LEGISLATIVE FINANCE-HOUSE/SENATE FINANCE COMM. FILES 8879

HB 264 cont. - HB 282 499 90

PATIENT NAME	CLAIM ACCT.	DIAGNOSIS	CARE IN ABSENCE OF ICM AND COST	ICM CARE CHOICE AND COST	DATE ICM STARTED	EST. SAVINGS TO DATE	ACTIVE
Rachel	10-001	Substance Abuse	Charter North $38,460	Milam $12,605	11/2/88	$25,855	No

Psychiatric Review Specialists

Focused Psychiatric Review activity will be administered by the Home Office Medical and Claim Departments by Psychiatric Review Specialists and physician consultants. Psychiatric Review Specialists are uniquely prepared and experienced professionals. PRS's are Masters-level educated psychiatric nurse clinicians (MSN's) or psychiatric social workers (MSW's) with a minimum of two years post graduate experience in psychiatric inpatient care and management. The Psychiatric Review Specialist has a detailed knowledge of psychiatry, its concepts, practice, intent, limitations and alternatives and is trained in insurance principles. Clinical expertise and insurance knowledge are applied through the process of concurrent clinical review. Additionally, they must exhibit interpersonal qualities which enable them to work comfortably and effectively with health care professionals in discussing and influencing treatment, overall patient management decisions within professional boundaries, and the plan provisions.

Additionally, PRS's are knowledgeable about the full range of psychiatric and substance abuse coverage available under the STATE OF ALASKA benefit plan. The clinicians work collaboratively as members of Ætna's professional team which includes psychiatrists and doctoral level clinical psychologists. Clinicians expert in various psychiatric subspecialities provide ongoing consultation at periodic case conferences.

Physician Consultant

In order to qualify as a Physician Consultant, the physician must:

- Be board certified in his/her specialty.
- Have local medical society membership, including county and state medical societies.
- Be familiar with the goals of Ætna's utilization management program.
- Be familiar with the criteria sets used by the utilization review coordinators to assess the medical necessity of admission to the hospital and continued stay.
- Be knowledgeable about facilities and different levels of care available in the community.
- When necessary, seek the opinion of a qualified specialist.
- When necessary, telephone the patient's attending physician to discuss our recommendation concerning the need for admission and appropriate length of stay.

HEALTHLINE Program Evaluation

STATE OF ALASKA will be provided with reports reflecting pre-certification activity and savings achieved through the HEALTHLINE Program. Please refer to EXHIBIT III and IV.

Pricing

Cost for administering the HEALTHLINE Program through the 1989 calendar year are as follows:

- Full Healthline/FPR: $2.08 per employee per month.
- Precert Only: $1.56 per employee per month.
- Consumer Advisory Only: $.71 per employee per month.

Pre-Installation Activity

It is in the employee's best interest to have one source for all questions on claim handling and Healthline. Accordingly, we propose to operate the Ætna Healthline Program out of the Seattle, WA claim office where the healthcare claims are currently processed.

Prior to the effective date, the following must be accomplished;

- Distribute employee descriptive literature announcing the program and the associated benefit provisions.

- Commence the employee educational campaign which includes the use of a videotape, payroll stuffers, and other educational materials. It is recommended that the educational campaign continue after the effective date in order to reinforce the availability and understanding of the program.

- Consider the need to issue employee identification cards bearing a toll-free Ætna Healthline number, highlights of the program, and an initial supply of the Ætna Healthline Pre-Admission Certification Checklist. Refer to Exhibit I.

- Establish Ætna system records to reflect the purchase and coverage of the Ætna Healthline Program.

- Consider the need to provide staffing, telephone lines, and information systems necessary to support the program. A lead time of 90 days is suggested for this purpose.

Recommendation

We believe that an effective cost containment program should focus on pre-certification and the evaluation of confinement which might lead to unnecessarily costly and inappropriate use of the hospital setting. Ætna's HEALTHLINE Program puts the emphasis where experience shows it belongs - education, information and informed choice before the patient enters the medical care system followed by appropriate discharge planning and case management after admission.

In conclusion, Ætna is prepared to offer HEALTHLINE to STATE OF ALASKA and assure a smooth and successful start-up period.

SAMPLE
PRECERTIFICATION ACTIVITY
BY THE TYPE OF HOSPITAL ADMISSION
EMPLOYEES AND DEPENDENTS, ÆTNA PRIMARY

Prepared 6/1/87

PH NO. STATE OF ALASKA Page 1 TA
04/01/86 - 04/01/87

PH TOTALS

TYPE OF ADMISSION	ADMISSIONS TOTAL	DAYS REQUESTED	DAYS CERTIFIED	DAYS USED	DAYS GREATER THAN CERTIFIED: USED	REQUESTED	PERCENT OF DAYS CERT	SAVINGS
PRECERTIFIED	623	4,276	3,795	3,612	41	387	9	106,820
NOT PRECERTIFIED	20	N/A	N/A	93	93	N/A	N/A	9,300
OTHER	44	N/A	N/A	357	N/A	N/A	N/A	0
TOTAL	687	4,276	3,795	4,062	134	387	N/A	116,120

STANDARD SAVINGS CALCULATIONS:

1) 41 NON CERTIFIED DAYS CONSIST OF:

21 HOSPITAL DAYS WERE USED ON 3 ADMISSION WHERE 0 DAYS WERE CERTIFIED. SAVINGS ARE CALCULATED AS THE SUM OF THE ROOM & BOARD CHARGES FOR THESE ADMISSION. SAVINGS = $ 4,200

20 HOSPITAL DAYS WERE USED IN EXCESS OF DAYS CERTIFIED ON 15 ADMISSIONS. SAVINGS ARE CALCULATED BY MULTIPLYING THE NUMBER OF EXCESS DAYS TIME THE AVERAGE DAILY ROOM & BOARD CHARGE FOR EACH ADMISSION TIMES THE 50% STANDARD BENEFIT PENALTY. SAVINGS = 2,000

387 DAYS WERE REQUESTED IN EXCESS OF DAYS CERTIFIED ON THE REMAINING CERTIFIED ADMISSIONS. SAVINGS ARE CALCULATED BY MULTIPLYING THE AVERAGE NUMBER OF DAYS REQUESTED IN EXCESS OF CERTIFICATION TIMES THE AVERAGE DAILY ROOM & BOARD CHARGE FOR EACH ADMISSION PLUS 30% TO ACCOUNT FOR ANCILLARY CHARGES. SAVINGS = 100,620

$106,820

2) 93 DAYS WERE USED FOR 20 NON PRECERTIFIED ADMISSIONS. SAVINGS ARE CALCULATED BY MULTIPLYING THE NUMBER OF DAYS USED TIMES THE AVERAGE ROOM & BOARD CHARGE PER DAY TIMES 50%. SAVINGS = 9,300

A23

SAMPLE
INTEGRATED COST CONTAINMENT SAVINGS
ALL EMPLOYEES AND DEPENDENTS

Prepared 6/1/87
PAGE 1 TC

PH NO. STATE OF ALASKA

		CURRENT QUARTER		1ST PRIOR QUARTER	2ND PRIOR QUARTER	3RD PRIOR QUARTER
REASONABLE AND CUSTOMARY CHARGE SAVINGS	$	4,984	$	12,527		
COORDINATION OF BENEFIT SAVINGS	$	80,474	$	146,634		
HOSPITAL PRECERTIFICATION SAVINGS	$	150,750	$	124,620		
INDIVIDUAL CASE MANAGEMENT SAVINGS	$	164,866	$	0		
TOTAL SAVINGS FROM ÆTNA COST CONTAINMENT	$	401,074	$	283,781		

A24

SENATE COMMITTEE REPORT

FURTHER

5/3/89

DATE TURNED INTO OFFICE 5/7/89

Mr. President:

Finance Committee considered CSHB 272 (CRA) am

optional exemptions from or deferral of payment of, municipal taxes on economic development property, and to an optional exemption from municipal taxes on inventories intended for export outside the state

and recommended

[✓] replace with SCS CS HB 272 (Fin)) [✓] same title
[ ] or adopt ______ CS ______) [] new title
[ ] attached amendment(s) and
[] technical title change (HB only)
[ ] ______ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to ______

FISCAL NOTE(S) [✓] zero [ ] fiscal impact [ ] appropriation no FN
[ ] new [ ] updated [✓] previous DCCRA-0
[ ] same as previous fiscal note(s) published ______

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

DO PASS

Chair: signature and recommendation

Co-Chair

[ ] Committee Backup attached

Adopted

No. 1

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: S CSHB 272 (Fin)
PUBLISH DATE: HOUSE 4/28/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act..optional exemption.. deferral of payment, municipal taxes."
Sponsor: Rep Gruenberg, Ellis, Larson & Zawacki
Requestor:

Agency Affected: Community & Regional Affairs
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Jim Plasman

Prepared by: Jim Plasman, Deputy Director
Phone: 465-4750
Division: Municipal & Regional Assistance
Date: 4/14/88

Approved by Commissioner: [illegible]
Date: 4/14/89
Agency: Community & Regional Affairs

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Changes in SCS CSHB 272 (Fin) have no fiscal impact. This fiscal note is appropriate. 5/7/89

1/3

No. 1

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSHB 272 (CRA)
PUBLISH DATE: HOUSE 4/28/89

FISCAL NOTE

cc

REQUEST:

Revision Date:
Title: "An Act..optional exemption.. deferral of payment, municipal taxes."
Sponsor: Rep Gruenberg, Ellis, Larson & Zawacki
Requestor:

Agency Affected: Community & Regional Affairs
BRU:
Components:

Adopted

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Jim Plasman

Prepared by: Jim Plasman, Deputy Director
Phone: 465-4750
Division: Municipal & Regional Assistance
Date: 4/14/88

Approved by Commissioner: Raymond Hennigan for David Hoffman
Date: 4/14/89
Agency: Community & Regional Affairs

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Offered: 5/7/89 6-0951G
Referred: Rules

Original sponsors: Gruenberg, Ellis, Larson, et al.

IN THE HOUSE BY THE FINANCE COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 272 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to an optional exemption from, and deferral of payment of, municipal taxes on economic development property, and to an optional exemption from municipal taxes on inventories intended for export outside the state."

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

* Section 1. AS 29.45.050 is amended by adding new subsections to read:

(m) A municipality may by ordinance partially or totally exempt all or some types of economic development property from taxation for up to five years. The municipality may provide for renewal of the exemption under conditions established in the ordinance. A municipality may by ordinance permit deferral of payment of taxes on all or some types of economic development property for up to five years. The municipality may provide for renewal of the deferral under conditions established in the ordinance. A municipality may adopt an ordinance under this subsection only if, before it is adopted, copies of the proposed ordinance made available at a public hearing on it contain written notice that the ordinance, if adopted, may be repealed by the voters through referendum. An ordinance adopted under this subsection must include specific eligibility requirements and require a written application for each exemption or deferral. In this subsection "economic development property" means real or personal property, including developed property conveyed under 43 U.S.C. 1601 - 1629e (Alaska Native Claims Settlement Act), that

(1) has not previously been taxed as real or personal property by the municipality;

(2) is used in a trade or business in a way that

(A) creates employment in the municipality;

(B) generates sales outside of the municipality of goods or services produced in the municipality; or

(C) materially reduces the importation of goods or services from outside the municipality; and

(3) has not been used in the same trade or business in another municipality for at least six months before the application for deferral or exemption is filed; this paragraph does not apply if the property was used in the same trade or business in an area that has been annexed to the municipality within six months before the application for deferral or exemption is filed; this paragraph does not apply to inventories.

(n) A municipality may by ordinance classify as to type inventories intended for export outside the state and partially or totally exempt all or some types of those inventories from taxation. A municipality may adopt an ordinance under this subsection only if, before it is adopted, copies of the proposed ordinance made available at a public hearing on it contain written notice that the ordinance, if adopted, may be repealed by the voters through referendum. The ordinance may provide for different levels of exemption for different classifications of inventories. An ordinance adopted under this subsection must include specific eligibility requirements and require a written application for each exemption.

HOUSE COMMITTEE REPORT

File

(11)
Date Referred: March 13, 1990 FURTHER REFERRALS:

Date of Committee Action: 4/24/90

The FINANCE Committee considered: HB 274

HOUSE BILL NO. 274 MEDICAID PAYMENT FOR PSYCHOLOGISTS

"An Act relating to psychologists' services under the state medical assistance program; and reordering the priorities for eliminating coverage under Medicaid."

