

# LEGAL SERVICES

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## MEMORANDUM

April 6, 2010

**SUBJECT:** Overview of statutes as they relate to the March 31, 2010 order in *Moore v. State of Alaska* (Case No. 3AN-04-9756 CI) (Work Order No. 26-LS1650)

**TO:** Senator Joe Thomas  
Co-chair of the Senate Education Committee  
Attn: Murray Richmond

**FROM:** Jean M. Mischel  
Legislative Counsel



You have asked for a review of current statutes as they relate to the March 31, 2010 superior court order in *Moore, et. al. v. State of Alaska*, case no. 3AN-04-9756 CI. The order pertains to the court's review of and findings based on 2009 submissions by the state provided in response to the court's June 2007 and February 2009 orders in the same case that identified educational adequacy concerns under the Alaska Constitution.

### 1. Case overview.

The superior court has, over the past five years, heard testimony, reviewed reports, and considered various education strategies after several plaintiffs complained of sending students to public schools that had for years failed to meet state standards following the passage of the No Child Left Behind Act. The recent decision and order reflect concerns consistently expressed by the court over the course of the litigation that the decentralized system adopted in statute and regulation has failed to provide a constitutionally adequate education in some districts.

In the 2007 decision and order in this case, the court reviewed prior case law that interpreted art. VII, sec. 1 of the Alaska Constitution, which provides:

The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

As previously interpreted by the Alaska Supreme Court, this section both allows for differences in the manner of providing an education in rural districts (*Hootch v. Alaska*

*State-Operated School System*, 536 P.2d 793 (Alaska 1975) (settled on remand for consideration of equal protection claims)) and requires pervasive state authority (*McCauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971)). In *McCauley*, the court stated firmly:

This constitutional mandate for pervasive state authority in the field of education could not be more clear. First, the language is mandatory, not permissive. Second, the section not only requires that the legislature "establish" a school system, but also give to that body the continuing obligation to "maintain" the system. Finally, the provision is unqualified; no other unit of government share responsibility or authority. That the legislature has seen fit to delegate certain educational functions to local school boards in order that Alaska schools might be adapted to meet the varying conditions of different localities does not diminish this constitutionally mandated state control over education. (Id at 122.)

The 2007 superior court order in *Moore* found that the concept of local control over the delivery of public education is deeply ingrained in state educational policy in the state but opined:

If a school, despite adequate funding, is failing to accord a child with a constitutionally adequate education--such as failing to give that child a meaningful opportunity to acquire proficiency in the State's own performance standards--then the concept of local control must give way because that school is not being maintained as required by the Education Clause. (June 2007 Order, page 186.)

The superior court also found that:

The State has developed appropriate content and performance standards. It has developed finely-tuned assessments to determine each child's proficiency with respect to the performance standards, and widely disseminated those results. It has fully met its constitutional obligation to adequately fund education. But, having elected to delegate to school districts the primary responsibility for educating Alaska's school children, the State must also establish a system of adequate oversight and accountability of those districts. The State must also insure that its educational standards are being implemented at the local level so that all children within this state receive their constitutional entitlement to the opportunity for an adequate education. (2007 Order at 186, citing *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987).)

Following the 2007 order, the legislature provided additional authority to the Department of Education and Early Development ("department"), as requested by the department, to intervene in failing school districts under AS 14.07.020(16) and (17) and 14.07.030(13)

and (14). The 2009 submissions to the court included a description of the intervention efforts in what the department identified as "chronically underperforming" school districts: Yupiit, Lower Yukon, Yukon Flats, Yukon-Koyukuk, and Northwest Arctic Borough School District. The court referred to these districts as the "intervention districts."

The superior court's most recent decision and order found those efforts to be inadequate and held that:

In evaluating the State's responses at this time, this Court returns once again to the language of the Alaska Constitution, which places the responsibility "to maintain a system of public schools open to all children of the State" squarely upon the Legislature--not upon the Department of Education and Early Development and not upon local school districts. To date, the State has not demonstrated that the delegation of this responsibility to school districts that have been identified as chronically underperforming, but which do not appear to have been accorded adequate assistance and oversight, will result in compliance with this constitutional responsibility. (March 31, 2010 order, page 15.)

