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MEMORANDUM

March 11, 2010

SUBJECT: Two year high school attendance requirement (CSHB 297(EDC)
(Work Order No. 26-GH2771\E))

TO: Representative Paul Seaton
Chair of the House Education Committee
Attn: Louie Flora

FROM: Jean M. Mischel
Legislative Counsel

Upon further reflection after the committee hearing yesterday on the above referenced bill, I'd like to clarify my response to the questions pertaining to the addition in this version of a two year high school attendance requirement for Alaska residents who graduate from a high school outside of the state and whose parents are in military services at page 7, lines 15 - 16 of the bill.

The option of graduation from an out-of-state high school under circumstances allowed by the Department of Education and Early Development itself presents a potential equal protection issue under the bill, the result of which depends greatly upon the importance of and relationship to the state interest served by both the option and the in-state requirement from an equal protection and a privileges and immunity perspective.

In Alaska, if a court finds that two people are similarly situated, a sliding scale of high to low scrutiny by the court is applied to unequal treatment. In the case of a fundamental right (education), the court will apply a strict scrutiny standard and invalidate an apparently inequitable state law unless the state has shown a compelling interest for it, the law is closely related to that interest, and there are no alternative means for accomplishing that. If the court finds that the interest at stake is merely economic (scholarship funding), a lower level of scrutiny is applied and the distinction between out-of-state and in-state graduates will be upheld if the state has a legitimate interest in maintaining the distinction and the law is rationally related to that interest.

The addition of two years of in-state attendance for an out-of-state graduate for a student whose parents serve in the military both enhances the distinction and provides consistency for the out-of-state option with the stated purpose of the bill: to instill rigor in the curriculum of in-state high schools and to better prepare those graduates for post-secondary work. The out-of-state graduate, then, is not only not in a similar situation to

Representative Paul Seaton

March 11, 2010

Page 2

the in-state graduate, the stated purpose for the bill is called into question by the out-of-state option.

On the other hand, in-state graduates may themselves have attended high school here for less than two years. The means employed, then, may not be found by a court to be rationally related to the state purpose. A court would look at information such as the percentage of in-state students who spend less than two years at a high school in the state and compare that to the basis for adding that requirement for out-of-state graduates in the face of a constitutional challenge. That presumes, however, that the court would first find that the two types of graduates are similarly situated and, in particular, that students with military parents, spend as much time at in-state schools as graduates from in-state schools. In my opinion, the two are not similarly situated but if a court finds otherwise, the two year requirement bears a close relationship to a compelling state interest. I can, however, not assure the committee of that result if the provision is subject to constitutional challenge.

I hope this adds some clarity to a fairly complex issue. If I may be of further assistance, please advise.

JMM:med

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