

MEMORANDUM

State of Alaska
Department of Law

TO:	Members, State Board of Education and Early Development	DATE:	November 16, 2020
THRU:	Michael Johnson, Commissioner Department of Education and Early Development	FILE NO.:	JU2015200003
FROM:	Susan Sonneborn Luann Weyhrauch Assistant Attorneys General Public Corporations and Governmental Services Section Department of Law	TEL. NO.:	(907) 269-6612
		FAX NO.:	(907) 258-4978
		SUBJECT:	Attorney General's Report

This memorandum describes the status of current litigation involving the Department of Education and Early Development.

1. *DEC Enforcement Matter related to Contamination at Joe Parent Vocational Education Center in Aniak.* The Alaska Department of Environmental Conservation (DEC) identified DEED, DOT&PF, and the Kuspuk School District, as well as the federal government, AT&T Alascom, Lockheed Martin Corporation, and Exelis-Arctic Services, Inc., as potentially responsible parties (PRPs) for polychlorinated biphenyls (PCBs) and trichloroethylene (TCE) contamination at the site of the Aniak Middle School. The contamination dates back to the use of the site by the U.S. Air Force as a White Alice Communications System site from 1958 to 1979.

At a mediation in 2013, the PRPs agreed to the allocations (percentages of responsibility) that each party would bear in an agreement to share past and future clean-up costs for PCB and TCE contamination, although not all issues relating to TCE contamination could be resolved. In 2015, the PRPs executed an agreement (which remains in effect) to share the cost of the sub-slab-depressurization system and the TCE monitoring program at the site.

In 2016, Consent Decree (a settlement agreement in the form of a court order) was fully executed. In 2017, DOT&PF retained contractors who conducted PCB clean-up work. The TCE remedial investigation report was issued in 2018, and the TCE feasibility study was approved by DEC in 2019. The feasibility study includes a recommended alternative for addressing TCE at the site. DEC has requested a project schedule to implement the recommended alternative. Currently the parties are considering scaling back the TCE monitoring program in part because the future status of the building is

uncertain.

2. *North Slope Borough (NSB) & North Slope Borough School District v. State of Alaska, Department of Education and Early Development*. This is a judicial appeal of the department's denial of debt reimbursement on five NSB bonds. In 2015, the department determined that the bonds were ineligible for school construction debt reimbursement under AS 14.11.100(j)(3) because they did not conform to the statutory requirement that bonds be repaid in approximately equal principal and interest payments over a period of at least 10 years. NSB filed an administrative appeal to the Commissioner. In September 2016, the Commissioner issued a final decision affirming the decision to deny reimbursement. NSB appealed the decision to the superior court. NSB then moved for a trial de novo; that motion was denied, and NSB's Petition for Review challenging the denial of trial de novo was rejected by the Alaska Supreme Court. Superior Court Judge Kevin Saxby issued a favorable decision on July 12, 2019, affirming the department's decision. NSB appealed to the Alaska Supreme Court. Oral argument was held August 27, 2020, and the matter is now pending with the Alaska Supreme Court. AAG Janell Hafner in the Opinions, Appeals, & Ethics Section has primary responsibility for this appeal.

3(a). *Illuminations Childcare and Educational Center (Illuminations) Appeal of Department Action taken under Child and Adult Care Food Program (CACFP). Appeal within Department*. In 2015, Illuminations submitted a request for an administrative review of the department's notice suspending the participation of Illuminations in the CACFP program, proposing to terminate Illumination's agreement, proposing to disqualify Illuminations, and proposing to disqualify its owner and administrator. This notice, required under CACFP federal regulations, was sent because of action taken by the state Child Care Program Office to suspend the child care license of Illuminations based on serious health or safety violations. A review official issued a determination upholding the DEED's action.

3(b). *Illuminations, LLC, d/b/a Illuminations Childcare and Educational Center, Brenda J. Fuller, and Kimberly J. Danford v. Alaska Department of Education and Early Development. Appeal to court*. In 2015, Illuminations, *et al.*, filed an appeal and their opening brief in the superior court. They continue to agree to the postponement of the deadline for the department's responsive brief (currently April 21, 2021) based initially on the discussion of settlement and claim documentation. In light of appellants' waning interest in pursuing their claims, the case is evolving into dormancy. This is likely to lead eventually to an agreed-upon dismissal of the matter.