RECOMMENDATIONS:

[✓] be replaced with CS HB 274 (FIN) [ ] the same title [ ] a new title

[ ] have attached amendment(s)

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ________ Committee

ADOPTS: ________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)	APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal impact ____	[ ] fiscal note(s) ____
[✓] zero fiscal note HFC	[ ] zero fiscal note(s) ____
[ ] zero with analysis ____	[ ] zero fn/analysis ____

SIGNING DO PASS:

Larson
Swackhammer
Brown
Kopon
~~Wilner~~
Barness
Shultz
Phillips
Rieger
[signature]

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

Larson
Chairman's Signature

(C) Hoffman

Adopted

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 274 (FIN)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date: 2/13/90
Title: An Act Relating to Psychologists' Services.
Sponsor: House HESS Committee
Requestor: House Finance Committee

Agency Affected: Health and Social Services
BRU: Medical Assistance
Medical Assistance Administration
Components: Medicaid Non-Facility
Claims Processing

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: House Finance Committee
Phone: 465-3727
Division: Co-Chairman Ron Larson
Date: April 24, 1990
Approved by Commissioner: Co-Chairman Lyman Hoffman
Date: April 24, 1990
Agency:

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Original sponsor(s): HESS Committee

IN THE HOUSE BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 274 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to psychologists' services under the state medical assistance program; and reordering the priorities for eliminating coverage under Medicaid."

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

* Section 1. AS 47.07.030(b) is amended to read:

(b) In addition to the mandatory services specified in (a) of this section, the department may offer only the following optional services: case management and nutrition services for pregnant women; personal care services in a recipient's home; emergency hospital services; long-term care noninstitutional services; medical supplies and equipment; clinic services; inpatient psychiatric facility services for individuals age 65 or older and individuals under age 21; prescribed drugs; clinical services of a psychologist licensed by the Board of Psychologist and Psychological Associate Examiners; physical therapy; occupational therapy; chiropractic services; treatment of speech, hearing, and language disorders; adult dental services; prosthetic devices and eyeglasses; optometrists' services; intermediate care facility services, including intermediate care facility services for the mentally retarded; skilled nursing facility services for individuals under age 21; and reasonable transportation to and from the point of medical care.

* Sec. 2. AS 47.07.035 is amended to read:

Sec. 47.07.035. PRIORITY OF MEDICAL ASSISTANCE. If the department finds that the cost of medical assistance for all persons eligible under this chapter will exceed the amount allocated in the state budget for that assistance for the fiscal year, the department shall eliminate coverage for optional medical services and optionally eligible groups of individuals in the following order:

(1) clinical services of a psychologist licensed by the Board of Psychologist and Psychological Associate Examiners;

(2) chiropractic services;

[(2) ADULT DENTAL SERVICES];

(3) emergency hospital services;

(4) treatment of speech, hearing, and language disorders;

(5) optometrists' services and eyeglasses;

(6) occupational therapy;

(7) prosthetic devices;

(8) medical supplies and equipment;

(9) clinic services;

(10) adult dental services;

(11) physical therapy;

(12) [(11)] personal care services in a recipient's home;

(13) [(12)] prescribed drugs;

(14) [(13)] long-term care noninstitutional services;

(15) [(14)] inpatient psychiatric facility services;

(16) [(15)] intermediate care facility services for the mentally retarded;

(17) [(16)] intermediate care facility services;

(18) [(17)] pregnant women, and children five years of age or younger, with a household income that does not exceed 100 percent of the federal poverty level;

(19) [(18)] individuals under age 21 who are not eligible for benefits under the federal aid to families with dependent children

program because they are not deprived of one or more of their natural or adoptive parents;

<u>(20)</u> [(19)] skilled nursing facility services for persons under age 21;

<u>(21)</u> [(20)] aged, blind, and disabled individuals who, because they do not meet the income requirements, do not receive supplemental security income under Title XVI of the Social Security Act, but who are eligible, or would be eligible if they were not in a skilled nursing facility or intermediate care facility, to receive an optional state supplementary payment;

<u>(22)</u> [(21)] individuals in a hospital, skilled nursing facility, or intermediate care facility whose income while in the facility does not exceed 300 percent of the supplemental security income benefit rate under Title XVI of the Social Security Act, but who, because of income, are not eligible for the optional state supplementary payment;

<u>(23)</u> [(22)] individuals under age 21 under supervision of the department, for whom maintenance is being paid in whole or in part from public money and who are in foster homes or private child-care institutions.

POSITION PAPER/Department of Health & Social Services

POSITION PAPER
House Bill No. 274

"An Act relating to psychologists' services under the state medical assistance program; and reordering the priorities for eliminating coverage under Medicaid."

This Act would amend AS 47.07.030(b) to add psychologists' services to the services available for needy persons who are eligible for Medicaid, and it would amend AS 47.07.035 to place this new coverage tenth in the priority listing of all optional Medicaid services authorized by the Legislature for Alaska.

Currently, there are 115 licensed psychologists in Alaska, all of whom would be eligible to enroll as Medicaid providers were House Bill No. 274 to pass. A substantial number of these psychologists are already providing services to Medicaid recipients, and indirectly receiving Medicaid payments, in work settings such as physicians' clinics or community mental health clinics where they are supervised by a physician or psychiatrist who is enrolled.

The Division of Medical Assistance has long believed that this situation is far from ideal, for these reasons:

(1) The Division has no evidence that the supervision requirement generally results in more effective, higher-quality care. However, there is a strong conviction, here and in other states' Medicaid agencies, that supervision increases the cost of care.

Many states have specified exactly how much and what types of supervision are required, but as a practical matter, there is no cost-effective way to enforce such rules, and there is considerable disagreement over whether such rules do in fact result in any measurable improvement in the care provided. Federal Medicaid rules allow for any type of M.D. to be a supervisor, so it's frequently the case that a general practitioner, who may or may not have any formal training in psychology, is being paid to consult with and guide a certified mental health professional. This may be helpful in cases in which a persons' mental problems are caused by or accompanied by physical problems, but in many cases, the only advantage in such a relationship is a financial one to the doctor, resulting in an unnecessary cost to the taxpayer

(2) Not only does the Division pay physicians for supervisory duties that may or may not enhance the quality of care, the "screening" effect in clinical settings which result from the supervision requirement means that Medicaid pays for services that are actually provided by any licensed person the supervisor deems appropriate. This means that Medicaid pays the rate appropriate for a psychiatrist/M.D., but the patient often gets

services from someone whose credentials would justify a lower rate.

House Bill No. 274 would enable the Division to directly enroll psychologists, which would allow the Division to better measure, monitor, and control the use and costs of psychologists' services. House Bill No. 274 offers a good possibility of slightly lowering the costs per unit of services without decreasing the quality of the service.

From the provider's point of view, adding psychologists' services to Alaska's Medicaid Program would create equity between psychologists who practice independently and those who practice under the supervision of a physician or in a community mental health clinic.

From the Medicaid recipient's point of view, adding psychologists' services would make it easier to obtain care because it would increase the number of Alaska providers offering this service. It would also make it easier for them to directly access the person who gives them care, as they would no longer have to pass through a physician's examination or a clinic's screening process.

Position:

From the Department's perspective, House Bill No. 274 is a highly desirable bill that provides a simple solution to a long-standing and growing problem. The only objection we believe could be raised to House Bill No. 274 is that it will result in new providers enrolling in Medicaid, which in turn means that more recipients may use these provider's services, which may increase the program costs. These costs are detailed in the Department's Fiscal Note. However, these same cost increases appear to be occurring to some degree already, and House Bill No. 274 would give us the administrative structure in which we could measure and control them.

The Department supports the passage of House Bill No. 29.

Recommended By: Kim Busch

Kim Busch, Director
Division of Medical Assistance

Date: 2-13-90

Approved By: Myra M Munson

Myra M. Munson, Commissioner
Department of Health and
Social Services

Date: 2-14-90

Alaska State Legislature

Please enter into the record my testimony to the House HESS committee name

committee on CSHB 274 bill/subject, dated 3/9/90.

I ask that this testemony be entered in the record. The addition of psychologist services under the state medical assistance program likely will help make available the mental health services of licensed professionals to parts of the state and at levels not presently served or underserved. The Alaska Mental Health Board has supported enhanced availability of professional mental health services. While not the greatest unmet need in the state mental health program, enhanced availability of psychologist services is consistent with recommendations of the Mental Health Board.

Signed: [signature] Exec Director
Testifier

Alaska Mental Health Board
Representing (Optional)

419 6th St, Suite 124, Juneau 99801
Address

465-3071
Phone No.

COST-SAVINGS AS A RESULT OF [illegible]YCHOTHERAPY

A number of studies have discussed the fact that overall medical costs are dramatically reduced one year after a patient has been in psychotherapy. The following are a few of those studies. Specific references will be provided upon request:

---

1. Nicholas Cummings, Ph.D., with Kaiser-Permanente mental health programs stated in the October 15, 1982 Psychiatric New[illegible] that "...Dispite two decades of research...showing that brief psychotherapy dramatically reduces utilization of other medical resources, policymakers continue to ignore these findings when designing health care systems...." He found in his study that resolving financial problems of HMO's was done "...by relying o[illegible] brief psychotherapy to reduce the high incidence of unnecessary medical care....medical utilization declined significantly--and stayed down for the five years studied...[and]...amoung patient[illegible] who completed brief psychotherapy, medical utilization dropped 75 percent." This was seen as important when, as he indicated, "...60 percent of all patient care could not be attributed to organic illness but was due, instead, to psychological problems." Patients many times reported not liking their therapists, and that therapy did not help them, but they did dramatically change their overall medi[illegible]al overutilization and n[illegible] longer had symptoms. There have been over 28 replications of these studies.

---

2. In 1977 Sten and Young in completing a Masters degree (M.S.W.) thesis at Portland State University found that clinica[illegible] social work psychotherapy of patients at Kaiser Permanente in Portland, helped to significantly reduce patient over-utilization of other medical services. There was a "...47.1% decrease in physician office visits; a 48.6% decrease in the number of physicians seen for office visits; a 31.2% decrease in telephone contacts; a 48.6% decrease in the number of prescriptions written; a 45.3% decrease in emergency room

visits; a 66.7% decrease in frequency of hospitalizations and a 77.9% decrease in the average length of stay in the hospital...intervention appeared to be positively assocated with an over-all change rate of some 53 percent....."

---

3. Jones and Vischi (1979), in reviewing twenty-five (25) research projects, showed that after an individual was in psychotherapy reductions in medical/surgical expenditures averaged 57% in one study to 62% in out-patint medical visits and 68% in in-patient care.

---

4. A Kaiser-Permanente study of 152 patients showed that over a five year period there was a reduction in out-patient visits of 62% and 68% for in-patients. The most important aspect of this study is that the matched non-treatment controls, also a psychologicall distressed group, showed no change in their health care utilization over the same five year period.

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5. A West German study utilizin a five year follow-up period after mental health treatment found an 85% reduction in in-patient utilization.

---

6. Other studies indicated that waiting list, non-treated, groups demonstrated the highest levels of medical care over-utilization, with even increases seen in their request for more doctors appointments and hospitalizations. Other findings revealed that even one psychotherapy session was effective in reducing medical care utilization. However, greater reductions in medical utilization rates were noted with increasing frequency of psychotherpy contacts. Weekly therapy sessions, particularly on a short-term basis of 12 sessions, lead to the greatest psychotherapeutic benefits.

---

7. Research conducted by Blue Cross/Blue Shield, reported in the New York Times and by the Psychotherapy in Private Practice Journal , with joint sponsorship by the National Institutes of Mental Health, found that "...psychotherapy can

significantly reduce hospital costs for physical ailments among people with heart disease--ischemic and hypertensive, air-flow limitations disease and diabetes." the findings indicated "...that people who had at least 7 visits of out-patient psychotherapy after the diagnosis of one of these 4 diseases incurred costs for medical services that were 66% lower than the costs for those who did not have psychotherapy....They found that psychotherapy was most effective when it involved moderate amounts of out-patient visits ranging from 7 to 20."

