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7460 SENATE JUDICIARY

State has failed to act as a responsible trustee. State plans for a comprehensive and integrated program of mental health services were not and have not been consistently maintained or implemented. The State did not and has not provided necessary services, as described in an approved plan, to *"all persons who are residents of the state of Alaska and who will require mental health services."*[9] Coincident with this failure, the State used Mental Health Trust lands and proceeds for other public purposes. In 1978, the State wrongfully redesignated Mental Health Trust Lands as general grant lands thereby breaching the duty of the trustee to preserve the Trust corpus. Suit was filed in 1982 alleging breach of Trust.[10]

In 1985 the Alaska Supreme Court ruled against the State and in favor of the class plaintiffs.[11] The Court ordered the Mental Health Lands Trust be reconstituted as closely as possible to its condition at the time of enactment of the invalid legislation which attempted to redesignate Trust land as general grant land. The land not recoverable was to be compensated for with cash. The State was to be granted a credit against its Trust indebtedness for Mental Health Program expenditures.[12]

The Legislature has since passed laws (Ch 132 SLA 1986; Ch. 48 SLA 1987; Chapter 210 SLA 1990) in hopes of satisfying the Supreme Court order. The AMHB was created as a critical element of the Legislature's various settlement attempts.[13] The Legislature's efforts to settle the Trust litigation

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9 This description is the class definition in the Weiss class action lawsuit.

10 The case is usually called the "Weiss" case and identified as Weiss et.al.vs.State of Alaska, Case No. 4FA-82-2208 Civil.

11 State v. Weiss, 706, P.2d, 681 (Alaska, 1985)

12 Consistent application of Trust principles would suggest that the state's credit could be applied only against Trust earnings and not against funds the state obtained by wrongly selling off and depleting the Trust corpus. The credit calculation should apply to Trust earnings that would have been realized under proper management of Trust assets. In part, the credit calculation must be based upon a clear definition of the "Mental Health Program" so that general expenditures for other programs are not inappropriately included. Furthermore, expenditures for which a separate accounting was not rendered annually should not be included in the state's credit.

13 The Interim Mental Health Trust Commission (IMHTC) was another critical element of the Chapter 48 proposed settlement. The IMHTC was assigned the duties of trustee for the Mental Health Trust on an interim basis and also the task of approving procedures under which the value of the Trust was to be determined. The IMHTC Commissioners included Alaskan economist Dr. George Rogers, Alaskan Geologist Dr. Lidia Selkregg and designees of various Commissioners of the Department of Natural Resources.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

INTRODUCTION

Alaska Mental Health Board: 1988-1990

The Alaska Mental Health Board (AMHB) held its first meeting in January, 1988. The AMHB was created by the 15th Alaska State Legislature as a critical element of a legislatively proposed settlement of a lawsuit involving the State's breach of Trust. The AMHB mandate is much broader than that of the Governor's Mental Health Advisory Council which the Board replaced. The Board consists of twelve persons appointed by the Governor and a representative of the Commissioner of Health and Social Services. Of the appointed members, one third are consumers of mental health services, one third are providers of mental health services and the remainder are representatives of the public at large. The Alaska Mental Health Board constituency embraces all people served by the State's mental health program. The beneficiaries of the mental health program are, at a minimum, the mentally ill, the mentally defective and retarded, chronic alcoholics who suffer from psychosis and senile persons who as a result of their senility suffer major mental illness.[1]

The beneficiary groups encompassed by the Mental Health Trust were identified by a Memorandum Decision and Order issued by Fairbanks Superior Court Judge Greene in April 1988 (Greene Decision). This decision generated considerable debate within the mental health community. In response to the Greene Decision, the AMHB formed the Greene Decision Ad Hoc Committee known as the "Greene Group". The Greene Group included the AMHB Executive Committee, staff from the Department of Health and Social Services, and representatives of boards or organizations interested in services to the beneficiary groups indentified in the Greene Decision.[2] In addition, a new organization was formed by representatives of the beneficiary groups known as the Mental Health Trust Coalition (MHTC). The MHTC prepared a policy paper entitled the "White Paper: Statement Regarding Beneficiaries of Alaska's Mental Health Trust" which was presented to the AMHB. The AMHB adopted the "White Paper" as a statement of the Board's position regarding Trust beneficaries during their July 1990 meeting [3] (see Appendix).

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[1] These are the terms used by Judge Greene, Fairbanks Superior Court, in an April 1988 Decision and Order in the Weiss case known as the "Greene Decision".

[2] Two reports were produced: "Executive Committee Report Pertinent to the Greene Decision", July 1989; and Policy Report Pertinent to the Greene Decision, AMHB Report number 5, July 1989.

[3] Motion 90-28 passed during the July 15, 16, 1990 meeting in Anchorage.

The Alaska Mental Health Board mandate is presented in AS 47.30.661-666. In general, the AMHB serves as the planning and coordinating body for purposes of federal and state laws pertaining to the Mental Health Program of Alaska. The AMHB assists the State in ensuring a comprehensive, integrated Mental Health Program. Board duties include: providing a public forum for discussion of issues affecting the Mental Health Program; long range program planning; determination of the needs of persons served by the Mental Health Program[4]; short range implementation planning; program evaluation and review[5]; advocacy on behalf of persons served by the Mental Health Program; and review of applicable policies, statutes and regulations. The Board provides recommendations for funding the necessary operating and capital expenses of the Mental Health Program and for changing State mental health policy, statutes and regulations.[6]

Since January, 1988, the Alaska Mental Health Board has provided the Legislature and the Governor with funding recommendations for the Mental Health Program.[7] The Board has provided fiscal year 1992 recommendations to the commissioners of the various affected departments. The Board has updated Alaska's Comprehensive Mental Health Plan annually[8] and is preparing a new long range Mental Health Program Plan which is due for completion in June 1991.

Historical Perspective

In 1956, the Federal government gave the Territory of Alaska one million acres of land to be held in trust. The purpose of the 1956 Trust was to create revenue (of unknown amount at the time) to be used first to meet the necessary expenses of the Mental Health Program. For many years, the

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4 The AMHB has published three reports regarding unmet mental health service needs: Survey of Mental Health Needs in Political Subdivisions of the State; AMHB Report No. 2, 1989; 1988 Survey of Mental Health Facility Needs; AMHB Report No. 3, 1989; Survey of Health Association of Alaska Members Regarding Regional Mental Health Need; AMHB Report No. 4, 1989.

5 1988 Evaluation of Alaska's Mental Health Management Information System; AMHB Report No. 1, 1989.

6 Policy Report Pertinent to the Greene Decision; AMHB Report No. 5, 1989; 1989 Review of Alaska Statutes Affecting the State Mental Health Program; AMHB Report No. 7, 1990.

7 Alaska Mental Health Board Annual Report for the Calendar Year 1988; AMHB, 1989.

8 Annual Update of Alaska's Comprehensive Mental Health Plan: Revised Goals and Objectives, AMHB Report No. 8, in press.

State has failed to act as a responsible trustee. State plans for a comprehensive and integrated program of mental health services were not and have not been consistently maintained or implemented. The State did not and has not provided necessary services, as described in an approved plan, to *"all persons who are residents of the state of Alaska and who will require mental health services."*[9] Coincident with this failure, the State used Mental Health Trust lands and proceeds for other public purposes. In 1978, the State wrongfully redesignated Mental Health Trust Lands as general grant lands thereby breaching the duty of the trustee to preserve the Trust corpus. Suit was filed in 1982 alleging breach of Trust.[10]

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13 The Interim Mental Health Trust Commission (IMHTC) was another critical element of the Chapter 48 proposed settlement. The IMHTC was assigned the duties of trustee for the Mental Health Trust on an interim basis and also the task of approving procedures under which the value of the Trust was to be determined. The IMHTC Commissioners included Alaskan economist Dr. George Rogers, Alaskan Geologist Dr. Lidia Selkregg and designees of various Commissioners of the Department of Natural Resources.

have not been successful. Recently, the Fairbanks Superior Court, where the suit is held on remand from the Supreme Court, reminded the State that it cannot unilaterally settle the suit. At present, due to legislative and executive branch[14] actions the case is back before the court. Virtually all land transactions involving Mental Health Trust lands and resources (e.g. the Wishbone Hill coal development project) are currently frozen.

In this litigious atmosphere, the AMHB continues to fulfill its statutory mandate. The Board remains committed to ensuring that Trust proceeds fulfill the Trust purposes: ***establishment and support of a comprehensive, integrated Mental Health Program which adequately meets the needs of Alaska's citizens.***

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[14] Most importantly, the refusal by the Commissioner of Natural Resources to certify the value of the original Trust land as determined under procedures approved by the Interim Mental Health Trust Commission.

MENTAL HEALTH TRUST ISSUES

Major issues confronting the Alaska Mental Health Trust include: certifying the current value of the Trust corpus; ensuring that the value of the reconstituted Trust corpus is preserved over time; and guaranteeing that Trust earnings are appropriately expended to fulfill Trust purposes. The AMHB has repeatedly advised the Legislature and Governor to create an Independent Trustee. The extensive and inherent conflicts in the powers of the Legislature and the Executive branches make it virtually impossible for Mental Health Trust responsibilities to be fulfilled without an Independent Trustee.[15]

The value of the Alaska Mental Health Land Trust must be established. Procedures used to arrive at that value must stand up to tests regarding the long term best interests of the Trust. Valuation procedures should use appropriate methodology.[16] In determining the value, and thereby the State's liability for its breach of Trust, it would be inappropriate to adopt procedures which unfairly favor the non-Trust interests of the State. On November 7, 1989, the Interim Mental Health Trust Commission (IMHTC) approved procedures for this value determination which were developed within the limitations of appropriations made by the Legislature, time allotted for the task, and human resources available within the Department of Natural Resources. The State's conflicts of interest are at issue in the limitations of appropriations made for the value determination and in the refusal of the Departments of Law and Natural Resources to rely upon Trust principles in supporting the efforts of the IMHTC.

The Mental Health Lands Trust litigation is a highly visible public issue and failure to resolve it has had far reaching impact. At present, the Court

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15 In an April 27th, 1988 Decision and Order in the case the Superior Court stated, "Congress clearly intended that the patients at Morningside be cared for under the State's mental health program; thus Congress intended that the funds and lands given to the Territory, now State, be used to benefit those suffering from mental illnesses requiring hospitalization and the seriously mentally defective and retarded. Second Congress maintained federal control over the disbursement of monies by requiring approval by the Surgeon General of the proposed mental health plan before the money would be distributed. Such provision is inconsistent with the plenary authority argued by the State in this litigation. Where Congress has created a land trust to be administered by a state for the benefit of certain groups the state owes a duty of loyalty to the beneficiaries." (pg. 20). In a July 9th, 1990 Decision and Order in the case the Superior Court stated, "It is similarly clear that it is the duty of the state in administering this trust to administer solely in the interest of the beneficiaries." (pg.12).

16 The AMHB reviewed the Mental Health Trust Lands valuation process and reported findings in a report, Lands Committee Report on the Department of Natural Resources Value Determination of the Mental Health Trust Lands; AMHB, Report No. 6, 1990.

has prohibited transactions on original Mental Health Trust Lands including:

> *"issuing any patent(s) or other documents or taking any further steps which convey or transfer mental health trust lands or any interest(s) therein, including without limitation, any permits to use or occupy mental health trust lands, or extract resources from any mental health trust lands, pending final resolution of this litigation, or earlier order of this court."*[17]

Since the lands affected constitute some of the State's most valuable and productive property, the effect of this order has been to limit or shut down important developments all across the State. The settlement process outlined in Chapter 48 SLA, 1987 collapsed when, in April 1990, the Commissioner of Natural Resources refused to certify the value of the Mental Health Trust land determined under procedures approved by the IMHTC[18]. Chapter 210 SLA 1990, while creating the appearance of a replacement or substitute Trust, was rejected as a settlement in part because it failed to recognize the Trust value ($2,243,000,000) arrived at under the IMHTC approved procedures as called for by Chapter 48.[19]

In addition to issues regarding reconstituting the Trust, issues regarding the continuing revaluation of the Trust also remain. The trustee owes a duty to the Trust to preserve its value over time. For any revenue production approach based on value, e.g. lease payments, periodic re-determination of the value is required. The original version of Senate Bill 493 included a provision for recalculation of the Trust value over time which bore an identifiable relationship to the original Trust land value. This revaluation concept had considerable support within the mental

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[17] From a Fairbanks Superior Court Order in Weiss, July 9th, 1990.

[18] The Chapter 48 proposed settlement provided a mechanism for reconstituting the trust involving four elements: first, determination of fair market value of the original Trust land under procedures approved by the Interim Mental Health Trust Commission; second, an exchange of the original Trust lands for lands of equal value within legislatively designated areas would reconstitute the corpus; third, state rental of the reconstituted Trust corpus for eight percent of its fair market value to compensate the Trust for administering the lands for the legislative purposes; fourth, a transitional provision to compensate the Trust by annually paying an amount equal to five percent of the state's unrestricted income.

[19] See Analysis of State General Fund Revenue Forecasts and the Future of the Mental Health Trust Lands, The McDowell Group, Juneau, July, 12, 1990.

health constituency and was supported in concept by the administration.[20] This version was later extensively changed before enactment as Chapter 210 SLA, 1990. The substitute legislation failed to confirm the IMHTC based Trust value of $2,243,000,000 and also failed to establish revaluation procedures which could fulfill the Legislature's duties as trustee.

Finally, settlement of the Weiss litigation must guarantee that Trust earnings are appropriately expended to fulfill Trust purposes. If the earnings of the Mental Health Trust are to be expended properly, State policy must acknowledge the Trust purpose and mechanisms must be developed that permit annual accounting of Trust fund expenditures. Trust earnings should only be expended for a planned, integrated mental health program. In the past, the State has treated the earnings of the Mental Health Trust as an open, passive revenue stream from which to appropriate funds without any clear relationship to the mental health program plan.