4. *Burattin, et al. v. Chilkat Indian Village*. This is a judicial appeal of the superior court decision ordering that the state museum transfer certain artifacts to the Jilkaat Kwaan Cultural Center in Klukwan. On June 20, 2019, several individuals purporting to represent a faction of the Frog House clan filed this appeal. Starting in 1978

the state museum acted as a neutral temporary custodian of the artifacts (four carved house posts and one replica screen), based on an agreement and court order. In November 2018, the museum, through the Department of Law, gave notice that the museum intended to transfer the artifacts to the Jilkaat Kwaan Cultural Center in accordance with the 1978 order. Due to competing claims to custody of the artifacts, the court issued a temporary restraining order to prevent their transfer, but then lifted that temporary restraining order when it issued the May 21, 2019 order, now under appeal.

The main issue on appeal is whether the superior court properly ordered that the artifacts be transported to Klukwan. The state did not take a position on the ownership of the artifacts or assume a significant role in the appeal. The court held oral argument on the appeal and issued a Memorandum Opinion and Judgment on October 21, 2020, affirming the superior court's decision. Appellants filed a motion for extension of time to request a rehearing on November 2, 2020, which appellees have opposed. The court has not yet ruled on this motion.

5. *Coalition for Education Equity v. Governor Dunleavy and Commissioner Johnson*. On May 1, 2019, the Coalition for Education Equity (CEE) filed suit against Governor Dunleavy and Commissioner Johnson, in their official capacities. The suit seeks an order declaring that the distribution on June 10, 2019, of the fiscal year 2019 \$20 million education appropriation (outside the foundation formula), violated Alaska law. The suit, filed in advance of the distribution, also requested an order directing the release of the funds. The superior court denied the defendants' motion to dismiss on mootness grounds. The parties have agreed that the case should be decided on briefing, and all of the briefing has been completed. CEE has requested oral argument, which has not yet been scheduled. AAG Jessica Leeah in the Special Litigation Section is primarily responsible for this litigation.

6. *Alaska Legislative Council, on behalf of the Alaska Legislature v. Governor Dunleavy, Commissioner Tshibaka, and Commissioner Johnson*. On July 16, 2019, the Alaska Legislative Council on behalf of the legislature filed suit in superior court against Governor Dunleavy, Department of Administration Commissioner Tshibaka, and Commissioner Johnson, in their official capacities. The Council alleged in its complaint that the defendants failed to disburse the funds appropriated by the legislature in 2018 to public school districts for fiscal year 2020. The Attorney General issued a formal opinion prior to the lawsuit, concluding that the legislature's 2018 appropriation was unconstitutional because it sought to commit future revenues not on hand in the state treasury in fiscal year 2019, and a new appropriation was needed. The legislature did not pass a new appropriation.

On July 16, 2019, based on the parties' joint motion, the court entered an order requiring that education funds be disbursed while the lawsuit proceeds. After oral argument on the parties' cross motions for summary judgment, the superior court ruled in

favor of the Council, holding that forward appropriations do not violate the Alaska Constitution. Defendants appealed this decision. Briefing is complete, and the case is awaiting oral argument, which has not yet been scheduled. Senior AAG Laura Fox in the Opinions, Appeals, & Ethics Section is handling the appeal.

7. *In the matter of Chatham School District Predetermination Proceeding.* On May 13, 2020 Chatham School District sent a letter to the U.S. Department of Education (US-Ed) entitled Appeal of Alaska Equalization for Impact Aid, which alleged that the State of Alaska, Department of Education and Early Development's funding of public school districts for fiscal year 2019 was not equalized. The US-Ed held a telephonic predetermination hearing on June 11, 2020. The department filed a written response to Chatham's predetermination challenge on June 26, 2020, arguing that the state has used the same funding methodology for testing disparity among districts that has been approved by the US-Ed for over twenty years. The department is awaiting a decision from the US-Ed.