---

8. A University of Colorado study reported in the September 21, 1984 Psychiatric News reviewed claims for Blue Cross/Blue Shield patients. The findings indicated that psychotherapy significantly reduced medical services, and particularly inpatient services. "...after mental health treatment, inpatient hospitalizations were approximately 1.5 days shorter than those of the control group's average of 8.7 days.....The average change after psychotherapy was -73.4 percent for inpatient and -22.6 percent for outpatient care.....After the initial year, the psychotherapy group had significantly lower inpatient medical care costs in each of the other four years analyzed."

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9. Emily Mumford, Ph.D. in the October, 1984 issue of the American Journal of Psyhiatry presented her findings of reviewing over 58 research projects on pschotherapy. The results demonstrated that patient costs dropped dramatically after involvement in psychotherapy. Again there were significant reductions in in-patient stays for medical problems for those patients who received psychotherapy. "...following mental health treatment, the medical care charges of the treatment group increased more slowly than the average inflation rate of 13.6% per year....In contrast, the charges of the comparison group increased faster than the inflation rate."

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10. A study reported in Psychotherapy Finances in 1983 reported in findings by the U. S. Steel Company that there was a savings of $5.00 for every $1.00 spent on mental health services. Polaroid and several other large companies have reported similar results at the same time.

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11. Federal Employees health insurance programs, which have generous mental health benefits, showed that only 5 - 7% of the total health care costs are for emotional disorders.

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12. Studies at the local HMO, SelectCare, in studying 31 Ph.D. and M.S.W. providers, in computer analysis of records demonstrated that the average number of visits over a 3 year period was only 5.4 visits for all providers. A year later it was 4.3 visits. The analysis also indicated that mental health benefits are a very small part of their benefit package, i.e., 7/10th of 1% of their entire budget.

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13. In 1977 there were 118,767 patient contacts with 45 physicians at The Eugene Hospital and Clinic. Of these out-patients only 2,900, or 2.44% were diagnosed as having mental or emotional disorders by the physicians.

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14. The Group health Association of Washington, D.C., showed a reduction in usage of general medical care by as much as 30.7%, and a 29.8% drop in Lab and X-ray use the year after psychotherapy services were received.

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15. Kaiser Plan of California saved 250.00/yr, in the following year, for each patient who received psychotherapy services.

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20. Blue Cross of Western Pennsylvania noted a 50% decline in monthly costs per patient in the use of medical-surgical procedures/services for those patients who had received psychotherapy services.

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21. Studies of coverage of clinical social work psychotherpy services in private health insurance programs in new York State only costs $0.00 - $0.15 per month/premium (NASW in Washington

D.C. study).

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22. A 1972 study in West Germany of Insurance coverage for 1,004 patients, also in a five year follow-up study, who had averaged 100 hours of psychotherapy found that 81% felt strongly they were helped by treatment. Further, their hospital rage usage was reduced to 0.78 hospital days/year. Pre-treatment usage averaged 5.3 days/year, with the general population average being 2.5 days/year. This included hospitalization for any illness.

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23. Otto Jones, M.S.W., a clinical social worker, developed a mental health program for employees at Kennecott Copper in Utah. Before the program employees averaged 5.8 working days/month absence, weekly indemnity costs averaged $70.67/person/month, and hospital/medical/surgical costs averaged $109.04/person/month. One year after psychotherapy significant reductions were noted: Absenteeism decreased to a 2.93 average working days/month, weekly indemnity costs averaged 25.33/person/month, and hospital/med/surg. costs averaged $56.91/person/month. <u>THIS IS A 49.5% REDUCTION IN ABSENTEEISM, A 64.2% REDUCTION IN WEEKLY INDEMNITY, AND A 48.9% REDUCTION IN HOSP.-MED.-SURGERY COSTS!!</u> Those employees not invoved in psychotherapy tended to get worse and showed increases of: 2.9% increase in absenteeism, a 28.5% increase in weekly indemnity costs, and a 7.7% increase in hospital, medical and surgical costs.

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24. A 1980 letter from Blue Cross of California indicated that psychotherapy coverage for clinical social workers is "...a small part of their total health care package...[and]...have little impact on the total rates for health coverage."

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25. A 1979 study reported in <u>Psychiatric News</u> states that "...mental health claims are not a substantial portion of total claims dollars." Again the findings were that only between 5 to 7% of the claims dollars were paid out for mental heath care of all types including inpatient services. In general "...costs of mental health care...have lagged behind the increases in other health services."

26. A 1984 NIMH study (AMA News, November 9, 1984); which is the largest and most comprehensive survey to date of mental disorders indicates that 20% of all adult Americans suffers from at least one mental disorder. Such disorders were equally divided between males and females. However, only 1/5th of those so identified ever saw a mental health professional for treatment. The rest were seen by their family physician only and never referred for servces.

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27. A 1980 article in American Medical News (10/10/84) statec that "...A prepaid mental health care program...appears able to cut healh expences...." As a result of this intervention and cost-savings, "...for the first time in three years, Stationers Corp. did not have an increase in its health insurance premiums."

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28. McDonnell Douglas (and several other companies like Xeros, Hallmark Cards, Pitney Bowes, and IBM) in providing in-house mental health services for employees "calculates that it saved $4 million over 10 years...and other companies also report lowered costs for medical and disability insurance, fewer accidents and reduced absenteeism...."

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29. A 1980 article in the American Journal of Psychiatry indicates that only 7.3% of insured patients had services for mental health disorders. Of these, over half the claims for such services were submitted by general physicians and not mental health professionals.

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30. A 1981 study reported in American Medical News (9/4/81) found that treatment for alcoholism resulted in a savings of $1.5 million, with "alcoholism rehabilitation programs [having] an 85% success rate." A Stress management and health back programs also saved further money. "...the $2.7 million estimated savings are "conservative figures..." for New York Telephone employees.

31. A 1983 study in the Journal of Pain found that utilization of EMG Biofeedback treatment in patients with chronic rheumatic back pain resulted in significant positive changes. "...At the end of the treatment phase and at the 4 month followup the patients in the biofeedback group showed significant improvements in the duration, intensity, and quality of their back pain as well as their EMG levels, negative self-statements, and utilization of the health care system." Non-treated, control groups, and traditionally medically treated groups showed no improvements in their conditions at all."

POINT OF VIEW *Ronald Bronow*

Why the Prognosis Is Poor for the HMO System

Just a few years ago, everybody was saying that Health Maintenance Organizations would reshape our entire health-care delivery system.

In theory, it looked pretty good. The patient would pay a single premium and be covered for all of his medical needs, from doctor visits to surgical and hospital fees. The HMOs, by stressing preventative medicine techniques, were supposed to keep people healthy enough that they would need less medical care.

Well, it hasn't exactly worked out that way. The HMOs are in deep trouble; three out of every four plans are losing money.

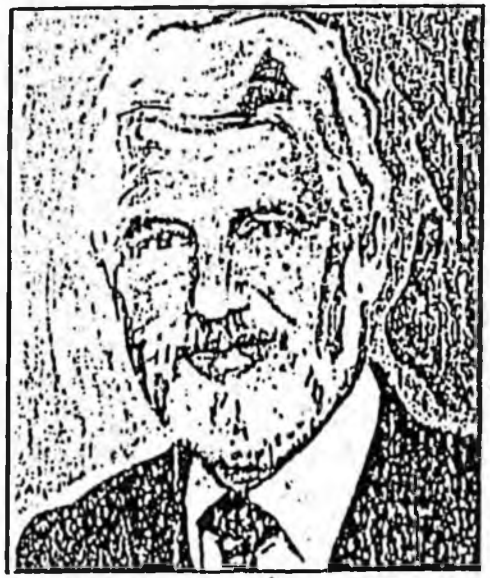
Forbes magazine says, "This once-vaunted scheme for holding down medical costs has turned out to be one of the decade's most over-hyped flops."

Business Week says, "Federal investigators believe they have uncovered a nationwide conspiracy by alleged mob groups to exploit the prepaid health-care industry."

The HMOs were supposed to eliminate unnecessary medical costs without reducing quality of care. What happened?

They simply couldn't do it. The industry is being clobbered because of its inability to hold down costs. By removing medical deductibles in order to get new customers, the patients can go to their doctor any time they want, because it's free.

The end result: All of the companies' health-care costs are rising faster than their incomes. They can't raise their premiums enough to make money, because of tremendous competition from all of the other



Ronald Bronow is a dermatologist who practices in Los Angeles.

HMOs and the pressure from employers to keep prices down.

Sixteen HMOs disappeared in 1987, and several states are taking action to protect consumers, forcing solvent HMOs to set up guarantee funds to pay claims of other HMOs who go broke.

The real crisis today is with the HMOs that treat Medicare patients. Twenty-nine plans did not renew their contracts for 1988, resulting in disruption of health care for 84,000 senior citizens. Last year was the first in which there was a decrease in enrollments since the program started in 1985.

So, the HMOs are utilizing some tough options:

- Dump the Medicare patients because they get sick and use more services.
- Increase the premiums and reduce the benefits to patients.
- Renegotiate lower rates for physicians.

At the same time the HMOs are spending millions of dollars on advertising (money that used to go for patient care), trying to attract young and healthy subscribers who don't get sick — and not enrolling those who might. Then they make it inconvenient for those who really get sick to get care. Maybe the patient will quit and go somewhere else.

Finally, they put the pressure on the doctor to perform fewer services. The main way they do that is by assigning the patient to a "gate-keeper" doctor, who evaluates whether the patient needs consultations, X-rays or laboratory tests. A review committee must then rule on the doctor's requests. These judgments are frequently based more on economics than patients' needs.

On top of this, all outside services or consultations approved are deducted from the "gate-keeper's" salary. Many people have called this form of treatment "undercare," the purpose being to delay.

(Note: This discussion does not include Kaiser, a high-quality HMO that does not pay its physicians more money if they provide less care to their patients.)

To us physicians, this is immoral. We did not go to medical school to learn how to

> ***The industry is being clobbered because it can't hold down costs***

ration care so a corporate executive can show a profit to his stockholders. We can't accept inferior quality of are: A Northern California HMO told its physicians to "avoid aggressive or heroic measures such as resuscitating the frail elderly, where a high morbidity or mortality rate can be expected."

So, what have the HMOs accomplished? By grabbing the young healthy patients, higher risks are pushed into the other insurance companies. That's why your premiums are skyrocketing.

Hospitals, because they have to discount to these "managed care" plans, are now unwilling to take care of the poor.

What has been saved by all of this? Nothing. Medical inflation continues at the same rate, while an increasing number of American citizens are subjected to rationing and second-rate care.

What should we do about this? We must start over. There should be a national dialogue on the flaws in our health-care system, with proposals to reform it.

Finally, we must protect the freedom and integrity of the physician while extending health care to more people. Don't lose your rights to receive quality care and our rights to practice quality medicine.

Mental care seen reducing medical costs

The provision of necessary mental treatment for many medical patients can lead to a decline in subsequent medical costs, according to a study described in the October issue of the *American Journal of Psychiatry*.

The savings are particularly significant among the hospitalized and the elderly, according to the report.

The two-part study analyzed data from 58 published and unpublished research reports comparing hospitalized patients' medical costs before and after they received mental health services. "Eighty-five percent of all these studies reported a decrease in medical utilization following psychotherapy," wrote Emily Mumford, PhD, of the New York State Psychiatric Institute.

She and her colleagues concluded that the "clearest cost-offset effect appears largely in the reduction of inpatient rather than outpatient costs. . . . Older patients show larger cost-offset effects than younger ones."

Twenty-two of the 58 studies dealt with medical-surgical patients who received emotional, psychological, and educational support during hospitalization. These studies generally found that these patients recuperated faster than those who did not receive such support, with an average reduction in inpatient length of stay of 1.5 days.

ANOTHER 26 studies compared medical utilization before and after psychotherapy. Twenty of the studies showed an average decline of 33% in the use of medical services. Five other studies comparing the use of inpatient and outpatient costs after psychotherapy showed that inpatient costs dropped more dramatically.

Dr. Mumford pointed out that psychological support had a greater effect on people older than 55. A study of elderly patients hospitalized for leg fractures showed that those who received psychiatric consultation left the hospital an average of 12 days earlier than those who did not, and "twice as many of the patients who had been provided [with] consultation returned home rather than being discharged to a nursing home or other institution," the report stated.

The second part of the study was based on a review of data from the files of the Blue Cross/Blue Shield Federal Employes Plan, which covers 6.7 million people.