Litigation will likely continue unless the Trust is managed according to Trust law principles and unless the Mental Health Trust is used as originally intended, to fund a comprehensive and integrated Mental Health Program which provides adequate services to Alaska's mentally ill and mentally handicapped citizens. **The necessity for executive branch initiative is clear.** Progress might be made if executive branch staff in the Departments of Law and Natural Resources were directed to settle the case in accordance with Trust principles and consistent with the long term best interests of the persons entitled to Mental Health Program services.

MENTAL HEALTH PROGRAM ISSUES

The current inadequate State Mental Health Program has become highly visible. The press has frequently featured persons with mental disorders for whom appropriate services are not available.

The AMHB believes that the purposes of the Trust have not yet been fulfilled, namely a comprehensive and integrated Mental Health Program, which includes an enforceable priority in services for those persons most disabled by mental conditions.

Issues facing the Mental Health Program are varied and detailed. To simplify, the issues can be encompassed under the topics of program comprehensiveness and integration.

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[20] See page 5 of DNR Commissioner Gorsuch's letter/report to Thelma Langdon, Alaska Mental Health Board Chair, dated April 17, 1990.

Program Comprehensiveness

Alaska has never had a comprehensive, integrated mental health program. Despite preparation and approval of several written program plans, there has never been a sustained effort to put in place the necessary services and facilities to implement the plans. A comprehensive program provides a full range of services including: emergency services for those in severe episodes of acute (short term) mental disorders; community support/psychosocial rehabilitation services for persons with severe and persistent disorders;[21] inpatient hospital care for complex diagnostic and treatment services; long term residential care for persons with persistent disorders insufficiently corrected by current treatment interventions; outpatient services for persons with mild or moderate disorders of various duration; prevention, early intervention and mental health education services.

The State's program must improve to provide continuing care and services for over 20,000 Alaskans of all ages with severe mental disorders including mental retardation, persistent mental illness, and other mental impairments such as Alzheimer's disease or psychoses resulting from the long term abuse of alcohol. In addition to these groups of persons most severely affected by mental disorders, the comprehensive program must address the service needs of another 10,000 individuals yearly manifesting milder forms of mental illness and a like number suffering from substance abuse disorders.[22]

This comprehensive program requires a current plan, adequate funding and staffing, efficient implementation, as well as intense evaluation of effectiveness. Funding issues extend beyond the available earnings of the Mental Health Trust and involve health care insurance, the State Medicaid program, fees for service, local contributions and a host of alternative funding mechanisms.

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[21] Case management, crisis and respite services, vocational training, socialization and residential opportunities are specific examples of these types of services.

[22] Services for persons affected by these various mental handicaps are described in a variety of state service plans some of which are: A Comprehensive Mental Health Plan for the State of Alaska: Fiscal Years 1988-1992; Three Year State Plan, 1987-1989: Services for People with Developmental Disabilities and Other Substantial Handicaps: 1989 Through 1991 State Plan for Services to Older Alaskans and State Plan for the Older Alaskans Commission; State of Alaska Alcoholism and Drug Abuse Plan 1990-1992. This fractured planning makes more difficult the task of integrating the State Mental Health Program.

Program Integration

Despite Alaska's relatively small population, the Mental Health Program has become fractured over the years. Both federal and state initiatives have led to the creation of sub-programs specially designed to address only the needs of persons of certain age or having just certain mental disorders. These sub-programs are funded through numerous departments and divisions with no centralized coordination and integration. The separate programs of service for persons with mental disorders should be re-integrated into a model program of community health care. Many of the most disabled need individualized treatment and support plans involving generic services such as case management, day care, respite care, vocational training, rehabilitation, hospital care, nursing home care etc.. There is no need for these services to be provided in a haphazard fashion by dozens of uncoordinated programs.

Mental Health Program re-integration will require some executive branch reorganization and a concerted effort to eliminate statutory, regulatory and bureaucratic obstacles built up over the years. For example, catchment area boundaries could be consistent from program to program. At present the boundaries bear no relationship to one another across the various program funding areas. Multiple management information systems for various sub-programs should be integrated. Unnecessary discrepancies between commitment statutes for mentally ill persons and those disabled by alcoholism could be eliminated. Duplicative grant application processes for state funded services targeted at different mental disabilities could be simplified.

MENTAL HEALTH BOARD ISSUES

The AMHB provides a public forum to discuss all the Trust and Program issues outlined above. The AMHB also provides recommendations on these issues to the legislative and executive branches of government. The AMHB itself has a staff of only three. It must and will rely upon the work of agencies and boards having mandates affecting the Mental Health Program. Those include the Division of Mental Health and Developmental Disabilities; the Division of Alcoholism and Drug Abuse; the Departments of Health and Social Services, Corrections, and Education; the Advisory Board on Alcoholism and Drug Abuse; the Governor's Council for the Handicapped and Gifted; the Older Alaskans Commission, and other State advisory and planning bodies. Caring for persons in need of mental health services currently involves the efforts of many agencies in numerous departments. Resolving the legal, policy, and programmatic issues related to the Mental Health Trust will continue to require intensive Board involvement. During the next administration, some issues the Alaska Mental Health Board must address include the following:

1. The AMHB must establish working agreements with agencies other than DHSS that are delivering Mental Health Trust funded services. The Board must develop formal agreements and protocols with all Departments receiving Trust funding to allow the Board to perform statutorily assigned evaluation, planning and budget tasks. Formal agreements and protocols will allow the Board to receive all the necessary program data, planning documents and fiscal information necessary to evaluate services, develop a state wide comprehensive plan and make funding recommendations.

2. The AMHB must work with the Legislature to resolve differences regarding appropriate expenditures of Trust income. The AMHB has provided the Legislature with criteria based upon Trust principles. These criteria have not been employed in the appropriations process so far.

3. The AMHB must continue to clarify the purpose of the public Trust and its relationship to a comprehensive program for persons in need of mental health services.

4. Human Resource Development: A lack of trained mental health professionals and paraprofessionals to fill the state need for qualified practitioners is of great concern. The AMHB has and must continue to support a program of mental health human resource development.

5. To improve the factual basis of the determination of mental health needs, the AMHB must insist on an effective mental health management information system. Data gathered by such a system will be critical for program monitoring, evaluation and planning.

6. The Alaska Psychiatric Institute has outlived its usefulness and is not fit for the delivery of services previously provided by the institute. Services and facilities to replace the old institute must be funded, implemented and constructed.

7. Beginning with FY93, preparation of annual implementation plans must incorporate service priorities from all Mental Health Trust funded state agencies.

8. Mental Health Research Needs and Strategy: A quality research program is essential to understand and overcome Alaska's special mental health problems and needs.

LEGISLATIVE ISSUES

The AMHB will complete a compilation and examination of statutes, regulations and policies pertinent to the State Mental Health Program. Past Board work in this area focused upon Chapter 48 SLA, 1987. In 1989 the Board conducted a series of public meetings regarding Chapter 48. A final report documenting the results of the Board review was published in July 1990. The Board believes the following issues need to be addressed:

1. The creation of an Independent Trustee for the Mental Health Trust.

2. The Composition of the Alaska Mental Health Board: to ensure that it reflects the actual nature of the Trust funded Program and the various persons served by Trust funded mental health programs.

3. The Reorganization of Trust Funded State Programs: The Legislature should examine the alternative of creating a Mental Health Department with authority to integrate planning, budgeting, and services delivery by diverse administrative entities.

4. Revised Commitment Statutes: for mentally ill persons as well as for persons incapacitated by substance abuse. Current statutes create unnecessary obstacles to treatment and perpetuate dangers to persons needing commitment as well as to persons providing mental health services. Outpatient commitment options are not well developed.

5. Capital Improvements for Community Programs: A well reasoned long term capital improvement plan for community mental health programs and facilities is long overdue.

6. Medicaid Options: Medicaid has a proper role in the overall funding of necessary services to people who experience mental handicaps. Currently, the Medicaid rehabilitation option is not exercised by Alaska when it might well compliment other state funding of mental health services. To avoid treating Trust funds as a passive revenue source Medicaid expenditures for mental health services should be included as a planned element in a comprehensive and integrated system of care with appropriate oversight, monitoring, and program evaluation.

7. Mental Health Insurance: coverage requirements comparable to that for other medical conditions and including freedom of choice in service providers is important to the development of an adequate public and private system of mental health services.

AMHB PUBLICATIONS

The AMHB has benefit of its own staff and independent office to maintain a record of AMHB activities and help the Board fulfill its legislative mandate. The AMHB has conducted a number of independent studies and has published policy reports. The studies have centered around facility and service need determination and program evaluation. Policy reports pertain to the priority populations served by the Trust, land valuation issues and a review of legislation affecting the Mental Health Program.

1988 Evaluation of Alaska's Mental Health Management Information System; AMHB Report Number 1, August 1989.

Survey of Mental Health Needs in Political Subdivisions of the State; AMHB Report Number 2, August 1989.

1988 Survey of Mental Health Facility Needs; AMHB Report Number 3, August 1989.

Survey of Health Association of Alaska Members Regarding Regional Mental Health Need; AMHB Report Number 4, August 1989.

Policy Report Pertinent to the Greene Decision; AMHB Report Number 5, July 1989.

Alaska Mental Health Board Annual Report for the Calendar Year 1988. 1989

Lands Committee Report on the Department of Natural Resources Value Determination of the Mental Health Trust Lands; AMHB Report Number 6, July 1990.

1989 Review of Alaska Statutes Affecting the State Mental Health Program; AMHB Report Number 7, July 1990.

Annual Update of Alaska's Comprehensive Mental Health Plan: Revised Goals and Objectives, Alaska Mental Health Board Report Number 8, in press.

Review of Valdez Mental Health Trust Funded Programs, Alaska Mental Health Board Report Number 9, November, 1990.

APPENDIX

Mental Health Trust Coalition "White Paper",
adopted by the Mental Health Board in July 1990.

WHITE PAPER:
STATEMENT REGARDING
BENEFICIARIES OF ALASKA'S MENTAL HEALTH LANDS TRUST

Mental Health Trust Coalition
February 1990

There has been considerable debate over who are beneficiaries of the Mental Health Lands Trust, and what are appropriate expenditures from the trust since Judge Mary E. Greene's decision of April, 1988 (Greene Decision), ruling, among other things, that:

> Congress intended that the Territory [now State] establish a comprehensive mental health program which would provide services to a group consisting of at least those individuals suffering from a psychiatric illness who may require hospitalization and the mentally defective and retarded.* Further, it is the conclusion of the court that Congress intended that the mental health lands public trust benefit the recipients of the services of the comprehensive mental health program, which group; must include, at a minimum, the mentally ill who may require hospitalization, and the mentally defective and retarded. The court concludes that it is within the discretion of the State to include other groups as recipients of services by the mental health program but it is not within the discretion of the State to exclude either of those two groups.
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>
> *The Court does not exclude from this operative definition either chronic alcoholics suffering from psychoses or senile people who as a result of their senility suffer major mental illness.

In April of 1989, the Greene Decision Ad Hoc Committee (Green Group), which was facilitated by the Alaska Mental Health Board and in which the Alaska Mental Health Board participated through its Executive Committee, issued its report, "The Greene Group Report", which responded to certain specific questions it was asked to address. In July of 1989, the Alaska Mental Health Board adopted its Executive Committee's "Policy Report Pertinent to the Greene Decision". Because of the different tasks each report was addressed to, they have different orientations. Certain statements in each of these reports have been taken out of context or otherwise misinterpreted. A close analysis of these reports reveals agreement in all important respects and the purpose here is to discuss this agreement.

The single statement in the Greene Group Report that has generated the misunderstanding and controversy is:

> By unanimous vote the group [agreed] that the proceeds of the Mental Health Lands Trust must first provide the Trust beneficiaries as named in the Greene decision with a program of services necessary to address their self care, self direction, and social and economic functional limitations.

Some people have interpreted this statement to mean that all of the needs of these "core beneficiaries" have to be met before any trust funds may be spent for any other beneficiaries. However, none of the members of the Greene Group take that position.

Similarly, the following statements contained in the Mental Health Board's Policy Report Pertinent to the Greene Decision have been misinterpreted by some to mean that all Alaskan's are to share equally in funding from the Trust, and that prioritization of services to the most seriously disabled is inappropriate.

> [A]ll Alaskans are to be included among the beneficiaries to receive trust funded benefit services.
>
> * * *
>
> The State may not <u>discriminate</u> among beneficiaries simply because some need more trust benefit services and some require less.

and its reference to Judge Greene's statement that:

> In the administration of this trust, the State must treat all the beneficiaries <u>impartially</u>.

Neither of these extreme interpretations are correct or helpful Black's Law Dictionary defines Impartial as "Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just." Similarly, Webster's New World Dictionary, Second College Edition defines discriminate in this context as "to show partiality (in favor of) or prejudice (against)." Treating the beneficiaries impartially or not discriminating between beneficiaries, then, simply means that similarly disabled beneficiaries should be treated equally and that the interests of the beneficiaries are the only legitimate considerations (i.e., the interests of the trustee is a completely impermissible consideration). Allocations of trust funds must be "equitable, fair, and just."

In terms of treating similarly disabled beneficiaries alike, the critical issue is to recognize this responsibility across the categories of beneficiaries rather than within them. In other words, mentally retarded or mentally

defective individuals and mentally ill individuals with the same level of impairment should be treated equally. It does not mean that all Alaskans because they are potentially beneficiaries of the Trust, should receive the same amount of support from the Trust.

The Alaska Mental Health Board has not taken the position that the needs of the most severely disabled beneficiaries are not the priority in the event of insufficient resources. A clear statement of the Board's position is made clear by the Resolution adopted at its December, 1989, meeting containing the following language:

> This [Mental Health] Trust Plan, the Chapter 48 revisions and the settlement of the Weiss litigation must ensure that the beneficiaries described by Judge Greene in the second phase of the Weiss litigation are afforded an enforceable priority for receiving appropriate services funded by the Trust.

