

MEMORANDUM

State of Alaska
Department of Law

TO:	Members, State Board of Education and Early Development	DATE:	May 11, 2021
THRU:	Michael Johnson, Commissioner Department of Education and Early Development	FILE NO.:	JU2015200003
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		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 maintain 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. DEC has also requested the drilling of another monitoring well to assess the underground movement of TCE. 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 was 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. In March, the Alaska Supreme Court issued a favorable decision affirming the department's decision. The Court concluded, among other things, that the borough's bonds were not equally amortized over at least ten years as required by the statute, and that alternative payment schedules the borough submitted did not comply with the statutory requirements. The Court's decision was very favorable to the department and ultimately means that the department will not have to pay millions in reimbursement to the borough on non-compliant bonds. Chief AAG Janell Hafner in the Opinions, Appeals, & Ethics Section handled this case on behalf of the department.

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 October 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. The department is actively soliciting an agreed-upon dismissal of the matter.

4. *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. The parties participated in oral argument on January 12, 2021. The Court held the record open to allow the parties to supplement the record in response to the Court's questions. CEE objected to materials submitted by the State. All briefing is completed, and we are waiting for the court's decisions on the pending motions. AAG Jessica Leeah in the Special Litigation Section is primarily responsible for this litigation.

5. *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 and briefing is complete. The court held oral argument on March 31, 2021 and the case is pending a decision from the Alaska Supreme Court. Senior AAG Laura Fox in the Opinions, Appeals, & Ethics Section is handling the appeal.

6. *Lower Yukon School District Average Daily Membership (ADM) Appeal*. On March 5, 2021, the Lower Yukon School District filed an appeal with the department under 4 AAC 40 (the department's internal appeal process). The appeal challenged the way that the department had calculated the ADM (student enrollment) count for the Hooper Bay School. In the initial step of the appeal process, an internal reviewer reassessed the way that the ADM had been calculated and determined that no error had been made under the relevant statutes. The review decision was issued on April 12, 2021.

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The district did not pursue the next step of the review process (a request for a hearing) by April 27, 2021. This means the review decision has fully resolved the appeal.