The court's concerns expressed in each of its orders in this litigation relate to the policy decisions leading to a decentralized system of education in the state and how those have resulted in a failure of oversight and support in failing districts. The court provided in the 2010 order a list of five specific items that must be submitted to the court within 60 days, none of which directly implicated the legislature. The legislature may, however, as it has in the past, provide further direction and oversight, as well as make additional necessary appropriations, if any, to assist the department and the local districts to provide for an adequate education in the underperforming districts and schools.<sup>1</sup>

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<sup>1</sup> For example, the legislature may mandate that intervention districts be consolidated and under what circumstances, that the department close schools or otherwise provide alternatives to the affected students, that experts be consulted or employed to provide educational services or technical assistance (as suggested by the court), that best practices (as defined) be implemented for the intervention districts, that the curriculum and curriculum materials be standardized for all or some of the districts, that teacher incentives and interviews be provided, that early learning be required in failing districts, or that more frequent and detailed reporting be provided, among other things. The legislature has under consideration this session a number of bills that may address some of the court's order. Those include an oversight body such as the P-16 Education Council (or something similar directed only at intervention districts), early learning and kindergarten programs, and loan forgiveness and scholarship incentives for students.

**2. The four areas identified for further response by the state.**

The following is a list of the four items ordered by the court that are relevant to the question presented in this memorandum regarding current statutory authority. The fifth item, not included below, is an update from the department on current efforts summarized in an earlier submission to the court in the Yupiit school district.

A. Plan for Curriculum Alignment.

The 2010 order summarized the 20 year old statewide assessment system and the 2005 changes that provide standards-based assessments in grades three through ten in reading, writing, math, and, most recently, science. Much of that system is described in departmental regulations through authority delegated to the department under AS 14.03.075 (secondary school competency testing); AS 14.03.123 (school and district accountability); AS 14.07.020(b) (departmental duties in relation to content standards and assessments); and AS 14.50.010 (delegation to department to "do all things necessary" to cooperate and participate under the federal education acts).

The court made clear that the assessments are "fully aligned with the State's instructional content standards in each of those subject areas" and accepted the parties' agreement that the state has "adopted constitutionally sound instructional content standards and testing criteria." But the court repeated its concern that the state must also accord each child a "meaningful opportunity to achieve proficiency" in the subject areas tested. (2010 Order at page 5). The court expressed doubt that the continuing delegation of curriculum selection and alignment to the underperforming districts without a deadline was working. The court called for "greater technical support", "best efforts," and access to a "fully aligned curriculum together with adequate professional training." (Order at page 7).

The 2008 legislative response to the 2009 court order required the department to establish by regulation criteria under which the department may intervene in a school district and allowed the department to redirect funds.

AS 14.07.020(a)(16) and (17) provide that the department shall:

(16) establish by regulation criteria, based on low student performance, under which the department may intervene in a school district to improve instructional practices, as described in AS 14.07.030(14) or (15); the regulations must include

(A) a notice provision that alerts the district to the deficiencies and the instructional practice changes proposed by the department;

(B) an end date for departmental intervention, as described in AS 14.07.030(14)(A) and (B) and (15), after the district demonstrates three consecutive years of improvement consisting of not less than two percent increases in student proficiency on standards-based assessments in math, reading, and writing as provided in AS 14.03.123(f)(2)(A); and

(C) a process for districts to petition the department for continuing or discontinuing the department's intervention;

(17) notify the legislative committees having jurisdiction over education before intervening in a school district under AS 14.07.030(14) or redirecting public school funding under AS 14.07.030(15).

AS 14.07.030(14) and (15), also passed in 2008, provide that the department may:

(14) notwithstanding any other provision of this title, intervene in a school district to improve instructional practices under standards established by the department in regulation, including directing the

(A) employees identified by the department to exercise supervisory authority for instructional practices in the district or in a specified school;

(B) use of appropriations under this title for distribution to a district;

(15) notwithstanding any other provision of this title, redirect public school funding under AS 14.17 appropriated for distribution to a school district, after providing notice to the district and an opportunity for the district to respond, when

(A) necessary to contract for services to improve instructional practices in the district; or

(B) the district has failed to take an action required by the department to improve instructional practices in the district; if funding is redirected under this subparagraph, the department shall provide the redirected funding to the district when the department has determined that the required action is satisfactorily completed.

While the department has a very broad mandate under AS 14.07.020(a)(1) to "exercise general supervision" over schools, nothing in the statutes expressly requires the department to provide the technical assistance, support, or standardization that may be necessary, according to the court, after years of failure.

A failing district is required to submit a school or district improvement plan under AS 14.03.123(d) and may seek school improvement funding under AS 14.03.125. Current statutes do not describe standardized curriculum in the content areas for any district but instead continue to allow all school districts, regardless of performance, to select textbooks and curriculum materials under AS 14.07.050, AS 14.08.111, and AS 14.14.090.

