

# Holland & Knight

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November 2, 2015

Charles Wohlforth, Executive Director  
CEAAC  
P.O. Box 90791  
Anchorage, AK 99509

Re: Constitutionality of Legislative Proposal to Close Small Rural Schools

Dear Charles:

You have requested a brief preliminary opinion on the whether a legislative proposal to close small rural schools in over sixty villages and communities in the State could withstand constitutional scrutiny. In my opinion, any such measure would violate both the Education Clause and the Equal Protection Clause of the Alaska Constitution. In providing you with the basis for my opinion, I will apply the core constitutional principles that the courts have recognized in construing these two clauses of the constitution in the context of educational funding challenges.

Based on the information you have provided, several legislators are proposing to close small schools in villages and small communities across the state. Few details have been provided yet on what would replace these schools and how the State would serve school age children in place of providing a functioning school. The legislators proposing such measures cite the current fiscal crisis and need to cut State spending as the sole justification for closing small schools.

Closing small schools will result in disparate treatment of the children attending those schools and living in small communities in two ways. First, the overall amount of funding available and the educational resources available to provide these children with an adequate education will be reduced. Second, there will be dramatic disparities in the educational opportunities available to these students who will be deprived of the educational resources of the school environment, classroom supports, and a classroom teacher. The evidence-based scientific research supports the need for students to be educated with their peers in a classroom with a qualified teacher. The State will be unable to point to any scientific, research-based alternative as a substitute for educating children in a school with a qualified teacher and administrative support. Without such an

alternative, the proposed legislation will violate the State Constitution. Let me now address the provisions of the Constitution this proposal will violate.

### **Article VII, Section 1, Education**

Under Article VII, Section 1, the State has a duty to establish and maintain a system of public schools open to all children in the State. Judge Sharon Gleason undertook the most comprehensive analysis of the State's constitutional duties in the *Moore* case.

Before the *Moore* trial commenced, Judge Gleason held that it is "the court's responsibility to determine a constitutional floor with respect to educational adequacy and to determine if that constitutional floor is currently being met."<sup>1</sup> Judge Gleason ruled that "the focus at trial with respect to this claim should be on defining the constitutional right to an education under Alaska's Constitution and determining whether the schools that have been established and maintained fulfill that constitutional right."<sup>2</sup> After careful and thorough consideration of the evidence, Judge Gleason rendered a 196-page Decision and Order.

Judge Gleason found that the State had a constitutional duty to insure that an acceptable educational opportunity is provided to all children in the state. Based on a review of all the evidence, the applicable Alaska cases and to a lesser extent decisions from other jurisdictions regarding educational adequacy pursuant to their constitutions, the court concluded that the State's constitutional obligation to maintain schools has four components:<sup>3</sup>

First, there must be rational educational standards that set out what it is that children should be expected to learn. These standards should meet or exceed a constitutional floor of an adequate knowledge base for children. Second, there must be an adequate method of assessing whether children are actually learning what is set out in the standards. Third, there must be adequate funding so as to accord to schools the ability to provide

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<sup>1</sup> June 21, 2007 Decision and Order (Judge Sharon Gleason), *Moore v. State of Alaska*, Case No. 3AN-04-09756 Civil, p. 8.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, p. 174.

instruction in the standards. And fourth, where, as here, the State has delegated the responsibility to educate children to local school districts, there must be adequate accountability and oversight by the State over those school districts so as to insure that the districts are fulfilling the State's constitutional responsibility to "establish and maintain a system of public schools" as set forth in Article VII, § 1 of Alaska's Constitution.<sup>4</sup>

The four-part Education Clause duty adopted by Judge Gleason flows logically from combining two lines of cases.<sup>5</sup> The first line makes it clear that the Education Clause gives Alaska children the right to a public education and makes the State responsible for providing this right to children; the second recognizes that the State can delegate this function, but only when the State provides precise guidance – and only if the State retains primary responsibility for constitutional compliance. In effect, when combined, this series of propositions means that, although the State may delegate its educational function to local districts, it must remain primarily responsible for maintaining an adequate school system.

Collectively, these cases stand for several relevant propositions concerning the Education Clause: (1) the Clause vests the legislature with exclusive responsibility and authority over public schools in Alaska; (2) the Clause serves a dual purpose – imposing an ongoing duty on the State to establish and maintain public schools and guaranteeing all children of Alaska a right to a public education; and (3) in enacting the Clause, its drafters intended that it would be implemented by delegating a large part of the educational function to local schools acting under supervision of an executive department of the State.<sup>6</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> The Superior Court summarized these cases in the Legal Analysis section of its Decision and Order. [*Id.*, pp. 147-154] They include *Hootch v. State*, 536 P.2d 793, 799 (Alaska 1975), *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971), *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972), *Alaska State Operated School System v. Mueller*, 536 P.2d 99 (Alaska 1975), *Tunley v. Municipality of Anchorage School Dist.*, 631 P.2d 67 (Alaska 1980), *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska 1997), *Municipality of Anchorage v. Repasky*, 34 P.3d 302 (Alaska 2001), and *Kasayulie v. State*, 3AN-97-03782CI (Super. Ct. 1999).

<sup>6</sup> See Decision and Order, pp. 147-154 and cases cited above in footnote 5.

We think that the State would be hard pressed to justify a wholesale closure of a large swath of small schools. Such action is irreconcilable with the basic constitutional obligation to establish and maintain public schools and provide each Alaskan child with a public education.

### **Article I, Section I, Equal Protection**

Article I, Section I provides that all persons are treated equal under the law. In giving effect to the equal protection clause, the court employs a sliding scale approach to determine the level of scrutiny that is required in reviewing challenged legislation.

This approach adopts a three-step process described by the Court as follows:

First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review.... Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.

Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated. *Alaska Pacific Assur. Co. v. Brown*, 687 P.2d 264, 269–70 (Alaska 1984).<sup>7</sup>

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<sup>7</sup> *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska 1997).

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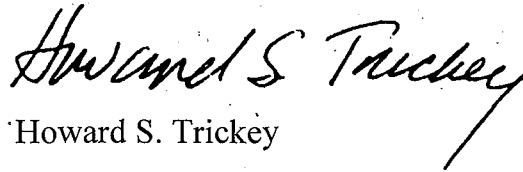
In applying this three-part test to the proposed legislation, the first step is to determine the nature of the constitutional interest impaired by the legislative enactment. Since the Court has found that students have a right to an education, the interest involved is the fundamental right to education. Once students from small schools demonstrate that they will be subject to disparate treatment by receiving an inferior education, the State will have to demonstrate both a compelling interest in enacting the legislation and that the means chosen to further the State's interest was the least restrictive method available. This will require the State to carry its burden to demonstrate that the proposed alternative to educating students in a school with a qualified teacher is not going to deprive the students of an equal education opportunity. Based on a vast body of scientific research-based evidence, the State will not be able to meet its burden.

As stated above, we do not think any legislation targeted to eliminate small schools can pass the Constitutional analysis required by both the Education Clause and the Equal Protection Clause. Once such a piece of legislation is proposed, we can provide a more definitive analysis for your consideration.

Please feel free to contact me should you have further questions about this matter.

Sincerely,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink that reads "Howard S. Trickey". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

Howard S. Trickey

HST/jmh