

# Holland & Knight

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March 3, 2017

Governor Bill Walker  
Office of the Governor  
550 West 7th Avenue, Suite 1700  
Anchorage, AK 99501  
(*VIA EMAIL AND HAND DELIVERY*)

Jahna Lindemuth, Attorney General  
Office of the Attorney General  
1031 West 4th Avenue, Suite 200  
Anchorage, AK 99501  
(*VIA EMAIL AND HAND DELIVERY*)

Dr. Michael Johnson, Commissioner  
Department of Education & Early Development  
P.O. Box 110050  
Juneau, Alaska 99811-0500  
(*VIA EMAIL AND U.S. MAIL*)

Re: *Kasayulie v. State* Consent Decree and Settlement Agreement

Dear Governor Walker, Ms. Lindemuth & Dr. Johnson:

This letter is in reference to the *Kasayulie* Consent Decree and is a follow up to our meeting on November 15, 2016, with then-Deputy Chief of Staff to the Governor Marcia Davis, OMB Director Pat Pitney, Attorney General Jahna Lindemuth, DEED Commissioner Michael Johnson, and Assistant Attorney General Luann Weyhrauch. As was discussed in that meeting, we believe the State is currently in breach of the *Kasayulie* Consent Decree and Settlement Agreement, and seek to work constructively with the State toward resolution of these breaches. The purpose of this letter is to outline the breaches and our proposed remedies.

The Coalition for Education Equity (the “Coalition”)<sup>1</sup> was a plaintiff in *Kasayulie v. State*, Case No. 3AN-97-03782 CI. In 2011, the *Kasayulie* Plaintiffs and the State of Alaska entered into a Consent Decree and Settlement Agreement to resolve the longstanding litigation over the State’s method of funding capital projects for education. Unfortunately, the State has not complied with the terms of the *Kasayulie* Consent Decree in the following ways:

1. **The Legislature has failed to fully fund construction of the Kivalina School by July 1, 2015.** The *Kasayulie* Consent Decree identified five specific school projects that were to be funded under a timetable in the Decree. The last of these five projects was the Kivalina School, which was to be funded in an amount sufficient to provide for the construction of the school by July 1, 2015. The Legislature did not provide funding sufficient to construct this school by July 1, 2015, and no school has been constructed. While efforts have continued over the past year by the Coalition’s legislative team to secure funding for the Kivalina School, the Senate Finance Committee unequivocally stated that it had met its obligations under the *Kasayulie* Consent Decree with regard to the amount of funding made available for Kivalina.
2. **The State failed to fund any REAA construction in FY 2016.** The *Kasayulie* Consent Decree came about because the Legislature was willing to comply with the court’s order by remedying a serious constitutional violation with the passage of SB 237. SB 237 established a formula under AS 14.11.025 and AS 14.11.030, which provided for funds to be deposited each year into a rural school construction fund. To equalize funding between rural and urban schools on an equitable basis, SB 237 contained a formula that was based on a percentage of the debt funding to urban schools. Yet, no REAA funds were used in FY 2016 for needed REAA construction and major maintenance.<sup>2</sup>
3. **Governor Walker’s line-item veto of \$10,410,000 in REAA funds in FY 2017 Budget.** For the FY 2017 budget, Governor Walker vetoed \$10.41

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<sup>1</sup> Coalition for Education Equity was formerly known as Citizens for the Educational Advancement of Alaska’s Children (“CEAAC”).

<sup>2</sup> [https://education.alaska.gov/facilities/pdf/Final\\_SB237\\_Report2015.pdf](https://education.alaska.gov/facilities/pdf/Final_SB237_Report2015.pdf) at page 9.

million from the general fund appropriation to the REAA.<sup>3</sup> This action deprived REAA school projects of their proportionate share of general funds for school construction and again put urban school funding ahead of rural school funding.

It bears repeating that the Coalition desires to work with the State to resolve these breaches. However, in the event the State is unwilling or unable to remedy these breaches, the *Kasayulie* Consent Decree provides that the “plaintiffs retain the right to reopen this action and litigate whether the State has met the requirements of the law for funding school construction projects, with all parties reserving their rights and claims to the same extent as they exist at the time of this agreement.” If necessary, the Coalition will reopen the litigation to protect the constitutional right of rural students to adequate school facilities.