Judge Greene's Decision, itself, makes a similar statement:

> [I]t must be recalled that Congress intended the Territory to deal with the Morningside problem [those previously defined -- essentially requiring hospitalization in the 1950's]. Had the legislature and territorial government not dealt with the individuals who were placed at Morningside but rather had chosen a "mental health program" that merely improved the mental health and disposition of otherwise healthy people, surely Congress would have taken action. The reason that Congress would have taken action is that its intent was not being fulfilled. Congress clearly intended that the patients at Morningside be cared for under the State's mental health program; thus, Congress intended that the funds and lands given to the territory, now State, be used to benefit those suffering from mental illness requiring hospitalization and the seriously mentally defective and retarded.

Of course, as previously noted, Judge Greene also acknowledged that Congress intended the State use the trust funds for a "comprehensive mental health program". These two statements are not incompatible.

First, in funding Alaska's comprehensive mental health program from the trust, the needs of other most seriously ill -- those suffering from a psychiatric illness who may require hospitalization and the mentally defective and retarded, to use Judge Greene's terminology -- must be addressed. That is, with in the comprehensive mental health program the people in most serious need (those delimited by Judge Greene) can not be sacrificed to provide services to the less needy (persons that may be beneficiaries in addition to those delimited by Judge Greene). In other

words, trust funding emphasis can not be placed on general mental health services until the program provides a reasonable level of service to the persons delimited by Judge Greene. On the other hand, the state's comprehensive mental health program can not be dismantled or put on hold to find and fund services to the last seriously ill person (s).

The solution is not as difficult as has been made out. Alaska's comprehensive mental health program should provide comprehensive services, and in doing so, must provide an appropriate priority for those most seriously in need. In fact, AS 47.30 545 already requires such an approach.

Senator - Many of the policy questions re: an authority are covered in this paper

Sharon Silbaugh

PUBLIC AUTHORITIES FOR MENTAL HEALTH PROGRAMS

by

Annmarie Hauck Walsh and James Leigland

Institute of Public Administration

February 1986

This paper was developed at the Institute of Public Administration under a purchase order 86 MO 30724401D from the Division of Biometry and Applied Sciences, National Institute of Mental Health.

The authors: Annmarie Hauck Walsh, is President and James Leigland is a staff member of the Institute of Public Administration, 55 West 44th Street, New York, N.Y. 10036.

The opinions expressed herein are the views of the authors and do not necessarily reflect the offical position of the National Institute of Mental Health or any other part of the U.S. Department of Health and Human Services.

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Institute of Public Administration
55 West 44th Street
New York, NY 10036
212-730-5480

1717 Massachusetts Avenue NW
Washington, DC 20036
202-667-6551

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TABLE 1

Sources of Public Mental Health Services
Funding in New York State - 1984*

Source	Description
Federal	
Medicare	Limited inpatient and outpatient coverage for the treatment of mental illness for persons 65 and over and some disabled persons (introduced in 1965).
Medicaid	50 percent federal reimbursement for a wide range of inpatient and outpatient services for those who meet income eligibility standards (introduced in 1965).
Supplemental Security Income (SSI)	Basic monthly income to the aged, blind or disabled based on income eligibility standards. State has an option to supplement these federal dollar amounts (introduced in 1974).
Community Mental Health Centers Act	Federal funds for construction and staffing of multi-purpose centers (introduced 1963-65).
Alcohol, Drug Abuse and Mental Health Block Grant (ADM)	100 percent of the net operating expenses incurred by contractors in support of the Community Mental Health program as defined under the federal omnibus legislation.
STATE/LOCAL	
State Purposes	100 percent New York State dollars to support state mental hospitals, hospital-based outpatient services and the family care program.
State Aid to Localities	Local governments are granted state aid for approved net operating costs, pursuant to an approved local service plan, at the rate of 50 percent of the amount incurred during the local fiscal year by local governments and voluntary agencies under a contract (introduced 1954).
Unified Services Plan Financing	The net deficit incurred by a county pursuant to an approved unified services plan is funded by the state (introduced 1973).
Chapter 620 of the Mental Hygiene Law	Local governments or voluntary agencies having a contract to provide services to persons who were patients in a state facility for a period of five or more years following January 1, 1969, are granted state aid at the rate of 100 percent of approved net operating expenses (introduced 1974).
Community Support Services	A mechanism for building comprehensive and integrated mental health services for a chronically mentally ill population, the program is intended to forge a partnership among service agencies whose common goal is meeting the community living needs of the target clientele. Funding is provided at the rate of 100 percent of net costs (introduced 1977).
Direct Sheltered Workshop	Voluntary not-for-profit agencies which receive income through the operation of a sheltered workshop or industrial contract may have that income matched dollar for dollar through direct contract.
Program Development Grants	Local governmental units and voluntary nonprofit agencies may receive state funding in an amount not to exceed 80 percent of the development costs for community residential facilities, including but not limited to group apartments and other transitional living arrangements for the mentally disabled.
Demonstration Grants	Local governments and voluntary provider agencies are granted state aid of 100 percent of the net operating costs pursuant to contract with such local governments and voluntary agencies for approved demonstration projects.
Subcontract Funding—Local Assistance, Chapter 620 Community Support Services, ADM Block Grant	Agencies which subcontract with a core service agency of a Community Mental Health Center receive 100 percent of their local assistance funding through the core service agency of the CMHC which in turn receives its funding from the state.
Community Residence Funds	State aid is available to local governments and voluntary agencies, not to exceed 50 percent, for acquisition or construction of community residences for the mentally disabled and for operating costs.
Community Residence Rental Costs	Funding is provided for all rental costs incurred for community residence programs at 100 percent of net cost.
Family Care Adult and Children	State aid is provided to cover 100 percent of net cost.
Group Homes	A funding mechanism used by the Office of Mental Health (OMH) to supplement the State Department of Social Services rate in the amount of $5,000 per bed per year. OMH will fund 100 percent of the net as long as the net does not exceed the cost per bed rate.
OTHER	
State Facility Fee for Service Contracts	The Commissioner (OMH) establishes fee schedules annually for inpatient and noninpatient services.

* Adapted from New York Governor's Select Commission, 1984: 14

Foreword

The Public Enterprise Research Center at the Institute of Public Administration provides research, data exchange,and consulting services concerning organization and management of services, public-private contracting, public authority finance and management.

Current publications include Government Corporations, Special Districts, and Public Authorities, a selected, annotated bibliography by Xenia Duisin ($15.00). A wide sample of case studies as well as general writings are described in the bibliography.

Introduction

The purpose of this paper is to provide information concerning one organizational framework -- the "public authority" -- to assist local government officials who are participating in competition for awards under the Program for the Chronically Mentally Ill (an initiative of the Robert Wood Johnson Foundation and the U.S. Department of Housing and Urban Development). By the terms of the program, applicants must "present a plan to implement a community-wide mental health authority with operational and budgetary control for publicly financed mental health services within two years of the grant award."

This paper attempts to give a clear picture of the major issues that must be considered in the selection and design of a public authority for the purposes described, leaving out detailed variables which would nevertheless need to be analyzed by the winning cities in the subsequent process of organizing a community-wide mental health authority.

A public authority is a form of organization common to state and local government in the United States. It is a non-stock government corporation, established by state legislative statute or municipal ordinance under state enabling legislation, with legal powers and legal personality separate from that of its sponsoring government(s), and without the power to tax. Generally, public authorities are also authorized to issue revenue bonds, on which the interest paid to investors is exempt from federal and other income taxes. This gives authorities access to sources of capital funding in the "tax-exempt" or municipal bond market. This distinguishes them from federal

government corporations, and provides them with a steady supply of investment capital from private sources, totaling over $70 billion annually in recent years.[1]

No organizational form has fixed strengths and weaknesses. The usefulness of any structural alternative varies with the functions it is to serve, the way in it is led and operated, and its economic and political environment. To assess the public authority's usefulness and how it should be designed, one must make some decisions about what powers and activities would be assigned to it, the characteristics of the services it will provide, the patterns of financing, and the distribution of political, legal and economic support on which it will depend. Hence consideration must begin with the aims and conditions of reorganization of mental health services, the market and support structures for them.

The Problem

Policy and treatment alternatives for the mentally ill have changed dramatically over the past twenty years, without concomitant adjustments in intergovernmental financial and organizational arrangements. Mental health services are under-planned and under-managed; service delivery and funding mechanisms are fragmented and uncoordinated to the point of chaos. (Funding diversity is illustrated in Table 1.) And there are counterproductive biases in the chaos: for example, bias for institutionalization where funding and client assignments are handled by a state agency which also manages long-term

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1. Proposed federal income tax reform measures (e.g., the bill passed by the House of Representatives) would substantially reduce this volume.

care institutions; or bias for underfunding where clients are moved to the community faster than money moves to the community. Many of the chronically mentally ill fall through the cracks either by not finding a responsive authority or by failing to return for service.

This "Program for The Chronically Mentally Ill" begins with the fundamental decision that there should be in each major urban region or city a unified mental health authority with "combined administrative, fiscal and service responsibility" (hereinafter, "local mental health authority"). This is not a solution; it is a challenge to applicant governments to find innovative solutions. However the local mental health authority is designed and empowered, two major dimensions of complex interaction will remain: the intergovernmental and the interservice dimensions.

The role of state government will be crucial in each case. Institutional care for the mentally ill has long been a state responsibility. After nearly two decades of increasing emphasis on "deinstitutionalization" to community-based care, the bulk of funding for mental health services still comes from state and federal sources. These funds are not allocated in correlation to patient needs and patient load, but by diverse, unrationalized formulas and eligibility requirements for Medicare, Medicaid, Supplemental Security Income, categorical grant programs, local shares of state aid, net deficit contracts, etc. Any effective arrangement for a consolidated local mental health authority will have to involve some pooling of funds, some devolution of fund channeling by and from state government. And the new arrangements must avoid tempting state government to use deinstitutionalization as a means of cutting total resources allocated to

mental health. In the early 1980's the federal government began to cut its grants to state governments for the first time in 50 years. States are increasingly unable to make up the difference. So state fiscal contributions at stable and plannable levels must be part of any effective arrangement for local mental health management.

In addition, basic regulatory and standard-setting powers reside in state governments. Some degree of "deregulation" might be part of a demonstration project for local mental health management, eliminating detailed procedural regulations which tend more to delay administration than to improve service and performance. States would retain broad standard setting and review powers over institutions managed by the local mental health authority. So even with maximum consolidation of management for mental health services, intergovernmental linkages with state agencies will remain important elements of the system.

The question of whether the local mental health authority should take over some state institutions forms another issue in the state-local relationship. If the major long term institutions remain state-owned, then state institutions might become contractual "clients" of the local authority which assigns patient cases. A related issue will be the flow of Medicare, Medicaid and other third party payments. If these are channeled through the mental health authority, they can be part of a revenue stream to secure issue of revenue bonds for construction of new community-based facilities. In addition, it may be possible to utilize land and even redesigned buildings of state institutions located in a given city for development of special apartments, group homes, outpatient centers, etc. (For example, New York

City's Health and Hospitals Corporation has been planning to sell land and buildings from its Bellevue Campus to obtain both revenue and moderate cost housing.) If certain state institutions and property were transferred to the mental health authority, the authority might be authorized to sell part of them for development, or sell property and lease back portions for continued use in mental health services.

The larger issue of whether the local mental health authority should operate service delivery facilities must be considered. Should it be an operating authority as well as a planning, managing and financing authority? The Governor's Select Commission on the Future of the State-Local Mental Health System in New York concluded that "The local [mental health] management cannot be a direct service provider, but must be accountable solely for system management....the local management function [should] be organizationally separated from that of direct service delivery" (p. VII). Its basic argument is that comprehensive, balanced mental health services planning and management (including case assignment) requires objective detachment from operating responsibility for one kind of facility or another.

On the other hand, the "Guidelines for Application Narrative" for this program suggest that operational responsibility for delivering care to the chronically mentally ill should fall within the jurisdiction of the local mental health authority. If that authority oversees integrated management of a full range of different kinds of facility (long-term care institutions, community housing and clinics, and so forth), objectivity in case assignment should be possible. In any case, most experts seem to agree that integrated planning and management of mental health services must coexist with the

diversity of types of service delivered. This can be accomplished through one managing organization with operating divisions or subsidiaries, through a managing organization with regulatory powers and intergovernmental agreements that give it control over separate operating agencies, through a managing organization with multiple contractual relationships with public and private service providers, or—most likely, through a combination of all three. The difference in those three models is in the nature of the lines of control from service planning and management to operations: direct corporate hierarchical lines of control (ideally with decentralized management styles); legal regulatory controls (ideally streamlined and focused on factors that clearly affect quality of service); or contract controls (the most variable and flexible, but difficult to manage).

Federal involvement in the insurance and income transfer programs, grants programs, housing, and patients' rights will remain part of any reorganized system. And in many urban regions, more than one municipality is involved, plus one or more counties. In sum, an important set of considerations in organizational design will involve accommodating the intergovernmental dimension.

Interservice coordination will also remain an i[illegible]mension. New diagnostic, treatment and prevention techniques involv[illegible]l health services in mental health care. Community-based care is particularly dependent upon availability of low-cost housing. Supply of such housing relative to demand is in critical shortage in most urban areas, with little improvement in sight given major reductions in federal responsibility. Social services—including services for the aging and the homeless—will remain

intimately related to mental health care. Indeed, one of the major incentives for increased city efforts for care of the mentally ill may be the burgeoning problems of the homeless.

Organizational Alternatives

In light of the above description and of the "Guidelines for Application," the common denominator for reorganization of mental health services is one organization in the urban community which is the primary point of contact, information, assignment (including admission and discharge authorization), monitoring, evaluation for each client case. The organization must be the intermediary between the client cases and a wide range of service and facility types. It must be willing and able to interact with state, local and private voluntary agencies and to meet specifications of state and federal law. The organization must be able to assure provision of, and to monitor, crisis services, hospital care, clinic and outpatient services, residential treatment, and special housing. It must be able to plan, manage and enforce the distribution of client cases among various service delivery facilities. It must be an information clearing house for case tracking and monitoring. It must have first-rate financial management for handling and reporting on contracts, grants, insurance, etc. It must have planning capability to forecast needs for various types of facilities and to stimulate investments and resource shifts to meet these needs (health planning systems offer some precedents for this role). Finally, its effectiveness will be increased by having good access to political support at state and local levels and to community leadership and advocacy resources.

