreting and applying the provisions of the bill, as well as related legislation, to make certain that appropriations are implemented in a manner that is consistent with enabling statutes and valid legislative intent.

Sincerely,

KEVIN G. CLARKSON  
ATTORNEY GENERAL

By:

William E. Milks  
Senior Assistant Attorney General  
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WEM/rjc