

**ALASKA LEGISLATURE**

**2344**

**HOUSE and SENATE FINANCE COMMITTEE FILES, 2001 - 2002**

availability of arrangements less restrictive to competition that would achieve the same or similar benefits to the community in health care delivery.

(i) The exclusive or nonexclusive nature of the proposal including, but not limited to (1) the extent to which viable competing networks or plans with adequate provider participation currently exist in the market, (2) the extent to which providers in the proposed network actually participate in other networks or contract individually with health benefit plans, or other evidence of their willingness and incentives to do so, (3) the extent to which providers in the proposed network will earn substantial revenue outside the network, (4) the absence of any indication of significant departicipation from other networks in the market as a result of the proposed venture, and (5) the absence of any indications of coordination among the providers in the network regarding price or other competitively significant terms of participation in other networks or plans.

(3) **Simultaneous review.** Identify any other state or federal agency reviewing the proposal and state the date on which each review was requested.

(4) Identify the name and address of all employee organizations representing the applicant's employees.

(5) **Description of how conduct will meet the goals of health care reform.** Describe in narrative form how the proposal will:

- (a) Enhance the quality, access and cost of health services to consumers;
- (b) Gain cost efficiency in the provision of health services;
- (c) Improve utilization of health services, facilities and equipment;
- (d) Avoid duplication of health services resources;
- (e) Facilitate the exchange of information relating to performance expectations;
- (f) Develop comprehensive, integrated, and cost-effective health services delivery in the geographic, product or service area;
- (g) Reduce competition among certified health plans, health care providers, or health care facilities;
- (h) Have an impact on the quality, availability, or price of health services to consumers;
- (i) Reduce the number of people employed or otherwise impact how employees deliver health care services; and
- (j) Change or otherwise have an impact on employee to patient ratios and how this will affect the quality of health services available to consumers.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-115, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-115, filed 2/1/95, effective 3/4/95.]

#### WAC 246-25-120 Continuing oversight and reporting requirements.

Written petitions and requests for informal opinions must include, in narrative form, a description of the nature of the continued supervision and oversight the parties believe would be necessary and appropriate to ensure the proposal continues to be consistent with the petition or request and that its benefits continue to outweigh its disadvantages. The description shall include a recommendation for the form of annual or more frequent progress reports appropriate to the transaction and sufficient to allow the commission and attorney general to evaluate the continuing conduct.

[Statutory Authority: RCW 43.72.310, 99-04-049, recodified as § 246-25-120, filed 1/28/99, effective 1/28/99; 95-04-112, § 245-02-120, filed 2/1/95, effective 3/4/95.]

# ALASKA STATE MEDICAL ASSOCIATION

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March 25, 2001

Honorable Pete Kelly  
State Senate  
Co- Chairman Senate Finance Committee  
State Capitol, Room 518  
Juneau, AK 99801-1182

RE: SB 37

Dear Senator Kelly:

The Alaska State Medical Association (ASMA) represents Alaska's patients and the physicians who care for them. Thank you for this opportunity to again provide you testimony on this important matter.

ASMA continues to support a strong physician joint negotiation bill. We have already provided you with a great deal of information relating to our support of SB 37. Today, I would like to provide you with a slightly different perspective.

ASMA is pursuing legislation like SB 37 because it views enactment of this and other physician friendly legislation as important in creating an environment that will attract physicians to practice in Alaska. Why is this important? A few numbers will serve to illustrate. It has been reported that there are over 2000 physicians licensed to practice in Alaska. That is correct but not all of those physicians practice and reside in Alaska. ASMA maintains a database of those physicians practicing and residing in Alaska and at December 20, 2000 that number was 1,036 physicians. But this is only part of the story. Below is an extract from physician workforce data compiled by Dr. Sam Cullison, an AMA delegate from Washington.

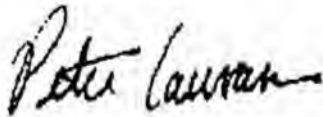
<u>State</u>	<u>Number of Physicians</u>	<u>Per Capita Physicians/100K</u>
Alaska	1,036	171
California	89,153	282
Hawaii	3,399	286
Washington	14,759	271
Oregon	8,333	265
U.S.	-	282

It would appear that Alaska is either "underserved" or the other states are "over served". We suspect the former.

Finally, in an analysis done last year of ASMA's data base, over one-half of the physicians in private practice are over the age of 51. (This was estimated using the year of graduation from medical school and assuming an age of 26 at the time of graduation and anyone with an indeterminate year of graduation was assumed to be under 51.) We are facing a serious recruiting effort in order to replace those leaving practice in Alaska. Idaho is facing a similar situation in that a little over 40% of its physician workforce is over the age of 50. Idaho is seeking 10 more slots per year in the WWAMI program to help meet its future recruitment needs.

Access to timely and appropriate care is already an issue in Alaska for certain specialties. Alaska, in the foreseeable future, will continue to be a "net importer" of physicians. We believe it is critical that an environment is created and maintained that will attract well trained physicians in sufficient numbers to adequately and expediently care for Alaska's patients. Passage of bills like SB 37 help to create that favorable environment. Thank you for your continued support in this endeavor.

Sincerely,



By: Peter Lawrason, MD, President  
For: Alaska State Medical Association

c.c. Senate Finance Committee Members.

# ERISA Litigation and Physician Autonomy

Peter D. Jacobson, JD, MPH

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**T**HE FEDERAL EMPLOYEE RETIREMENT INCOME SECURITY Act (ERISA) looms like a colossus over the managed care environment. Originally enacted to regulate employer-sponsored pension plans, the statute also covers health care benefits established by self-insured employers (with few exceptions, such as for governmental employees). According to recent Department of Labor estimates, ERISA applies to approximately 125 million US citizens.<sup>1</sup>

ERISA has created a regulatory vacuum by preempting state regulation of managed care organizations (MCOs) and drastically limiting state medical liability lawsuits against MCOs, while providing minimal federal regulation in their place.<sup>2,4</sup> For physicians, ERISA preemption has indirectly caused courts to favor MCOs' cost containment initiatives over traditional notions of physician autonomy.<sup>5</sup> The treatment a physician recommends is vulnerable to a managed care utilization management process largely unconstrained by state regulation or liability law, inevitably resulting in reduced physician autonomy.

The consequences of ERISA preemption lie at the heart of proposed congressional patients' rights legislation that would restore the primacy of the patient-physician relationship and permit state legal challenges to cost containment programs. At issue is control over physicians' clinical decisions and the ability to challenge improperly operated cost containment programs.

Because ERISA plays a vital role in the relationship between physicians and MCOs, it is important for physicians to understand what ERISA is, how it operates, and how it influences clinical decision making and physician autonomy in the managed care era. In this article, we outline ERISA's major provisions, analyze trends in ERISA litigation applicable to physicians, and conclude by discussing the policy implications and significance of these trends for physician autonomy.

## AN ERISA PRIMER

### Overview

Congress enacted ERISA in 1974 primarily to regulate pension plans, but it also included health benefit plans within its scope.<sup>6</sup> ERISA's goals are to establish uniform national

The Employee Retirement Income Security Act (ERISA), enacted in 1974 to regulate pension and health benefit plans, is a complex statute that dominates the managed care environment. Physicians must understand ERISA's role in the relationship between themselves and managed care organizations (MCOs), including how it can influence clinical decision making and physician autonomy.

This article describes ERISA's central provisions and how ERISA influences health care delivery in MCOs. We analyze ERISA litigation trends in 4 areas: professional liability, utilization management, state legislative initiatives, and compensation arrangements. This analysis demonstrates how courts have interpreted ERISA to limit physician autonomy and subordinate clinical decision making to MCOs' cost containment decisions. Physicians should support efforts to amend ERISA, thus allowing greater state regulatory oversight of MCOs and permitting courts to hold MCOs accountable for their role in medical decision making.

JAMA. 2000;283:921-926

www.jama.com

standards, safeguard employee benefits from loss or abuse, and encourage employers to offer those benefits. To achieve these objectives, ERISA imposes strict requirements on pension plan administrators for reporting and disclosure,<sup>7</sup> participation and vesting,<sup>8</sup> funding,<sup>9</sup> and performance of fiduciary obligations.<sup>10</sup> ERISA does not mandate that employers offer benefit plans, but provides a structure for national uniformity of administration once such plans are extended.

Only a few of these requirements apply to health benefit plans, in part because Congress did not pursue the implications of regulating both pension and health benefit plans under 1 statute. Nor could Congress have anticipated the dominance of the managed care model. As a result, ERISA provides almost no federal regulation of health plans. Nevertheless, ERISA has 3 provisions that directly affect physician autonomy: ERISA's preemption clause, its limited remedial scheme, and its fiduciary duty obligation.

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### ERISA's Preemption Clause

Traditionally, states are responsible for regulating health care delivery, and litigation against health care providers is resolved under state law. Medical liability lawsuits are rarely heard in federal courts. ERISA alters the traditional approach by preempting state law, which means that state laws purporting to regulate health plans may not be enforced in any court.<sup>11</sup> In this context, state laws include legislation and regulations, such as those mandating particular benefit coverage, and most medical liability actions targeting MCOs.

Courts have interpreted the preemption clause broadly to prevent enforcement of state laws ranging from laws protecting the patient-physician relationship to litigation challenging how cost containment initiatives are implemented. The courts have held that Congress intended such broad preemption of state law to allow a multistate employer to offer a single, nationally consistent plan to all its workers without the cost and inconvenience of complying with contradictory state regulations, legislation, or litigation. National uniformity conforms with congressional intent to keep the costs of administering an employee benefit plan (EBP) low to encourage employers to offer health care coverage.<sup>12</sup>

In assessing whether a particular state law is prohibited, courts look sequentially to each of the 3 parts of the preemption provision. First, courts must decide whether the state law "relates to" an EBP.<sup>13</sup> In doing so, courts consider whether the challenged law burdens the administration of plan benefits or has only a remote impact on them. Courts generally hold that ERISA preempts state laws that bind employers or plan administrators to particular benefit choices or that preclude the uniform administration of an EBP.<sup>14</sup> For example, a state lawsuit challenging a benefit determination, such as an MCO's denial of additional hospital coverage, "relates to" a health plan because that challenge would require the court to interpret the plan's benefits, hence binding the administrator to certain actions. But laws with only a remote or incidental effect on plan administration, such as a surcharge on hospital services, may not "relate to" the EBP.

A law is not preempted merely because it "relates to" a plan. Courts must also interpret 2 qualifying provisions, the *savings clause* and the *deemer clause*. ERISA's savings clause provides that laws regulating the business of insurance, even if they "relate to" a managed care plan, will not be preempted. This allows states to continue to enforce state laws governing the business of insurance by saving state regulation of health insurance, such as solvency requirements, from preemption.

In turn, the *deemer clause* qualifies the *savings clause*. The *deemer clause* prevents states from deeming (or characterizing) an ERISA-covered plan as the business of insurance. States may not characterize a self-funded plan as an insurer to circumvent the effect of the "relates to" clause.

As an example of how these terms interact, consider a state law mandating certain health insurance benefits. That law "relates to" an ERISA plan since it would involve the struc-

ture of plan benefits. Even though the legislation would be saved from preemption insofar as it regulates EBPs that purchase traditional insurance policies, it would still be preempted if, for example, a state attempted to apply the statute to a self-funded EBP. Under the *deemer clause*, a self-funded EBP cannot be an insurer.

### ERISA's Limited Remedies

Although much state litigation is preempted, ERISA provides some relief for injuries to health plan participants through its civil enforcement scheme. A plan participant or beneficiary may bring a civil action against an administrator who fails to comply with a request for information about the plan, to recover claimed benefits, to enforce rights under the terms of the plan, or to clarify rights to future benefits.<sup>15</sup> A plan participant may also bring suit against a plan fiduciary who breaches any fiduciary duties and may seek to enjoin practices that violate ERISA or the terms of the plan.

Even if victorious, a plan participant can usually only recover the amount of the benefits that should have been provided, as well as certain incidentals such as attorneys' fees. This is a decidedly more limited remedy than what is usually available under state law, through which the patient might be able to recover damages for any economic losses, noneconomic damages for pain and suffering, and possibly punitive damages (especially in cases alleging bad faith insurance denial).<sup>16</sup>

Take, for example, a challenge to an improperly denied benefit filed in state court. If the MCO successfully invokes preemption, the plaintiff will be forced to sue instead under ERISA's limited civil enforcement scheme. Effectively, this insulates the MCO from exposure to monetary damages, except for what it would have paid (the amount of the denied benefit) in the first place.