Financing for mental health services is presently diverse and inadequate. Future arrangements should encourage rationalization but will have to accommodate continued diversity. User charges in mental health are generally dominated by third party payments, although there is a narrow market for at-cost services to patients with the means. State appropriations will remain crucial for annual operating subsidies and contractual and debt service contributions. Maximizing private sources of finance—including bond market investment, private insurance, and tax-shelter investment--may have some application, particularly to housing and clinic construction. As a result, a local mental health authority might be designed to have a broad range of financial capabilities:

1. Utilization of federal and state grants-in-aid and appropriations;
2. Receipt and processing of medicare, medicaid and private insurance payments for patient care;
3. Participation in guaranteed loans and mortgage pools;
4. Issuance of tax exempt bonds;
5. Lease rental and contract payments from state and city government that can provide operating income or debt service;
6. Receipt of tax exempt gifts;
7. Excess revenues (AKA profits) from rent or sale of property or from user charges;
8. Sale and leaseback arrangements with private parties.

The intimate mix of private and public financial forces that is also involved means, however, that effective methods of audit and of assuring public accountability are crucial. This will in all probability remain a state responsibility.

For purposes of understanding the relevance of the Public Authority as the managing organization for local mental health under these conditions, it is useful to compare it to some of the major alternatives, for example, the Non-Profit Corporation and a regular Government Agency.

A Non-Profit Corporation in most states can be formed for such purposes without special state legislation. It is incorporated within the terms of general state law by issuing certificates of membership or participation, establishing by-laws and registering with appropriate state authorities. It may be completely independent of government (with start up funds from a foundation, for example) or its members and directors may include city, county and state representatives. (The ability of local governments to participate in non-profits varies with state law.) This is an easier start up process than is required for most public authorities. Indeed an existing non-profit, such as a university, community development corporation, or hospital could be given expanded functions. However, in the case of mental health, state legislation will eventually be required anyway to distribute state and local service and financial responsibilities.

Non-profit corporations must be carefully designed if they are to be exempt from federal, state and local taxes on income and property, and to be eligible for government aid and net deficit contracts under various laws. For the most part they are not classified as "public instrumentalities" for purposes of issuing tax exempt bonds and are more likely to turn to commercial loans and gifts. Non-profits do have separate legal personality, like public authorities, for flexible contracting, market transactions, and personnel systems. In fields of community service, there is some history of weakness in financial management

and public accountability among private non-profits, and some state courts have limited state oversight with regard to their activities.

It may be more difficult to assign to a non-profit corporation some of the public regulatory powers and public funds management functions described above. In any case, the non-profits will continue to play an important role as local service providers and could be better integrated in a unified system of planning and contracting with a local mental health authority or as subsidiaries of one.

Agencies of Government--city agencies, urban county agencies, metropolitan government agencies, state agencies with regional jurisdiction—represent another class of alternative. Developing an existing agency into the local mental health authority may build on political, managerial and administrative resources already in place. But major political readjustments will still be required to delegate powers from state mental health bureaucracies and to coordinate activities with health, housing and social services. All forms of public funding can be accommodated by this type of agency; capital would be raised via state and federal grants and general obligation bonds issued by the government (competing with other bond purposes and in many states requiring bond referenda or being limited by constitutional ceilings). Loans to the agency can be backed by state or local government guarantee (something not often available to public authorities).

Most government agencies are limited in their enterprise-type transactions by administrative procedures and rules (eg., civil service, procurement by competitive bidding, property auction and other requirements). But there are varied precedents for agencies of government with special status

that are not separate corporations and that are subject to regular legislative budgeting processes. This is the case with many state universities, for example, which are granted separate personnel systems by law and substantial managerial independence. Successful regional enterprises such as the Los Angeles Department of Water and Power and the Maryland Environmental Service have operated as or within government departments but with special legal and financial powers that are tailored to their missions. Indeed, to the extent to which state law permits the development of special hybrid forms carefully shaped to organizational needs and accountability requirements of mental health services, departures from the charter "boilerplate" of the typical public authority will be possible.

The major advantages of the government agency in this context may be superior outreach and neighborhood liaison, and overarching executive authority (eg., mayor, county executive, umbrella-agency director) to enforce coordination with related emergency, housing, social and health services. Of course, in some cases housing and health services are already cordoned off in corporate public authorities of their own, in which case interauthority agreements will be necessary. Agreement with the public housing authority is called for by the application guidelines.

Finally one form government agency has proliferated since the 1950's and provides another alternative: the special taxing district. Local precedents abound--school districts, sewerage and water supply districts, mosquito control districts, residential development districts, and so forth.

The Public Authority Device

A public authority is an extremely versatile organizational form. It can be designed to have some of the attributes of the private corporation on the one hand and the government agency on the other. It can be endowed with the financial and managerial flexibility of the private corporation. It can be coordinated and held accountable as might a government agency. It can combine planning, financing and operational functions for both construction and service delivery. It can establish its own operating divisions and corporate subsidiaries or contract operations out to vendors. It can use both these techniques—direct operations and contracting, making comparisons and transitions between them. But a major warning is warranted here. All the advantages of the public authority turn into disadvantages if it is badly designed, badly managed, and badly integrated with government and related service systems. The single most common historical weakness of public authorities -- particularly those which are self-financing -- is their tendency to plan for their own isolation from broader interactive systems and tradeoffs, for their own protection from the most difficult and subsidy-dependent service responsibilities. Examples abound: authorities established to expand financing for low and moderate cost housing that grow and flourish by financing market-priced housing and commercial developments; the transportation and port authorities that minimize their responsibility for public transit services that require subsidy, and channel excess revenues into investment in office buildings, cultural and commercial centers; power authorities that overbuild and have feuded for decades with local governments over land use and environmental issues; health care authorities that

overemphasize hospitalization and equipment, and underemphasize preventative and outpatient services. These are tendencies which must be counteracted by design, governance and oversight.

In moat parts of the country public authorities — variously titled corporations, authorities, banks, services, agencies, commissions, etc. — are the least understood form of American government. The fact that so many titles are used only adds to the confusion, as does the fact that the number and functions of public authorities are growing faster than those of any other form of government.

Public Authorities differ from government itself in these ways:

- Public authorities do not have general government "police" (regulatory) or reserve powers, or powers to tax;
- Public authorities can exercise only those powers and conduct only those activities specifically authorized in their charters or statutes.

Public authorities differ from line agencies of the executive branch of government in the following ways:

- They have separate legal identity (corporate personality) for purposes of revenue retention, contracting, property ownership, financial obligations and litigation;
- They may be (depending upon statutory law and corporate charter) exempt from many of the administrative procedures and regulations that apply to line agencies, such as civil service and other personnel regulations, procurement and other administrative procedures, rules and controls by central executive staff agencies;
- Their powers and structure can usually be changed only by statutory amendment (not by executive order), and such changes may be limited by legal covenants entered into by the corporation for borrowing and other contracts;

- They are generally permitted business-type budgets without line item or expenditure period limitations, and may be permitted to retain their own earnings, rather than channeling them through treasury and appropriations processes;
- Public authorities usually have independent borrowing capacities and credit ratings.

Because they are independent legal entities, authorities act almost as if they were not "governmental" at all, and that is precisely the issue. Defenders of the authority concept argue that they must have independence and flexibility to act in a "business-like" fashion, to finance, construct and often operate revenue-producing public enterprises.

Hence one of the most commonly cited reasons for creating authorities is to circumvent the overloaded procedural due process of public administration in order to provide managerial flexibility for commercial-type activities. Increasingly this flexibility is sought for non-commercial, traditional government activities.

A second common rationale for public authorities arises from the desire to create capacity to borrow through the tax-exempt securities market, outside the restrictions of state constitutions. In fact, this is probably the most important single characteristic of public authorities, giving them financial clout and a set of values and behavioral tendencies generated by the investment market. In many states, constitutions or legislatures have instituted quantitative limits on the amount of "general obligation" debt that the state and municipalities can issue. Such debt is backed primarily by taxing powers. Other states require popular referenda in advance of general

obligation borrowing, and prohibit executive line agencies from selling revenue bonds. Most public authorities can circumvent these constraints and gain access to the bond market because they borrow without legal guarantees of state or local government. Ceilings on their debt volume are usually specified in charter legislation and subject to legislative amendment. The negative side of this independent borrowing capacity is that authorities compete against local governments in the bond market and tend to develop their own influence and policy priorities. Those priorities can be protected by being incorporated into bond resolutions with legal effect over 30 or 40 year periods.

Increasingly, independent tax exempt borrowing has been used not to develop self-financing "commercial-type" services, but to by-pass constitutional limits in order to strengthen financing for subsidized government services on the one hand, or to pass savings from tax-exempt borrowing on to private beneficiaries on the other hand.

The classic public authority, based on the model of the Port Authority of New York and New Jersey (established in 1921), is created by a legislative charter that defines its powers, activities, governing structure, relationship with government, and funding. The initial charter is crucial to future performance and is difficult to amend, particularly after the authority accumulates financial obligations. The port authority model is that of a corporation which operates outside of the regular executive structure of government to construct and operate services substantially financed by revenue bonds and by operating revenues sufficient to meet all or a substantial proportion of operating

and debt service costs. It is governed by a board of directors appointed by chief elected officials of sponsoring government(s). It is exempt from civil service and procurement regulations of government.

Like most port, bridge and toll-road authorities, the Port Authority of NY and NJ has operating income from user charges and investments, adequate to cover its operating expenses, its developmental and overhead costs, its debt service and reserve fund requirements. Its capital borrowings are secured by its own stream of revenue. Concentration on self-financing projects, with some exceptions, has allowed the authority to grow and prosper, just as any large-scale profit-oriented business attempts to do. In the case of the Port Authority of NY and NJ, surplus income is available for use by the authority, for planning and initiating new projects, or for leveraging debt financing. This means that unlike a regular government agency, the Port Authority can devote substantial sums to project planning and design without waiting for legislative authorization or appropriation. A major point of contention over several decades has been the inability of city or state governments to channel port authority excess revenues into deficit-ridden public transit services.

The most rapid growth of public authorities in the past two decades, however, has generated substantially different types of corporations -- many of them financial corporations without operating responsibilities. These include bond banks, economic development authorities, housing finance agencies, hospital and dormitory finance authorities, which issue tax exempt bonds for the purpose of relending to

local governments, to private businesses, to developers, to home buyers, to health care institutions (public and private). and to universities (see below, section on Financing).

In mental health services, the major application of bond borrowing might be for capital construction of residential and health care buildings. In some states, public authorities already exist for these purposes (public housing authorities, housing and health facilities financing authorities). These are state financing authorities that could be tapped by the mental health management agency for funding of specific projects that it sponsors. Where such state sources of tax exempt borrowing are available to the local mental health authority, it does not need separate corporate credit status. (Thus,for example, many universities borrow through state education finance authorities).

By the late 1970s, at least 6,000 local and regional authorities and 1,000 state and interstate corporations were operating. By the early 1980s, the total was estimated to be well over 10,000, and the revenue bond market, which lends primarily to public authorities, was raising almost twice as much capital as all general obligation state and local bonds in the nation. At some point competition with state and local governments for bond market capital must be considered a negative factor, as well as the buildup of indirect obligations of state or city government to cover the costs of deficit corporate operations. Most economists would argue that tax supported services should be capitalized from tax-backed credit. But from the perspective of any single service sector, the advantages of tax-exempt borrowing appear substantial.

Financing & Resource Allocation

Debt Financing. Revenue bond debt is amortized from specific pledged sources, as opposed to general obligations (or GO debt) secured by the full faith and credit, and taxing power, of the state or municipal government issuing the bonds.

Other kinds of governmental entities, including special taxing districts or state or municipal agencies themselves can issue debt secured by specific pledged sources if state law so provides. "Pledged sources" can include special taxes, special assessments, lease payments, federal grants, state or city legislative appropriations, as well as the revenues of the enterprises that are de facto obligors. Revenue debt can be backed by secondary pledges of financial support, such as formal city or state guarantees (to repay debt in case of revenue short-falls), or "moral obligation" backing (e.g., an informal pledge by a state legislature to assist in the repayment of debt if necessary). The reason for the informal, or "moral obligation" pledge of state government is that many state constitutions treat state guaranteed debt the same as direct state debt for purposes of debt ceilings or referenda requirements.

Selected Types of Revenue Bonds. A variety of types of revenue bonds have some relevance to funding social services. A few examples are listed and explained below.

HOUSING BONDS. There are four basic kinds of housing revenue bonds, although many subclassifications exist.

1. Direct loan program bonds. Under these kinds of programs, developers receive direct mortgage loans from a state

public authority (usually a housing finance authority). The loans are used to finance the construction of new housing, usually multi-unit apartment buildings for elderly or low- to moderate-income families that receive federal rent subsidies. These subsidies, in turn, are used to secure (and to pay debt service for) the bonds issued by the public authority to make the mortgage loans possible. If the mortgages are guaranteed by the VA, or insured by the FHA, then it is much easier (and less costly) to issue debt for direct loan programs. But federal insurance programs do not always guarantee 100% of the principal of the mortgage, and states often purchase private insurance or make "moral obligation" pledges that they will support the bonds in cases of revenue short-falls.

2. Mortgage Purchase Bonds. The funds raised by the issuance of this kind of debt are used to buy mortgages from savings and loan institutions. Typically this technique is used to provide housing for low and moderate-income families. As in the case of direct loan program bonds, mortgage payments provide the funds to pay debt service for these bonds. Although first issued by state housing authorities, these kinds of bonds can be, and are, issued by cities, local agencies and counties. Once again, federal insurance or guarantees, private insurance, and/or state moral obligation backing can be used as supplements.

