

MEMORANDUM

State of Alaska Department of Law

TO: Pat Pitney
Director
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SUBJECT: Use of REAA Fund

I. Legal Question

Once funds are appropriated by the legislature into the REAA school fund, is an additional legislative appropriation required before grant funding may be provided for the highest priority REAA schools on DEED's Capital Improvement Projects (CIP) list? You have asked for a legal analysis that will be available to assist legislators.

II. Summary of Answer

It appears that after funds are originally appropriated into the REAA school fund, no further legislative appropriation is required for DEED to provide grant funding under its CIP list. Four factors lead to this conclusion (factors 1- 3 are set out in chronological order):

- (1) the two court rulings in *Kasayulie*;
- (2) the language and intent of SB 237, which created the REAA fund in 2010 in response to *Kasayulie*;
- (3) the terms of the Consent Decree and Settlement Agreement in *Kasayulie*; and
- (4) the distinction drawn in *Hickel v. Cowper* between funds available for expenditure and funds that require an additional appropriation.

The REAA fund was created in response to court rulings in the *Kasayulie* case that found the dual system of school construction funding unconstitutional. Under the dual system, bonded debt reimbursement is available to municipal districts but not to REAAs or small municipal districts without bonding capability. The lack of funding for REAA school construction arose in part because the funding was dependent on legislative

appropriation for individual projects, an unpredictable process. In contrast, the legislature provided funding for municipal school construction (via debt reimbursement) in a reliable and predictable stream, not dependent on individual appropriation.

The language in the authorizing statutes for the REAA fund supports the conclusion that money is authorized to be used without further appropriation. Under the authorizing statutes, money appropriated to the REAA fund is available each fiscal year for "expenditure." *See* AS 14.11.025 and AS 14.11.030.

III. The Orders issued in *Kasayulie*.

- The *Kasayulie* case was filed in 1997. The complaint alleged that the separate funding mechanisms for REAAs (and small municipal districts without bonding capacity) and municipal school districts eligible for bonded debt were unconstitutional and racially discriminatory.
 - In 1999, Superior Court Judge Reese issued an order finding that the state's dual system for funding school construction violated both the Education and Equal Protection Clauses of the Alaska Constitution and Title VI of the Civil Rights Act of 1964 (as racial discrimination). The 1999 order is attached.
 - In 2001, after the state had asked the court to reconsider its 1999 decision based on additional state spending information, Judge Reese issued another order confirming the conclusions of the 1999 order. The 2001 order is attached.
 - In 2001, the court acknowledged that spending on rural schools had increased for fiscal year 2001, but continued, "there remains the flawed dual funding system that allowed the prior problems. ...The bond reimbursement program is automatic. The rural funding is political, and has been arbitrary, inadequate, and racially discriminatory." 2001 Order, p. 3.
 - In the 2001 order, the court declined to enter a final (appealable) order or to require specific funding to remedy the past errors of the legislature. Instead, the court noted its expectation that the legislature would, "within a reasonable time, create a constitutionally proper system of funding" and "in the meantime, provide adequate remedial and ongoing capital funding for rural schools." 2001 Order, p. 3. The court explained that it would issue more specific orders "if progress be thwarted, or the good faith efforts of the players be successfully challenged." 2001 Order, p. 4.
- A side-note from the *Kasayulie* case regarding the importance of the CIP list to define how DEED uses the amounts appropriated to the REAA fund:

- The court noted the importance of the "legislatively mandated process" (AS 14.11.011 –AS 14.11.019) for setting the funding priorities of the CIP list. The court voiced its concern that priorities of the CIP list had not been followed in the FY 2001 funding:
 - "If the priorities are ignored, it leaves the rural districts, and the parents and children they represent, 'out of the loop,' effectively disenfranchised. Considering the impermissible racial impact of the prior funding choices made by the legislature, to deprive the rural children of even the indirect voice of the priority list seems to be treading on pretty thin legal ice. Endorsement of the priorities would seem to be a much better policy." 2001 Order, pp. 3-4.
- In the sponsor statement for SB 237, Senator Hoffman states, "[T]he legislation assumes that a project must meet all current Department of Education approvals before becoming eligible to use money from this account."
- According to the minutes of the April 7, 2010, House Finance Committee hearing on SB 237, staff to Senator Hoffman testified that "any school that wanted to receive funds would need to go through the department's process of project approval."