The department is annually required to report its efforts in assisting school districts meet performance standards to the legislature. AS 14.03.078 provides:

The department shall provide to the legislature by February 15 of each year an annual report regarding the progress of each school and school

district toward high academic performance by all students. The report required under this section must include

- (1) information described under AS 14.03.120(d);
- (2) the number and percentage of students in each school who pass the examination required under AS 14.03.075, and the number who pass each section of the examination;
- (3) progress of the department
  - (A) toward implementing the school accountability provisions of AS 14.03.123; and
  - (B) in assisting high schools to become accredited;
- (4) a description of the resources provided to each school and school district for coordinated school improvement activities and staff training in each school and school district;
- (5) each school district's and each school's progress in aligning curriculum with state education performance standards;
- (6) a description of the efforts by the department to assist a public school that receives a designation of deficient or in crisis;
- (7) a description of intervention efforts by each school district and school for students who are not meeting state performance standards;
- (8) the number and percentage of turnover in certificated personnel and superintendents;
- (9) the number of teachers by district and by school who are teaching outside the teacher's area of endorsement but in areas tested by the high school competency examination.

The information provided in this annual report could both be updated more frequently as necessary and be relied upon to provide further direction to underperforming districts and to the department.

#### B. Comprehensive Review of and Plan for Deficiencies in Meaningful Exposure to Other Content Areas.

The court found that expert witnesses had unanimously agreed that a constitutionally adequate education required more than adequate teaching of the core content areas. The improvement plans previously submitted by the intervention districts failed to adequately address other content areas and whether students in intervention districts had meaningful exposure to them. The department's response of defining the phrase "meaningful exposure" in regulation was found to be inadequate.

The statutes are clear on the type of reporting and the delegation of both curriculum material selection and improvement planning authorized, as discussed above. The statutes also require health and safety education (AS 14.30.360 and 14.30.370), encourage environmental education (AS 14.30.380) and adventure-based education (AS 14.30.500), provide grants for bilingual and bicultural education (AS 14.30.400), and require school districts to provide native language education (AS 14.30.420).

Current law, however, provides no substantive direction on other content areas such as foreign languages, art, physical education, or social studies. The statutes are also silent on a system of review, reporting, and evaluation of the successes and failures of schools outside of the core content areas.

C. Detailed Remediation Plan for Juniors and Seniors to Pass the High School Graduation Qualifying Examination.

Current statutes at AS 14.03.075 require passage of the high school graduation qualifying examination, or an alternative assessment approved for the student. The statutes do not provide for remediation planning or for remediation "best practices" to be adopted, regardless of the failure rate of a school. The department instead delegated remediation planning and implementation to the districts which must be reported to the department on request. The court order calls for additional oversight and support for intervention districts, including technical support, guidance, and review.

D. Improvement Plans That Address Curriculum Alignment, Content Areas Not Tested, Strengths and Weaknesses of Intervention Districts, Pre-kindergarten and Early Learning Initiatives, and Teaching Capacity Deficiencies.

The court ordered the state to

insure not only that curriculum materials aligned with the State's standards are available to the teaching staff at each intervention districts, but also that the teachers are provided adequate instructional support and technical assistance so as to insure that that [sic] curriculum will actually be effectively taught in the classrooms. (2010 Order at page 13).

The court further expressed concern in the same order that goal setting for early learning and literacy provided inadequate support for improving student success in later years.

With the exception of the statewide boarding and correspondence programs, teacher training, evaluation, and capacity issues are left entirely to districts and district employees. The department has, however, provided some staff development opportunities and mentoring to the intervention districts in response to previous court orders. The department may also require the cooperation and consolidation of school districts for efficiency purposes and for the development of standardized curriculum under AS 14.14.110. Consolidation may affect teacher capacity by sharing resources, training, and oversight.

With regard to early learning, AS 14.07.020(15) requires the department to develop a "model curriculum" and provide technical assistance for early childhood education programs, but only if one is implemented in a district. In addition, the department is authorized to comply with federal mandates for Head Start programs and funding. The

legislature provided additional funding last session to establish a pilot project on early learning, which the department is in the process of implementing.

In 2008, the legislature solicited the input of the University of Alaska Board of Regents on teacher training, quality, and retention. AS 14.40.190(b) requires an annual report to the senate and house education committees that includes short-term and five year strategies.

**3. Summary.**

In general, current statutes differentiate on the basis of performance level of a school district by requiring additional reporting, some grant funding for school improvement and electronic materials, redirecting of funding, and the establishment of criteria for intervention in instructional practices. Curriculum material choice, curriculum alignment, initial improvement planning and reporting, and teacher evaluations remain under the control of the school district. Pre-elementary education is optional to all districts. The *Moore* court is dissatisfied with the educational system established by the legislature that relies heavily on local control when local control and reporting has apparently failed in some districts. The legislature may need to provide further direction and oversight in these instances.

If I may be of further assistance, please advise.

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