### Fiduciary Duties

ERISA imposes a fiduciary duty on those who make discretionary decisions on behalf of the EBP. A fiduciary must discharge his/her discretionary functions "solely in the interest of the participants and beneficiaries" of the plan.<sup>17</sup> In many, but not all cases,<sup>18</sup> courts have held that MCOs are subject to this fiduciary duty when making certain decisions, such as reviewing the appropriateness of a physician's treatment recommendations.<sup>19</sup> On the other hand, MCOs and employers are not considered fiduciaries for establishing or changing the terms of the plan. Thus, the fiduciary duty extends only to decisions made once the plan is in place.<sup>20,21</sup> Employers must provide whatever health benefits they promise but need not offer plans at all and can change what they offer after giving plan beneficiaries proper notice.

In exercising the fiduciary duty, an obvious problem is that the clinical needs of one patient may conflict with the MCO's economic interests. Increasingly, disappointed plan participants have sued for breach of fiduciary duty, often challenging the denial of physician-prescribed benefits, especially when there is a potential conflict of interest.<sup>22</sup>

To determine whether an MCO breached its fiduciary duty when denying plan benefits (ie, that the denial is not solely in the interest of the participant), courts use different levels of scrutiny based on the amount of discretion granted to the MCO under the EBP. Generally, courts are very deferential, upholding the plan administrator as long as the decision was not arbitrary and capricious.<sup>23,24</sup> In most cases, courts have equated compliance with the terms of the EBP as, by definition, acting "in the interests" of the plan participant. In this sense, the court limits its review to ensuring that the MCO reasonably comported with the terms of the EBP.<sup>25</sup> As a result, MCOs retain power vis-a-vis physicians by controlling the interpretation of EBP terms (including medical necessity). But in a case from which the plan profits directly from the denial, the potential conflict of interest must be considered a factor in deciding whether there was an abuse of the fiduciary's discretion.<sup>26</sup>

## RECENT CASE TRENDS

### MCO Malpractice Liability

For many years, courts have monitored quality of care through medical liability lawsuits. Originally, physicians were the targets of such suits, then hospitals were added, and now MCOs have been held liable under state tort law.

When a patient receives care under a health plan not governed by ERISA (as when a person buys his/her own health insurance), MCOs have been held directly liable for their own actions, such as the failure to maintain safe and adequate facilities, select and retain competent physicians, oversee all patient care within the institution, and ensure quality care.<sup>27</sup> Managed care organizations can also be held vicariously (indirectly) liable for malpractice committed by physicians who are independent contractors. The primary factors affecting whether a court will impose vicarious liability include the amount of influence the MCO has over the clinical decision, patients' perceptions of the relationship between the physician and the MCO, and the manner in which the health plan is marketed. Managed care organizations operating in contexts other than ERISA may also be subject to state consumer protection or bad faith insurance laws for improper processing of claims that results in delayed or denied care.<sup>16</sup> In non-ERISA cases, courts are essentially following the pattern of establishing liability that was applied to hospitals beginning in the 1960s.<sup>28</sup>

Managed care organizations covered by ERISA operate under different rules. ERISA preempts many state law claims alleging that the MCO's denial or delay in care caused an adverse medical outcome. Those types of lawsuits may be brought in federal court as actions under ERISA's civil enforcement scheme, but the limited remedies available effectively insulate MCOs from liability and, therefore, accountability for these medical outcomes. Liability may be borne instead entirely by physicians. The practical effect is that MCOs often control resource allocation, but physicians (and patients) bear the costs when resource alloca-

tion decisions produce adverse outcomes. In these cases, the patient's only remedy is to sue the physician, regardless of how much influence over the clinical decision the physician actually exercised.

Courts have not been consistent in deciding whether all or merely some state law claims against MCOs will be preempted. Until recently, led by early Supreme Court doctrine, lower federal courts have interpreted the phrase "relates to" very broadly, preempting most state law tort suits challenging health plan innovations and medical decisions. For example, courts generally have held that challenges to delayed or denied care relate to an EBP and are preempted,<sup>29</sup> including litigation alleging that the structure of the EBP was responsible for poor medical outcomes. But in *New York State Conference of Blue Cross and Blue Shield Plans v Travelers Insurance Co*,<sup>30</sup> the Supreme Court permitted New York State to impose a tax on all insurers except Blue Cross and Blue Shield, reasoning that a uniform tax only tangentially relates to ERISA plan administration. This decision signaled a scaling back on the breadth of preemption. After this decision, courts have been less vigorous in finding ERISA preemption.

Narrowing preemption has inspired other related changes. The most important change is that courts have erected a critical distinction between state tort law challenges to the technical quality of care (ie, liability claims for substandard clinical care) and state law challenges to the quantity of care (involving improper plan benefit decisions). The latter must be brought in federal court subject to ERISA's limited remedies; the former would be heard in state court.

In practice, the quantity/quality distinction may signal a nascent trend toward holding MCOs accountable at least in some circumstances, especially, if courts strain to characterize a dispute as involving quality. By way of example, the court in *Bauman v US Healthcare, Inc*<sup>31</sup> recently held that the defendant's policy of discharging a newborn within<sup>24</sup> hours without adequately considering the medical appropriateness in a given case could be challenged in state court as substandard quality of care. As their liability expands, MCOs may begin to reconsider the ways in which they review clinical decisions, as the United Healthcare decision<sup>32</sup> signaled recently by shifting greater clinical authority back to physicians. It is one thing to deny treatment when potential liability rests with the treating physician, but it is another to deny the claim when the organization might also be held responsible.

Consider, for example, state litigation seeking to hold an MCO indirectly liable for the actions of an affiliated physician. Because substandard care is litigation about the quality of care and not the quantity of benefits, the case will probably be heard in state court. And because state courts assess liability based in part on the amount of influence the MCO exerts over clinical decision making, MCOs may seek to avoid liability by loosening their control below the threshold required by state law. The result is increased physician au-

tonomy. While this result is what we anticipate, greater liability exposure could alternatively lead an MCO to protect itself by exerting stricter oversight of clinical decisions. Exactly how MCOs respond will need to be studied.

Preemption is not the only area in which this trend toward judicial reconsideration may be emerging. In recent years, many lawsuits charging MCO misconduct that resulted in adverse outcomes from delayed or denied care have been cast as breaches of fiduciary duty under ERISA.<sup>33</sup> No patient has yet recovered a judgment in such a case<sup>34</sup>; but to the extent such suits are successful, MCOs might be less likely to second-guess clinical decision making. To date, the decisions have been inconsistent and no truly coherent doctrine has yet emerged. Most courts have explicitly refused to be the agents of a major overhaul of ERISA doctrine, preferring to leave such a role in the legislative arena.<sup>5</sup>

#### Utilization Management

A central aspect of the managed care environment is the emergence of new organizational forms, including utilization management processes, which have mixed clinical and financial functions. Managed care organizations rely heavily on utilization management techniques, such as preauthorization for high-cost medical interventions, to reduce costs. The more courts uphold utilization management decisions, the less control the treating physician has over the clinical encounter.

In state cases for which ERISA does not apply, courts have held generally that physicians and MCOs may share liability for bad outcomes.<sup>35,36</sup> By contrast, ERISA preemption clearly shields MCOs from liability in state courts for utilization management decisions, even when these are arguably medical and not merely administrative in nature. So far, federal courts have uniformly held that utilization management decisions relate to benefit plans and are preempted, regardless of whether medical care recommended by the treating physician is denied. For instance, in *Danca v Private Health Care Systems Inc.*,<sup>37</sup> the court supported the prevailing view that a utilization review dispute was preempted by ERISA because it is part of the process used to assess a benefit dispute.<sup>38</sup> And in *Corcoran v United Health Care Inc.*,<sup>39</sup> the court concluded that United's utilization management program, whose denial of hospital care resulted in the death of a fetus, made medical decisions in the context of determining benefits. Accordingly, the court preempted Corcoran's lawsuit under ERISA. By holding that the administrative aspect of the utilization management process trumps the medical aspect (ie, that it is more a quantity than a quality decision), the federal courts, through ERISA, provide wide latitude for health care plans to control costs, at the possible expense of both individual access to health care services and the treating physician's clinical autonomy.

#### State Legislative Initiatives

As part of the backlash against managed care, many state legislatures have tried to safeguard physician autonomy. This

legislation has ranged from prohibiting gag clauses to comprehensive reforms designed to limit the primacy of cost containment strategies. In many instances, courts have ruled that these laws are preempted by ERISA, although the decisions are by no means uniform. Such rulings have essentially negated state legislative attempts to restore physician autonomy and have reinforced health plan control over clinical decisions.

The most extensive attempt to regulate MCOs is the Texas statute<sup>40</sup> requiring an external appeals process for health care denials and allowing subscribers to sue the MCO for poor quality of health care. A federal district court recently upheld the right to sue, based on the quality/quantity distinction, yet overturned the external grievance process as preempted by ERISA.<sup>41</sup> Although the case is on appeal, that the court preempted the external review process as a law "relating to" an EBP is an indication of the ERISA-created hurdles facing state laws that try to bolster clinical autonomy.

Just as troublesome, the current uncertainty in ERISA litigation makes it difficult, if not impossible, to predict which state laws will be preempted. As an example, courts have split on whether any willing provider laws are preempted by ERISA.<sup>42,43</sup> Any willing provider laws would require MCOs to contract with any provider willing to meet the MCO's established criteria and are intended to preserve patient choice of physician.

#### Compensation Arrangements

Another important cost containment mechanism used by MCOs is to provide financial incentives to plan physicians to restrain costs. For instance, salary withholds and bonuses are used as compensation incentives for limiting referrals to specialists and other high-cost procedures. No court has yet ruled that these financial incentives violate public policy, though some non-ERISA cases have permitted challenges to be tried before a jury.<sup>44</sup>

ERISA does not regulate how MCOs create incentive structures to motivate contracting physicians' compliance with cost containment measures. More importantly, ERISA preemption may prevent states from trying to regulate such compensation and incentive arrangements through tort law or legislation. A typical case is *Lancaster v Kaiser Foundation Health Plan of Mid-Atlantic States Inc.*,<sup>45</sup> in which the court held that the plaintiff's state law claim alleging negligence in establishing and operating an incentive program that encouraged physicians not to prescribe certain expensive tests and not to refer to specialists, was preempted by ERISA. The plaintiff claimed that this program was a substantial factor in her physicians' failure to diagnose her brain tumor for 5½ years until it had invaded 40% of her brain. The court characterized the establishment and operation of this incentive scheme as an administrative decision affecting the provision of benefits and therefore dismissed the claim as preempted.

Not all courts have agreed.<sup>46</sup> A more recent case perhaps presages a different direction based on breach of ERISA fi-

duciary duties (with, of course, the corresponding limit on remedies under ERISA). In *Herdrich v Pegram*,<sup>47</sup> the court held that a patient could sue for breach of fiduciary duty based on an allegation that the nature of incentive arrangements between the MCO and the physicians caused her to be deprived of proper medical care and that the MCO reaped economic gain from this deprivation. Even though the *Herdrich* court specifically noted that the existence of economic incentives would not automatically be tantamount to a breach of fiduciary duty, this case is a potentially significant extension of the rationale advanced in non-ERISA cases. If read broadly and followed by other courts, this case could augur an attack on the underlying financial incentives at the core of managed care, perhaps by seeking to enjoin their use.<sup>47</sup> However, *Herdrich* may represent a legal theory that is viable only in an extreme case in which "a fiduciary jettisons his responsibility to the physical well-being of the beneficiaries in favor of loyalty to his own financial interests,"<sup>46</sup> and the Supreme Court has agreed to review the decision.

### COMMENT

ERISA has played an important role in facilitating, and perhaps stimulating, the development of managed care. But this undeniable policy benefit has come at a high cost to some individual plan subscribers and to physicians. From a policy perspective, ERISA has created a regulatory vacuum in which states cannot act and there is no comparable federal regulatory mechanism. From a legal perspective, ERISA has essentially insulated MCOs from liability by blocking state courts from resolving litigation challenging managed care practices. From a clinical perspective, ERISA has facilitated reductions in physician autonomy relative to health plan influence over clinical decisions.

### Policy Consequences

This analysis suggests several consequences of importance to physicians. First, the effect of judicial interpretations of ERISA is to subordinate physician autonomy and the patient-physician relationship to managed care cost containment goals. Implicitly, ERISA reinforces the status quo of the health care delivery market and hence managed care's current market domination.