IV. SB 237 was enacted in 2010, as a legislative remedy for the violations identified in the *Kasayulie* rulings.

- The legislative findings in the text of SB 237 identified the conclusions of the Superior Court in the *Kasayulie* case, as follows (SB 237 is attached):
 - The method for funding school construction does not provide rural schools with adequate or equitable funding opportunities;
 - Urban schools are adequately funded through existing funding mechanisms, including bonded debt, taxes, and appropriations, but a comparable funding mechanism for funding rural schools does not exist; and
 - The funding mechanisms currently in statute have not resulted in sufficient funding for approved projects for REAAs.
- SB 237 accomplished two things relevant to this analysis:
 - The enactment of AS 14.11.030 created the REAA fund as an account in the general fund to be used, in addition to other funding sources, to fund projects approved by the department for grant funding, as described in AS 14.11.025(a); and

- The enactment of AS 14.11.025
 - provided a formula for calculating "the amount of money available each fiscal year for expenditure" as grant funding from DEED under AS 14.11.030 (The annual calculation is tied to the annual debt service provided to municipal districts.); and
 - gave DEED authority to provide grant funding from the REAA fund.
- Of note: These two provisions did not take effect until July 1, 2012.
- Testimony during the legislative process indicated that the intent of SB 237 was to provide a "reliable stream of revenue" for school construction for districts without bonding capability.
 - As described by staff for the bill sponsor in the minutes of the House Finance Committee hearing on April 7, 2010,
 - ◆ "The benefits of the [debt reimbursement] program were limited to localities with bonding capacity, which had left a large section of the state's student population without access to program benefits. The bill would create in statute a comparable statutory mechanism for school construction in REAAs. ... [SB 237] was an attempt to put into statute a reliable stream of revenue for REAAs, which would make planning building projects easier."
 - SB 237 would not create a "reliable stream of revenue" comparable to debt reimbursement, if additional legislative appropriation is required prior to expenditure.

V. In 2011, the *Kasayulie* case was settled, partly because the legislature had enacted SB 237.

- In the *Kasayulie* Consent Decree and Settlement Agreement ("Settlement"), the parties agreed the 2010 enactment of SB 237 "was in response in part to the Court's order regarding perceived constitutional violations as to the funding of rural school construction." Settlement, p. 4. The Settlement is attached.
 - The agreement acknowledged that the court had identified the need for a remedy that would provide a funding mechanism for rural districts. Settlement, p. 7. The parties also specifically agreed that the funding mechanism set forth in AS 14.11.025 and AS 14.11.030 provides the legislative remedy for the constitutional violations identified by the court. Settlement, p. 7.

- The agreement spelled out that the establishment of the REAA fund "paved the way for settlement of this case by establishing a systematic mechanism for identifying funding amounts for rural school construction." Settlement, p. 4.
- The agreement specified that AS 14.11.025 and AS 14.11.030 established a formula for how much money would be available each year for funding school construction in REAAs. Settlement, p. 4.

VI. Under *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994), the authorizing statutes for the REAA fund appear to create an account from which expenditures may be made without additional appropriation.

- In the context of addressing whether funds are available for appropriation, the Alaska Supreme Court in *Hickel v. Cowper* discussed the distinction between funds from which expenditures may be made without further appropriation and funds that require an additional appropriation before expenditures may be made.
 - As outlined in the opinion, various special funds are created under AS 37.05.520 –AS 37.05.610. These statutes provide that each fund consists of funds appropriated to it; the statutes additionally provide that the legislature may appropriate from the fund. The court in *Hickel* concludes that, for funds so structured, the initial appropriations into the fund are not sufficient to support expenditures. *Hickel* at 933-934.
 - In contrast, the statutes creating the REAA fund do not refer to legislative appropriation from the fund prior to expenditure. The statutes refer the appropriation into the fund as "money ... available for expenditure." This fits within the phrase "authorized for expenditure" as used in the *Hickel* opinion for funds from which expenditures may be made without additional appropriation. *Hickel* at 933.

IV. Conclusion

This memorandum summarizes our legal analysis regarding the use of the REAA fund – based on the language of AS 14.11.025 and AS 14.11.030, the *Kasayulie* litigation, SB 237, and the terms of the *Kasayulie* settlement.

Enclosures: 1999 Order in *Kasayulie v. State of Alaska*
2001 Order in *Kasayulie v. State of Alaska*
SB 237
Consent Decree and Settlement Agreement of October 4, 2011, in *Kasayulie v. State of Alaska*