At the meeting held on November 15, 2016, the Coalition proposed remedies to the breaches of the *Kasayulie* Consent Decree discussed above. They are as follows:

- **DEED’s implementation of a stand-alone REAA/small schools major maintenance and construction priority list, and DEED’s commitment that it will follow the Department of Law’s opinion<sup>4</sup> that no further Legislative appropriation is required before DEED can use money in the REAA fund.** Implementation of a list separate from DEED’s CIP Priority Lists will ensure that urban school construction does not prevent REAA construction. In FY 2016, DEED failed to fund any REAA construction because a non-REAA school was higher on its CIP Priority List and that project had yet to be funded by the Legislature. By creating two lists and committing to following the Department of Law’s legal advice that the REAA funds need no further appropriation for DEED to use them, non-REAA construction will no longer halt needed REAA construction and major maintenance. Moreover, separately listing REAA and non-REAA school construction projects makes sense because they have separate funding mechanisms.

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<sup>3</sup> [https://www.omb.alaska.gov/ombfiles/17\\_budget/PDFs/HB0256\\_With\\_Vetoes%206-28-16.pdf](https://www.omb.alaska.gov/ombfiles/17_budget/PDFs/HB0256_With_Vetoes%206-28-16.pdf) at page 90.

<sup>4</sup> Memorandum from Assistant Attorney General Luann E.B. Weyhrauch to OMB Director Pat Pitney (February 17, 2016).

- **Ensure future funding for the Kivalina School and execution of an agreement to toll the statute of limitations for breaches of the *Kasayulie* Consent Decree.** The *Kasayulie* Consent Decree calls for the building of the Kivalina School in FY 2015. Unfortunately, to date, the Legislature has not appropriated sufficient funds to construct the Kivalina School. The Coalition is seeking an amendment to the *Kasayulie* Consent Decree or a written commitment from the State that the Kivalina School will be funded in the FY 2018 state budget. If the State does not believe this is feasible, the Coalition would ask the State to agree to toll the statute of limitations on the *Kasayulie* Consent Decree so that the Coalition need not immediately reopen the litigation to preserve its right to a fully funded school facility in Kivalina. Under this proposed tolling agreement, the Coalition would have until December 31, 2019 to assert a breach of the *Kasayulie* Consent Decree based on the Legislature's failure to fully fund the Kivalina School. In addition, the Coalition seeks an amendment to the *Kasayulie* Consent Decree that extends the timeframe for construction of the school to begin so that funds appropriated for the school do not lapse. The State will agree that the funds for the Kivalina School shall not lapse after appropriation and that the required local district participating share under AS 14.11.008 from the Northwest Arctic Borough School District shall be funded by the time construction begins on the Kivalina School.
- **Restoration of the \$10.41 million in REAA funding that Governor Walker vetoed last year.**
- **Governor Walker's support for legislation to clarify that REAA funds can be used for major maintenance.** The Coalition is currently drafting legislation that would clarify that REAA funds can be used for major maintenance projects, as well as new construction. This clarification ensures that REAA schools receive an equitable share of State dollars for major maintenance. The Coalition is seeking the Administration's commitment to support this legislation.
- **Governor Walker's commitment that REAA funds will be used in FY 2018 to fund school construction and major maintenance projects.** In FY 2016, DEED did not use any REAA funds for school construction or major maintenance. Conversely, in FY 2016, urban school construction and major maintenance was funded through the debt reimbursement program. The purpose of the *Kasayulie* Consent Decree was to remedy the inequity between urban and rural schools, and money from the REAA should be used every year for school construction and major

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maintenance. The Coalition seeks a commitment that the State will fund REAA school construction and major maintenance projects in its FY 2018 budget.

- **Governor Walker's commitment to support other proposed Legislation by the Coalition.** The Coalition is currently drafting legislation to: clarify emergency situations that affect REAA funding, add an inflation cap to the REAA fund, grant REAAs access to loans or bonds, and extend the REAA funding mechanism for 10 additional years. The Coalition seeks a commitment from the Administration that it will support this Legislation.

The Coalition is happy to meet and discuss these breaches and proposed solutions. As noted above, time is of the essence in addressing the Legislature's failure to provide adequate funding to build the Kivalina School. The *Kasayulie* Consent Decree allows the Coalition to reopen that litigation if that funding is not completed. However, the State and *Kasayulie* Plaintiffs will accomplish much more by talking through this rather than returning to the courts. Please advise at your earliest convenience if the State is willing to enter into a tolling agreement with the Coalition so that reopening the litigation is not necessary to protect Kivalina's right to a fully funded school. If this is amenable to the State, the Coalition will prepare a draft tolling agreement for review by the Department of Law.

Sincerely,

HOLLAND & KNIGHT LLP



Howard S. Trickey

HST/jmh

cc: Sarah Sledge, Executive Director  
Coalition for Education Equity  
Director Pat Pitney  
Office of Management & Budget  
Luann Weyhrauch, Ass't A.G.  
Office of the Attorney General