

MEMORANDUM

State of Alaska Department of Law

TO: Members, State Board of Education and Early Development

THRU: Heidi Teshner, Acting Commissioner
Department of Education and Early Development

FROM: Susan Sonneborn
Assistant Attorney General
Public Corporations and
Governmental Services Section
Department of Law

DATE: August 11, 2022

FILE NO.: JU2015200003

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 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. DOT&PF has funding to demolish the building, now expected to occur in the summer of 2023. 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, and the administrative costs of DEC. AAG Gene Hickey in the Public Corporations & Governmental Services Section is handling this matter.

2. *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 the 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 the court held oral argument on March 31, 2021.

On August 12, 2022 the court issued a favorable decision, holding that the Alaska Constitution contemplates an annual budgeting model and that the legislature's recent practice of "forward funding" education spending is therefore unconstitutional. More specifically, the court held that "[t]he delegates envisioned an annual budget that comprehensively addresses the State's current needs and the resources currently available to meet those needs," and reasoned that "[i]f the legislature appropriates funds from a future fiscal year's general fund revenues, it circumvents the planning function of the executive budget and undercuts an important aspect of the constitutional design: protecting the State's flexibility in the future to respond to then-present needs with then-present resources." Senior AAG Laura Fox in the Opinions, Appeals, & Ethics Section handled the appeal.

3. *In the matter of Alaska Department of Education and Early Development Predetermination Proceeding*. On March 3, 2021, the Department submitted to the U.S. Department of Education (US-Ed) its disparity test along with attachments and formal notice, in accord with 20 USC 7009(c)(1)(A), that it intended to consider federal Impact Aid payments when allocating state aid to school districts. The disparity test measures the

disparity among state aid revenues available to the school districts in the state. In order for the state to consider federal impact aid payments (and reduce state aid accordingly) there can be no more than 25% disparity among school districts, discounting the highest and lowest 5%. US-Ed recently requested for the first time that DEED include transportation costs in its disparity test submission.

US-Ed held a telephonic predetermination hearing on June 8, 2021. The department filed a written response to the issues raised by US-Ed at the hearing on June 24, 2021, arguing that transportation costs should not be included in the state's disparity test. On June 30, 2021, US-Ed distributed its decision concluding that Alaska does not meet the disparity test federal requirements and that, as a result, the state is not eligible to consider a portion of impact aid payments as local resources in determining state aid entitlements for the period of July 1, 2021 through June 30, 2022. DEED requested a hearing on this decision on August 27, 2021, and the matter was assigned to an administrative law judge and briefing ordered.

On November 15, 2021, DEED submitted to US-Ed an alternative fiscal analysis for consideration. The federal administrative law judge thereafter granted the parties' joint motion to stay the scheduling order. The stay will allow time for US-Ed to review the new submission and consider whether it meets the disparity test under an alternative methodology, which would resolve this matter. The parties remain engaged in this process.