Dr. Mumford and her associates, comparing claims from individuals who had received psychotherapy with those who had not, found that medical charges for all patients increased during the study. The authors reported, however, that "following mental health treatment, the medical care charges of the treatment group increased more slowly than the average inflation rate of 13.6% per year. . . . In contrast, the charges of the comparison group increased faster than the inflation rate."

Psychotherapy Reduces Costs For Other Care, Study Shows

Support for the contention that psychotherapy leads to lower costs for other medical services was bolstered recently with the completion of a major study at the University of Colorado Health Sciences Center.

Researchers Emily Mumford, Herbert J. Schlesinger, Gene V. Glass, Cathleen Patrick (all Ph.D.'s), and Timothy Cuerdon analyzed 58 cost-offset studies completed since 1978 and the 1974–78 claims files of the Blue Cross and Blue Shield Federal Employees Program (FEP), which contains insurance information on 6.7 million persons. They found that outpatient mental health treatment (including psychotherapy and less intensive interventions) led to significant reductions in utilization of medical services, particularly inpatient services.

Their analyses also indicated a larger cost-offset effect among older people who had received mental health treatment than among young or middle-aged psychotherapy patients. Their findings will be published in the October issue of the *American Journal of Psychiatry*.

The two sets of data the researchers analyzed produced similar results.

Data from the 58 cost-offset studies indicated that in 85 percent of the studies there was a decrease in medical care utilization after psychotherapy. The researchers analyzed only the 22 studies that could not be biased by self-selection as in the naturalistic, time-series ones that compared the individual's medical care use before and after psychotherapy. They found that after mental health treatment, inpatient hospitalizations were approximately 1.5 days shorter than those of the control group's average of 8.7 days.

Most of the experimental (treatment) group received only modest psychotherapeutic intervention, while the control group received just a standard medical regimen.

In five of the controlled experimental studies, Mumford and her colleagues were able to analyze data on both inpatient and outpatient medical utilization. The average change after psychotherapy was -73.4 percent for inpatient and -22.6 percent for outpatient care.

Inflation Rate

The researchers also compared the FEP data with inflation rates for the five-year study period. They found that while medical charges for all groups increased during this period, the total care charges for the psychotherapy treatment group—all of whom had at least seven outpatient and no inpatient visits—increased more slowly than the average inflation rate of 13.6 percent. Similar charges for the comparison group increased faster than did the inflation rate.

After the initial year, the psychotherapy group had significantly lower inpatient medical care costs in each of the other four years analyzed. In each year the treatment group outspent the comparison group for outpatient care, and the differences remained constant throughout the period. The cost reductions were thus attributable primarily to lower inpatient costs.

Age

Age turned out to be a significant factor in the degree of cost-offset following mental health treatment.

Twenty-three of the 58 studies reported the mean age of the subjects, including 15 studies of inpatients, four of outpatients, and four of alcoholic outpatients. In all three settings older people had greater reductions in medical care use after mental health treatment.

Comparable results were evident when they analyzed the FEP data for age differences. Patients 55 years of age or older showed the greatest decrease in hospital charges after psychotherapeutic intervention. Their average inpatient medical charges in 1974, the first year of the study period, were more than $160 higher than those of the comparison group. By 1978 the treatment group was spending $70 less than the comparison group. Differences in outpatient expenses were not significant.

Using research showing that elderly persons suffer more emotional distress than younger ones—due largely to chronic illnesses, loss of friends, loved ones, or income, and forced relocation—yet receive proportionally less psychiatric care, Mumford and colleagues suggest that "underutilization of mental health services by the elderly may result in needless suffering among the elderly and needless cost to society."

Physicians spend less time with their older patients, the researchers point out, and thus offer little emotional support to the group that could benefit most from a sympathetic ear. Nonpsychiatric physicians are often unaware of how important it is for them to boost the determination of older patients to continue taking medication as prescribed and to follow other medical advice.

The problem is compounded and the cost of medical care increased, they suggest, by the frequent reluctance of older patients to confide emotional problems to younger physicians, who may in turn neglect to ask about emotional and psychological problems that may be affecting their elderly patients.

ALASKA
PSYCHOLOGICAL
ASSOCIATION 3211 Providence Drive, Anchorage, Alaska 99508 (907) 786-1711

HB 274

POSITION PAPER

Issue: Alaskan Psychologists, although licensed by the State of Alaska, are omitted from the statutes which determine the type of care allowed by and covered under the Medicaid program.

Position: The Alaska Psychological Association is proposing changes in the current statutes to allow Medicaid patients to receive psychological services with consumer choice regarding the licensed provider of the service.

Current statutes create a situation which:

1) Discriminates against the needy and those in remote locations;
2) Is more costly to the Medicaid system;
3) Limits the quality of care available to all Alaskans;
4) Results in a restraint of trade.

The proposed changes would correct this situation and allow psychologists to receive compensation for services provided to Medicaid patients. Currently, a number of psychologists provide needed care to Medicaid patients without compensation, or they are forced to resort to the courts in legal action against agencies of the State of Alaska to receive compensation. It is currently the practice of the Alaska Attorney General's office to settle such suits out of court when possible. Many psychologists feel that reasonable changes in the statutes by the legislature are the only recourse left to them, short of joining the growing number of costly and time-consuming suits. They have elected to pursue these changes through their professional Association.

The Federal Medicaid program allows the various states to determine eligibility and types of care covered by the program.

A variety of other professional health services are provided for under Alaska statutes pertaining to Medicaid. These include optometrists, physical therapists, nurse midwives, physicians and others.

A growing number of states, currently about half, provide for Medicaid recipients to receive independent psychological services.

People covered by private insurance and even employees of the State of Alaska covered by Alaska's employee health care plans are able to receive the services of an independent psychologist.

However, Alaskans who are Medicaid recipients may not choose freely between equally qualified providers. They are also denied equal access to treatment by care providers offering non-drug approaches.

The Alaska Psychological Association hereby requests your support of Senate Bill 29, which allows Medicaid recipients access to psychological services.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 274(HESS) NO..
PUBLISH DATE: HOUSE 3/13/90

FISCAL NOTE

cc

REQUEST:

Revision Date: 2/13/90
Title: An Act Relating to Psychologists' Services
Sponsor: House HESS Committe
Requestor:

Agency Affected: Health and Social Services
BRU: Medical Assistance
Medical Assistance Administration
Components: Medicaid Non-Facility
Claims Processing

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	61.2	71.4	81.8	93.7	107.4	123.1
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	291.2	708.8	862.6	1,049.8	1,277.6	1,554.9
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	352.4	780.2	944.4	1,143.5	1,385.0	1,678.0

CAPITAL	0	0	0	0	0	0

REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	168.4	372.2	451.7	548.3	665.6	803.2
FEDERAL FUNDS	184.0	408.0	492.7	595.2	719.4	869.8
OTHER	0	0	0	0	0	0
TOTAL	352.4	780.2	944.4	1,143.5	1,385.0	1,678.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

See attached analysis. As published, HB No. 274 has no effective date. The starting date of the addition of psychologists' services to the Medicaid Program is assumed to be January 1, 1991.

Prepared by: Kimberly B. Busch
Division: Division of Medical Assistance
Phone: 465-3355
Date: 2-13-90

Approved by Commissioner: [illegible signature]
Agency: Department of Health and Social Services
Date: 2-14-90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

House Bill No. 274
Fiscal Note Attachment
Cost Analysis for Psychologists' Services

I. Contractual Costs

a. The Alaska Medical Payments System will require modification to pay psychologists as a new service. The contractual costs include the following: provider manuals, training, a new claims form, tables included in the system for psychologists' services, computer programming, computer reports, the addition of collocation codes, the provision of notice to providers, provider relations, and a computer system test. This is a one-time FY91 cost of 30.0. (15.0 FED, 15.0 SGFM)

b. The Division of Medical Assistance must pay the claims processing contractor $6.23 for each claim processed. Estimated claims volume for FY91 is 5,000, assuming a January 1, 1991 start date. FY91 processing costs = 31.2. All costs of claims processing are 75% FED, 25% SGFM.

II. New Grants/Claims Costs

a. There is no accurate method for determining the numbers of Medicaid eligibles who will use this new coverage, the numbers of providers who will choose to enroll, and the initial costs per type of service that they will provide. Cost estimates are based on the following assumptions:

(1) 50 psychologists will enroll as providers in the first year.

(2) Approximately 24 of these new providers are currently providing services indirectly, supervised by and/or billing through a physician or psychiatrist. About half of these are billing Medicaid at a rate 15% lower than the rate charged by psychiatrists. Payments to the 12 now billing at the higher rate will be reduced by $14,400 (15% reduction X $8,000 current average psychiatrist's Medicaid billing per year, X 12 psychologists = $14,400 Medicaid savings).

(3) Logic suggests that billings from physicians and psychiatrists who supervise the psychologists now providing services to Medicaid eligibles would decrease if these psychologists were to enroll directly. However, experience in other states that have added psychologists' services has varied so much on this point that we cannot safely assume any decrease in current billings.

(4) Approximately 26 psychologists in private practice who are not currently serving Medicaid recipients will enroll. Alaska Psychological Association data indicates these new providers will see an average of 21 patients per week for a total of 34 hours per week, and that they charge $90 per hour for private sessions.

(5) We assume that psychologists will not differ from other medical professionals enrolled as Medicaid providers, in that Medicaid patients will, on average, not exceed 15% of their total patient load. Cost for new providers will be 34 hours per week X $90/hour X 15% X 50 weeks/year X 26 psychologists = $596,700.

(6) $596,700 new costs minus $14,400 savings = $582,300 net costs for a full year of psychologists' services. The time required for data system changes, promulgation of regulations, and provider enrollment activities necessitate a starting date no earlier than January 1, 1991. FY91 costs will therefore be 50% of a full year:

145.6	SGFM
145.6	FED
291.2	Total

(b) Costs for FY92 through FY96 are computed from the FY90 base estimate, adjusted for a full year, and increased annually by 21.7% (7.1% for price increases, 4.2% for increases in the number of eligible recipients, and 10.4% for utilization increases).

Claims processing costs are billed at $6.23 per claim. For FY92 through FY96, FY91 costs, adjusted for a full year, are increased by 14.6% annually (4.2% for increases in the number of eligible recipients, and 10.4% for utilization increases).

HOUSE COMMITTEE REPORT

(11)
Date Referred: April 27, 1989 FURTHER REFERRALS:

Date of Committee Action: 4/28/89

The FINANCE Committee considered: HB 276

HOUSE BILL NO. 276 [PERMANENT FUND - AMERADA HESS LITIGATION]
"An Act amending the permanent fund dividend fund statutes to permit litigation of State v. Amerada Hess in Alaska courts; and providing for an effective date."

RECOMMENDATIONS:
[X] be replaced with CSHB 276 (Fin.) [ ] the same title [X] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ____________ Committee

ADOPTS: ____________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact ____________
[ ] zero fiscal note ____________
[ ] zero with analysis ____________

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) ____________
(2) [X] zero fiscal note(s) 4/7/89 (Rev.(2))
[ ] zero fn/analysis ____________

SIGNING DO PASS:

Ronald L. Larson
Ramona L. Barnes
[illegible]
[illegible]
[illegible]
Steve Frank

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend
Lyman Hoffman		X	

Ronald L. Larson
Chairman's Signature
Lyman Hoffman

No. 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 276
PUBLISH DATE: HOUSE 4/7/89

FISCAL NOTE

REQUEST

Revision Date:
Title: An Act amending the PFD statutes

Agency Affected: Revenue
BRU: Permanent Fund Dividend Division

Sponsor: Rules/Governor
Requestor: Rules

Components: Permanent Fund Dividend Division

Adopted

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
OPERATING						
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LANDS & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: This bill would have no affect on the administration of the dividend program.