Second, perceiving themselves bound by ERISA, courts do not champion either physician autonomy or the patient-physician relationship. Courts that once protected physician autonomy, are no longer doing so.<sup>49</sup> Judges repeatedly suggest that complaints against managed care should be taken to the legislative branches of government rather than to the courts. Since state legislative initiatives are often barred by ERISA preemption, Congress appears to be physicians' best hope for change or relief. As of this writing, congressional action to amend the preemption provision (so that state legislatures and courts may act with fewer constraints) or to create new federal regulations similar to recent state initia-

tives appears to be unlikely. During the 1999 session, the House of Representatives enacted a bill that would permit patients to sue MCOs for damages in state courts, but the Senate bill does not contain a right-to-sue provision. Although House and Senate conferees have been meeting to reconcile the 2 bills, the prospects for enactment are slight, in part because the House conferees are largely opposed to the right-to-sue provision.

Regardless, physicians should continue to support attempts to remove ERISA preemption. Even though treating physicians would remain accountable, MCOs should also be held accountable for both financial decisions that affect clinical treatment and for their implicit role in making medical decisions. Physicians should not be left in the untenable position of being entirely responsible for cost containment provisions over which they have almost no control. By exposing MCOs to similar liability considerations, MCOs will not be able to influence medical decisions with impunity, which may enhance physician autonomy.

Short of eliminating ERISA preemption, Congress could also amend ERISA by expanding on the available remedies. Consistent with the goal of maintaining national uniformity, Congress could retain preemption but allow individuals to sue for monetary damages in federal court for an ERISA violation. Congress could also direct the US Department of Labor (as the appropriate regulatory agency) to develop regulations that would more effectively protect the patient-physician relationship. For instance, regulations might address patients' rights to notice of a denial of care and to an external grievance panel.

### Physician Autonomy

An assumption animating this article is that deference to physician autonomy is a desirable goal for better patient care. To some, that proposition may not be self-evident. After all, public concern with rising health care costs and perceived harms from overtreatment in the fee-for-service era led directly to managed care's cost containment innovations and concomitant restrictions on physician autonomy as public policy objectives. Indeed, constraints on physician autonomy predate the effects of ERISA litigation.<sup>50</sup>

Thus, one scenario suggests that if Congress removes ERISA preemption and helps restore physician autonomy, managed care's cost containment goals may be difficult to achieve. This outcome seems unlikely given the current policy environment. Another possible scenario is that MCOs might respond to eliminating ERISA preemption by imposing more aggressive utilization management controls, ironically reducing physician autonomy below what it is under current financial incentives. Yet there is no indication that MCOs are eager to accept the additional liability consequences that may result from greater control over clinical decisions.

No matter whether Congress changes ERISA preemption or expands ERISA's limited remedies, the tensions among physicians, MCOs, and patients will not be resolved easily.

Even if there are some downsides to physician autonomy, patient care ultimately depends on the treating physician's ability to maintain patient trust while balancing patient demands for high-quality care with the MCO's legitimate cost containment efforts. In truth, these cost containment programs are needed corrections to an unsustainable fee-for-service system, and many physicians have worked effectively to mediate managed care's constraints. Yet, inevitably, some patients will not be well served by this system. Either there will be undue delay in arranging health care, or benefits will be denied that should have been provided. In those situations, holding MCOs legally accountable provides incentives for better health care plan administration. ERISA preemption simply goes too far in removing the liability threat for improper undertreatment.

**Funding/Support:** Support for this article was provided by an Investigator Award in Health Policy Research from the Robert Wood Johnson Foundation, Princeton, NJ.

**Acknowledgments:** We thank Stephen Modell, MD, David Hyman, MD, JD, and Edward Goldman, JD, for comments on a previous draft.

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**SITE: ANCHORAGE LIO**

**COMMITTEE: Senate Finance**

**DATE: 3-28-2001**

**SUBJECT OF MEETING:**

SB 37

**UPDATE #:**



## PLEASE SIGN IN

**PLEASE PRINT:**

**NAME**

**ADDRESS (MAILING & ZIP)**

**REPRESENTING**

**DO YOU WANT**

**TO TESTIFY?**

**Y OR N**

NAME	ADDRESS (MAILING & ZIP)	REPRESENTING	DO YOU WANT TO TESTIFY? Y OR N
Clyde Sniffen		Dept of Law	Y - SB 37
(you have an opinion from DEPT. of LAW in the members' packets)			

SENATE FINANCE COMMITTEE

SIGN-IN

SB 37-PHYSICIAN NEGOTIATIONS WITH HEALTH INSURE

NAME: IANET PARKER Subject/Bill No: SB 37  
Co./Dept./Title: DOA RETIREMENT & BENEFITS Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

**SB**

**39**

SFIN

FILE

SB 39

was referred to the  
Senate Finance  
Committee

No hearing was held  
on this bill

**SB**

**40**

SFIN

FILE

SB 40

was referred to the  
Senate Finance  
Committee

No hearing was held  
on this bill

22-GS1010U  
Ford  
5/4/01

**CS FOR SENATE BILL NO. 40( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SECOND LEGISLATURE - FIRST SESSION**

**BY**

**Offered:  
Referred:**

**Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the education of children with disabilities and of gifted children;**  
2 **relating to the Governor's Council on Disabilities and Special Education; and providing**  
3 **for an effective date."**

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

5 **\* Section 1. AS 14.16.050(a) is amended to read:**

6 (a) The following provisions apply with respect to the operation and  
7 management of a state boarding school as if it were a school district:

8 (1) requirements relating to school district operations:

9 (A) AS 14.03.030 - 14.03.050 (defining the school term, day in  
10 session, and school holidays);

11 (B) AS 14.03.083 - 14.03.140 (miscellaneous provisions  
12 applicable to school district operations);

13 (C) regulations adopted by the board under authority of  
14 AS 14.07.020(a) that are applicable to school districts and their schools, unless

1 the board specifically exempts state boarding schools from compliance with a  
2 regulation;

3 (D) AS 14.12.150 (authorizing school districts to establish and  
4 participate in the services of a regional resource center);

5 (E) AS 14.14.050 (imposing the requirement of an annual  
6 audit);

7 (F) AS 14.14.110 (authorizing cooperation with other school  
8 districts);

9 (G) AS 14.14.140(b) (establishing a prohibition on  
10 employment of a relative of the chief school administrator);

11 (H) AS 14.18 (prohibiting discrimination based on sex in  
12 public education);

13 (2) requirements relating to the public school funding program and the  
14 receipt and expenditure of that funding:

15 (A) AS 14.17.500 (relating to student count estimates);

16 (B) AS 14.17.505 (relating to school operating fund balances);

17 (C) AS 14.17.500 - 14.17.910 (setting out the procedure for  
18 payment of public school funding and imposing general requirements and  
19 limits on money paid);

20 (3) requirements relating to teacher employment and retirement:

21 (A) AS 14.14.105 and 14.14.107 (relating to sick leave);

22 (B) AS 14.20.095 - 14.20.215 (relating to the employment and  
23 tenure of teachers);

24 (C) AS 14.20.220 (relating to the salaries of teachers  
25 employed);

26 (D) AS 14.20.280 - 14.20.350 (relating to sabbatical leave  
27 provisions for teachers);

28 (E) AS 23.40.070 - 23.40.260 (authorizing collective  
29 bargaining by certificated employees), except with regard to teachers who are  
30 administrators and except that the board may delegate some or all of its  
31 responsibilities under those statutes;

1 (F) AS 14.25 (provisions regarding the teachers' retirement  
2 system);

3 (4) requirements relating to students and educational programs:

4 (A) AS 14.30.180 - 14.30.350 (relating to educational services  
5 for [EXCEPTIONAL] children with disabilities);

6 (B) AS 14.30.360 - 14.30.370 (establishing health education  
7 program standards);

8 (C) AS 14.30.400 - 14.30.410 (relating to bilingual and  
9 bicultural education).

10 \* Sec. 2. AS 14.30.180 is amended to read:

11 **Sec. 14.30.180. Purpose.** It is the purpose of AS 14.30.180 - 14.30.350 to

12 (1) provide an appropriate public education for each child with a  
13 disability [EXCEPTIONAL CHILDREN] in the state who is [ARE] at least three  
14 years of age but less than 22 years of age;

15 (2) allow procedures and actions necessary to comply with the  
16 requirements of federal law, including 20 U.S.C. 1400 - 1487 [20 U.S.C. 1400 - 1485]  
17 (Individuals with Disabilities Education Act).

18 \* Sec. 3. AS 14.30.186(a) is repealed and reenacted to read:

19 (a) Special education and related services shall be provided by

20 (1) a borough or city school district for a child with a disability residing  
21 within the district;

22 (2) the board of a regional educational attendance area operating a school  
23 in the area for a child with a disability residing in the area served by the school;

24 (3) the borough, city school district, or regional educational attendance  
25 area in which a treatment facility or a correctional or youth detention facility is located  
26 for a child with a disability placed at the facility;

27 (4) a state boarding school established under AS 14.16 for a child with a  
28 disability enrolled at a state boarding school; or

29 (5) a school district that provides a statewide correspondence study  
30 program for a child with a disability who is enrolled in the program.

31 \* Sec. 4. AS 14.30.186(e) is amended to read:

1 (e) If the parent of a child with a disability [EXCEPTIONAL CHILDREN  
2 BEING EDUCATED AS PROVIDED UNDER AS 14.30.010(b) MAY RECEIVE  
3 SPECIAL EDUCATION AND RELATED SERVICES AS PROVIDED UNDER  
4 AS 14.30.180 - 14.30.350. THE EXCEPTIONAL CHILD OF A PARENT WHO]  
5 elects to educate the child as allowed under AS 14.30.010(b), the child may not be  
6 compelled to receive the special education and related services provided under  
7 AS 14.30.180 - 14.30.350.

8 \* Sec. 5. AS 14.30.186 is amended by adding a new subsection to read:

9 (f) The department shall, by regulation, establish standards for the allocation of  
10 financial responsibilities and the coordination of the provision of special education and  
11 related services among the educational agencies listed in (a) of this section when more  
12 than one educational agency is responsible for providing those services.

13 \* Sec. 6. AS 14.30.191(a) is amended to read:

14 (a) A school district shall obtain the written informed consent of the child's  
15 parent before an initial evaluation or placement of a child with a disability in a  
16 program of special education and related services.

17 \* Sec. 7. AS 14.30.191(b) is amended to read:

18 (b) After initial placement in a program of special education and related  
19 services and not less than once every three years for as long as the child is assigned to  
20 the program, a [AN EXCEPTIONAL] child with a disability shall receive an  
21 educational evaluation [FOR THE IDENTIFICATION AND CLASSIFICATION OF  
22 EXCEPTIONAL CHILDREN].

23 \* Sec. 8. AS 14.30.191(c) is amended to read:

24 (c) Before a school district initiates or refuses a change in the [A CHILD'S]  
25 placement or educational program of a child with a disability, the district shall  
26 notify the child's parent.

27 \* Sec. 9. AS 14.30.191(d) is amended to read:

28 (d) Upon completion of an [THE] evaluation or reevaluation under this  
29 section [AND BEFORE PLACEMENT], the school district shall provide to the parent  
30 of each [EXCEPTIONAL] child evaluated under this section an opportunity to  
31 participate in the determination of the

1                   (1) child's eligibility for special education and related services:  
2 [FOR CONSULTATION ABOUT THE EVALUATION. A CONSULTATION  
3 MUST BE AVAILABLE AFTER EACH REEVALUATION OF THE CONDITION]  
4 and

5                   (2) educational placement of the [EXCEPTIONAL] child if the child  
6 is determined to be eligible for special education and related services.

7 \* Sec. 10. AS 14.30.191 is amended by adding new subsections to read:

8                   (h) A school district shall provide written notice of its decision under this  
9 section to the parent of the child. The notice must include a description of the  
10 procedural safeguards available to the parent and child under federal law.

11                   (i) In this section, "hearing" means a due process hearing under AS 14.30.193.

12 \* Sec. 11. AS 14.30.193 is repealed and reenacted to read:

13                   **Sec. 14.30.193. Due process hearing.** (a) A school district or a parent of a  
14 child with a disability may request a due process hearing on any issue related to  
15 identification, evaluation, or educational placement of the child, or the provision of a  
16 free, appropriate, public education to the child. A request is made by providing written  
17 notice to the other party to the hearing. A parent shall make a request for a due process  
18 hearing under this section not later than 12 months after the date that the school district  
19 provides the parent with written notice of the decision with which the parent disagrees.  
20 A school district shall make its request for a due process hearing in accordance with the  
21 time limit established by the department by regulation.

