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March 28, 2016

The Honorable Wes Keller
Chair, House Education Committee
State Capitol Room 403
Juneau AK, 99801

RE: HB 357 – Nonvoting Legislators on the Board of Regents

Dear Representative Keller:

I am writing in regard to HB 357, which among other things would appoint two nonvoting Legislators to the Board of Regents. The university administration is very concerned about the potential for legal challenges to Board action if legislators are appointed to the Board.

First, legislators or their staff are always welcome to attend Board of Regents meetings. Meetings are open to all members of the public and are commonly web streamed live.

However, appointment of legislators and their participation on the board would subject critical board action to legal challenges on three bases: violation of separation of powers between the executive and legislative branches; violation of the constitutional prohibition on dual office holding; and inconsistency with the intent of the drafters of Alaska's constitution to insulate education and the university from politics. These issues are discussed briefly below.

With respect to separation of powers, the relevant part of Article VII, Section 3 of the Alaska Constitution states that "*The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session.*" (Emphasis added.) Nothing in the constitution suggests that the Legislature has authority to appoint regents. Thus appointment of regents by the legislature would directly encroach on the governor's exclusive authority to appoint regents.¹ It would thereby subject any action in which the legislator-regents participated² to legal challenge by any aggrieved party.

¹ Similar concerns are reflected in a September 10, 2014, opinion of Legislative Council on a related but less intrusive extension of the legislature into the regent appointment process, i.e., the establishment of regional residency requirements for members of the Board of Regents under HB 107 (Work Order No. 28- LS1798,) which states in part:

The constitutional authority of the legislature to restrict or otherwise control the qualifications of a regent is the subject of considerable debate and raises a possibility of a separation of Powers challenge. The legislature has, however, established some qualifications in the past for the student regent and the citizenship requirements contained in AS 14.40.130 and 14.40.150.

Unlike boards and commissions controlled by art. III, sec. 26 of the Constitution of the State of Alaska, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over the qualifications of a regent outside of the confirmation process.

² As discussed below, participation constituting official action is not limited to voting.

Appointing legislator-regents also inevitably injects politics into education. A 2007 Attorney General's opinion regarding the governor's authority to remove regents noted the considerable documentation in the proceedings of the Constitutional Convention regarding the desire to separate politics from education and the university.

During the consideration of the executive branch article, however, concerns were raised regarding the appropriate place for the University of Alaska within the constitutional design for the new government. These concerns were often expressed in terms of the need to insulate education from politics. Alaska Constitutional Convention Proceedings at 2043, 2246.

...
With this summary of the constitutional history of the University in mind, we think it is fair to draw the following conclusions. First, the convention intended to create a very strong governor with full appointive power. Second, despite the strong governor model, the convention nevertheless intended to insulate the University from politics, including the governor.

2007 Alaska Op. Atty. Gen. 1

Finally, a legislator appointed to serve as a -regent would clearly hold two state offices. Legislators are prohibited from holding most other state offices by Article II, Section 5, which states:

Disqualifications. No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.

According to a 1976 attorney general opinion, this provision is interpreted literally and neither a judge, a legislator, nor a governor may sit as a regent of the University of Alaska while holding office. (*December 27, 1976 Op. Atty. Gen.*) That same opinion notes that the Board of Regents is not an inter-branch commission of a type that might avoid the prohibition on dual office holding.

Nor would the fact that legislator-regents are non-voting avoid a challenge to board action. Appointment of and participation by legislator-regents in board deliberations is very likely to be construed as intended to influence board decision-making. Moreover, voting is not the only way to participate or influence decisions of a public body. That point is explicitly recognized in the Alaska Executive Branch Ethics Act, to which all regents are subject. Refraining from voting is

not sufficient to avoid taking “official action” as defined by the Act, since “advice, participation or assistance” is sufficient to constitute “official action.”³

Participation by legislators in board deliberations prior to selling bonds, hiring a president, conferring degrees, adjusting tuition, adopting budgets and selling or purchasing property could lead to challenges to those actions by any aggrieved party.

The board also must authorize any declaration of financial exigency and reduction or discontinuation of academic programs. These are actions that permit the university to reduce faculty and staff without the constraints or notice periods typically required. Third parties dissatisfied with board decisions in such areas will have significant incentive to seize on any uncertainty regarding board authority, and use that uncertainty to delay or disrupt necessary actions through litigation. This is particularly problematic when budgetary pressures require aggressive and prompt action.

To summarize, appointment of legislators as regents is legally problematic and at best will create legal uncertainty regarding board authority at a time when difficult decisions have to be made and implemented, and when legal challenges to those decisions by those negatively affected are very likely.

The uncertainty, delay, and litigation expense could be catastrophic in the current budgetary climate and I urge the committee not to pass this bill. We very much appreciate the committee’s willingness to consider the significant legal issues related to this bill.

Sincerely,



Michael Hostina
General Counsel

cc: Rep. Vazquez; Rep. Colver; Rep. Seaton; Rep. Talerico; Rep. Drummond;
Rep. Spohnholz

³ AS 39.52.960(14) “official action” means advice, participation, or assistance, including, for example, a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.