Prepared By: Ervin Jones
Division: Permanent Fund Dividend Division

Phone: 465-2323
Date: April 6, 1989

Approved by Commissioner: [signature]
Agency: Revenue

Date: 4/6/89

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Item 3
No. 1

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 276
PUBLISH DATE: HOUSE 4/7/89

Adopted

FISCAL NOTE

REQUEST:

Revision Date:
Title: Amending the PF dividend fund statutes to permit litigation of State v. Amerada Hess
Sponsor: Rules-Request of Governor
Requestor: Governor

Agency Affected: Revenue-APFC
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact - see attached

Prepared by:
Division: David A. Rose, Exec. Director
Alaska Permanent Fund Corporation
Phone: 465-2047
Date: [illegible]ril 6, 1989

Approved by Commissioner:
Agency:
Date: 4/6/89

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Continuation of Fiscal Note/Bill Analysis

Permanent Fund Dividend Fund Statute Amendment to Permit Litigation of State v. Amerada Hess in Alaska

This bill would eliminate certain due process arguments currently advanced by the defendants in State v. Amerada Hess, by neutralizing the impact upon Permanent Fund dividends of a decision favorable to the State. The Alaska Permanent Fund's legally mandated share of all funds received in a settlement of the litigation, including associated interest, would be credited to the principal of the Fund at the time of receipt. It is expected that the settlement could range from $400 million to $2.6 billion, the latter number estimated by the defendants.

All future earnings on this portion of Fund principal would be forever excluded from Permanent Fund dividend calculations. In this manner, the bill prevents all income earned from a judgment favorable to the State from entering the Permanent Fund dividend stream, and makes it possible to continue the trial in an Alaska court on schedule.

IN THE HOUSE BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 276 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to transfers to the dividend fund; and providing for an effective date."

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

* Section 1. AS 43.23.045(b) is amended to read:

(b) Notwithstanding any contrary provision of law, each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending on June 30 of the current year and available for distribution. <u>However, income earned on money awarded after trial in State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District) shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund.</u>

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

Item 2

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 7, 1989

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that amends AS 43.-23.045 by excluding potential revenue from the State v. Amerada Hess case from the permanent fund earnings available for distribution as dividends.

Under current law, the commissioner of revenue must transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which is determined to be available for distribution. Normally this would include income derived from litigation involving the state's royalties. However, in November 1987 three defendants in the State v. Amerada Hess royalty litigation filed suit in federal court to prevent that case from being tried in any court in Alaska. Standard Alaska Petroleum, Exxon, and Chevron USA claim that no judge or jury in Alaska can provide them with a fair trial since all judges and jurors have a financial stake in the outcome and are, therefore, unconstitutionally biased. In particular, the companies assert that these judges and jurors qualify for permanent fund dividends and would financially benefit if the state prevailed in the Amerada Hess case because any money awarded the state would increase the amount available for distribution.

The state Department of Law is vigorously contesting this claim and was successful in having the federal case dismissed in the United States District Court. However, the matter has been appealed to, and is pending before, the Court of Appeals for the Ninth Circuit. Were we to lose this case, the state would be faced with having a non-Alaska court interpreting the meaning of an Alaska lease form and deciding fundamental state policies regarding oil and gas leasing in this state. If the case is still on appeal at the time of trial, now scheduled for April 4, 1990, there would be a cloud hanging over the lengthy proceedings, perhaps compelling enough to lead to further postponements.

This bill would eliminate the due process arguments advanced by the companies, thus making it possible for the trial to stay on schedule in an Alaska court where it belongs. This result is achieved by preventing income earned from any judgment favorable to the state from entering the permanent fund dividend stream. This sacrifice is a small price to pay for assuring that Alaska courts will be the final arbiters of Alaska royalty law.

Sincerely,

Steve Cowper
Governor

Item 5

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ 1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ 1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☒ P.O. BOX K—STATE CAPITOL
JUNEAU ALASKA 99811-0300
PHONE: (907) 465-3600

April 10, 1989

The Honorable H. A. Boucher
Chair, House State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: Proposed committee
substitute for HB 276
Our file: 773-89-0114

Dear Representative Boucher:

It has come to our attention that the title of HB 276 could be made more specific and that it would be helpful to make express a point that is now only implied in the amendment in sec. 1 of the original bill. A proposed committee substitute, drafted for possible adoption by your committee, is attached.

The change in the bill title makes clear that the bill is to prevent amounts received as a result of the State v. Amerada Hess litigation from being used for permanent fund dividends. The current title merely indicates that the effect of the bill will be to permit litigation of that case in Alaska courts and thus make moot the current legal challenge to having that case heard by an Alaska court.

With regard to the change in the text, the original version of the bill relies on the application of existing law with regard to oil and gas income. The change offered by this draft committee substitute makes clear that money received as a result of the State v. Amerada Hess litigation will be treated the same as other income of the Alaska permanent fund, except for permanent fund dividends. Both versions make clear that that money is not available for distribution to the dividend fund from which permanent fund dividends are paid.

Thank you for your consideration of this matter.

Yours truly,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Art Peterson
Arthur H. Peterson
Assistant Attorney General

AHP/cb

Enclosure

cc w/encl.: Robert A. Evans
Legislative Liaison
Office of the Governor

Bruce Botehlo
Assistant Attorney General
Juneau

MEMORANDUM

State of Alaska
Department of Law

TO: Members of the Legislature

DATE: April 24, 1989

FILE NO:

TEL NO: 465-3600

SUBJECT: HB 276 and the recent court decision in Standard v. Schaible

FROM: Douglas B. Baily
Attorney General

The recent Ninth Circuit Court of Appeals decision in Standard v. Schaible did not resolve the bias issue -- it only delayed its resolution. Basically, the court ruled that the issue was not "ripe", and that the federal courts would rule on the issue only after the Alaska courts had the initial chance to decide whether there was unconstitutional bias because of the potential impact of the Amerada Hess case on the amount of Permanent Fund dividends. The matter was dismissed "without prejudice" and with the express invitation to the Producers to come back to the federal courts if the State did not provide a fair and unbiased forum for the resolution of the dispute. The Ninth Circuit Court of Appeals stated:

> In dismissing this matter without prejudice, the district court issued a challenge to the State of Alaska to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors within a reasonable time. The district court invited the Producers "to reopen this federal case" if the State Officials fail to provide an unbiased forum within a reasonable time. We applaud the district court's wise resolution of a very delicate test of the joint responsiblility of state and federal courts to provide every person with due process.

The burden, therefore, is still on the State to guarantee a fair tribunal. Without passage of legislation, the State would have to convince both the state courts and the federal courts that the effect on Permanent Fund dividends does not raise constitutional problems. Failure to convince either tribuanl would result in losing the state forum. In essence, the Ninth Circuit Court of Appeals merely passed on the issue for the time being, reserving its look at the issue until after the state Superior Court and Supreme Court has a chance to make the initial judgment.

DBB:jf

002

ALASKA OIL COMPANY, a general partnership, and Charter Oil (Alaska), Inc., a corporation, Appellants,

v.

STATE OF ALASKA, Appellee.

Civ. A. Nos. A83-428, A83-429.
Bankruptcy Nos. 1-82-0000-1, 1-82-0000-2.

United States District Court, D. Alaska.

Jan. 4, 1985.

On appeal from decision in the United States Bankruptcy Court, David N. Naugle, J., ruling for debtors, but denying attorney fee award, debtors moved for recusal. The District Court, Fitzgerald, J., held that judge's entitlement, as Alaska resident, to Alaska permanent fund dividend was neither "financial interest in the subject matter in controversy" nor "any other interest that could be substantially affected by the outcome of the proceedings" so as to require disqualification from hearing appeal which involved amounts which debtors owed state as royalties under mineral leases.

So ordered.

1. Judges ⇐42

Entitlement of federal judge, as resident of Alaska, to dividends from permanent fund and in which percentage of all mineral lease rentals, royalties, etc., received by state is placed, is not "financial interest," within meaning of statute which governs disqualification of federal judges in Alaska permanent fund, since entitlement to dividend does not confer any ownership interest in permanent fund. 28 U.S.C.A. § 455.

See publication Words and Phrases for other judicial constructions and definitions.

2. Judges ⇐39

Alaska permanent fund, in which percentage of mineral lease rentals, royalties, etc., received by state is placed, was not part of "subject matter in controversy" within statute which governs judge's disqualification, in appeal from decision of bankruptcy court dismissing involuntary bankruptcy proceedings, in which basic issue faced was whether state was entitled to additional payments under royalty oil sale agreement with debtor; rather, on appeal, issues were whether bankruptcy court should have entered findings of fact and conclusions of law and whether bankruptcy court should have awarded attorney fees to debtors. 28 U.S.C.A. § 455.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judges ⇐39

Entitlement of federal judge, as resident of Alaska, to dividend from permanent fund, in which percentage of mineral lease rentals, royalties, etc., received by state is placed, did not warrant disqualification of judge, for having "any other interest that could be substantially affected by the outcome of the proceeding" from presiding over appeal in bankruptcy initiated by state's involuntary petitions against oil companies, in which permanent fund was only indirectly implicated and amount at stake was possible increase in individual dividends of only $1.78 annually. 28 U.S.C.A. § 455(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

Charles E. Cole, Law Offices of Charles E. Cole, Fairbanks, Alaska, Stuart L. Kadison, Lee L. Blackman, Monica Bachner, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, Cal., Stephen D. Busey, Douglas P. McClurg, Smith & Hulsey, Jacksonville, Fla., Richard B. Levin, Anthony Castanares, members of Stutman, Treister & Glatt, Professional Corp., Los Angeles, Cal., for appellants.

Norman C. Gorsuch, Atty. Gen. of State of Alaska, Juneau, Alaska, Haley J. Fromholz, Jonathan M. Landers, Kenneth M

Glazier, Steven S. Rosenthal, Morrison & Foerster, Los Angeles, Cal., for appellee.

OPINION

FITZGERALD, District Judge.

Background

The original dispute had to do with the sale of oil which the State of Alaska was entitled to receive as "in kind" royalties under its North Slope mineral leases. Appellant Alaska Oil Co. (AOC) succeeded in 1979 to the obligations to purchase the royalty oil under a 1978 contract. Charter Oil (Alaska), Inc. (COA) owns a majority interest in AOC.

A dispute arose as to whether AOC fulfilled its contractual obligations under the agreement. In December 1981, AOC filed suit for declaratory judgment against the state in the state superior court.[1] In February 1982, the state filed involuntary petitions in bankruptcy against AOC and COA seeking payments allegedly due under the contract.[2]

Judge David N. Naugle, Bankruptcy Judge for the Central District of California, was designated by Chief Judge James Browning of the Ninth Circuit to Alaska and was assigned the bankruptcy court proceedings. On January 21, 1983, after five days of trial, Judge Naugle ruled in favor of AOC and COA, and requested that the companies submit proposed findings of fact and conclusions of law. AOC and COA did so on February 11, 1983, and also filed a Motion for an Award of Reasonable Attorneys' Fees. At a post-trial hearing on April 27, 1983, the court denied the award of attorneys' fees. It also settled the findings of fact and conclusions of law, and announced them from the bench.

The state then requested that the court not enter adverse findings, and, at the court's suggestion, the state moved for leave to dismiss the petitions with prejudice without formal entry of findings of fact and conclusions of law. On June 15, 1983, the bankruptcy court granted the state's motions. The Order of Dismissal, entered on June 29, 1983, specifically denied the request for entry of findings and conclusions and the request for attorneys' fees.

On July 7, 1983, AOC and COA appealed to this court. The case was initially assigned to Judge von der Heydt, but later reassigned to me. On appeal, AOC and COA seek reversal of the decision of the bankruptcy court, and a remand with instructions to enter the settled findings of fact and conclusions of law and to determine and enter judgment for the reasonable attorneys' fees incurred by AOC and COA.

On October 25, 1983, appellants AOC and COA filed a Motion for Recusal, requesting that I disqualify myself from hearing the appeal, and that the Chief Judge of the Ninth Circuit designate a nonresident district judge to preside. In support of their motion, AOC and COA cite 28 U.S.C. § 455 (1982) which provides for disqualification if a judge has "a financial interest in the subject matter in controversy ... or any other interest that could be substantially affected by the outcome of the proceeding." AOC and COA observe that a portion of any income the state might recover in this action would be deposited in the state's permanent fund, and that part of the income from the fund would be distributed to all Alaska residents, including resident federal judges, as a permanent fund dividend. This, AOC and COA reason, gives the judge an "interest" in the proceedings, thus requiring disqualification.

Applicable Statutes

Title 28 U.S.C. § 455 (1982) provides for disqualification of federal judges under certain circumstances. In relevant part, this statute reads:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

1. *Alaska Oil Co. v. State of Alaska*, No. 4FA 81-2071 (filed December 17, 1981).