3. Loans-to-lenders programs. These programs involve the use of bond proceeds to make collateralized loans to lending institutions, which in turn make mortgage loans that are payable from loan repayments by the lending institution.

4. Federal Subsidies. Federal housing subsidies of various kinds have played important roles in making the issuance of housing revenue bonds possible. In the past, housing authority bonds issued under Sect. 8-11(B) of the U.S. Housing Act made possible "indirect" financings -- they involved no direct financing from the federal government. Instead, the federal government provided comprehensive rent subsidy packages. Section 8-11(B) provided for 100% of the financing on Section 8 projects and was used for multi-family buildings. Again, these financings could be insured in a variety of ways, or backed by moral obligation.

HOSPITAL OR MEDICAL FACILITY REVENUE BONDS. There are two principal ways of financing health facility construction or rehabilitation.

1. Lease Method of Financing. Under one common variation of this technique, the issuing authority (e.g., a Health

Facilities Finance Corporation) uses bond proceeds to buy facilities from a hospital. The facilities are then leased back to the hospital. Another variation involves the leasing of the facilities to the bond issuer, who then subleases the facilities back to the hospital. Under this arrangement, lease payments secure the bonds and provide debt service payments. Title to the properties may revert to the operating health facility when the bonds are paid off. These kinds of lease-back arrangements typically involve unconditional guarantees by the health facility to make lease payments, rather than mortgages.

2. Loan Agreement Financing. Under this arrangement, the hospital keeps title to the facility and simply accepts a loan from the financing authority. The loan payments received by the issuing authority from the hospital are usually assigned to the trustee as security for the debt. The hospitals usually pledge gross revenues or gross receipts as well as a mortgage to secure the necessary loan.

No matter what kind of financing technique is used, the security of the bond depends on the ability of the facility to generate enough revenues to meet its operating expenses and debt service requirements (or on the ability of the facility to tap public funds from from other sources). The value represented by the physical plant and equipment does not provide sufficient security to back hospital revenue bonds.

LIFE CARE BONDS. Life care communities exist in a great variety of forms, but they typically consist of condominium apartments designed for occupancy by the elderly, a community building, and a health care facility with traditional nursing home services. Residents sign lifetime residency agreements requiring an entrance fee and commitment to pay monthly maintenance. In some cases, residents must pay fees for use of the community center or health facilities. More often the entrance agreement guarantees residents the ability to move to the nursing home facilities at no additional cost.

A large number of life care facilities are organized as non-profit corporations that make use of the proceeds of the sales of tax-exempt securities by local development authorities or health facility authorities. The funds are advanced to the life care corporation in the form of loans, installment sales, or leasing agreements. The life care corporation generally pledges gross revenues and grants a first mortgage lien on its facilities to secure the payments to the issuer, in amounts necessary to cover debt service.

* * *

All of these financing devices can be applied, in one way or another to services for the mentally ill. The mix of options is complex and needs to be worked out in the specific context of state law and funding arrangements. One issue to be resolved in each case is whether the local mental health authority must incorporate the functions of a finance authority or can be designed as an operating authority which can borrow from and through existing state housing and medical facilities finance corporations. If the former option is selected, there are some strong reasons for the mental health authority to be a state corporation, with urban region jurisdiction, rather than a municipal corporation, in order to enjoy the backup, direct or indirect, of state credit and pledges. There are ample precedents for state corporations with regional jurisdiction (eg., port and some economic development authorities).

User Charges. One of the defining characteristics of public authorities (and public enterprises), is their utilization of user charges for financing. They are organized outside the normal public budget process to retain their own earnings and to plan financial operations without appropriation-year limitations. Most public authorities do have a significant proportion of authority income from charges levied on identifiable beneficiaries for services provided, rather than from general taxes levied on the community at large.

User charges are sometimes distinguished from "service fees." User charges pay for services that are provided to a specific user or consumer; A service fee may be paid to a public enterprise to provide certain levels of service without dependence on particular use patterns.

Hospital room charges are an example of user fees, with or without supplementary third party payment. Maintenance of 24-hour ambulance and emergency services may be supported by a service fee guaranteed to the authority regardless of the frequency with which they are used. For a local mental health authority to be financially viable and stable, state and federal aid could be channeled into carefully planned service fees.

The establishment of a user charge system, especially one that takes market pricing into consideration or supports the repayment of debt, must be preceded by the determination of the true cost of a service. Cost information makes possible decisions about productivity, allocation of resources and the actual need for outside funding assistance, and therefore can be a significant incentive for efficiency. Efforts to undertake annual reviews of user charge designs often require the kind of information produced by internal cost accounting systems -- systems not always found in departments of municipal agencies.

Cost analysis usually involves the breaking up of costs into direct and indirect costs, and fixed and variable costs. Other related kinds of analysis necessary for the establishment of such a system include the determination of ways in which demand affects costs, the identification of relationships between demand and user charges, the kind of pricing technique to be used (average cost pricing, profit pricing, marginal cost pricing, peak load pricing, etc.), the kinds of collection procedures to be used (and a system for monitoring whatever method is chosen).

Subsidies. Subsidies often affect the design of user charge systems, especially in cases where the user charges are not of a self-sustaining nature and the service is considered (by the subsidizer) to be necessary or capable of providing benefits to a community wider than that made up of specific "users" of the services. For example, an authority that provides mass transit services, but at prices not high enough to cover that authority's operating expenses (and/or debt service costs), may be subsidized because of the positive effects of its services on economic activity or land value -- benefits that enhance a community's tax base.

Another form of subsidy provides services to lower income groups on the basis of a sliding scale of charges, based on a percentage of the user's income. A more direct kind of subsidy, and arguably a more efficient kind, involves the subsidization by income transfer directly to the low income client (eg., rent subsidies, food stamps).

Finally, earmarked taxes can be an important source of subsidy. By definition public authorities do not have direct taxing powers but state or municipal taxes can be earmarked for grants to them or subsidy contracts. A recent example is a gasoline tax add-on committed to state aid to local transit authorities.(Another option is to establish a local mental health taxing district on the model of school, sewerage, or mosquito control districts, with elected or appointed boards, municipal status, and specified local tax powers.)

In the case of a full-service mental health authority, user charges, service fees, and indirect and direct subsidies would be

mixed.) These mechanisms must be devised in the process of drafting charter legislation. Also involved is how the authority will utilize vendors. It is likely that a relatively small portion of authority income will be derived directly from user charges, but policy should be set on this issue. Third party insurance and Medicaid payments, categorical grants, state and municipal aid payments should be channeled in ways consistent with incentives for efficiency, needs for debt security, stability for operations and planning. (Cost-plus and net deficit contracts tend to be disincentives for efficiency unless special cost control measures are included.) Consideration should be given to designing state aid formulas which award performance by specific measure or at least are proportionate to number and unit cost of case load types. Part of the subsidy package could include service fees to the authority to maintain emergency and outreach services, for example. Another part could base state aid payments on patient load and case severity by specific categories. Finally, the possibilities of combining self financing facilities (eg., life care facilities) and even some profit making facilities (eg., craft shops, land rental) within the authority framework should be considered.

Budgeting & Accounting. Public authorities that are financed primarily by user charges and/or revenue bond borrowing generally use accounting and budgeting procedures that are more like those of private enterprise than those of most state and municipal governments. This is the recommendation of the "generally accepted accounting principles" promulgated by the National Council on Governmental Accounting (NCGA).

Until 1984, and the establishment of the Governmental Accounting Standards Board (GASB), the NCGA was the recognized authority in state and local accounting. Now the NCGA will be phased out, but its statements will remain in force until they are modified by the GASB.

The recommendation for the use of business-like accounting and budgeting procedures holds for a semi-independent public authority or simply a "public enterprise" activity of regular government (in which case a special "enterprise fund" would be set up). Although the principles of the NCGA (and now the GASB) are recommendations only, they define the terms within which independent Certified Public Accountants will render "unqualified" audit opinions of an authority's books. Without such opinions, rating agencies issue lower credit ratings, and revenue debt becomes more costly to issue.

"Business-like accounting and budgeting" means that the costs of providing services and revenues earned, must be accounted for in such a way that they can be compared for the purposes of capital maintenance, public policy, management control, accountability, etc. An important way of doing this, called for by NCGA principles, is the use of the accrual basis of accounting for enterprise funds. In other words, revenues can best be matched with the costs incurred in earning those revenues if transactions are recorded as they occur, regardless of the actual timing of receipts and disbursements.

Other differences between enterprise accounting and regular governmental accounting include certain restricted accounts, including those related to revenue bond financing, financial reports similar to

those used in private business, and the use of budgets as guides to spending (based on market demand), rather than means of legal line-item control.

The local mental health authority, if organized as a corporate public authority, would not be part of state or municipal budget processes, although it would be dependent upon them for annually appropriate subsidies.

How Authorities are Organized and Managed

The Board of Directors. Most public authorities are headed by boards of directors modeled after private sector boards. But unlike directors of a private firm, they do not answer to stockholders, and the company cannot be controlled through stock transactions. Securities and Exchange Commission regulations and commercial directors' liability have not been applied to public authority board members. Directors in the public sector are usually secure from ouster during their terms, although dismissal for cause can be provided for in the charter. History has demonstrated that it would be useful to define carefully the directors' responsibilities and reporting requirements in an authority charter.

The directors of most state corporations are appointed by the governor; the directors of the majority of local authorities are appointed by mayors or town or county councils. They generally do not receive full-time pay but are entitled to costs and allowances for attending meetings and for other work on authority business. Where

annual stipends are provided, they are usually in the range of $1,000 to $5,000, although some are as high as $40,000.

Authority directors are usually appointed for fixed and staggered terms. Frequently they are reappointed and stay in office for longer periods of time than the elected officials who selected them. As a result, they have a distinct advantage over newly elected officials who may be their nominal superiors.

Most authority directors (or "commissioners," as they are variously titled) are private persons not otherwise in government service, chosen to bring financial prestige or political contacts to the board. Other theories can be applied to the design of the board, however. One is to use the board to institutionalize coordination—intergovernmental and interfunctional. For example, the mental health authority might be partially appointed by a governor and partially appointed by a mayor or county executive, or include appointees of several municipalities in an urban region. In addition, several such appointments can be specified in charter to be reserved for persons with professional qualifications or representatives of particular community groups or client constituencies. Design of such a board becomes part of the negotiations central to reorganizing powers.

Another alternative is to include ex officio appointments to the board; for example, social services officials, or housing and mental health commissioners might be members of the board. But if one office or agency (eg., state mental health department) is to be the main focus of oversight over the authority (see below), there is some experience to

suggest that it should not be represented on the board. Effective oversight requires objective review from outside the organization, something not always compatible with an active role on the board.

Elected boards or representative boards, which are common in Europe, are found in the West and Midwest. These variations remain rare in most of the U.S.

Considering the variety of state law, local politics, and practical tasks affecting public authorities, their governing boards tends to be remarkably alike. Appointments, responsibilities, terms, and conditions of service reflect legal and administrative advice that has traveled across state lines and through the decades. The theory of the "business-like" government corporation has called for directors of a certain type: successful people of high repute in business. They were expected to serve in positions of wide discretion with secure tenure, to formulate policy on nonpolitical premises, and to be appointed on nonpartisan basis. Sometimes this works out in practice, and sometimes it does not. But the degree to which directors actively monitor the performance of the enterprise is much more limited than theory would have it, and their immunity from politics is apocryphal at best.

Top Managers. Internally, the top managers of a public authority function much the same as private sector counterparts -- if and only if the corporation has been exempted from government budget, personnel and procurement systems, has not inherited labor contracts and civil service rules from a government forerunner, and is not subject to specific decision interventions by elected officials. Top managers of

public authorities then, may have as much control over operations as private sector managers, but without the involvement of the performance pressure put on the private sector manager by stock values and a board concerned with them. As long as the authority meets minimum service and/or revenue-producing requirements, the job of the top managers is usually safe and their turnover low. Because authorities rarely face competition from other organizations, and their revenue trends seldom change sharply from year to year, it is difficult to assess the performance of management. Quality of management is crucial in public authorities, and some type of performance/program audit should be required to stimulate it. There is no evidence that after a certain point higher salaries bring better managers into public enterprise. Appointment of the chief operating officer by the board is the rule, often with behind the scenes consultation with elected officials. Once appointed, the manager needs support--he should be permitted to manage freely and held responsible for results.

Relationships with government

Public authorities are independent governmental entities only in comparison with divisions, departments, agencies of the regular government bureaucracy. Public authorities — by definition -- are subsidiaries of government, and are increasingly being treated that way by states, counties, and cities. This treatment has paralleled the growth of public authorities in traditional government, as opposed to commercial, activities. "Generally Accepted Accounting Principles," as

promulgated by the National Council on Government Accounting (and now the GASB), require that "parent" governments of whatever kind, include in their financial reporting, data on all of their governmental subsidiaries. The Wall Street investment community generally refuses to consider public authorities completely independent of parent governments, especially when those authorities are in danger of defaulting on revenue debt. In those cases, the credit standing of the parent government (and its own cost of borrowing) can be in jeopardy if it does not make efforts to come to the financial rescue of its subsidiary.

The greatest challenge of drafting public authority charters is to build in effective oversight, performance incentives, and opportunities for state or local government financial and policy planning and influence, without undermining the management effectiveness of the corporation. Oversight is a largely misunderstood concept. The first dictionary definition of oversight is "watchful care, supervision," but the second and third definitions are "failure to see or notice" and "unintentional mistake". These sum up the history of public authority oversight. Good oversight allows government to develop priorities on allocation of financial resources and basic public policies, including in those service areas in which operational responsibilities are delegated to separate organizations. And good oversight promotes management skill, decentralized, task-oriented organization, accountability to customer and public, employee support and motivation. To do this, managers must be given management freedom with risk. Performance reviews are necessary

but government should resist the temptation to substitute detailed administrative controls for effective oversight.