22                   (b) If a due process hearing is requested by either a school district or a parent, the  
23 school district shall contact the department to request appointment of a hearing officer.  
24 The department shall select a hearing officer through a random selection process, from a  
25 list maintained by the department under (g) of this section. Within five working days  
26 after receipt of the request, the department shall provide to the school district and the  
27 parent a notice of appointment, including the name and a statement of qualifications, of  
28 the hearing officer that the department determines is available to conduct the hearing.

29                   (c) The school district and the parent each have the right to reject, without stating  
30 a reason, one hearing officer appointed under this section. The rejecting party shall  
31 notify the department of that rejection in writing within five days after receipt of the

1 department's notice of appointment. If a hearing officer is rejected under this subsection,  
2 the department shall, within five working days after receipt of the written rejection,  
3 provide a notice of appointment, including the name and a statement of qualifications, of  
4 another hearing officer that the department determines is available to conduct the  
5 hearing. Each appointment is subject to a right of rejection under this subsection by a  
6 party who has not previously rejected an appointment.

7 (d) After a hearing officer is appointed and the time for rejection under (c) of  
8 this section has expired, the hearing officer shall immediately inform the parent and  
9 the school district of the availability of the mediation process provided under  
10 AS 14.30.194 and encourage use of that process to attempt to resolve the disagreement  
11 between the parent and the school district. If the mediation process does not result in  
12 settlement of all of the issues, the hearing officer shall conduct a hearing in  
13 conformance with the requirements of federal law, including 34 C.F.R. 300.507 - 509.  
14 After the hearing is completed, the hearing officer shall issue a written decision that

15 (1) upholds the school district's decision; or

16 (2) overturns the school district's decision with specific instructions for  
17 modification of the identification, evaluation, educational placement, or provision of the  
18 education program by the district.

19 (e) A hearing officer's decision under this section is final and binding on the  
20 school district and parent unless appealed under (f) of this section. Notwithstanding a  
21 decision by the hearing officer, a child may not be evaluated, placed, transferred, or  
22 compelled to receive special education or related services from the school district until  
23 the period for filing an appeal under (f) of this section has expired or, if an appeal is  
24 filed, until the appellate review process has been completed.

25 (f) A hearing officer's decision under this section is a final administrative  
26 order, subject to appeal to the superior court for review in the manner provided under  
27 AS 44.62.560.

28 (g) The department shall maintain a list of qualified hearing officers and shall  
29 provide for qualification of hearing officers through a training program that is open to  
30 all individuals who meet the criteria set by the department by regulation. The list of  
31 qualified hearing officers shall be maintained as a public record.

1 (h) For purposes of this section, a student with a disability aged 18 - 21 has the  
2 same rights and obligations under this section as a parent of a child with a disability.

3 \* Sec. 12. AS 14.30 is amended by adding a new section to read:

4 Sec. 14.30.194. Mediation. (a) The department shall, by regulation,  
5 establish and implement a voluntary mediation process in conformance with the  
6 requirements of federal law, including 34 C.F.R. 300.506. The department shall  
7 encourage the use of mediation for settlement of disputes under AS 14.30.180 -  
8 14.30.350.

9 (b) The department shall

10 (1) maintain a list of individuals who are qualified mediators  
11 knowledgeable in the federal and state statutes and regulations relating to the  
12 provision of special education and related services; and

13 (2) provide for qualification of mediators through a training program  
14 that is open to all individuals who meet the criteria set by the department by  
15 regulation.

16 \* Sec. 13. AS 14.30.231 is amended to read:

17 Sec. 14.30.231. Advisory panel [COMMITTEE]. The Governor's Council  
18 on Disabilities and Special Education established under AS 47.80 shall serve as the  
19 state [AN] advisory panel [COMMITTEE], the function of which is to provide  
20 information and guidance for the development of appropriate programs of special  
21 education and related services for [EXCEPTIONAL] children with disabilities.

22 \* Sec. 14. AS 14.30.250 is amended to read:

23 Sec. 14.30.250. Teacher qualifications. A person may not be employed as a  
24 teacher of [EXCEPTIONAL] children with disabilities unless that person possesses a  
25 valid teacher certificate and, in addition, the [SUCH] training that [AS] the  
26 department requires [MAY REQUIRE] by regulation.

27 \* Sec. 15. AS 14.30.270 is amended to read:

28 Sec. 14.30.270. Substitutes. AS 14.30.250 does not prohibit the employment  
29 of a person, otherwise qualified to serve as a substitute teacher, to serve as a substitute  
30 teacher of [EXCEPTIONAL] children with disabilities.

31 \* Sec. 16. AS 14.30.272 is amended to read:

1           **Sec. 14.30.272. Procedural safeguards.** (a) A school district shall inform  
2 the parent of a [AN EXCEPTIONAL] child with a disability of the right

3                   (1) to review the child's educational record;

4                   (2) [,] to review evaluation tests and procedures;

5                   (3) [,] to refuse to permit evaluation or a change in the child's  
6 educational placement;

7                   (4) [,] to be informed of the results of evaluation;

8                   (5) [,] to obtain an independent evaluation by choosing a person from a  
9 list provided by the school district or by choosing a person by agreement between the  
10 parent and school district;

11                   (6) [,] to request a due process [AN IMPARTIAL] hearing;

12                   (7) [,] to appeal a hearing officer's decision; and

13                   (8) [, AND] to give consent or deny access to others to the child's  
14 educational record.

15           (b) The department shall establish, by regulation, impartial procedures for a  
16 school district to follow for due process hearings [UNDER AS 14.30.193] to comply  
17 with requirements necessary to participate in federal grant-in-aid programs, including  
18 20 U.S.C. 1400 - 1487 [20 U.S.C. 1400 - 1485] (Individuals with Disabilities  
19 Education Act).

20 \* **Sec. 17.** AS 14.30.274 is amended to read:

21           **Sec. 14.30.274. Identification of [EXCEPTIONAL] children with**  
22 **disabilities.** Each school district shall establish and implement written procedures to  
23 ensure that all [EXCEPTIONAL] children with disabilities under the age of 22 for  
24 whom the agency is responsible under AS 14.30.186 to provide special education  
25 and related services [WHO RESIDE IN THE DISTRICT] are identified and located  
26 for the purpose of establishing their need for special education and related services.

27 \* **Sec. 18.** AS 14.30.276 is amended to read:

28           **Sec. 14.30.276. Least restrictive environment.** Each school district shall  
29 ensure that, to the maximum extent appropriate, [EXCEPTIONAL] children with  
30 disabilities, including children in public or private institutions or other care facilities,  
31 are educated with children who are not children with disabilities [EXCEPTIONAL]

1 and that special classes, separate schooling, or other removal of [EXCEPTIONAL]  
2 children with disabilities from the regular educational environment occurs only when  
3 the nature or severity of the child's disability [EXCEPTIONALITY] is such that  
4 education in regular classes with the use of supplementary aids and services cannot be  
5 achieved satisfactorily.

6 \* Sec. 19. AS 14.30.278 is repealed and reenacted to read:

7 **Sec. 14.30.278. Individualized education program.** A school district shall  
8 develop an individualized education program for special education and related  
9 services for each eligible child with a disability. The plan must be completed not later  
10 than 30 days after the determination of the child's eligibility. Each individualized  
11 education program shall be developed and periodically reviewed and revised as  
12 necessary in conformance with federal requirements, including 34 C.F.R. 300.340 -  
13 350.

14 \* Sec. 20. AS 14.30.285(a) is amended to read:

15 (a) The department shall institute a statewide program for the education of  
16 [EXCEPTIONAL] children with disabilities [,] to ensure that whenever possible  
17 children are educated in the state at locations in or near their resident school district.

18 \* Sec. 21. AS 14.30.285(b) is amended to read:

19 (b) An identified [EXCEPTIONAL] child with a disability may be sent to an  
20 educational program or residential school outside the child's community or school  
21 district if the child resides in a community or school district where an appropriate  
22 educational program cannot reasonably be made available and if the school district  
23 [DEPARTMENT] determines that provision of special education and related services  
24 in another educational program or residential school is appropriate. If the school  
25 district approves [AND THE DEPARTMENT APPROVE] the enrollment of a [THE  
26 EXCEPTIONAL] child with a disability in another educational program or  
27 residential school outside the child's community or school district and the child is  
28 enrolled, the child's education expenses shall be paid as follows:

29 (1) except as otherwise provided by (2) of this subsection, the sending  
30 district shall pay all costs associated with the transfer;

31 (2) the department may provide financial assistance to the school

1 district for a child's education provided for in (1) of this subsection under regulations  
2 adopted by the department.

3 \* Sec. 22. AS 14.30.285(e) is amended to read:

4 (e) The educational assessment of a [AN EXCEPTIONAL] child with a  
5 disability that indicates that the educational program that is locally available is  
6 inappropriate for the needs of the child must conform to the standards set out in  
7 AS 14.30.191.

8 \* Sec. 23. AS 14.30.285(f) is amended to read:

9 (f) A school district shall obtain informed [THE] consent of the child's parent  
10 before a child may be transferred to a school outside the district in which the child  
11 resides.

12 \* Sec. 24. AS 14.30.285(g) is amended to read:

13 (g) The withholding of informed consent by a parent [OR  
14 DEPARTMENTAL APPROVAL] for the transfer of a [AN EXCEPTIONAL] child  
15 with a disability under this section does not relieve a school district of the obligation  
16 to provide special education and related services to the [AN EXCEPTIONAL] child  
17 [UNDER AS 14.30.186].

18 \* Sec. 25. AS 14.30.325(a) is amended to read:

19 (a) The department shall [MAY] by regulation provide for the appointment of  
20 surrogate parents to represent a child with a disability [EXCEPTIONAL  
21 CHILDREN] in matters relating to the provision of an appropriate public education.

22 \* Sec. 26. AS 14.30.335 is amended to read:

23 **Sec. 14.30.335. Eligibility for federal funds.** Notwithstanding any other  
24 provision of AS 14.30.180 - 14.30.350, the department may do all things necessary to  
25 qualify for federal funds that are available to the state for the education of  
26 [EXCEPTIONAL] children with disabilities.

27 \* Sec. 27. AS 14.30.340 is amended to read:

28 **Sec. 14.30.340. Provision of special education in a private school, home, or**  
29 **hospital setting.** (a) If a parent of a [AN EXCEPTIONAL] child with a disability  
30 enrolls the child in a private school, including a religious school, at the parent's  
31 expense or teaches the child at home, the school district in which the child resides [IS

1 LOCATED] shall make special education and related services available in  
2 conformance with federal requirements, including 34 C.F.R. 300.450 - 462. A  
3 parent teaching the parent's child at home may refuse special education and  
4 related services for the child [AN INDIVIDUALIZED EDUCATION PROGRAM  
5 UNDER AS 14.30.278].

6 (b) If a physician certifies in writing, and if the child's individualized  
7 education program under AS 14.30.278 provides [TEAM THEN DETERMINES]  
8 that a child's bodily, mental, or emotional condition does not permit attendance at a  
9 school and the child's parents do not elect to teach the child at home as permitted  
10 under AS 14.30.010(b), the school district in which the child is located shall enroll the  
11 child in public school and provide the child with special education and related services  
12 in conformance with the child's [AN] individualized education program [UNDER  
13 AS 14.30.278] at the child's home or at a medical treatment facility.

14 \* Sec. 28. AS 14.30.347 is amended to read:

15 Sec. 14.30.347. Transportation of [EXCEPTIONAL] children with  
16 disabilities. When transportation is required to be provided as a related service, a  
17 child with a disability [SERVICES, AN EXCEPTIONAL CHILD] shall be  
18 transported [CARRIED] with children who are not children with disabilities  
19 [OTHER CHILDREN] if the district provides transportation to [OTHER] children in  
20 the district, except when the nature of the physical or mental disability is such that it is  
21 in the best interest of the [EXCEPTIONAL] child with a disability, as provided in  
22 the child's individualized education program [DETERMINED BY THE SCHOOL  
23 DISTRICT], that the child be transported separately. State reimbursement for  
24 transportation of [EXCEPTIONAL] children with disabilities shall be as provided for  
25 transportation of all other pupils except that eligibility for reimbursement is not  
26 subject to restriction based on the minimum distance between the school and the  
27 residence of the exceptional child with a disability.