2. *In re Alaska Oil Co.*, No. 1-82-00001 (Bankr.Ct. filed February 26, 1982); *In re Charter Oil (Alaska), Inc.*, No. 1082-00002 (Bankr.Ct. filed February 26, 1982).

(b) He shall also disqualify himself in the following circumstances:

....

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

....

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

....

(4) "financial interest" means ownership of a legal or equitable interest, however small ...;

....

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

The Alaska permanent fund was created by art. IX, § 15 of the Alaska Constitution which provides:

> At least twenty-five percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

Alaska Stat. title 43, ch. 23 (1983) provides for permanent fund dividends. Under this statute, 50% of the income from the permanent fund is transferred each year to the dividend fund. Alaska Stat. § 43.23.045(b) (1983). The dividend fund is then distributed each year in equal shares to all eligible Alaska residents. *Id.* § 43.23.025. In general, an individual who has been a state resident for at least six months is eligible to receive a permanent fund dividend. *Id.* § 43.23.005(a).

Issues

(1) Do the federal judges of the District of Alaska have a "financial interest," as that term is defined in 28 U.S.C. § 455, in the Alaska permanent fund?

(2) Is the Alaska permanent fund part of the "subject matter in controversy"?

(3) Does the judge's entitlement to a permanent fund dividend constitute "any other interest that could be substantially affected by the outcome of the proceeding"?

Title 28 U.S.C. § 455 defines "financial interest" as "ownership of a legal or equitable interest however small." I must initially determine whether as an Alaska resident I have a "financial interest" in the Alaska permanent fund.

Alaska Constitution art. IX, § 15 mandates that "[a]t least twenty-five percent of all mineral lease ... royalties [and] royalty sale proceeds" be placed in the permanent fund. In these involuntary bankruptcy proceedings, the state seeks payments allegedly due under a contract for the sale of the state's royalty oil. Thus, if successful, any money recovered by the state would constitute "royalty sale proceeds," and at least 25% would be deposited in the permanent fund. Under the statutes providing for the permanent fund dividend, half of the annual income from these proceeds would be distributed to all eligible residents. Alaska Stat. §§ 43.23.025, 43.23.045 (1983).

[1] I conclude that entitlement to a permanent fund dividend is not a "financial interest" as that term is defined in 28 U.S.C. § 455(d)(4). Entitlement to a dividend does not confer any "ownership" interest in the permanent fund. The commentary on Canon 3(C) of the ABA Code of Judicial Conduct, on which § 455 was based, supports this conclusion:

> Not all of a judge's economic interests are defined as "financial interests." ... The "financial interest" of a judge that will disqualify him is his *direct legal or*

equitable ownership no matter how small ... in the subject matter in a proceeding before him.

E. Thode, Reporter's Notes to Code of Judicial Conduct, 69–70 (1973) (emphasis added). The reporter further noted that certain interests were not direct financial interests. These included financial interests as a customer of a public or private utility, as a taxpayer, and as a premium payer in a stock insurance company. *Id.* at 66; *see also New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 719 F.2d 733, 734 (5th Cir.1983) (en banc) (holding that judge's status as rate payer did not require automatic disqualification); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir.1980) (same).

I therefore conclude that I do not, as an Alaska resident, have a "financial interest" in the permanent fund.

[2] Turning to the second part of the statutory requirement for disqualification based on "financial interest," I further conclude that the permanent fund is not a part of the "subject matter in controversy." The case at bar in the district court is an appeal from a decision of the bankruptcy court dismissing the involuntary bankruptcy proceedings. One of the basic issues faced by the bankruptcy court was whether the state was entitled to additional payments under the royalty oil sale agreement. Thus the permanent fund was more directly implicated in the bankruptcy court proceedings.

The same is not true in this court, however. There are two issues before me in this appeal: (1) whether the bankruptcy court should have entered findings of fact and conclusions of law, and (2) whether the bankruptcy court should have awarded attorneys fees to AOC and COA. Whatever decision I make here can have no direct effect on the permanent fund.

AOC and COA argue, however, that the statute's focus on "the subject matter in controversy," rather than on the particular issue to be resolved, requires a broad interpretation of "the subject matter in controversy."[3] The companies suggest that the permanent fund is indeed part of the larger "subject matter in controversy" for these reasons: The merits of the royalty payment dispute are currently before the state superior court in a declaratory judgment action. If the bankruptcy court is ordered to enter findings of fact and conclusions of law, the state court judge may give such findings and conclusions collateral estoppel effect in the state court proceeding. The outcome of the underlying royalty payment dispute, and potential permanent fund revenues, thus may be affected by whether or not I direct the bankruptcy court to enter findings and conclusions.

I conclude otherwise. While the proceedings in bankruptcy court may have had an impact on the amount of revenue obtained by the state for the permanent fund, the issues raised on appeal are otherwise. Permanent fund revenues are not at stake in this appeal. I therefore conclude that the permanent fund is not part of the "subject matter in controversy" before me.

Given my conclusion that entitlement to a permanent fund dividend is not a "financial interest in the subject matter in controversy," I now turn to the second provision of 28 U.S.C. § 455(b)(4). This provision requires disqualification if a judge has "any other interest that could be substantially affected by the outcome of the proceeding." The term "other interest" is not defined in the statute. Whereas the first provision of § 455(b)(4) requires disqualification for any financial interest, "however small," *id.* § 455(d)(4), the second provision applies only to those other interests which could be "substantially affected" by the outcome.

It has been suggested that the outcome of this test should "depend on the interaction of two variables: the remoteness of the interest and its extent or degree." Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv.L. Rev. 736, 753 (1973). To elaborate,

3. *See* Appellants' Reply to the State of Alaska' Opposition to Motion for Recusal at 3–4 (filed November 15, 1983).

> If the interest strongly resembles a direct interest—for example, stock held in a subsidiary (or parent) of the corporate party—any amount should disqualify, just as does any stock held in the party itself. As the interest becomes less direct, such as that in an enterprise carrying on business with the party, only if the extent of the interest is itself substantial can the judge's impartiality reasonably be questioned.

Id.; see also In re Virginia Electric and Power Co., 539 F.2d 357, 368 (4th Cir.1976); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3547 (2d ed. 1984).

[3] Applying this analysis to the facts of the case before me, I conclude entitlement to a permanent fund dividend does not warrant disqualification. First, as discussed above, the permanent fund is only indirectly implicated in this appeal. My decision here will not directly increase or decrease permanent fund revenues. Second, the extent of my interest is very small. AOC and COA themselves estimate that the amount at stake in these proceedings might translate into an increase of $1.78 in the annual permanent fund dividend for each Alaska resident.[4] This small amount, coupled with the indirectness of the effect, does not rise to the level of "any other interest that could be substantially affected." This conclusion comports with decisions of the Fourth and Tenth Circuits in which small, indirect, potential benefits were held to not require disqualification. *See In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Electric and Power Co.*, 539 F.2d 357 (4th Cir.1976).

In *In re New Mexico Natural Gas*, the Tenth Circuit identified additional factors to be considered under the "substantially affected" provision of § 455(b)(4). The court observed:

> In view of the statutory requirement that interests must be substantially affected before recusal is required, we believe Congress did not intend to require disqualification in all cases in which the judge might benefit as a member of the general public. We realize that recusal would be required by the statute if the judge owned even one share of stock in a party to the litigation. But an interest shared by the judge in common with the public is distinguishable for at least two reasons. First, the policy to promote public confidence in the impartiality of the judicial system is not served to as great an extent by disqualifying a judge who would receive only such a benefit. It is not simply a question of de minimis effect; a personal benefit or detriment shared in common with the community at large is perceived to have a different psychological effect on a judge than would a benefit or detriment not so shared.
>
> Second, practical problems abound if recusal is required whenever a judge benefits simply as a member of the common populace. There is much litigation today that can have far-reaching effects on large segments of the nation. For instance, an antitrust suit against a major oil company could reduce gasoline prices within the entire United States, and hence affect the transportation costs of every judge. The ratemaking proceedings of public utility commissions throughout the nation are reviewed by the courts in the states involved, where most of the reviewing judges are customers of the telephone, electric, water or gas company; yet there is no suggestion in any cases we have seen that these judges should disqualify themselves. Federal and state judges sit every day on tort, patent or other cases in which potentially large verdicts could affect an insurance or other company's profitability, and the loser is in a position to pass the loss on through higher future costs which increase the judges' cost of living.

620 F.2d at 796–97.

Similar considerations apply here. According to the records of the Clerk of the

4. *See* Affidavit of Charles E. Cole in Support of Motion for Recusal, exhibit 2 at 11-12 (filed October 25, 1983).

Court for this district, 60 cases have been filed here since 1981 which likely involve potential permanent fund revenues. This averages 15 cases per year, and these cases often entail far-reaching and complex litigation. Moreover, I note that the state is entitled to 90% of oil revenues received by the federal government from federal oil leases in the state. Cases involving federal leases thus may also have an impact on the permanent fund. It is readily apparent that frequent assignment of nonresident judges to hear these cases would impair the effective administration of justice in the federal court in the District of Alaska.

For these reasons, I conclude that my entitlement to an Alaska permanent fund dividend does not constitute either a "financial interest in the subject matter in controversy" nor "any other interest that could be substantially affected by the outcome of the proceedings." Accordingly, there are no grounds for disqualification under 28 U.S.C. § 455. The Motion for Recusal is therefore DENIED.

ORDERED ACCORDINGLY.

In re STORAGE TECHNOLOGY CORPORATION, Debtor.

BENDER & TREECE, P.C., Movant,

v.

STORAGE TECHNOLOGY CORPORATION, Respondent.

Bankruptcy No. 84 B 05377 G. Motion No. 1130J43.

United States District Court, D. Colorado.

Jan. 7, 1985.

As Amended Jan. 8, 1985.

Former counsel for Chapter 11 debtor moved for relief from automatic stay to perfect and otherwise enforce its attorneys' lien. The District Court, Roland J. Brumbaugh, J., held that lien was statutory and that counsel violated automatic stay when it filed its notice of lien after the bankruptcy filing.

Motion denied.

1. Bankruptcy ⇐191

An attorneys' lien is "statutory" for purpose of avoiding the fixing of a statutory lien. Bankr.Code, 11 U.S.C.A. §§ 101(45), 545(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Attorney and Client ⇐174

Under Colorado law, an attorneys' lien does not exist apart from statute. C.R.S. 12-5-119, 12-5-120.

3. Attorney and Client ⇐174

Attorneys' lien arises solely by force of a statute on specified conditions, i.e., entitlement to the fruits of a suit or settlement accruing to the client.

4. Bankruptcy ⇐659(3)

Attorneys having lien under Colorado law for services rendered Chapter 11 debtor in connection with civil action violated automatic stay by filing notice of attorneys' lien, and perfection of lien as to third parties was not retroactive so as to trigger Bankruptcy Code provision exempting the "act" of filing from the automatic stay and, thus, notice was void and lien was neither enforceable nor perfected against third parties. C.R.S. 12-5-119, 12-5-120; Bankr. Code, 11 U.S.C.A. §§ 101(45), 362, 362(a)(5), (b)(3), 546(b).

5. Bankruptcy ⇐675

Debtor in possession stands in shoes of the trustee and may exercise lien avoidance powers, but such requires filing of an adversary proceeding. Bankr.Code, 11 U.S.C.A. § 545(2); Rules Bankr.Proc.Rule 7001, 11 U.S.C.A.

Paul G. Hyman, Jr., Holme, Roberts & Owen, Denver, Colo., for Storage Technology Corp., debtor.

THE FOLLOWING DOCUMENT HAS NOT BEEN FILMED BUT IS AVAILABLE IN THE ORIGINAL FILE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANDARD ALASKA PRODUCTION COMPANY, EXXON CORPORATION, CHEVRON U.S.A., INC., *Plaintiffs-Appellants/ Cross-Appellees.* v. GRACE B. SCHAIBLE, Attorney General of Alaska, JUDITH M. BRADY, Comm'r of Natural Resources of Alaska, MARGARET J. HAYES, Director of Div. of Lands, JAMES E. EASON, Director of Div. of Oil and Gas, and WALTER L. CARPENETI, Judge of Superior Court of Alaska, *Defendants-Appellees/ Cross-Appellants.*	Nos. 88-4008: 88-4035 D.C. No. CV 87-521-RCB OPINION

Appeal from the United States District Court
for the District of Alaska
Robert C. Belloni, District Judge, Presiding

Argued and Submitted
March 7, 1989—Seattle, Washington

Filed April 21, 1989

Before: Eugene A. Wright and Arthur L. Alarcon, Circuit Judges, and Edward Rafeedie*, District Judge

*Honorable Edward Rafeedie, United States District Judge for the Central District of California, sitting by designation.