Typical dimensions of oversight for public authorities are listed below.

1. Information gathering and distribution. Some parent governments have begun to gather and organize data on the operations of their corporate subsidiaries. Some data may be used to trigger intra-governmental financial or management audits. Reporting requirements and procedures for analyzing the information should be spelled out in charter legislation.

2. Powers to appoint and replace directors. Powers of appointment and dismissal represent in most cases the primary means of effective government oversight of authority operations. Those who exercise such oversight are increasingly careful about the impacts of such interventions. Dismissal is difficult and controversial. More effective is designation of staff units to monitor authority operations, and alert government officials or departments (such as comptrollers offices) of impending authority problems and to define directors responsibilities in such a way to make them responsive to program audits.

3. Laws regarding the duties of directors. The directors of every public authority are affected by laws covering the liability, indemnification and exoneration of authority executives. In many states, for example, the liability of authority directors for decisions made "in good faith" has been legislated away. This is done in order to attract capable people to authority boards. However, other states have laws that make the liability of authority directors conform to "duty of care" provisions found in business codes. In other words, authority directors can be found guilty of "mismanagement," and liable for damages, if they do not maintain a reasonably careful awareness of their organization's operations -- no matter how much good faith was involved. Such directors may still be indemnified against personal financial loss resulting from such judgments. The point of the law is not to punish after mismanagement occurs, but to provide extra motivation for directors to perform responsibly. Just the thought of being held liable for reasonable management capability usually suffices to keep directors well informed.

4. Special laws regarding business plans, open hearings, etc. Some parent governments have passed special laws to force authorities to draw up investment plans or "business plans," as a source of information about what the future course of the

authority's operations may be. Provisions may be added to have such plans approved by the regular government chief executive, or planning office. Laws may require that such plans be discussed in open public meetings, or that they be signed and approved by each member of the authority's board of directors.

5. Relationships with government staff agencies. Many parent governments have regulations about regular intra-governmental audits of authorities, the policies and procedures use by authorities in investing surplus funds, financial reporting and budgeting formats, and the regular provision by authorities of financial and administrative data concerning their operations. Some parent governments have created special agencies to monitor or participate in the management of troubled authorities, and other agencies to review authority borrowing proposals. Many states and cities have set up special authorities to divide up the capital financing, construction, and ongoing management of particular kinds of governmental activities (health care, housing, etc.). In some instances special units in the budget office review authority budgets and summarize them in executive budget documents.

6. Line departments, such as a mental health or social services department, may be designated as major focus of oversight, with clearly defined standard setting and review responsibilities. Indeed, authorities can be administratively located within a department. Departmental review and coordination can only be effective, however, if it is based upon mutually agreed on program plans and standards. Without these, it can deteriorate into nit-picking.

7. The legislature, with its powers of investigation, hearing and legislative amendment, in addition to powers of appropriation of subsidies, has the ultimate oversight responsibility, but usually lacks information. Reporting and staffing mechanisms to overcome this weakness are needed.

As we have noted a number of times, authorities exist in a variety of different forms, depending on a wide variety of significant characteristics. An equally wide variety of interactive mechanisms exist to enhance the coordination and cooperation between authorities engaged in complementary kinds of activities. Among the kinds of mechanisms commonly used are task forces, plans, contracts

and intergovernmental agreements, overlapping board memberships, referrals, joint ventures, etc.

A growing phenomenon in the U.S. is the spawning of subsidiary authorities by "parent" authorities, and the creation of affiliate authorities to share related kinds of work. New York State's Urban Development Corporation (UDC) is a convenient example of the proliferation of affiliates and subsidiaries -- all connected by the interactive mechanisms cited above. In addition to the Project Finance Agency created to help refund UDC mortgages, UDC has as affiliates or subsidiaries the Mortgage Loan Enforcement and Administration Corporation (MLC), the Convention Center Development Corporation (sponsored jointly by UDC and the Tri-borough Bridge and Tunnel Authority), and the Battery Park City Authority (with separate legal status, but run by UDC's management). When the New York City Convention Center is completed, another authority -- the Convention Center Operating Corporation -- will sublease the center from the state, after the state leases the center from the Tri-borough Bridge and Tunnel Authority. UDC currently lists over 80 corporate subsidiaries, ranging from the Fresh Produce Corporation and the Apollo Theatre Redevelopment Corporation, to the Times Square Development Corporation and the New York State Sportsplex Corporation.

This pattern may have some application in services for the mentally ill, particularly to supplement reliance on private vendors or to provide some performance competition to them, and to bring a

range of service types under the umbrella of the consolidated local mental health authority. The more reliance on subsidiaries, however, the more carefully the management plans, performance reviews and oversight arrangements must be designed.

Conclusion: Summry and Checklist

The following sections provide a summary review of issues to be considered in the process of designing reorganization and public authorities.

Strengths & Weakness of the Corporate Form

Advantages sought from public corporations include the following:

- Managerial and budgetary flexibility for enterprise-type activities that need to be continually adapted to changes in consumer demand, construction contingencies, and other market factors;
- Speed and efficiency of large scale construction using planned funding schedules, flexible contract administration, and non-controlling, multi-year construction budgets;
- Increased access to bond markets;
- Protected, earmarked funding for priority projects and long term debt service, subject to dedicated fund prohibitions;
- Business-like and self supporting management, particularly where the benefits produced go primarily to the persons or organizations who use and can pay for the service;
- Insulation from political influence, for philosophical or other reasons;
- Use of an agency with mixed ownership, with the potential for transfer to the private sector, or with a jurisdiction that spans several government units;
- Integration in one management framework of activities of multiple jurisdictions and/or functional departments to focus upon defined clientele, purpose, territory, or resource.

None of the advantages described above can be achieved only through use of public corporations, and none of them are automatically achieved by use of public corporations. The record of public corporations throughout the nation includes examples of political corruption, financial debacle, service deterioration, and construction failure as well as numerous success stories. It is important therefore to keep in mind some of the potential disadvantages when making the initial decision.

Potential disadvantages include the following:

- The accumulation of independent debt burden and other financial obligations and potential claims against future taxes and tax payers without control, financial planning or early warning.

Two facts affect this potential problem. First, high volumes of borrowing through corporate revenue bonds do tend to tighten the market for general obligation borrowing by state and local governments, particularly from the same state. Second, even when the state clearly has no legal obligation for the debts of its corporations, if those corporations get into financial difficulty the state or units within it will be under severe pressure to help them - by channeling appropriations into corporate reserve funds, by offsetting their operating deficits through subsidies or rate increases, by helping to refinance debt or otherwise avoid default. The credit standing of the state and participating local governments is affected by the credit record of the corporations. Unforeseen

changes in interest rates, in economic conditions or in revenues have caused problems with even the seemingly strongest corporations in some states.

- The separation of important development decisions (such as distribution and pricing of transportation, energy, industrial investment and housing) from legitimate political institutions based upon voter support and executive leadership.

Conflicts over social, environmental and economic impacts may arise too late, after the corporation has made decisions to which the people's representatives did not have access, even when there are public hearing requirements. Similarly, lack of consistency between corporate programs and departmental programs and plans can increase the costs and reduce the effectiveness of government as a whole.

- Undermining government procedures established for desirable purposes of accountability and legitimacy, including appropriations and budgeting, equitable job classification and salary scales, merit recruitment and promotion, standardized accounting and auditing procedures, and contracting and procurement controls.

There is often a temptation to by-pass regular government agencies when these procedures seem too rigid and cumbersome for good management. However, reform of procedures may be preferable to progressively cutting chunks of government activity out of them altogether.

- Creating pockets of public activity susceptible to narrow special interest control.

- The potential for "creaming", or removing revenue producing activities from government budgets, leaving deficit operations to fall more heavily on taxpayers or appropriations. Many states have tried unsuccessfully, for example, to tap the revenues from successful corporation toll facilities to help finance public roads or transit.

Other Approaches to Consolidating Authority

Not all of the differences between public corporations and line agencies are necessary. Indeed, some of the characteristics of public corporations can be given to line agencies in order to allow them to undertake enterprise-type activities efficiently without giving up executive and legislative controls. For example, some of the legislative alternatives to the full blown corporation are the following:

- A separate executive agency or administration, headed by an administrator reporting to the governor, mayor or county executive, with special powers designated by statute but without independent corporate status.

This arrangement has been used for enterprises that are funded by appropriations and state bond issues (eg., transportation bond issues).

- A revolving fund or corporate loan fund within an executive department.

This is used for loan and subsidy programs that require protected financial integrity, revenue bonding powers and separate

credit obligations, but which do not require separate administrative bureaucracies and which benefit by policy coordination with related programs. Such arrangements have provided revenue streams which are identifiable and protected allowing for accounting separate from the general agency budget in order to maintain credit ratings for revenue bonds.

- Regional/local enterprises run by representative commissions or intergovernmental boards.

In summary, the selection of the corporate form should be based upon four kinds of information:

What characteristics for financing and management are implied by the mission of the proposed agency?

What alternative forms of organization can provide these characteristics with minimal loss of democratic control?

How important is it to relate these activities to political representation? to community preferences? to departmental policies?

How can a corporation be effectively monitored in terms of financial and administrative impacts on state and local government?

The Design of the Public Corporation

Careful design of each public corporation to meet the needs of the particular mission, financing situation, and desired patterns of leadership and oversight is crucial if the agency is to live up to the expectations for it, and not prove to be a source of future problems. There are many different ways to organize a public corporation, and the

form appropriate for a loan fund may not be appropriate for a power authority, transit system or a local mental health authority. Below is a check list of questions and legislative issues to be considered when drafting or amending corporate charters.

Legislative intent and oversight. The corporate mission should be stated clearly enough to provide policy guidelines to the corporation and to provide standards for subsequent oversight. Goals, priorities and performance targets should be expressed clearly so that performance can be judged against them. (For example, are services to be self supporting from revenues? Is the aim to increase supply and utilization of some units (eg., passenger trips, kilowatt hours, person beds in community facilities? To aid or subsidize certain groups to levels of minimum standards?)

The most effective way to hold an enterprise accountable is to measure its performance against targets for that performance. Without targets or priorities, oversight tends to consist of random interchanges between government and corporate managers that are frustrating to both sides. If statements of corporate mission are ambiguous or shift from year to year, there is little that the supervising officials can do except try to assure that the corporation is acting prudently. It is always difficult to express clear goals and priorities for public programs because the nature of the democratic process is such that they are often the product of shifting compromise. Nevertheless, the exercise of trying to develop coherent statements of mission for each corporation and related departmental programs - however imperfect - can clarify the

issues that are relevant to audit and to budget review, and can provide a framework within which requests for statutory amendment can be judged.

- What are the goals and the policy guidelines that the legislature intends for the corporation?
- Are goals and guidelines sufficiently clear and consistent to judge the performance of the corporation in the future?
- Should government authorization be required for each major capital project or new program expansion? For major project planning efforts? For administrative and public affairs budgets? For salary scales? For fare and rate structures?

The relationship of the corporation to government. Coordination calls for clarification of the relationship between corporations and the departments of state or municipal government.

- What role should the related department play?
- How should departmental programs and policy plans relate to corporate activities?

Experience generally has shown that the ability of part-time boards to provide policy leadership to public corporations is limited, and ex-officio appointment of busy government officials does little to overcome those limitations. Problems are compounded if board meetings must cope with managerial detail, or if board members lack timely information on policy and performance. Consideration should be given to establishing board committees, regularly supplying board members with issue papers, carefully designing meeting agenda, and having board members participate in public hearings.

Other alternatives should be examined. One is to have the corporation headed by a single administrator who reports to a departmental commissioner and who is aided, not by a governing board but by an advisory board This is particularly appropriate for enterprises closely linked to other state services (social services, transit agencies, equipment maintenance agencies, revolving loan funds related to specific economic programs). Advisory boards without direct responsibility for management can be larger and draw on a broader range of expertise and objective opinion. By reporting their assessment of the corporation to the related state department and to the legislature, they can often provide for better accountability than can governing boards that get bogged down in details.

Another alternative, one suitable for regional enterprises, uses a policy council representing local groups or elected officials together with a strong executive director (see, for example, the public utility districts of the Pacific Northwest).

- If a governing board is to be used, who shall appoint the members? The chief executive? The head of an executive department? Local representatives? Should the board be representative? Should it be large enough to use special committees (eg., audit and finance committees typical of the private sector)? If it is large, will it have problems scheduling meetings or assembling a quorum to conduct business?

- Should terms of members be staggered (giving the board added stability and some political insulation, but making it somewhat less responsive to elected leaders in the short run)? Or should their terms coincide with those of the appointing authorities, making them political executives like department heads?

- Has provision been made for removing board members for conflict of interest violations, for non attendance, or for malfeasance?

- Who shall appoint the executive director? The board? The governor? The department head (corporation subsidiary of one department)? Will the executive director serve by contract, or at the pleasure of the appointing authorities? What provision has been made for removal?

- Have means of improving the effectiveness of boards been explored? (e.g., use of working and advisory committees or staff to the board)?

In addition to careful design of the corporate governing structure, three other considerations are important to produce good corporate management with state government leadership.

First, the powers and responsibilities of the general manager, the board or council (if there is one) and of the appropriate government officials must be sorted out clearly and sensibly. The manager should have full responsibility to manage, and can then be held responsible for corporate performance. The board should not be burdened with detailed decisions and personnel choices below that of the manager. The board should focus on continuing evaluation of what is going on in the corporation. And state officials should have a clear role in decisions that have substantial impact on the public interest.

Second, officials of the sponsoring government need timely information concerning the corporation's programs and plans. Multi-year program and financial plans should be required. So should annual reports showing actual results. Statutes should specify the kinds of information and factors that should be included in plans and reports. They should also specify who is to review those documents and approve them.

Third, statutes should specify key policy decisions by the corporation that will affect public welfare and costs. Shall the government have certain veto powers, prior approval powers or power to give the corporation certain directions?

Impact on budgets. There should be provided ongoing means of assessing and controlling the extent to which the corporation may burden government with direct or indirect financial costs.