28 \* Sec. 29. AS 14.30.350(2) is repealed and reenacted to read:

29 (2) "child with a disability" means a child with one or more of the  
30 following:

31 (A) mental retardation;

- 1 (B) learning disabilities;  
2 (C) emotional disturbance;  
3 (D) deafness;  
4 (E) deaf-blindness;  
5 (F) hearing impairment;  
6 (G) orthopedic impairment;  
7 (H) other health impairment;  
8 (I) speech or language impairment;  
9 (J) visual impairment;  
10 (K) multiple disabilities;  
11 (L) early childhood development delay;  
12 (M) autism;  
13 (N) traumatic brain injury;

14 \* Sec. 30. AS 14.30.350(8) is repealed and reenacted to read:

15 (8) "parent" means a

- 16 (A) child's natural or adoptive parent;  
17 (B) child's guardian, but not the state if the child is in the legal  
18 custody of the state;  
19 (C) person who is acting in the place of a child's natural or  
20 adoptive parent, such as a grandparent or stepparent with whom the child lives,  
21 or a person who is legally responsible for the child's welfare; and  
22 (D) child's surrogate parent who has been appointed under  
23 AS 14.30.325;

24 \* Sec. 31. AS 14.30.350(9) is repealed and reenacted to read:

25 (9) "related services" means services described in 34 C.F.R. 300.24;

26 \* Sec. 32. AS 14.30.350(10) is repealed and reenacted to read:

27 (10) "school district" means a borough school district, a city school  
28 district, a regional educational attendance area, a state boarding school, and the state  
29 centralized correspondence study program;

30 \* Sec. 33. AS 14.30.350(11) is repealed and reenacted to read:

31 (11) "special education" means an educational program described in 34

1 C.F.R. 300.26;

2 \* Sec. 34. AS 14.30.350 is amended by adding new paragraphs to read:

3 (12) "due process hearing" means a hearing conducted under  
4 AS 14.30.193;

5 (13) "informed consent" means that

6 (A) a child's parent has been fully informed, in the parent's  
7 native language or other mode of communication, of all information relevant to  
8 the activity for which consent is sought;

9 (B) the parent understands and agrees in writing to the carrying  
10 out of the activity for which the parent's consent is sought;

11 (C) the consent describes that activity and lists any records that  
12 will be released and to whom; and

13 (D) the parent understands that the granting of consent is  
14 voluntary on the part of the parent and may be revoked at any time.

15 \* Sec. 35. AS 14.30 is amended by adding a new section to read:

16 **Article 3A. Education for Gifted Children.**

17 **Sec. 14.30.352. Programs for gifted children.** Every school district shall  
18 establish educational services for gifted children that provide for student identification,  
19 student eligibility, student learning plans, and parental and student participation,  
20 including an appropriate review process, consistent with regulations adopted by the  
21 department.

22 \* Sec. 36. AS 14.30.640 is amended to read:

23 **Sec. 14.30.640. Eligibility for service.** The services of the agency shall be  
24 available to school districts that serve children whose special education needs occur  
25 infrequently, who require specialized services not normally available in the school  
26 district, and who cannot be easily served by local school district personnel because of  
27 the low number of students in the district in need of the particular service. The agency  
28 may provide services to a child with a disability [EXCEPTIONAL CHILDREN], as  
29 that term is defined in AS 14.30.350.

30 \* Sec. 37. AS 29.60.599(7) is amended to read:

31 (7) "school district" means a borough school district, a city school

1 district, or a regional educational attendance area under AS 14 [HAS THE  
2 MEANING GIVEN IN AS 14.30.350];

3 \* Sec. 38. AS 44.21.410(a) is amended to read:

4 (a) The office of public advocacy shall

5 (1) perform the duties of the public guardian under AS 13.26.360 -  
6 13.26.410;

7 (2) provide visitors and experts in guardianship proceedings under  
8 AS 13.26.131;

9 (3) provide guardian ad litem services to children in child protection  
10 actions under AS 47.17.030(e) and to wards and respondents in guardianship  
11 proceedings who will suffer financial hardship or become dependent upon a  
12 government agency or a private person or agency if the services are not provided at  
13 state expense under AS 13.26.112;

14 (4) provide legal representation in cases involving judicial bypass  
15 procedures for minors seeking abortions under AS 18.16.030, in guardianship  
16 proceedings to respondents who are financially unable to employ attorneys under  
17 AS 13.26.106(b), to indigent parties in cases involving child custody in which the  
18 opposing party is represented by counsel provided by a public agency, to indigent  
19 parents or guardians of a minor respondent in a commitment proceeding concerning  
20 the minor under AS 47.30.775;

21 (5) provide legal representation and guardian ad litem services under  
22 AS 25.24.310; in cases arising under AS 47.15 (Uniform Interstate Compact on  
23 Juveniles); in cases involving petitions to adopt a minor under AS 25.23.125(b) or  
24 petitions for the termination of parental rights on grounds set out in  
25 AS 25.23.180(c)(3); in cases involving petitions to remove the disabilities of a minor  
26 under AS 09.55.590; in children's proceedings under AS 47.10.050(a) or under  
27 AS 47.12.090; in cases involving appointments under AS 18.66.100(a) in petitions for  
28 protective orders on behalf of a minor; and in cases involving indigent persons who  
29 are entitled to representation under AS 18.65.100 and who cannot be represented by  
30 the public defender agency because of a conflict of interests;

31 (6) develop and coordinate a program to recruit, select, train, assign,

1 and supervise volunteer guardians ad litem from local communities to aid in delivering  
2 services in cases in which the office of public advocacy is appointed as guardian ad  
3 litem;

4 (7) provide guardian ad litem services in proceedings under  
5 AS 12.45.046;

6 (8) establish a fee schedule and collect fees for services provided by  
7 the office, except as provided in AS 18.85.120 or when imposition or collection of a  
8 fee is not in the public interest as defined under regulations adopted by the  
9 commissioner of administration;

10 (9) provide visitors and guardians ad litem in proceedings under  
11 AS 47.30.839;

12 (10) provide legal representation to an indigent parent of a child with  
13 a disability; in this paragraph, "child with a disability" has the meaning given in  
14 AS 14.30.350 [PARENTS UNDER AS 14.30.195(e)].

15 \* Sec. 39. AS 47.80.090(9) is amended to read:

16 (9) provide information and guidance for the development of  
17 appropriate special educational programs and services for a child with a disability  
18 [EXCEPTIONAL CHILDREN] as defined in AS 14.30.350;

19 \* Sec. 40. AS 47.80.900(6) is amended to read:

20 (6) "person with a handicap" means a person with a developmental  
21 disability as defined in (7) of this section or a person who is hard of hearing, deaf,  
22 speech impaired, visually handicapped, seriously emotionally disturbed,  
23 orthopedically or otherwise health impaired, or who has a specific learning disability;  
24 the term includes a child with a disability [BUT IS NOT LIMITED TO  
25 "EXCEPTIONAL CHILDREN"] as defined in AS 14.30.350;

26 \* Sec. 41. AS 14.30.186(b), 14.30.195, 14.30.315(b), 14.30.350(3), 14.30.350(5),  
27 14.30.350(6), and 14.30.350(7) are repealed.

28 \* Sec. 42. The uncodified law of the State of Alaska is amended by adding a new section to  
29 read:

30 TRANSITION: REGULATIONS. (a) The state Board of Education and Early  
31 Development may immediately proceed to adopt regulations necessary to implement the

1 changes made by this Act. The regulations take effect under AS 44.62 (Administrative  
2 Procedure Act), but not before the effective date of the statutory change.

3 (b) To the extent they are not inconsistent with the statutory changes made by this  
4 Act, regulations adopted by the state Board of Education and Early Development and in effect  
5 on July 1, 2001, continue in effect until amended or repealed by the board, and may be  
6 enforced and implemented.

7 \* Sec. 43. The uncodified law of the State of Alaska is amended by adding a new section to  
8 read:

9 REVISOR'S INSTRUCTIONS. The revisor of statutes is requested to change the  
10 following:

11 (1) the heading of Article 3 of AS 14.30 from "Education For Exceptional  
12 Children" to "Education for Children With Disabilities";

13 (2) the catchline of AS 14.30.285 from "Transfers of exceptional children" to  
14 "Transfers of children with disabilities."

15 \* Sec. 44. Section 42(a) of this Act takes effect immediately under AS 01.10.070(c).

16 \* Sec. 45. Except as provided in sec. 44 of this Act, this Act takes effect July 1, 2001.

**SENATE COMMITTEE REPORT  
First Committee of Referral**

DATE: 1/17/01

FURTHER: Finance

Date of 5-Day Notice: \_\_\_\_\_  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 04/28/01

Health, Education and Social Services Committee considered **SENATE BILL NO. 40**

"An Act relating to the education of children with disabilities and of gifted children; relating to the Governor's Council on Disabilities and Special Education; making conforming amendments; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS SB 40 (HES)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**

- same title
- new title

**House Bill:**

- same title
- technical title
- new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#
DEED	11/14/00		X	2

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>				✓
CHAIR: <i>[Signature]</i>	✓			

**SB**

**44**

SFIN

FILE

SB 44

was referred to the  
Senate Finance  
Committee

No hearing was held  
on this bill

**SB**

**45**

SFIN

FILE

SB 45

was referred to the  
Senate Finance  
Committee

No hearing was held  
on this bill

**SB**

**48**

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT  
MAR 28 2001  
SENATE FINANCE  
COMMITTEE

DATE: 3/9/01

FURTHER:

DATE TURNED IN TO OFFICE: 29 Mar 01

Finance Committee considered SENATE BILL NO. 48

MUNICIPALITIES: INCORPORATION/PROPERTY VALUATION

and recommends:

- be replaced with CS SB 48 (FIN)
- adopt previous CS CS forthcoming - ( )
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

Senate Bill:

- same title
- new title

House Bill:

- same title
- technical title
- new: SCR # \_\_\_\_\_

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DCED	3/7/01	130.0		#2

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	NO REC	AMEND
<i>Linda Green</i>	✓			
<i>Alan Claster</i>			✓	
<i>Greg Kemp</i>	✓			
<i>James Hoff</i>		XX		
<i>George Walker</i>		<del> </del>		
<i>Steve J. Roman</i>	✓			
COCHAIR: <i>[Signature]</i>				
COCHAIR: <i>[Signature]</i>	✓			

MAR 28 2001

SENATE FINANCE  
COMMITTEE

# FISCAL NOTE

STATE OF ALASKA  
2001 LEGISLATIVE SESSION

Fiscal Note Number: 2  
Bill Version: CSSB 48 (CRA)  
(S) Publish Date: 3/9/01

Revision Date/Time (Note if correction): 03/07/2001 11:36a.m. Dept. Affected: DCED  
Title: Municipalities:Incorporation/Property Valuation BRU: Comm. Asst & Econ. Dev  
Sponsor: Senator Wilken Component: Community and Business  
Requester: Senate CRA Component Number: 2486  
Development

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel	16.0					
Contractual	114.0	100.0	100.0	100.0	100.0	100.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims	0.0	300.0	500.0	600.0	600.0	600.0
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>130.0</b>	<b>400.0</b>	<b>600.0</b>	<b>700.0</b>	<b>700.0</b>	<b>700.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	130.0	400.0	600.0	700.0	700.0	700.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>130.0</b>	<b>400.0</b>	<b>600.0</b>	<b>700.0</b>	<b>700.0</b>	<b>700.0</b>

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Assumptions.

- SB 48 will be enacted in 2001.
  - Beginning in FY 2002, one petition for borough incorporation or annexation will initiated annually under the provisions of SB 48. Each petition initiated under SB 48 would not have otherwise been initiated under current law. (Of course, if no petition is initiated, there will be no expense).
  - Each borough incorporation or annexation petition that is initiated under SB 48 will be approved by the Local Boundary Commission and the Legislature. The first such incorporation or annexation will occur in FY 2003. (Of course, if the Local Boundary Commission or Legislature disapprove the petition, there will be no cost for an organizational grant.)
  - For each petition, a financial consultant with expertise in local government finance and property values will be utilized to prepare an independent analysis of the financial feasibility of the proposed borough.
- (continued on separate page)

Prepared by: Pat Poland, Director Phone 907-269-4580  
Division: Community and Business Development Date/Time 03/07/2001 11:36a.m.  
Approved by: Commissioner Deborah B. Sedwick Date 3/7/2001  
Agency: Department of Community & Economic Development

For distribution information, call the Governor's Legislative Office

**Fiscal Note: SB 48 (#2) -- Additional Notes**

Estimated costs.