Opinion by Judge Alarcon

SUMMARY

Jurisdiction

Affirming the district court's order denying motion to dismiss, the court held that the claim was not ripe.

Standard Alaska Production Co., Exxon Corporation and Chevron U.S.A., Inc. (Producers) filed suit in the District of Alaska for injunctive and declaratory relief. They contended that continuation of an underlying state action filed by the State of Alaska against Producers and other defendants for damages for underpayment of royalties statutorily owed every Alaska resident, was a violation of Producer's fourteenth amendment right to trial before an impartial tribunal. Because of the damages sought in the underlying state action, Producers claimed that every potential judge and juror in Alaska state court had a direct and substantial pecuniary interest in the outcome of the underlying state action. Judge Belloni of the District of Oregon presided over the federal court proceedings and dismissed the Producers' federal cause of action on ripeness grounds.

[1] There was no finding by any court that Alaska could not provide an unbiased trier of fact and appellate court to consider Producers' federal constitutional claims. Merely alleging there was no competent court in Alaska did not demonstrate that Alaska's disqualification procedures were inadequate to resolve the issue of bias. [2] There was no evidence in the record to support any estimated figure by Producers establishing that as a result of a favorable judgment in the underlying state action there would be a substantial financial interest compelling disqualification for cause. [3] Producers' failure to raise their claim of bias before the

Alaska courts denied that state's judges the opportunity to determine whether they must decline to hear this matter because they have a substantial interest in the outcome. [4] Thus, the district court did not err in its determination that Producers' claim of bias could not be resolved until a factual presentation demonstrating bias was made before the state trial judge.

COUNSEL

C. Douglas Floyd, San Francisco, California, for the appellant, Chevron U.S.A., Inc.

Bruce Botelho, Assistant Attorney General, Department of Law, Oil, Gas & Mining Section, Juneau, Alaska, for the appellees/cross-appellants.

OPINION

ALARCON, Circuit Judge:

Standard Alaska Production Company, Exxon Corporation and Chevron U.S.A., Inc. (Producers), appeal from the order granting the motion of Grace R Schaible, et al. (State Officials) to dismiss this suit on the ground that the claim is not ripe. The State Officials cross-appeal from (1) the denial of their motion to dismiss pursuant to the Eleventh Amendment and (2) the refusal to dismiss this matter under *Younger v. Harris*, 401 U.S. 37 (1971).

I

We review independently, without deference to the district court's rulings, each of the issues raised on this appeal: (1) whether the district court erred in denying the motion to dismiss based on the ground that federal jurisdiction was lacking due to the Eleventh Amendment. *South Delta Water Agency v. United States Dept. of Interior*, 767 F.2d 531, 535 (9th Cir. 1985); (2) whether the district court erred in dismissing the case on ripeness grounds, *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation of Montana*, 792 F.2d 782, 787 (9th Cir. 1986); and (3) whether this suit should have been dismissed pursuant to the *Younger* abstention doctrine. *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987).

II

On September 2, 1977, the State of Alaska (Alaska) filed an action in an Alaskan trial court for injunctive and declaratory relief against Amerada Hess Corporation and eighteen North Slope oil companies including Standard Alaska Production Company, Exxon Corporation, and Chevron, U.S.A., Inc. *State of Alaska v. Amerada Hess Corporation et al.*, Civil No. IJU-77-847, (Hess). Alaska sought a declaration of its rights under certain oil and gas leases negotiated with the Producers.

On July 6, 1983, Alaska filed a second amended complaint in the state action seeking damages for underpayment of royalties pursuant to the leasing agreement. In this pleading, Alaska alleged it had not received all of its royalties because the Producers had been underestimating the value of the oil and gas taken from Prudhoe Bay and Kuparuk River oil fields. The state court proceedings are scheduled for trial on April 4, 1990.

In their amended complaint for injunctive and declaratory judgment, the Producers claim that there would be three basic adjustments to Alaska's share of royalties: (1) the lessees will owe at least $1 billion in royalties on past production; (2) the value of royalties on future production would increase by an additional $1 billion; and (3) Alaska would receive $600 million in contract adjustments on any oil previously received in the form of royalties-in-kind.

The Producers contend that "the monetary recovery sought by the state in *Hess* will substantially increase the Alaska Permanent Fund and, consequently, the annual amount of dividends from the fund that every Alaska resident has a statutory right to receive." Brief for Appellants at 3. Every resident of Alaska who applies and who meets certain residency requirements is entitled to receive an annual dividend from the earnings on the permanent fund investment. (Alaska Statute §§ 43.23.005-.015.) The residency requirements are: (1) that an applicant live in Alaska from October 1st through March 31st of the year preceding disbursement of dividends. and (2) the applicant submit a written statement of intent to remain a permanent resident of Alaska. *Id.* The amount of each year's dividend is determined by a fixed formula. (Alaska Statute 37.13.140).

III

On November 2, 1987, the Producers filed suit in the District Court for the District of Alaska for injunctive and declaratory relief under 42 U.S.C. § 1983 "on the ground that the continuation of [the state] action is a violation of their Fourteenth Amendment right to trial before an impartial tribunal." Brief for Appellants at 2. They claim that with an annual increase in dividends, "every potential judge and juror in Alaska state court has a direct and substantial pecuniary interest in the outcome of *Hess*." *Id.* at 3. The Producers argue that issuance of an injunction "would not prevent the state from pursuing its royalty claims against the *Hess* defendants, but would require it to pursue those claims in an alternative forum where the judges and jurors have no financial interest in the case, such as the court of another state." *Id.*

The State Officials moved to dismiss on the following grounds: (1) The Eleventh Amendment deprives the district court of subject matter jurisdiction; (2) There is no justiciable case or controversy; (3) Principles of comity and federalism embodied in the rule of abstention require dismissal: and (4) The complaint failed to allege sufficient facts to support a finding of a due process violation.

This matter was assigned to Judge Kleinfeld of the United States District Court for the District of Alaska. Judge Kleinfeld recused himself from presiding over this matter. Judge Kleinfeld advised the parties of the reasons he disqualified himself as follows:

> I don't think we need go so far as to examine a judge's balance sheets and the exact size of his family. Mine is five, as counsel obviously researched when they wrote their memorandum. Some judges have smaller families and they make less money off of dividends, but it doesn't matter a whole lot, it's still substantial. It's substantial enough so that it would make a good hostile headline impairing the appearance of integrity of the judicial process.

As a result of Judge Kleinfeld's recusal. Judge Belloni of the United States District Court for the District of Oregon was designated to preside over the federal court proceedings. The district court dismissed the Producers' federal cause of action on ripeness grounds. The court expressly denied the motions to dismiss based on the Eleventh Amendment and failure to state a claim. The court did not reach the State Officials' abstention arguments.

We first consider the State Officials' contention in their cross-appeal that the district court lacked jurisdiction to hear this matter because they are immune from suit under the Eleventh Amendment.

IV

The State Officials argue that there is no federal court jurisdiction over this matter because the Eleventh Amendment prohibits a citizen from suing a state. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). Eleventh Amendment immunity extends to an action or a suit filed against a state agency or official. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984). The Eleventh Amendment does not, however, preclude a suit to enjoin a state official from violating the federal constitution. *Ex Parte Young*, 209 U.S. at 159-60; *Pennhurst*, 465 U.S. at 101-103.

The Producers allege that the filing of the *Hess* action in an Alaskan state court is a violation of their right under the Fourteenth Amendment to an impartial tribunal. They contend that the monetary recovery sought in the *Hess* matter will increase the annual dividends paid to the Alaska residents. Thus, it is argued, every judge and potential juror in that state "has a direct and pecuniary" interest in the outcome of *Hess*. Brief for Appellants at 3.

The State Officials argue, however, that "the connection between them and the alleged due process deprivation must be deemed too tenuous to permit reliance upon the doctrine of *Ex Parte Young* to avoid the bar of Eleventh Amendment state immunity." Brief for Appellees at 36. They further argue that the essence of the Producers' claim "is directed at the effect of the Permanent Fund dividend program on the *Amerada Hess* judge and jury; their claim does not arise out of any allegation of unconstitutional conduct on the part of any of the defendants named here." *Id.*

The State Officials' argument is unpersuasive. They are the parties responsible for the filing and maintenance of the state court action against *Hess*. Grace B. Schaible is the Attorney General of Alaska. She is responsible for bringing civil suits on behalf of the state. (Alaska Stat., § 44.23.020(b)). Judith M. Brady, the Commissioner of Natural Resources of the State of Alaska, Mary J. Hayes, the Director of the Division of Lands, and James E. Eason, the Director of the Division of Oil and Gas are the officials responsible for collecting the royalty revenues in dispute in the state court proceedings. (*Id.* §§ 44.37.010 -.020, 38.05.035.) The action was assigned for trial before Walter L. Carpeneti of the Superior Court of the State of Alaska. The required connection with the enforcement of the act, under the doctrine announced in *Ex Parte Young*, is therefore present.

We find that the Eleventh Amendment does not bar the Producers from seeking relief in the federal courts and we affirm the district court's denial of appellees' motion to dismiss under Eleventh Amendment state immunity.

V

The Producers contend that the district court erred in granting the state officials' motion to dismiss on the ground that the issue was not ripe for review. The Producers allege that "the district court failed to address the relevant questions governing the ripeness determination." Brief for Appellants at 13.

The doctrine of ripeness is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Ripeness requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Friedman Brothers Investment Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982).

The Producers contend that their due process claim is ripe for review because "there is nothing hypothetical, speculative, remote, or contingent about the denial of due process presently resulting from the pending Alaska state court action in *Hess*." Brief for Appellants at 10. They claim that their action seeks "to enjoin *currently ongoing* proceedings before a financially interested tribunal on the ground that they have an absolute due process right to the adjudication of *Hess* by a disinterested judge and jury." *Id.* (emphasis in original). They argue that "[t]he right to a decisionmaker free of a pecuniary interest is absolute [and] it does not depend on any determination of actual bias." *Id.* at 11. The Producers assert that their "due process claim in this case thus presents a legal issue that 'will not be clarified by further factual development.'" *Id.* (citation omitted). They claim that the financial interest of every Alaskan judge or juror in the outcome of the pending state proceedings supports a ruling that, as a matter of law, Alaska cannot provide an unbiased tribunal.

The Producers argue further that the district court should not have dismissed their claim on ripeness grounds because "the state's disqualification procedures are inadequate to cure the financial bias in *Hess*, which, . . . affects every Alaska resident regardless of subjective belief, and works a per se constitutional disqualification of every judge or juror in Alaska state court." *Id.* at 24. They contend that "[s]uccessful invocation of the state's disqualification procedures would simply result in the appointment of another judge or juror having an identical pecuniary interest." *Id.* at 24-25. The Producers rely on *Gibson v. Berryhill*, 411 U.S. 564 (1973), for the proposition that "an 'adequate opportunity' does not exist where, as in this case, the state tribunal has a financial interest in the outcome of the case:

> '[*Younger*] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger v. Harris* dismissal was lacking, for appellees alleged, and the District Court con-

> cluded, that the State Board of Optometry was *incompetent by reason of bias to adjudicate the issues pending before it.*" (*Id.* at 577)(emphasis added).' "

Reply Brief for Appellants at 21.

A brief summary of the issue before the Supreme Court in *Gibson* will readily demonstrate that it does not support the Producers' argument. In *Gibson*, the Alabama Optometric Association (Association) filed with the Alabama Board of Optometry (Board) charges against various optometrists (the employee-pharmacists) who were practicing their profession as employees of Lee Optical Co. The Association asked the Board to revoke the licenses of each of the employee-optometrists. The Association alleged that the practice of optometry by individuals employed by a business establishment was unethical conduct. *Id.* at 567-68.

Two days later, the Board filed a suit in state court against Lee Optical Co. "seeking to enjoin the company from engaging in the 'unlawful practice of optometry.' " *Id.* at 568. The state court enjoined Lee Optical from practicing optometry without a license or from employing licensed optometrists. Thereafter the Board scheduled hearings on May 26th and 27th on the unethical conduct charges brought against the employee-optometrists by the Association.