- Are the corporation's services likely to be self supporting out of operating revenues? At what price levels? Are services to be provided at below market prices? What interests will be served?
- If operating subsidies are to be provided by appropriations, should there be a ceiling imposed in statute? Absolute or percentage ceiling? What factors will effect the level of subsidies: interest rates, user charges, volume of use, costs? Should prices be regulated? By whom? By what formula?
- Should specific cost controls be imposed (eg., salary ceilings; executive scale; administrative expense limitations; interest rate ceilings)? How can cost control and efficiency incentives by management be encouraged if deficits are to be absorbed by appropriations?

Impact on capital finance and debt. Corporate financial plans, debt burden, security arrangements and borrowing volume should be continuously monitored together with those of other state corporations and state and local government. Some orderly process should be established to analyze information on current and planned borrowing, lending, investments, and potential demands on capital appropriations, including impacts on the economy and on state credit given varying market trends.

- What security will underlie corporate borrowing? Is the estimated revenue stream adequate to secure the borrowing necessary to complete planned projects?

- What will borrowing costs do to revenue requirements (for example, costs of patient care, rental and mortgage rates, etc.)? What are the fall back resources for debt repayment if the revenue stream diminishes?

- Does the state have a moral obligation (legislative option to keep corporate reserves up to specified levels)? Are earmarked taxes to be pledged to back up debt? Can the corporation's finances be leveraged by federal grants, by state loans or grants, or by other sources? Are lease payments by state or local government agencies pledged to back up debt?

- Where will the liability or risk fall in case of extraordinary circumstances (eg., impacts of power plant failure, of earthquake or bankruptcies on mortgage and loan obligations, etc.?)

- How will the authorized debt and debt security affect the ratios of debt of and in the state, and the ratings and indices used by the financial community to assess and cost out state and local government borrowings?

- What arrangements have been made for payback of state or municipal capital appropriations or loans (interest, time period, enforcement and forgiveness provisions)?

- Regarding nonguaranteed borrowing authority, what ceiling shall be established by statute? What agency of state government shall approve issues after reviewing timing, volume, interest costs, and terms of bond resolutions or official statements?

The management capabilities of the corporation. To do its job well the corporation needs stable financing, concentrated management authority, marketing expertise, high quality labor force, and flexible procurement and contracting capabilities. Sometimes these require exemption from some of the provisions of state administrative law. If

such exemptions are applied when they are not needed, however, the public purposes for which the corporations were established are undermined.

- Should the agency's personnel be part of the civil service? Should it have its own merit-based personnel system? Should it have salary comparability? Should it offer no job security but provide full management prerogatives to hire and fire? If so, what protection from abuses should be provided? Will the agency assume labor agreements from predecessor organizations? Do collective bargaining provisions make civil service regulation unnecessary?

- Should regular provisions for equity, public participation and public information apply (freedom of information, sunshine laws, equal employment opportunity, community reviews, environmental impact statements, zoning approvals, and public notice and hearings, etc.)? In general these should not be waived without strong justifications.

- Should regular procurement and contracting procedures be waived for the agency? Rigid competitive bidding requirements may slow down and raise the costs of large scale or repetitive construction projects, and slow procurement procedures are a problem in high technology activities.

- Should the corporation be permitted to promulgate regulations? If so, should all administrative procedures acts apply to it?

- Does the structure of top leadership for the agency assure strong management together with coordination with the executive branch? The full time executive director is the key to corporate management. Will that position be clearly responsible (eg., appoint other personnel, have duties clearly distinguished from the chairman of the board, be answerable for the performance of the agency, be subject to incentives and to dismissal by the board, the governor or department head, be expected to testify regularly before the legislature)?

- Should the corporation be required to have organization and management surveys at least once every five years? To have full engineering and economic feasibility studies of its major projects before their authorization? Receive financial advice independent of underwriters and project consultants?

- Should the corporation be required to have approved accounting systems, multi-year financial plans and capital budgets, and annual outside audit of its books? Conflict of interest restrictions should be applied by statute to corporate personnel.

- What kind of budget should the corporation be required to submit annually? Does the nature of its activity require more flexibility that a normal government line item budget? If so, should a business type budget be specified? Budget estimates with freedom for the corporation to shift funds from category to category? Should Management by Objectives or Zero Based Budget documentation be required? What special provisions are needed for capital and construction budgets?

- Should its entire budget be subject to annual approval, or only the appropriations requested by it? (If only the appropriations, what evidence of cost control and efficiency will be required in the documentation?) Should full budget review be required of all authorities with outstanding loans from the state?

- Who should review corporate budgets? Executive budget office? Legislative auditor? Comptroller? Legislative budget review or appropriations committees?

- What format and time span should be required for the capital budget of the corporation? What provision for depreciation (maintenance or sinking fund) should be made? How should the impact of interest obligations on operating budgets be reported and monitored? How should the borrowing requirements generated by short term debt be reported and monitored? Are there adequate provisions for coordination with other capital programs?

Exercising legislative oversight. What procedures should the legislature use to monitor the agency's performance with respect to goals? Legislative performance audit? Periodic public hearings or committee investigations (special circumstances only)? Legislative veto of financial plans or budgets which will exceed debt or spending ceilings?

Legislative oversight should not involve intervention in specific management applications of policy (e.g., approval of specific loan applications, personnel actions, contractor selections, detailed budget lines.) If legislative judgment dominates these types of administrative action, the advantages sought from using the corporate form in the first place are lost.

In order for legislative oversight to be effective, legislative staff reviewing and dealing with the corporations must be adequate to keep up with the material coming to it, to analyze, to summarize, and to help distill out the policy implications. Investment in the capacity to continue to evaluate the public corporations would be small in comparison to the state appropriations supporting them.

Legislative oversight tools that have been used recently include public authority control boards, special investigations, assignment of a full-time performance auditor to individual corporations, and codified corporation control acts. In many states, recent initiatives concerning public corporations have been part of broader efforts to plan and strengthen debt management policies generally.

Implementation Steps

The basic policy and management issues discussed in this paper have to be resolved by the participants in government reorganization—the involved political officials, community and client group representatives, managers and employees. The process involves both technical organization design and open negotiations. In order to prepare an application narrative that presents a proposal that will have a reasonable chance of

being implemented in two years, the applicant in this case will need preliminary indications of where negotiations will lead. Hence the endorsement of major political officials is called for. More than that, preparation of the application will be enriched by clear understanding of the potential strengths and weaknesses in each jurisdiction and the feasibility of various reorganization strategies.

Reorganization is not preparing a blueprint on clean paper. It is much closer to strategic rearranging of existing components. A good inventory of existing services, powers and finances relating to mental health programs is an essential starting point, including discussions or interviews with service providers and sources of evaluation. In a number of states studies have been done in recent years that provide assessments and recommendations that can be considered.

For assistance with the technical aspects of design and drafting, governments usually turn to financial advisors from the public finance departments of investment or commercial banks and to bond attorneys. They can devise ingenious arrangements to make deficit services credit worthy, forging lines into government budgets. But their major focus tends to be on creating and optimizing opportunities for the authority to engage in municipal bond market transactions. Additional, objective sources of advice should be sought to balance the perspectives brought to bear on design of a local mental health authority for which service quality and system management is of higher priority than capital borrowing.

History of the State Land Office

At the end of their war in 1848, the governments of Mexico and the United States signed the Treaty of Guadalupe Hidalgo which deeded the territory encompassing what is now New Mexico to the United States and recognized existing private land grants. The territorial boundaries were described as extending from the border of the state of Texas on the east, to the territory of California on the west. Upon the establishment of the territory of Arizona from the western portion, and the creation of the territory of Colorado from the northern portion, the present boundaries of the state of New Mexico were established in 1863.

The Treaty of Guadalupe Hidalgo provided that "it shall be incorporated into the Union of the United States and be admitted at the proper time (decision to be judged by the Congress of the United States) to the enjoyment of all rights of citizens of the United States according to the principles of the Constitution..."

Near the turn of the century, a group of willful and aggressive leaders were desperately attempting to develop New Mexico. Among them, Harvey B. Ferguson, delegate at large from New Mexico, took up the statehood battle of his predecessors and sought during his term of office to cause a statehood resolution to be passed. However, his resolution, like so many others introduced before, was defeated. Seeing the hopelessness of obtaining statehood at that time, Mr. Ferguson proposed a bill authorizing the granting of lands for certain purposes to the territory of New Mexico. In a stirring speech before the Committee on Territories on February 2, 1898, he laid the groundwork for the introduction and passage of what is called "The Ferguson Act of 1898."

This Act gave sections 16 and 36 in every township to the territory of New Mexico for support of its common schools. In the event any of these sections were mineral lands or had otherwise been sold or appropriated under the mining or homesteading laws, the territory was then entitled to make alternative selections from other unappropriated, surveyed, non-mineral public lands.

Other provisions of the Ferguson Act included grants for the benefit of various institutions such as universities, insane asylums, School of Mines, School for the Deaf, School for the Blind, public schools, Miner's Hospital, the Military Institution,the penitentiary, reform schools, water reservoirs, improvements to the Rio Grande, and for capitol building purposes, for a total of some 5,589,185 acres of land, all to be selected from the public domain.

Miguel A. Otero, governor of the territory of New Mexico, urged in his message to the Legislature on January 16, 1899, the passage of appropriate laws by the territory to activate the federal grant.

Following his message, the Territorial Legislature enacted Council Bill #51 of the Territorial Laws of 1899, which accepted the grant and created the Public Land Board consisting of the governor, the solicitor general, and the commissioner of public lands, with the latter to be appointed by the governor.

Since the Act was passed by the Legislature in the latter part of its session, no opportunity was given the governor to appoint the commissioner of public lands by and with the consent of the Territorial Council. Therefore, Governor Otero appointed Alpheus A. Keen as commissioner of public lands and he served in this capacity through 1906.

The first meeting of the Public Lands Board was held on March 27, 1899, and Commissioner Keen at once began setting up the Territorial Land Office. The records show he started a system, commonly known as the "tract book system", which accounted for the state trust lands on an institutional basis. This system was changed in 1933-34 to a system containing a full record of the selected and acquired institutional lands, described by subdivision, in township and range order.

Many problems arose from the construction and interpretation of the Ferguson Act. It appears that the 5,589,185 acres of the public domain granted in quantity or as indemnity to the territory of New Mexico were to be selected by the territorial governor, the territorial surveyor general, and the territorial solicitor general acting as a commission and under the direction of the secretary of the interior.

The Act further provided that the Territorial Legislature should enact laws as to the leasing of the lands, but until the territorial Legislature did act, the governor, solicitor general and the secretary of the interior would act as a board for leasing such lands. No such lease could be granted for a period of more than five years, nor could more than 640 acres be leased to an individual. It also provided that all leases should terminate if and when the territory was admitted to the union as a state.

Another provision of the Act destined to create great administrative difficulty was the restriction limiting the sale of state trust lands to 160 acres per individual. (This restriction was later removed by the Enabling Act.)

The Ferguson Act, although a splendid benefit to the territory, turned out to be an exceedingly difficult piece of legislation to interpret and actually administer. This act stipulated that more grants would be forthcoming when statehood was granted. Therefore, when the Enabling Act was approved, it provided that sections 2 and 32 in every township were to be held in trust by the state for support of its common schools. If these sections were mineral in character or already appropriated, provision was made for the state to select lieu lands elsewhere, on a quantity basis, from the public domain. A later amendment stated that if these sections fell within a national forest, title was to remain in the United States and revenues derived therefrom would be remitted to the state until lieu selections were completed.

The Enabling Act, which provided for a constitutional convention, was finally passed by Congress on June 20, 1910. After the delegates drafted a constitution and submitted it to the people for a vote on January 21, 1911, and by presidential proclamation, the territory of New Mexico officially became the state of New Mexico on January 6, 1912.

One of the articles of the new constitution provided that the commissioner of public lands take control, jurisdiction, care and custody of the trust lands as agent for the state.

In addition to school sections 2 and 32 in every township, the Enabling Act also granted an additional 1,426,667 acres for the support of various schools, institutions, and other beneficiaries. An allocation of one million acres was also approved, designated as "Railroad Bonds Grant," in payment of bonds issued by Santa Fe and Grant counties. Thereafter, 250,000 acres were also granted to the "County Bond Grant" to defray interest which had been paid by Grant, Luna, and Hidalgo counties on invalid bonds. The Act provided that upon retirement of the bonds and interest indebtedness, any lands remaining in these grants would be administered for the support of the common schools.

The Enabling Act specified that five percent of all revenues derived from sales of public domain land within the state were to be deposited into the State Permanent Fund. Section 10 of the Act placed certain restrictions and limitations on the use and disposition of the trust lands. Some of the major points embodied in these restrictions were:

* The lands and all funds derived therefore were declared to be held in trust.

* There could be no commingling of funds; consequently, income from the various lands is held in separate accounts and each beneficiary is credited with the income from the lands appropriated to it.

* Before any land or the natural products of the land could be leased or sold, they had to be appraised and could not be sold for less than their true value.

* Lands or their natural products could only be sold at public auction, after proper advertisement in the newspapers.

* Any sale or contract handled contrary to these restrictions is considered null and void.

Over the years, amendments to the Enabling Act have been made. However, since this can only be accomplished by an act of the United States Congress and ratified by a Constitutional amendment approved by the citizens of New Mexico, such amendments are difficult to accomplish.

The most important of the few amendments which have been passed was Article 24. It removed restrictions on the disposition of the minerals as imposed by the original Act and placed control over the minerals with the state Legislature.