Contractual Services. \$100.0 will be needed annually beginning in FY 2002. These funds are necessary to prepare and process a petition for incorporation or annexation. The funds will be used primarily to develop credible and thorough expenditure and revenue projections relating to each proposed borough incorporation or annexation. Detailed information will be needed regarding local revenue alternatives (e.g., property taxes, general sales taxes, bed taxes, alcohol taxes, tobacco taxes, fish taxes, and severance taxes) as well as State and Federal revenue sources. Additionally, it is important to the long-term interests of the State to obtain a thorough and credible estimate of the full and true value of each area proposed for incorporation or annexation.

Organization grants. Each borough incorporation and annexation will result in an entitlement to an organization grant under AS 29.05.190. Each grant entitlement is paid over three years (\$300.0 the first year, \$200.0 the second year, and \$100.0 the third year).

Year	FY 02	FY 03	FY 04	FY 05	FY 06	FY 07
Contractual Services	\$100.0	\$100.0	\$100.0	\$100.0	\$100.0	\$100.0
Grants	\$0.0	\$300.0	\$500.0	\$600.0	\$600.0	\$600.0
Total	\$100.0	\$400.0	\$600.0	\$700.0	\$700.0	\$700.0

**Additional Fiscal Impacts as per CSSB 48 (CRA)**

DCED estimates its fiscal impact of dividing the single unorganized borough into multiple unorganized boroughs in accordance with Section 6 of CSSB 48 (CRA) to be \$30.0. In particular, DCED estimates the following fiscal impacts for Fiscal Year 2002.

Action	Cost
Printing, publication, and mailing of initial informational materials to principal local service providers throughout the unorganized borough (114 cities, 19 REAAs, 4 CRSAs, 11 Native regional non-profit associations, approximately 65 unincorporated recipients of state revenue sharing, and approximately 150 federally recognized tribal entities)	\$8.0
Travel by DCED staff to ten regional centers to conduct public informational meetings	\$8.0
Publication and mailing of public notice of ten DCED informational meetings	\$1.0
Publication and distribution of report to the LBC	\$1.0
Publication and mailing of public notice of ten LBC hearings	\$1.0
Travel by LBC to ten regional centers to conduct public hearings (assumes that LBC will split into two groups to conduct hearings, with 2 or 3 commission members and 1 staff attending each hearing).	\$8.0
Long distance telephone charges for teleconference connections	\$2.0
Publication and distribution of LBC decisions.	\$1.0

**Assumptions for Additional CSSB 48 (CRA) Fiscal Impacts**

The foundation for the division of the single unorganized borough into multiple unorganized boroughs already exists in the form of the model borough boundaries established by the LBC between 1989 – 1992. The model borough boundaries project involved LBC hearings in 88 communities (in person or by teleconference). Thus, public informational meetings and hearings to divide the unorganized borough into unorganized boroughs as required by CSSB 48 would be limited to those relatively few unorganized areas where circumstances warrant further consideration of the suitability of model boundaries as boundaries of unorganized boroughs. DCED estimates that ten such areas exist. (continued on following page)

**Fiscal Note: SB 48 (#2) -- Additional Notes (continued)**

The fiscal impacts identified above do not include staff time since DCED's duties under existing law include serving as staff to the LBC. Moreover, DCED's duties include assisting local governments. DCED assumes that many communities will seek assistance from DCED on topics relating to CSSB 48. DCED is likely to include travel expenses and other expenses in that regard beyond the levels stated in the fiscal note. However, here again, such activities are consistent with the current duties and functions of DCED. Expenses incurred in such activities will be funded through DCED's normal operating funding.



Official Business

# Alaska State Senate

Senate Finance Committee

Mail Stop 3100  
State Capitol  
Juneau, Alaska 99801-1182

## FAX COVER SHEET

DATE: 28 March 2001 TIME: 7:05 pm

TO: Legal Services

NUMBER OF PAGES, INCLUDING COVER SHEET: 1

FROM: MINDY ROWLAND  
SENATE FINANCE COMMITTEE SECRETARY  
PHONE: 465-4935  
FAX: 465-2187

NOTES: Final Please

CS SB 48 FIN 22-LS0025 R

3/28/01

no changes

Thanks

Mindy

faxed

SENATE FINANCE COMMITTEE  
2000 COMMITTEE ACTION

Bill Number	5848		
Amendment	Move from		
Motion	Committee		
<u>Motion by</u> Wilkan			
<u>Objection by</u> Hoffman			
<u>Removed</u>			
<u>Second Objection by</u>			
<u>Committee Member</u>	Y	<u>Vote</u>	N
Senator Ward			
Senator Wilkan	✓		
Senator Austerman	✓		
Senator Green	✓		
Senator Hoffman			✓
Senator Leman	✓		
Senator Olson			✓
Co-Chair Donley	✓		
Co-Chair Kelly	✓		
<u>Tally</u>			
Yea	6		
Nay	2		
Absent	1		
<u>MOTION</u> Pass			

Adopted

WORK DRAFT

WORK DRAFT

WORK DRAFT

22-LS0025\R  
Cook  
3/28/01

**CS FOR SENATE BILL NO. 48( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SECOND LEGISLATURE - FIRST SESSION**

BY

Offered:  
Referred:

Sponsor(s): SENATORS WILKEN, Donley, Cowdery, Green, Phillips

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to the determination of full and true value of taxable municipal  
2 property for purposes of calculating funding for education and certain other programs,  
3 to incorporation of third class boroughs, to incorporation of certain boroughs in the  
4 unorganized borough and annexation of portions of the unorganized borough to  
5 boroughs and unified municipalities, and to the formation of separate unorganized  
6 boroughs; and providing for an effective date."

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

8 \* Section 1. The uncodified law of the State of Alaska is amended by adding a new section  
9 to read:

10 LEGISLATIVE PURPOSE. (a) It is the purpose of the legislature to carry out the  
11 directive contained in art. X, sec. 3, Constitution of the State of Alaska, which provides, in  
12 part, "The entire State shall be divided into boroughs, organized or unorganized."

13 (b) The unorganized borough is divided into several unorganized boroughs to enable

1 the state to provide critical services on a more carefully controlled regional basis, to facilitate  
2 the gathering of information that reflects regional differences, and to separately track state  
3 expenditures and revenues in each of the unorganized boroughs.

4 (c) Permitting the incorporation of third class boroughs serves the purpose of  
5 encouraging formation of organized boroughs by increasing options for the types of borough  
6 government available to address unique local needs.

7 \* Sec. 2. AS 14.17.510(a) is amended to read:

8 (a) To determine the amount of required local contribution under  
9 AS 14.17.410(b)(2) and to aid the department and the legislature in planning, the  
10 Department of Community and Economic Development, in consultation with the  
11 assessor for each district in a city or borough, shall determine the full and true value of  
12 the taxable real and personal property in each district in a city or borough. If there is  
13 no local assessor or current local assessment for a city or borough school district, then  
14 the Department of Community and Economic Development shall make the  
15 determination of full and true value from information available. In making the  
16 determination, the Department of Community and Economic Development shall be  
17 guided by AS 29.45.110. However, the full and true value of taxable real and  
18 personal property in any area detached shall be excluded from the determination  
19 of the full and true value of the municipality from which the property was  
20 detached for the two years immediately preceding the effective date of the  
21 detachment. Also, in making the determination for a municipality that is a  
22 school district or for a city that is within a borough school district, the assessed  
23 value of property taxable under AS 43.56 shall be excluded if a municipal tax is  
24 not levied under AS 29.45.080 in that school district. The determination of full and  
25 true value shall be made by October 1 and sent by certified mail, return receipt  
26 requested, on or before that date to the president of the school board in each city or  
27 borough school district. Duplicate copies shall be sent to the commissioner. The  
28 governing body of a city or borough that is a school district may obtain judicial review  
29 of the determination. The superior court may modify the determination of the  
30 Department of Community and Economic Development only upon a finding of abuse  
31 of discretion or upon a finding that there is no substantial evidence to support the

1 determination.

2 \* **Sec. 3.** AS 29.05.031(a) is amended to read:

3 (a) An area that meets the following standards may incorporate as a home rule,  
4 first class, [OR] second class, or third class borough, or as a unified municipality:

5 (1) the population of the area is interrelated and integrated as to its  
6 social, cultural, and economic activities, and is large and stable enough to support  
7 borough government;

8 (2) the boundaries of the proposed borough or unified municipality  
9 conform generally to natural geography and include all areas necessary for full  
10 development of municipal services;

11 (3) the economy of the area includes the human and financial resources  
12 capable of providing municipal services; evaluation of an area's economy includes  
13 land use, property values, total economic base, total personal income, resource and  
14 commercial development, anticipated functions, expenses, and income of the proposed  
15 borough or unified municipality;

16 (4) land, water, and air transportation facilities allow the  
17 communication and exchange necessary for the development of integrated borough  
18 government.

19 \* **Sec. 4.** AS 44.33 is amended by adding a new section to article 11 to read:

20 **Sec. 44.33.830. Incorporation or annexation of unorganized areas.** (a) In  
21 addition to other methods for incorporation and annexation provided by law, an area  
22 of the unorganized borough may be incorporated as a first class, second class, or third  
23 class borough or annexed to an existing borough or unified municipality under (b) - (f)  
24 of this section. AS 44.33.814 - 44.33.828 apply to actions taken by the commission  
25 under this section.

26 (b) The Department of Community and Economic Development shall  
27 determine which areas of the unorganized borough reasonably appear to satisfy  
28 standards for borough incorporation or for annexation to an existing borough or  
29 unified municipality. By November 30 of each year, the department shall present to  
30 the Local Boundary Commission a list of those areas that reasonably appear to satisfy  
31 standards for borough incorporation or for annexation to an existing borough.

1 unified municipality, together with the department's analysis supporting its  
2 conclusions regarding the incorporation or annexation standards for each of the areas.  
3 By November 30 of each year, the commission shall select areas from the list provided  
4 by the department that the commission determines may warrant incorporation or  
5 annexation. By March 31 of the following year, the department shall prepare a  
6 petition for borough incorporation or for annexation of each of the areas selected by  
7 the commission. The department shall conduct at least one public meeting in each  
8 area for the purpose of gathering information needed to prepare the petition. The  
9 department shall provide public notice when the petition has been prepared, make  
10 copies of the petition available, and provide any interested person with the opportunity  
11 to submit written comments on the petition. After considering the comments, the  
12 department may amend the petition. The department shall file the original petition or,  
13 if amended, the amended petition with the commission.

14 (c) Upon receipt of a petition filed under (b) of this section, the Local  
15 Boundary Commission shall hold at least one public hearing in or near the area  
16 proposed for incorporation or annexation. In addition, the commission shall hold at  
17 least one public hearing in each community with at least 400 residents and in each  
18 home rule or first class city located in the area. Following the hearings, the  
19 commission may amend the petition and may impose conditions on the incorporation  
20 or annexation. If the commission determines that the incorporation or annexation  
21 meets applicable standards under the state constitution as well as those established by  
22 law and commission regulation and is in the best interests of the state, it may accept  
23 the petition. Otherwise, it shall reject the petition. An incorporation or annexation  
24 approved by the commission shall be submitted to the legislature under AS 44.33.828  
25 and takes effect as provided in that section. However, the commission may submit not  
26 more than two petitions to the legislature under this subsection each year.

27 (d) Regulations of the Local Boundary Commission filed under authority of  
28 other provisions of law that apply to incorporation and annexation petitions and that  
29 deal with the form and content of petitions, public notice of the filing of petitions,  
30 service of petitions, opportunity to file responsive briefs, amendment of petitions,  
31 notice and conduct of hearings, conduct of decisional sessions, and reconsideration

1 apply to the preparation and consideration of petitions under this section to the extent  
2 they may be applied without conflicting with this section. The Local Boundary  
3 Commission may adopt regulations providing additional standards and procedures for  
4 incorporations or boundary changes under this section and to carry out the purposes of  
5 this section.

6 (e) When a proposal for incorporation of an area under this section becomes  
7 effective, the Local Boundary Commission shall immediately notify the director of  
8 elections. Within 30 days after notification, the director of elections shall order an  
9 election in the area for initial borough officials. The election shall be held under  
10 AS 29.05.120 not less than 30 nor more than 90 days after the date of the election  
11 order. The election order must specify the dates during which nomination petitions for  
12 election of initial officials may be filed. Notwithstanding AS 29.45.670 and  
13 29.45.680, a borough incorporated under this section may levy sales and use taxes in  
14 the manner and at the rates included in the incorporation petition approved by the  
15 commission without ratification by the voters. AS 29.05.130 - 29.05.150, 29.05.190 -  
16 29.05.210, and AS 29.65.030 apply to boroughs incorporated under this section.

