

MEMORANDUM

State of Alaska Department of Law

TO: Members, State Board of Education and Early Development DATE: October 9, 2024

THRU: Dr. Deena Bishop, Commissioner FILE NO.: JU2015200003
Department of Education and Early Development TEL. NO.: (907) 269-6612

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Assistant Attorney General SUBJECT: Agenda 19E: Attorney
Public Corporations and Governmental General's Report
Services Section
Department of Law

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 also requested the drilling of another monitoring well to assess the underground movement of TCE.

Kuspuk School District has discontinued its use of the building as of January 31, 2022. Due to DOT&PF funding and allocation decisions, the demolition of the building was completed in the fall of 2023. Well monitoring work is now ongoing. The parties must still resolve the allocation of responsibility for cleanup costs for PCBs that may exist in the slab and under the building, cleanup costs for TCE, a newly discovered spill from an underground gas storage tank and the administrative costs of DEC. The parties are close to resolving the TCE liability apportionment with the State paying 15% of the TCE cleanup costs (i.e., DEED and DOT equally paying 7.5%). Jennifer Currie, Chief AAG for the Environmental Section, has been conducting monthly teleconference calls with counsel for all parties to try to get them to agree on apportioning the liability for TCE and recently indicated that if agreement is not reached soon, she will mandate mediation. There was an attempt to try to wrap the issues surrounding the underground storage tank spill into this settlement but given its early stage of development, that does not appear likely. AAG Gene Hickey in the Public Corporations & Governmental Services Section is handling this matter.

2. *Alexander et al. v. Acting Commissioner Heidi Teshner, State of Alaska, Department of Education & Early Development*. On January 24, 2023, individual teachers and parents of students enrolled in Alaska school districts filed suit in superior court against Acting Commissioner Heidi Teshner in her official capacity, State of Alaska, Department of Education & Early Development. Plaintiffs alleged in their complaint that the statutes implementing the correspondence study program are unconstitutional on their face and as applied. The complaint referenced the July 25, 2022 Deputy Attorney General opinion on whether publicly funded correspondence schools can pay for services from private schools.

On January 26, 2023 parents of students enrolled in correspondence study programs who have used program allotments to fund private school tuition filed a motion to intervene in the case as defendants. These parents alleged in their motion that they are entitled to intervene as the intended beneficiaries of the allotment program because their rights are not adequately represented by the existing parties. On February 10, 2023 the court granted the motion to intervene. On March 8, 2023 the state filed a motion to dismiss the complaint and on April 28, 2023 plaintiffs responded by filing an Opposition to State of Alaska's Motion to Dismiss/Cross Motion for Summary Judgment. The state also cross-moved for summary judgment.

The superior court heard oral argument on the cross-motions on October 24, 2023 and issued a decision on April 12, 2024, denying the state's motion to dismiss and granting plaintiffs' motion for summary judgment. In its order the court determined that AS 14.03.300-.310 must be struck down as unconstitutional in their entirety. In response to this order plaintiffs sought a stay of the decision (which would make the order temporarily unenforceable) until June 30, 2024 and the state requested a stay pending the outcome of an Alaska Supreme Court appeal. The superior court on May 2, 2024 issued an order on the stay requests, granting a stay until June 30, 2024. On the same date, the court also issued a final judgment.

On May 3, 2024 the state filed a notice of appeal of the final judgment to the Alaska Supreme Court and on May 6, 2024 it filed an emergency motion for stay of the superior court's order, pending appeal. The plaintiffs/appellees opposed this motion, and the intervenors/appellants supported this motion. The Alaska Supreme Court held oral argument on the appeal on June 27, 2024. On June 28, 2024 the court issued a summary order reversing the

superior court ruling that struck down Alaska's correspondence school statutes as unconstitutional. The court held that the statutes have a "plainly legitimate sweep" because there are "many constitutionally permissible uses of allotment funds." The court also ruled that any future lawsuit brought by plaintiffs claiming a specific use of the allotments is unconstitutional must be brought against the school district that approved the specific allotment spending. The Alaska Supreme Court remanded the matter back to the superior court for further proceedings, but the supreme court has not yet issued a formal opinion and the superior court has not taken any further action. Chief AAG Margaret Paton-Walsh has primary responsibility for this case.

3. *In the matter of Alaska Department of Education and Early Development FY22 Maintenance of Equity.* On July 30, 2024, the U.S. Department of Education (USDOE), Office of Elementary and Secondary Education (OESE), informed the Department that it (OESE) intends to withhold \$11,893,666 in American Rescue Plan (ARP) grant funds based on an alleged violation of the ARP's novel maintenance of equity provision. This provision requires that grant receiving States do not decrease per-pupil fundings to the State's high-needs and high-poverty school districts. OESE has alleged that the Department violated this provision by decreasing per-pupil funding to the Anchorage and Kenai Peninsula school districts between fiscal years 2019 and 2022. Over the past two years, the Department and OESE have engaged in numerous correspondence where the Department explained its position that per-pupil funding was not decrease during this period. Following OESE's July 30 letter, the Department submitted its demand for a formal hearing on August 29, 2024.

The USDOE Office of Hearings and Appeals held a telephonic pre-hearing conference on September 18, 2024. The Department and OESE are now engaged in the discovery and motion work portions of this litigation. A schedule for formal briefing on the issues is forthcoming from the assigned administrative law judge.