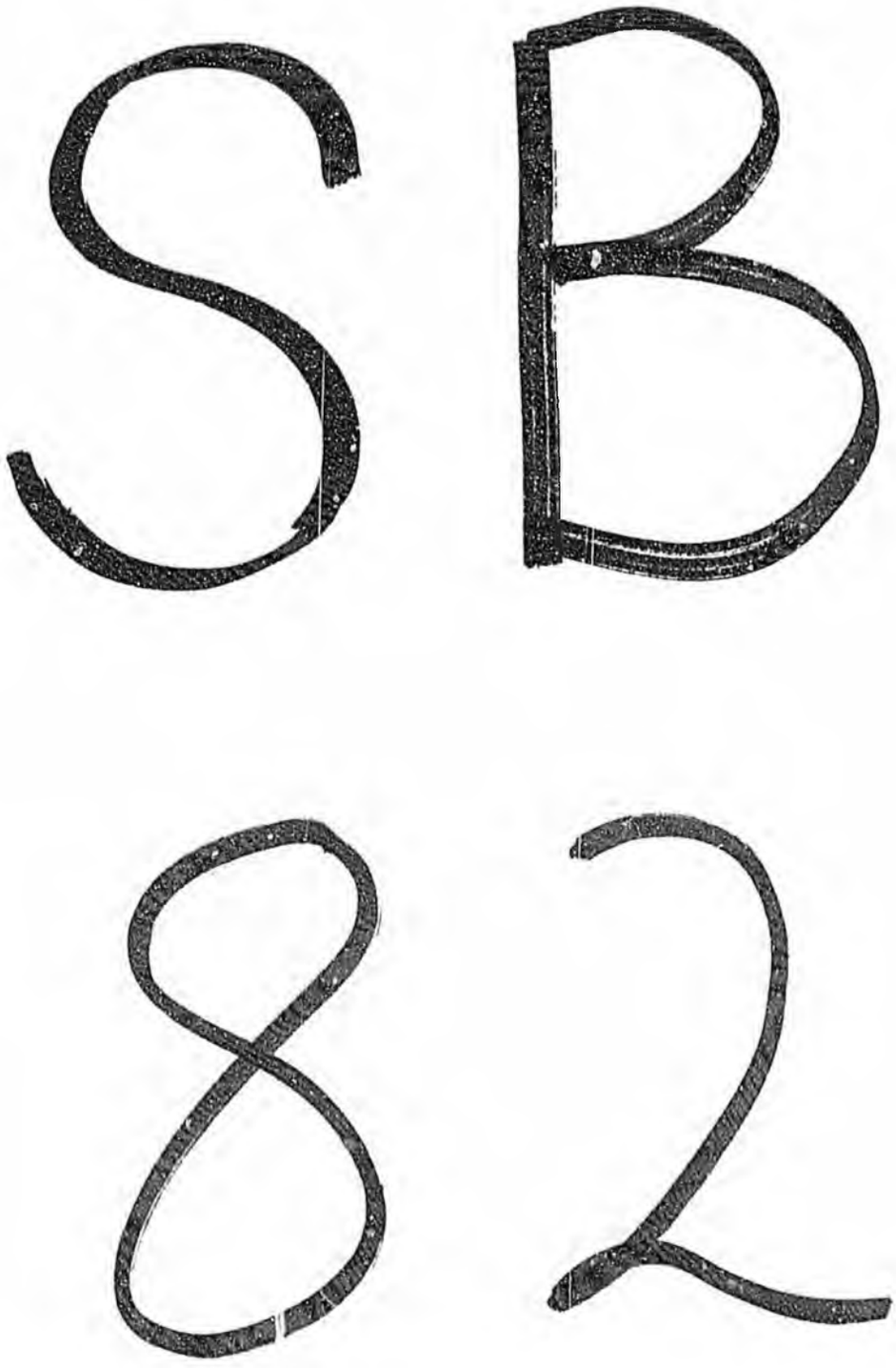
Approximately 13 million acres were originally granted to New Mexico. The ownership pattern has changed through the years because of sales to individuals, exchanges with, and condemnations of land by, the Federal Government, usually for military and defense purposes.

NEW MEXICO STATE PERMANENT FUND
INCOME DISTIBUTION
AS OF JUNE 30, 1990

	Balances June 30, 1990	Distributed Income (Cash Basis) FOR FY78	Income as Percent of Expenditures	Total Expenditures FY 78 (1989-90)
Charitable, Penal and Reform	$ 18,725,261	$ 1,658,087	32%	5,246,900*
Common Schools	2,408,706,612	213,199,034	24	870,982,000
Eastern New Mexico University	3,745,529	335,040	2	18,724,600
Improvements to the Rio Grande	11,064,752	988,176	48	2,068,000
Miners' Hospital of New Mexico	32,007,943	2,784,711	36	7,757,400
N.M. Boys' School	244,149	22,027	--	6,585,500
N.M. Highlands University	984,307	88,239	1	13,797,100
N.M. Institute of Mining & Technology	5,559,467	491,915	4	12,501,700
N.M. Military Institute	115,919,710	10,273,023	94	10,941,300
N.M. School for the Deaf	65,541,985	5,759,381	90	6,375,400
N.M. School for the Blind	65,351,395	5,742,171	104	5,534,000
N.M. State Hospital	8,553,038	760,488	3	26,543,900
N.M. State University	13,597,238	1,210,341	2	70,764,700
Northern New Mexico College	667,267	59,636	1	4,362,300
Penitentiary of New Mexico	65,856,785	5,788,168	24	24,343,900
Public Buildings - Capital	32,503,874	2,884,103	--	---
University of New Mexico	54,416,570	4,853,073	4	117,097,400
University Saline Lands	293,283	26,460	--	---
Water Reservoirs	22,354,640	1,948,658	--	---
Western New Mexico University	979,914	87,843	1	9,572,700
	$2,927,073,719	$258,960,574	21%	$1,213,198,800

* Expenditures for principle recipient - Carrie Tingley Children's Hospital

Source: State of New Mexico State Investment Council, 1990 Annual Report, July 1, 1989 - June 30, 1990
and Total Expenditures from New Mexico Legislative Finance Committee correspondence.



SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

BILL NUMBER: SB 82
ABBREVIATED TITLE: Broadcast Gambling

SPONSER: Duncan ORIGINAL RECEIVED: March 1
WRITTEN REQUEST TO SCHEDULE REC'D: ______ FROM: ______
SPONSER'S STATEMENT REC'D: ______ FROM: ______
SECTIONAL ANALYSIS RQST'D: ______ FROM: ______
SECTIONAL ANALYSIS RECEIVED: ______
FISCAL NOTE (ORIGINAL)
RQST'D OF: ______ REC'D FROM: Broadcast Commun DATE: With File
RQST'D OF: ______ REC'D FROM: Commerce, CED DATE: With file
RQST'D OF: ______ REC'D FROM: ______ DATE: ______
FISCAL NOTE (C.S.)
RQST'D OF: ______ REC'D FROM: ______ DATE: ______
RQST'D OF: ______ REC'D FROM: ______ DATE: ______
RQST'D OF: ______ REC'D FROM: ______ DATE: ______
FIVE DAY NOTICE GIVEN: In Senl L&C NOTICE OF HEARINGS GIVEN: ______
COMMITTEES OF REFERRAL: FIRST: L&C SECOND: Jud THIRD: ______

COMMITTEE ACTION

DATE:	
4-9-91	Heard — Held over - Sponsor to Prepare Section
	of finding to support distinction re Pull Tabs.
4-18-91	[illegible] 7LS0925/J 4-18-91
[illegible]	[illegible]

PERSONS TO BE NOTIFIED OF HEARING

1. SPONSOR Duncan
2. AGENCY AP Broadcast
3. ______
4. ______
5. ______
6. ______
7. ______
8. ______
9. ______
10. ______

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. CSSB 82

Revision Date: March 1, 1991
Department Affected: Commerce & Economic Dev.
Title: SEE ATTACHED
BRU: Occupational Licensing
Component: Administration
Sponsor: Senator Duncan
Requestor:
COMPONENT SERIAL NO. 0 3 5 6

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)
This bill would prohibit the conduct of gaming activities on the airwaves. It would allow on the airwaves advertising of gaming activities except for pull-tabs.

Prepared By: John N. Hansen, Jr., Gaming Program Mgr. Phone: 465-2581
Division: Occupational Licensing Date: April 4, 1991
Approved by Commissioner: Glenn A. Olds ASST CMMR
Agency: Department of Commerce & Economic Development Date: 4-4-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Alaska State Legislature

SENATOR JIM DUNCAN

P. O. BOX V JUNEAU, ALASKA 99811-3100

(907) 465-4766

COMMITTEES:
FINANCE
VICE CHAIR – HEALTH EDUCATION & SOCIAL SERVICES
BUDGET & AUDIT
BANKING & ECONOMIC DEVELOPMENT

To: Senator Rick Halford
Chair
Senate Judiciary Committee

From: Senator Jim Duncan

Regards: Hearing for Senate Bill 82

Date: February 28, 1991

I request the earliest possible hearing for Senate Bill 82 by the Senate Labor and Commerce Committee.

This measure lifts the moratorium placed on commercial broadcasters in Alaska in regards to charitable gaming activity last legislative session and permits activity allowable under federal law, the Charity Games Advertising Clarification Act of 1988. A copy of the act and a United States House of Representatives Judiciary Committee Report on the measure is attached for the benefit of your committee.

Passage of this act was a recognition by Congress of the unfair nature of banning charitable gaming through the electronic media. The law provides broadcasters essentially the same opportunities afforded the print media as it pertains to advertising lotteries and other games of chance such as the Golden North Salmon Derby in Juneau. Restrictions on broadcasters remain and violations are subject to the enforcement powers of the Federal Communications Commission which include fines and license forfeiture. The new law allows activity which is:

"(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization."

A number of questions concerning the scope of activity allowable by commercial stations and the role of game operators under terms of the new federal law were debated by the Legislature last year prior to its imposition of a moratorium. The Enforcement Division of the Federal Communications Commission's Mass Media Bureau has made it very clear that operators of games may not advertise or profit from advertising conducted by permit holders.

The National Association of Broadcasters has published an excellent guide explaining the new federal law. It contains a thorough explanation of the law and provides specific examples of activities which are allowed and those

 not included DR

considered in violation. I have provided a copy of this publication with this memo. Additional copies for each committee member will be provided in the near future. The National Association of Broadcasters, and in turn, the Alaska Broadcasters Association, do a good job ensuring its members are aware of the restrictions imposed by this law. As pointed out previously in this memo, individual commercial broadcasters run the risk of FCC fines and forfeiture of their license if found in violation. Obviously, there is great motivation on the part of broadcasters to adhere to the terms of federal measure. I do not feel additional state restrictions are necessary as a result. Alaska should follow the example of the States of Iowa and Illinois which allows federal law to exclusively regulate this activity.

Another issue of importance in this debate is one of basic fairness. My measure will allow commercial broadcasters to compete with the print media for the limited advertising dollars which may be available. Broadcasters would also be able to run public service or free time to promote the activities of non-profit organizations which are already promoted in Alaskan newspapers.

The measure approved by the Legislature last year also allows Alaska's public broadcasting facilities to air gaming activity. Even though commercial stations are banned by the federal law to conduct such activity, it is inherently unfair to restrict the activities of commercial broadcasters under this measure while allowing activity by non-commercial broadcasters. I've attached an opinion by the State Attorney General dated May 4, 1990, on this matter which states in its opening paragraph, "...we have serious concerns, from an equal protection standpoint, with any proposal that would allow one particular group or organization to conduct or advertise gaming activities on the air while excluding all others." not attached

The Senate Labor and Commerce Committee adopted a committee substitute which added the following prohibitions:

-A definitive statement is made in the title and in Section 2 prohibiting the conducting of gaming activity on the air.

-A prohibition against the promotion of pull-tab activity by broadcasters is was also enunciated in the title and Section 2.

I have every confidence that Alaska's broadcasters will operate responsibly and adhere to the restrictive terms of the federal law and the prohibitions added by this legislation. I have every confidence that federal authorities will enforce violations and I have every confidence that the broadcasting industry in Alaska will ensure compliance to the law by its members.

The favorable consideration of this legislation by the Judiciary Committee is appreciated.

Alaska State Legislature

SENATOR JIM DUNCAN

P.O. BOX V JUNEAU, ALASKA 99811-3100

(907) 465-4766

COMMITTEES:
FINANCE
VICE CHAIR –
HEALTH EDUCATION
& SOCIAL SERVICES
BUDGET & AUDIT
BANKING &
ECONOMIC
DEVELOPMENT

To: Senator Rick Halford
Chair
Senate Judiciary Committee

From: Senator Jim Duncan

Subject: Proposed CS for SB 82

Date: April 15, 1991

Attached is material related to SB 82 regarding the use of broadcasting of charitable gaming activity. It includes:

-A proposed committee substitute which addresses the following concerns of the Judiciary Committee during last Tuesday's hearing...

+Title change

+Inser...g the word "noncommercial" in line 12, page 1 when describing a network of broadcasting stations.

+Providing another definition for broadcasting on lines 2 and 3 of page 2.

+Repealing last year's law.

-Portion of federal law from which definition of broadcasting is based in the committee substitute.

-Draft findings prepared by John Gaguine of Legal based on draft offered by Doug Bailey of your staff. Findings are not part of the committee substitute at this time, but can be added by the committee if necessary.

-Transcript of testimony from Tuesday's hearing which serves as basis for draft findings.

I trust these changes address the concerns raised by Committee members. Your review of this material prior to action on SB 82 by the Judiciary Committee this week is appreciated. Please inform me of any additional concerns you may have after reviewing the proposed committee substitute.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM April 2, 1991

SUBJECT: Sectional analysis of CSSB 82 (L&C)

TO: Senator Jim Duncan
Attn: Pete Carran

FROM: John B. Gaguine JBG
Legislative Counsel

You have requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 expresses legislative intent.

Section 2 establishes a prohibition on the use of broadcasting to conduct all charitable gaming activity, and to promote charitable gaming activity involving pull-tabs. "Broadcasting" is defined as in the statutes governing the Alaska Public Broadcasting Commission.

Section 3 repeals the moratorium established by the 1990 legislature on the use of broadcasting to conduct or promote all charitable gaming activity.

Section 4 sets an immediate effective date.

JBG:gc
91-173.glc