17 (f) When a proposal under this section for annexation of an area in the  
18 unorganized borough becomes effective, the borough or unified municipality to which  
19 the area is annexed shall receive an additional general grant land entitlement equal to  
20 10 percent of the maximum total acreage of vacant, unappropriated, unreserved land  
21 within the boundaries of the area annexed on the date of the annexation. Additional  
22 general grant land entitlements under this subsection are subject to AS 29.65.030 -  
23 29.65.140 to the extent that those provisions can be made applicable. The borough or  
24 unified municipality to which the area is annexed is also entitled to an organization  
25 grant under AS 29.05.190, and, for purposes of applying that section, the effective  
26 date of the annexation shall be treated as though it were the date of incorporation.

27 \* Sec. 5. AS 29.05.031(b) is repealed.

28 \* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to  
29 read:

30 FORMATION OF UNORGANIZED BOROUGHES. The Department of Community  
31 and Economic Development shall, by November 30, 2001, submit a proposal to the Local

1 Boundary Commission to divide the entire area of the unorganized borough into separate  
2 unorganized boroughs, taking into account population, geography, economy, and  
3 transportation in each of the proposed unorganized boroughs. The Local Boundary  
4 Commission shall submit each proposed unorganized borough it approves to the legislature  
5 during the first 10 days of the Second Session of the Twenty-Second Alaska Legislature for  
6 consideration under art. X, sec. 12, Constitution of the State of Alaska.

7 \* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to  
8 read:

9 CONFORMING STATUTORY CHANGES. If separate unorganized boroughs are  
10 formed under sec. 6 of this Act, after formation of the unorganized boroughs, the revisor of  
11 statutes shall correct the statutes that refer to the single unorganized borough so that they refer  
12 to the unorganized boroughs.

13 \* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

SENATE FINANCE  
COMMITTEE  
Amendment Number: 1  
Bill Number: SB 48  
Sponsor: Hoffman Date: 3/22  
Logged In By: Cadie

Amendment

Offered in Senate Finance

By Senator Hoffman

To: CSSB 48(CRA), Draft version "S"

Page 4, Line 21:

Delete "incorporation or"

Page 5 lines 3-10:

Delete all material and insert:

"(e) When a petition for incorporation of an area is approved by the Local Boundary Commission under (c) of this section, the commission shall immediately notify the director of elections. Within 30 days after the notification, the director of elections shall order an election in the area to determine whether voters desire incorporation and, if so, to elect the initial borough officials. The election shall be held under AS 29.05.120 not less than 30 nor more than 90 days after the date of the election order. The election order must specify the dates during which nomination petitions for election of initial officials may be filed. If a majority of the voters voting on the question approve incorporation, the area is incorporated on the first Monday following certification of the election. AS29.05.130 - 29.05.150, 29.05.190 - 29.05.210, and AS 29.65.030 apply to a borough incorporated under section."

## GARY WILKEN

SENATOR  
Districts 29 & 30  
West Fairbanks

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Member: Health, Education, &  
Social Services (HESS)  
Member: Legislative Budget & Audit  
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## SPONSOR STATEMENT

### Senate Bill 48 Equity in Education Funding Act

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Senate Bill 48 simply asks the question, "Can you help?" Is there a way for residents living in unorganized Alaska to help contribute financially to their local school system?

Residents in organized Alaska are required by state law to contribute a four-mill equivalent of all taxable property within the school district to their local school system, a total of \$144 million last year. At the same time, citizens residing in the unorganized borough are not required to help financially as they live within a community that does not have the authority to levy or collect taxes.

Senate Bill 48 acknowledges that, while all communities of Alaska are perhaps not financially able to sustain a borough government, some areas of the state may very well have developed the capacity to operate boroughs. This legislation allows an arm's length, methodical and professional analysis of the readiness of certain areas of the state to either incorporate as a borough or be annexed to an existing borough.

First, the Department of Community and Economic Development will annually provide to the Local Boundary Commission (LBC) a list of areas in the unorganized borough that reasonably appear to satisfy current standards for borough incorporation or annexation. The LBC will consider and then select from this list areas that may warrant incorporation or annexation. The department will conduct at least one public hearing in each area under consideration. If the applicable borough standards are met and the incorporation or annexation is in the best interest of the state, the LBC may approve the petition of organization. If not, the Local Boundary Commission must reject the petition. Each approved petition is submitted to the Legislature for consideration.

It is important to note that Senate Bill 48 merely creates a new way for borough incorporation or annexation. All current laws that facilitate government formation today remain in place. Senate Bill 48 adds another tool to the Local Boundary Commission's professional toolbox to answer the question "Can you help?"

I respectfully request your consideration and support for Senate Bill 48.

Home of the  
University of Alaska

## GARY WILKEN

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## A Sectional Analysis Committee Substitute for Senate Bill 48 (CRA)

Senate Bill 48 creates a new way for borough incorporation or annexation in areas of the unorganized borough which have the human and financial resources necessary to support organized government. This 5-step process, outlined in Section 4, pages 3 – 5, is as followed:

1. The Department of Community and Economic Development (DCED), by November 30 of each year, provides to the Local Boundary Commission (LBC) a list of areas in the unorganized borough that appear to satisfy current standards for borough incorporation or annexation. The LBC must select areas from this list that may warrant incorporation or annexation.
2. By March 31 of the following year, DCED must prepare a petition for borough incorporation or annexation for the areas selected by the Local Boundary Commission. The department will conduct at least one public meeting in each area under consideration. After considering written and oral comments on the proposal, DCED may amend the petition. The original, or if amended, the amended petition is filed with the Local Boundary Commission.
3. After holding at least one hearing in each effected area, the LBC may amend the petition and impose conditions on the proposed incorporation or annexation. If the Commission determines that the applicable borough standards are met, and the incorporation or annexation is in the best interest of the state, the LBC may accept the petition. If not, the Commission must reject the petition.
4. Each incorporation or annexation approved by the Commission must be submitted to the Legislature during the first ten days of a regular legislative session as provided under AS 44.33.828. The Legislature has 45 days to review the proposal. The incorporation or annexation is tacitly approved by

the Legislature unless a concurrent resolution rejecting the proposal is adopted within the 45-day review period.

5. If a proposal for incorporation receives tacit approval from the Legislature, the LBC must notify the Director of Elections. Within 30 days, the director must order an election for borough officials and an election must be held not less than 30 or more than 90 days from the date of the election order.

All existing general laws governing borough incorporation apply to these newly formed boroughs. These laws relate to (1) integration of special districts and services areas – AS 29.05.130; (2) transition – AS 29.05.140; (3) challenge of legality – AS 29.05.150; (4) organization grants – AS 29.05.190; (5) organization grant fund – AS 29.05.200 (6) transitional assistance to boroughs – AS 29.05.210; and (7) land grants – AS 29.65.030.

#### Other Provisions in Committee Substitute for Senate Bill 48 (CRA)

A provision in Section 2, page 2, addresses a current inequity involving areas that may detach from organized government. The required local contribution of a city or borough school district to help pay for local schools is the equivalent of a four-mill tax levy on the full and true property value in the district as of January 1 of the second preceding fiscal year. Under current law, if an area is detached, the four-mill equivalent will, for two years following detachment, be based on property values that are no longer part of the district. Language in Section 2 corrects this unfair provision; the property value in the detached area is simply not counted when determining the required four-mill equivalent.

Section 2 also eliminates another disincentive to borough formation in certain regions of Alaska. In less developed parts of Alaska, property taxes are not necessarily the most practical or preferred means of generating municipal revenue. This is evidenced by the fact that four of the last five organized boroughs formed do not levy property tax.

As mentioned above, the four-mill local contribution requirement for education is based on the value of taxable property within the school district, including the Trans-Alaska Oil Pipeline if the pipeline transverses the municipality. In order for a municipality to collect an equivalent four-mill tax based on the value of the pipeline, the only realistic option for the residents to consider is a property tax. However, there may be situations where residents would prefer another taxing alternative. Senate Bill 48 addresses this concern in Section 2, page 2. If a municipality elects not to levy a property tax and decides instead to raise the four-mill equivalent in another fashion, the assessed value of any oil and gas properties within the municipality is excluded from the school district's full and true value of taxable property.

It should be noted that when a municipal government levies property taxes on the Trans-Alaska Oil Pipeline, the proceeds from that tax are deducted from revenues that the State of Alaska would otherwise receive under AS 43.56.010 (*Oil and Gas Property Taxes*). Thus, the State's financial gain from including oil and gas properties in the local required contribution determination is offset by an equal reduction in State taxes levied on oil and gas properties. However, if a new municipal government elects not to levy a property tax, the revenue collected on oil and gas properties is not impacted; there is no reduction to the state treasury.

Section 5, page 5, repeals the prohibition against the formation of a third class borough and allows an area to incorporate as a third class borough if certain existing standards are met, as outlined in Section 3, page 3. A third class borough must provide for an educational system within its boundaries, but the borough does not have planning, platting, or land use powers.

As noted in Section 6, page 6, the Department of Community and Economic Development is directed to submit a proposal by November 30, 2001 to the Local Boundary Commission to divide the entire area of the unorganized borough into separate unorganized boroughs. The area's population, geography, economy, and transportation will be considered when forming the proposed unorganized boroughs. The LBC will submit each proposed unorganized borough it approves to the Legislature during the first 10 days of the Second Session of the Twenty-Second Alaska Legislature.

Committee Substitute for Senate Bill 48 (CRA) takes effect immediately.



# State of Alaska Local Boundary Commission

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## **The Need to Reform State Laws Concerning Borough Incorporation and Annexation**



Alaska State Constitutional  
Convention in session  
February 1956

**January 2001**



The Local Boundary Commission complies with the Title II of the Americans with Disabilities Act of 1990. Upon request, this report will be made available in large print or other accessible formats. Requests for such should be directed to the Local Boundary Commission staff at 907-269-4560.

This report is also available on the Local Boundary Commission's website at:

[Http://www.dced.state.ak.us/mra/LBC/Mrad\\_lbc.htm](http://www.dced.state.ak.us/mra/LBC/Mrad_lbc.htm)

Photos of the Constitutional Convention were supplied by the Anchorage Museum of History and Art, Steve McCutcheon, Photographer.

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# CORRECTION

THE FOLLOWING DOCUMENT(S)  
HAVE BEEN REFILMED TO  
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services  
Department of Education & Early Development  
State of Alaska

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## Introduction

This year marks the 40th anniversary of the enactment of legislation to institute borough government in Alaska. Repeatedly throughout the past 40 years, an array of public interest groups, local government experts, State and local officials, and citizens have pointed out serious shortcomings in the manner in which the borough concept has been implemented.

In response to growing difficulties resulting from those shortcomings, the Local Boundary Commission is proposing remedial legislation. The proposed legislation would:

- eliminate certain disincentives to the incorporation of new boroughs;
- implement incentives for borough incorporation and annexation; and
- facilitate borough incorporation and annexation of unorganized areas that have the resources to support borough government.

The legislation proposed by the Commission will address the following issues:

- **Alaskans Treated Unequally.** Citizens of municipal school districts in Alaska must make substantial financial contributions in support of schools while all others have no such responsibility.
- **No Rational Basis for Unequal Treatment.** There is no legitimate public policy basis for the disparate treatment of Alaskans noted above. While some unorganized regions are poor, others have resources that are superior to areas that long ago accepted local responsibility for schools.
- **Lack of Local Authority to Fund Education.** Regional educational attendance areas (REAs) are instrumentalities of the State of Alaska. REA residents depend on the State for educational services. When funds are needed for new schools, major capital improvements, or increased operational funding, REA residents must look to the State of Alaska, which has exclusive responsibility for such matters.
- **Unorganized Regions Unique to Alaska.** Alaska is the only state that is not organized at the regional level into counties or their equivalent. Alaska is also unique among state governments in the extent to which it assumes responsibility for local services.

- **Unorganized Borough Sustains Inefficient Service Delivery.** Essential services are delivered in the unorganized borough in a highly fragmented manner. This perpetuates inefficient and ineffective governmental operations.
- **State Fiscal Policies Encourage Avoidance of Local Responsibility.** The State continues to shoulder the burden for education and plating services in communities that decline to accept local responsibility, even though many such communities have ample resources. At the same time, the State of Alaska has dramatically reduced financial aid to communities that have assumed local responsibility for services.
- **Unorganized Borough Impedes Development.** The lack of regional government has hindered economic and social development in unorganized areas.
- **Overpowering Borough Disincentives.** The deterrents in State law to form boroughs are so pervasive and so overwhelming that they impede successful incorporation of new borough governments.
- **Procedures Stifle Incorporation.** The process for incorporation of new boroughs actually thwarts local initiative in certain cases. For example, by requiring each of two different classes of voters to initiate incorporation (those within city school districts and those outside city school districts) a relatively small number of voters may block local efforts to incorporate.
- **System Promotes Flawed Boundaries.** Forming boroughs under the current ad hoc and voluntary basis has led to compromises with regard to ideal municipal boundaries. In some cases, boroughs have sought to draw boundaries to maximize their financial and political resources to the detriment of adjacent communities.