The employee-optometrists filed suit in the United States District Court against the Board, its individual members, and the Association pursuant to the Civil Rights Act, 42 U.S.C. § 1983, for an injunction against the scheduled license revocation proceedings. *Id.* at 569. The employee-optometrists alleged that they could not get a fair and impartial hearing because the Board was biased. *Id.* at 570.

The district court concluded that the Board was so biased by pecuniary interests that it could not conduct the revocation hearings. *Id.* at 578. The district court found that of the

192 licensed optometrists in Alabama, 92 were employed by a business establishment. None belonged to the Association. Each member of the Association was an independent optometrist engaged in private practice for his own accord. Only members of the Association were eligible to be members of the Board. *Id.* at 578. The district court concluded from these facts that revocation of the employee-optometrists licenses "would possibly redound to the personal benefit of members of the Board." *Id.* at 578.

The Supreme Court concluded that the district court's findings were not clearly erroneous. *Id.* at 579. Accordingly, the Supreme Court held in *Gibson* that, based on the district court's findings, "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose." *Id.* at 579. The Supreme Court also concluded that the district court did not err in failing to abstain because the matter was pending before the Board. *Id.* at 577. The Court instructed that the application of *Younger v. Harris* "presupposes the opportunity to raise and have timely decided by a *competent* state tribunal the federal issues involved." *Id.* (emphasis added). The Supreme Court concluded that "the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it." *Id.*

[1] In the matter before this court, there has been no finding by any court that Alaska cannot provide an unbiased trier of fact and appellate court to consider the Producers' federal constitutional claims. The Producers have not presented to the state courts their claim that all Alaskan judges and prospective jurors are biased because of a substantial pecuniary interest in the outcome of the pending proceedings in *Hess*. The simple fact that the Producers claim that there is no competent court in Alaska to preside over the injunctive and declaratory relief action does not demonstrate that Alaska's disqualification procedures are inadequate to resolve the issue of bias. In *Ohio Civil Rights Comm'n v. Dayton Chris-*

tian Schools, Inc., 477 U.S. 619 (1986), the Supreme Court observed:

> [W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'

Id. at 628 (citation omitted).

In *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), the appellant obtained an injunction from the District Court of Nevada to bar the remaining unrecused judges of the Supreme Court of Nevada from hearing disciplinary proceedings against an attorney based on affidavits alleging that bias against him by the present members of the court would also taint any substitute judges from the trial court. *Id.* at 947-48. We reversed the order granting the injunction. We distinguished *Gibson* on the ground that the failure of the appellant to utilize Nevada's disqualification procedures makes it impossible for us to determine whether the factual allegations of pervasive bias were true. *Id.* at 950. We held that "Flangas may not simply ignore the disqualification procedures based upon his perception that his chances of success in disqualifying the biased judges 'are not auspicious.' " *Id.* (citation omitted). We also noted in *Flangas* that "[t]here is no indication in *Gibson* that there was a statutory procedure for disqualification of the biased Board members." *Id.*

[2] In Alaska, judges may be challenged for cause upon a showing of financial interest in the matter. (Alaska Statute 22.20.020.) At such a proceeding, the Producers can mount a challenge to the impartiality of the Alaska judges by attempting to show that each of them has a *substantial* pecuniary interest in the outcome of the *Hess* matter. We cannot determine from the present record whether this matter comes within the *Gibson* exception to *Younger* abstention. In

Gibson, a decision to revoke the licenses of all optometrists employed by a business establishment would have reduced competition by almost fifty percent. Because all Board members were in private practice, revocation would mean that it was possible that each Board member could almost double his income through fees obtained from former patients of the employee-optometrists. Here, the Producers argue that a judgment for Alaska would ultimately increase a qualified resident's dividend from the permanent fund by $70 a year. No evidence has been presented, however, that supports this figure. Assuming that it is accurate, we do not have sufficient facts before us to determine whether an increase of $70 in dividends as a result of a favorable judgment for the state in *Hess* would constitute a substantial financial interest compelling disqualification for cause. An evidentiary hearing will also inform a reviewing court whether all Alaska judges and jurors have applied for permanent fund dividends or whether, in order to provide a forum for the trial of this matter, any are willing to waive such benefits.

[3] The Producers' failure to raise their claim of bias before the Alaska courts has denied that state's judges the opportunity to determine whether they must decline to hear this matter because they have a substantial interest in the outcome of this matter. In *Partington v. Gedan*, No. 87-2375, slip op. 2161 (March 13, 1989), we stated that when a party " 'has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.' " *Id.* at 2177 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)). Here, a prompt due process challenge in the Alaska trial court may result in a factual determination that each Alaska judge and juror is not competent to hear this matter. Such a ruling would eliminate the federal constitutional claim without federal court interference and avoid a needless conflict in this nation's dual court system.

In addition, the Producers have failed to meet their burden of showing that the Alaskan state courts cannot provide a fair tribunal to hear their federal constitutional claims. *See id.* (a litigant bears the burden of showing "that state procedural law bar[s] presentation of [his] claims") (citation omitted). Instead, the Producers have bypassed the Alaska court system on the sensitive issue of its ability to provide a fair and impartial trial in this matter. As a result, critical and dispositive factual questions remain unresolved.

We agree with the explanation by the Eighth Circuit of its disposition of an appeal regarding a similar claim of bias:

> The difficulty here is that the bias claim, unless first presented to the state court, does not reach constitutional ripeness. If requested to do so, some state supreme court justices might well rule under the record presented to them that they should step aside and allow others to be designated in their place. If some recuse themselves, and we in no way suggest that they should or shouldn't, this would obviate the necessity for any court to pass on the federal constitutionality claims. Thus, we rule the constitutional issues are not ripe for decision since all state issues have not been presented to the state court.

Peterson v. Sheran, 635 F.2d 1335, 1341 (8th Cir. 1980) (citation omitted).

[4] The district court did not err in determining that the Producers' claim of bias in the Alaska court system cannot be resolved until a factual presentation demonstrating bias is made before the state trial judge.

The Producers claim that the failure of the district court to decide whether an injunction should issue on ripeness grounds creates a hardship for them. No showing has been made that the Producers will suffer any hardship by presenting to the state evidence, if any exists, that the Alaskan judges and potential jurors have a substantial pecuniary interest in the outcome of the *Hess* matter. The Producers argue that "[i]f the state is constitutionally required to seek relief in an alternative forum, that determination should be made at the earliest opportunity to prevent as much needless delay and wasted pretrial and trial preparation as possible." Brief for Appellants at 12. This is a surprising argument for the Producers to assert. They have had several years to present a disqualification motion in the state court regarding the competency of any Alaska judge to try the *Hess* matter. They have not done so. Any injury suffered by the delay in determining the Producers' bias claim has been self-inflicted. The Producers suggest that if they prevail on their disqualification theory, this matter can be tried in an "alternative forum." If so, no time has been wasted in trial preparation.

We are persuaded from our independent review of the meagre record before us, that the question of the capacity of the State of Alaska to provide a fair and impartial trial and appellate review in the *Hess* matter is not ripe. Until a proper motion for disqualification is made in the state court, the disputed factual questions concerning the alleged bias of all Alaska judges and jurors cannot be reviewed by any federal court.

In dismissing this matter without prejudice, the district court issued a challenge to the State of Alaska "to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors" within a reasonable time. The district court invited the Producers "to re-open this federal case" if the State Officials fail to provide an unbiased forum within a reasonable time. We applaud the district court's wise resolution of a very delicate test of the joint responsibility of state and federal courts to provide every person with due process.

VI

In their cross-appeal, the State Officials contend that the district court should have dismissed this matter pursuant to the doctrine of *Younger v. Harris*. We need not address the merits of this issue because we have determined that the district court properly dismissed the federal constitutional issue raised in this matter because it is not ripe for review.

VII

The district court's order denying the motion to dismiss pursuant to the Eleventh Amendment is Affirmed. The order dismissing this matter because it is not ripe is Affirmed.

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HOUSE COMMITTEE REPORT 7.6

(11)
Date Referred: February 20, 1990 FURTHER REFERRALS:

Date of Committee Action: 4/28/90

The FINANCE Committee considered: HB 282

HOUSE BILL NO. 282 LOCAL ADMINISTRATION OF PUBLIC SCHOOLS

"An Act relating to local administration of public schools."

RECOMMENDATIONS:

[✓] be replaced with CS HB 282 (FIN) [ ] the same title [✓] a new title

[ ] have attached amendment(s)

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ____________ Committee

ADOPTS: ____ ____________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact ________

[ ] zero fiscal note ________

[ ] zero with analysis ________

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) ________

[✓] zero fiscal note(s) DOE 2/20/90

[ ] zero fn/analysis ________

SIGNING DO PASS:

Koponen

Larson

Brown

Ulmer

Barnes

Phillips

Rieger

Hoffman

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Kay Wallis Wallis	✓		

Hoffman

CO Chairman's Signature

Larson

Adopted

cc

No. 1

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 282(HESS)

PUBLISH DATE: HOUSE 2/20/90

FISCAL NOTE

REQUEST:

Revision Date:

Title: Relating to local administration of public schools

Sponsor: Koponen, Boyer and Ulmer

Requestor: House HESS

Agency Affected: Education

BRU: K-12 Support

Components: Foundation

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Mary Hakala

Phone: 465-2800

Division: Commissioner's Office

Date: 2/16/90

Approved by Commissioner: William G. Demmert

Date: 2/16/90

Agency: Education

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor

Original sponsor(s): REP. KOPONEN, Boyer, Ulmer

IN THE HOUSE BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 282 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to cooperation between school districts for educational and administrative services and to the employment of chief school administrators."

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

* Section 1. AS 14.14.110(a) is amended to read:

(a) When necessary to provide more efficient or more economical educational services, a district may cooperate or the department may require a district to cooperate with other districts, state-operated schools, or the Bureau of Indian Affairs in providing educational <u>or administrative</u> services [OR IN ESTABLISHING BOARDING AND TUITION ARRANGEMENTS, ARRANGEMENTS FOR THE EXCHANGE OF PUPILS OR TEACHERS, OR OTHER SIMILAR ARRANGEMENTS]. However, if a cooperative arrangement requires pupils to live away from their usual homes, the school board shall provide classes within the attendance area when there are at least eight children eligible to attend elementary and secondary school in the attendance area. <u>In this subsection</u>

<u>(1) "administrative services" includes supervisory, maintenance, purchasing, or other services that are required for unified administration; and</u>

<u>(2) "educational services" includes boarding and tuition arrangements, pupil or teacher exchanges, special education services, or curriculum development.</u>

* Sec. 2. AS 14.14.110 is amended by adding a new subsection to read:

(d) The department shall annually report to the legislature on the cooperative arrangements entered into under (a) of this section, and shall include in the report the estimated cost savings resulting from the cooperative arrangements.

* Sec. 3. AS 14.14.130(a) is amended to read:

(a) Each school board shall select and employ a qualified person as the chief school administrator for the district. <u>In this subsection, "employ" includes employment by contract.</u>

* Sec. 4. AS 14.14.130 is amended by adding a new subsection to read:

(d) This section does not prohibit two or more school districts from sharing the services of a chief school administrator.

Alaska State Legislature
Representative Niilo Koponen
House District 21

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SPONSOR STATEMENT

As state finances grow tighter and individual school district expenses grow less predictable, the economic downside of local control appears. We have created 55 separate school districts each with the authority to create an entire administrative structure, including superintendent business manager, purchasing, etc. In small districts such expenditures can absorb over fifty percent of the budget, leaving less for the direct classroom services for the pupils for whom we have created the schools and the Foundation Funding Program.

Other states, faced with the same problem, have tried a variety of solutions. This proposal preserves the authority and powers of each locally elected school board, but permits them to voluntarily join together to provide any given service or services both to save money or to organize programs no one small district can provide alone. In other states these arrangements are called "Union School District", "Cooperating School Districts", "Boards of Cooperative Education Services", etc. and run the gambit from several districts that jointly hire a superintendent and administrative staff to joint provision of single services such special education. The bill is drafted to afford the greatest flexibility to local districts in Alaska, rather than prejudging the areas in which they may choose to develop joint programs.