The Local Boundary Commission takes the view that timely attention to these matters is warranted. Details about the problems and the Commission's proposed legislative solutions follow.

## Background

- 1 *Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92, 101 (Alaska 1974).
- 2 Alaska Municipal League, *AML Issue Paper: Municipal Government In Alaska*, (printed from the Alaska Municipal League's Internet site at: <http://www.akmunileague.org/whitepaper.htm>), page 2.
- 3 Victor Fischer, *Alaska's Constitutional Convention*, 1975, page 119.

The Local Boundary Commission is one of five State boards created under Alaska's Constitution. Its duties include reviewing proposals for borough incorporation and annexation. Additionally, the Commission has the responsibility under AS 44.33.812 to make studies of "local government boundary problems." The Commission considers the lack of a strong State policy promoting the extension of borough government to be the most pressing "local government boundary problem" facing Alaska.

**"The state has failed to continue the evolution of local government directed by the Constitution."**

— Alaska Municipal League

The Commission considers the natural development of government in the unorganized borough to be

The Commission considers the natural development of government in the unorganized borough to be

stymied. Alaska's Constitution encourages the extension of borough government.<sup>1</sup> Yet, present circumstances have led the Alaska Municipal League to take the position that, "The state has failed to continue the evolution of local government directed by the Constitution."<sup>2</sup>

The Local Boundary Commission joins others that have previously expressed a preference for voluntary extension of borough government. However, many of those have also taken the position that the State should compel the extension of borough government in regions capable of supporting boroughs if citizens choose not to organize voluntarily. For example, the constitutional convention delegates who wrote the local government provisions of Alaska's Constitution held the view that creation of boroughs should be compulsory, with provision for local initiative.<sup>3</sup>



*Local Government Committee of the Alaska Constitutional Convention, February 1956*

Several who have favored voluntary incorporation have also acknowledged that, to be successful, such an approach requires adequate incentives to encourage incorporation. Unfortunately, current law has many provisions that act as disincentives to borough formation and annexation. However, if the disincentives were removed, it is unlikely that the State still could provide sufficient inducements to motivate all of its citizens to incorporate boroughs voluntarily.

Alaska's "Task Force on Governmental Roles", established by the 1991 Legislature to define Federal, State, and local relationships in the delivery of public services, "stopped short of endorsing mandatory borough formation legislation but agreed that continued formation of additional borough governments should be a *primary* state policy goal."<sup>4</sup> (emphasis added) However, instead of promoting borough formation, State policy has actually continued to regress in that arena since the 1991 Task Force study.<sup>5</sup>

Citizens and local officials in some areas have become frustrated over procedural and policy impediments to borough formation. For example, before any laws had been written concerning borough government in Alaska, residents of Cordova who attended a January 6, 1960 meeting of the Local Boundary Commission at the Cordova High School Auditorium expressed an immediate need for a Prince William Sound borough.

A clear majority recommended that borough boundaries in this area include Prince William Sound, east to the Canadian border, south along the border to Yakutat, then west to Prince William Sound; that this area be unorganized until borough standards are established so that a decision on a "home rule" or so-called "general law" boroughs (sic) can be made. (emphasis added) They felt that although they are probably not ready for "home rule" at this time, there is a real need for organized borough government in this area as soon as possible. (emphasis added)

There is a definite feeling of tie-in with all of Prince William Sound, the "highway communities" and the Copper River Valley when that road is finished. They definitely desire that the fishing areas on the west side of Prince William Sound be included in this area. Yakutat should be included if such is the wish of that community.<sup>6</sup>

Despite the aspiration among Cordova residents for a Prince William Sound Borough in 1960, such a borough, of course, has yet to form. However, current officials of the City of Cordova

<sup>4</sup> Brad Pierce, Governor's Office of Management and Budget, and the Alaska Municipal League, *Final Report: Task Force on Governmental Roles*, July 10, 1992, page 15.

<sup>5</sup> The Local Boundary Commission has chronicled an extensive and growing list of borough disincentives in its annual reports to the Legislature since the 1980s. Most recently this issue was addressed on pages 38-41 of the Commission's report to the 2001 Legislature. That report is available on the Internet at: [http://www.dced.state.ak.us/rira/LBC/pubs/000\\_LBC\\_Annual\\_Report.pdf](http://www.dced.state.ak.us/rira/LBC/pubs/000_LBC_Annual_Report.pdf)

<sup>6</sup> Local Boundary Commission, *First Report to the Second Session of the First Alaska State Legislature*, February 2, 1960, page 2-4.

**"They felt . . . there is a real need for organized borough government in this area as soon as possible."** – Local Boundary Commission, commenting on January 6, 1960 meeting with Cordova residents

<sup>7</sup> Zeine, Ed, Mayor of the City of Cordova, letter to the Chairman of the Local Boundary Commission, December 20, 1999.

<sup>8</sup> City of Cordova, *Proposal for Reform of State Law Regarding Borough Formation*, December 1999.

<sup>9</sup> City of Cordova *Resolution 12-99-83*.

<sup>10</sup> See comments by Thomas Morehouse and Victor Fischer in *Borough Government in Alaska*, page 73, former Governor Jay Hammond in *Tales of Alaska's Bush Rat Governor*, page 149; John Rader in *The Metropolitan Experiment in Alaska - A Study of Borough Government*, page 91; Thomas A. Morehouse, et al., *Alaska's Urban and Rural Governments*, page 43; House Research Agency in *A New Mandatory Borough Act: Local Education Costs and Potential Revenues of Newly Created Boroughs*, page 14; and City of Cordova in *Proposal for Reform of State Law Regarding Borough Formation*, December 1999.

<sup>11</sup> *Mobil Oil Corporation v. Local Boundary Commission*, *supra*, 98.

continue to recognize the need for a borough government. They cite procedures established under the Borough Act of 1961 as a principal reason for the lack of a Prince William Sound borough. Dissatisfaction with the status quo is evident in the following recent comments from Ed Zeine, Mayor of Cordova:

The City of Cordova and many other smaller Alaska cities have been frustrated in previous attempts to establish borough governments. The current process is cumbersome and self-defeating.<sup>7</sup>

In December of 1999, circumstances led the City of Cordova to propose legislation that is similar to the Commission's current proposal for reform of State law regarding borough incorporation and annexation.<sup>8</sup> The Cordova City Council adopted a formal resolution providing as follows:

... the City Council of Cordova, Alaska, hereby encourages the executive and legislative branches of the government of the State of Alaska to review and amend the borough formation process, and offers the paper "Proposal for the Reform of State Law Regarding Borough Formation" as a starting point for the process of change.<sup>9</sup>

Several respected Alaskans and institutions have concluded - some as far back as the early 1960s -- that it is naive to assume that the voluntary approach to borough formation will succeed except in rare instances.<sup>10</sup> The test of time has clearly proven them to be correct. During the past four decades, boroughs have formed voluntarily in areas that encompass only four percent of Alaskans. In contrast, eighty-three percent of Alaskans live in organized boroughs formed in a matter of a few months under the 1963 Mandatory Borough Act. The remaining thirteen percent live in the unorganized borough. Stated in other terms, ninety-six percent of Alaskans live in regions of the state that have not embraced borough government voluntarily.

Boroughs are adaptable to both rural and urban areas.<sup>11</sup> More than one-third of Alaska's organized boroughs encompass areas that are *exclusively* rural (Bristol Bay, North Slope, Northwest Arctic, Aleutians East, Lake & Peninsula, and Yakutat). Another one-third of the boroughs include a number of rural communities (Kodiak Island, Kenai Peninsula, Haines, Ketchikan, Matanuska-Susitna, and Denali).

Eben Hopson, first Mayor of the North Slope Borough, promoted borough formation as a means to advance the social and economic well-being of North Slope residents. Additionally, he saw

the North Slope Borough as a means to preserve and protect the Inupiat culture and language and to establish local control and self-determination.<sup>12</sup>

A report prepared for the Alaska Federation of Natives in 1999 noted that boroughs have the capacity that other organizations lack to address particular needs of Native communities:

In many Native communities, neither tribal government nor (city) status provides the powers or jurisdiction necessary to control land uses and protect subsistence fish and wildlife habitat in the much larger area surrounding the community. Also, developments in the surrounding area are outside the taxing powers of these local governments. One solution to these problems is to create an areawide or regional borough government under state law in order to bring these lands under local governmental jurisdiction. In addition to land use planning and control and tax powers, borough government also can localize control of public education. These are all mandatory powers of borough government.<sup>13</sup>

The Alaska Municipal League takes the following view concerning the suitability of boroughs in predominantly Native areas:

Borough government can be a valuable tool for local self-determination that allows municipal and tribal government/organizations to co-exist successfully while resources are maximized.<sup>14</sup>

Several existing boroughs are inhabited predominantly by Natives. These include the Aleutians East Borough, Lake and Peninsula Borough, North Slope Borough, Northwest Arctic Borough, and the City and Borough of Yakutat. Other existing boroughs include significant Native populations. At present, one-third of the villages recognized by the Bureau of Indian Affairs are within organized boroughs.<sup>15</sup>

It is unlikely that regions in the unorganized borough – those inhabited predominantly by non-Natives as well as those inhabited predominately by Natives – will form boroughs voluntarily under the present circumstances. In an effort to resolve the conflict between the constitutional goal of “maximum local self-government with a minimum of local government units”, and the near absence of local initiative, the Local Boundary Commission urges reform of State law concerning boroughs. Specifically, the Commission supports procedures wherein the State would take the initiative to extend borough government to those areas that have the human and financial resources needed to support boroughs.

The Commission’s suggested reform proposes roles for both the executive and legislative branches of State government, including the Commission itself, to determine whether regions of the

<sup>12</sup> Thomas Morehouse, et al., *Alaska’s Urban and Rural Governments*, 1984, page 144.

<sup>13</sup> Cornell, Stephen, et al., *The Economic Resource Group, Inc.; and Victor Fischer and Thomas Morehouse, Institute of Social and Economic Research, University of Alaska, Anchorage. Achieving Alaska Native Self-Governance: Toward Implementation of the Alaska Natives Commission Report*, May 1999, page 44.

<sup>14</sup> Alaska Municipal League. *supra.*, page 4.

<sup>15</sup> Cornell, et al., *supra.*, Appendix A lists 223 BIA-recognized villages, 72 of which are within organized boroughs.

<sup>16</sup> See Thomas A. Morehouse and Victor Fischer; *Borough Government In Alaska*; 1971, pages 43 - 46.

unorganized borough have adequate human and financial resources to support borough government. The proposed process is patterned after the method established in Alaska's Constitution for review of municipal boundary changes by the Commission and Legislature. That system has been in place since 1959 and has been used extensively throughout both rural and urban parts of Alaska.

Section 1 of this policy paper provides a more detailed discussion of the fundamental public policy issues that compel attention to this matter. Section 2 includes a copy of the remedial legislation proposed by the Local Boundary Commission. Section 3 provides a sectional analysis of the legislation, a timeline to illustrate how the proposed process would be implemented, and a summary of the standards for borough incorporation. Lastly, Section 4 offers background information concerning the Local Boundary Commission.

## **Section 1.**

### **Discussion of the need for reform.**

This section of the policy statement outlines reasons why the Local Boundary Commission advocates the extension of borough government to unorganized regions of Alaska that possess the human and financial resources to operate borough government. Further details on these topics are available from the Commission upon request.

---

**A. Boroughs are Alaska's fundamental political subdivision for delivery of municipal services, yet the State has never established a rational basis for the creation of new boroughs or the expansion of existing boroughs.**

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Boroughs were conceived as the fundamental political subdivision of the State of Alaska through which municipal services would be delivered.<sup>16</sup> The failure of the policy to establish boroughs through voluntary efforts in the early years of statehood led John Rader – Alaska's first State Attorney General and a former member of the State House of Repre-

**"The greatest unresolved political problem of the State was the matter of boroughs." –**  
John Rader, Alaska's first State Attorney General and former legislator