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MEMORANDUM April 9, 2015

SUBJECT: Kivalina school construction (Work Order No. 29-LS0870)

TO: Senator Anna MacKinnon
Attn: Laura Pierre

FROM: Kate S. Glover KG
Legislative Counsel

Megan A. Wallace
Legislative Counsel

As a result of yesterday's meeting with you, the Attorney General, the Commissioner of Education, representatives of the Department of Law, and Senators Olson and Dunleavy, you have asked for a legal opinion regarding the legislature's obligation to fund school construction in Kivalina stemming from the consent decree in *Kasayulie v. State*, 3AN-97-3782 CIV (Sept. 1, 1999). It is our understanding that you, and other senators, are concerned that an appropriation may be premature since the school construction project in Kivalina is still in planning stages, and the total cost of the project is unknown.[1] You have also provided us with correspondence between Commissioner Hanley and Citizens for the Educational Advancement of Alaska's Children (CEAAC), and asked whether the letters change the state's obligations in any way. Specifically, you would like to know 1) whether the state is committed to funding a school, and if so, where; 2) whether the state is committed to funding a road as a result of the letters; 3) whether there is a limit to the state's liability in terms of the total cost of the project; and 4) how the legislature can limit the state's liability going forward, through language in the budget.

Note, as a preliminary matter, that the consent decree specifically provides that the parties cannot bind the legislature. The consent decree binds the state, through the Department of Education and Early Development (the department) and the attorney general. Therefore, this memo discusses the consent decree in terms of the state's obligations. The legislature must decide, however, whether to appropriate the funds necessary to meet those obligations.

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[1] The legislature has appropriated money to the project in the past. *See* HCS CSSB 46(FIN), sec. 10 (2011) (2011 capital budget). The governor vetoed the appropriation. The appropriation by the legislature was made contingent on the community of Kivalina moving to a permanent location where the "new school can safely be constructed."

The state's obligation with respect to school construction

The *Kasayulie* consent decree sets out the state's obligation with respect to the Kivalina school. Under the consent decree, the state agreed to include in the governor's capital budget for FY 2015 two school construction projects, including the "Kivalina K-12 school renovation/addition." (Consent decree, p. 6.) The consent decree is slightly ambiguous in this regard, however, because although it states that the appropriation is to be included in the FY 2015 capital budget, the appropriation need not be effective until July 1, 2015. (*Id.*) Generally capital appropriations with a July 1, 2015, effective date will be contained in this session's FY 2016 capital budget. The Kivalina K-12 school construction project was not included in the FY 2015 capital budget.

The consent decree requires that the state include the "Kivalina K-12 school renovation/addition" in the governor's proposed capital appropriations budget bill. (*Id.*) The consent decree also provides that "if the Legislature declines to fund, or places contingencies on the Kivalina school project because of concerns about erosion or viability of the school site, the lack of funding or contingencies will have no effect on the settlement, and cannot be used by plaintiffs to reopen the litigation." (*Id.*) The governor has included two Kivalina appropriations in the FY 2016 capital budget -- $2.5 million for the Kivalina Evacuation and Access Road, and $4.6 million for the "Kivalina K-12 Replacement School - Kasayulie" under AS 14.11.005 (school construction grant fund). (*See* SB 26.)

You have asked whether the legislature is required to fund Kivalina new school construction, or renovations on the existing site. The express terms of the consent decree distinguish between school replacement and school renovation. The consent decree specifically requires the state to fund "Kivalina K-12 school renovation/addition" while it requires the legislature to fund "Kwethluk K-12 school replacement." Further, under the consent decree, the legislature can decline to fund the Kivalina K-12 school project if it has concerns about erosion or viability of the existing school site. The language does not, on its face, require the legislature to fund a new school if it finds the existing school site is not viable. One of the contingencies the legislature could place on school construction funding, however, might be that the school must be moved to a different location that addresses concerns related to erosion.

As discussed later in this memo, the department's November 2013 Capital Improvement Project process (2013 CIP), a document specifically referenced in the consent decree, lists a Kivalina replacement school, rather than a Kivalina renovation. A court may view this as reflecting a modification of the parties' agreement, since this document appears to be incorporated in the consent decree. In that case, the state may be bound to providing for a replacement school, as approved by the commissioner. We would have expected, however, that if this document were actually intended to modify the terms of the consent decree that the parties would have specifically said so.

In construing the terms of a consent decree, a court will attempt

> to enforce the reasonable expectations of the parties. In determining the intent of the parties, the court looks to the written contract as well as extrinsic evidence regarding the parties' intent at the time the contract was made. The parties' expectations are assessed by examining the language used in the contract, case law interpreting similar language, and relevant extrinsic evidence, including the subsequent conduct of the parties.[2]

Given the contingencies tied to the Kivalina school reconstruction, a court may be willing to consider extrinsic evidence of the parties' intent at the time the consent decree was entered. We do not have the facts available to know what extrinsic evidence a court may consider, but it is possible that, at the time the consent decree was entered, the parties' "reasonable expectations" were that the state would fund either renovations or a new school for Kivalina, consistent with its constitutional obligations to establish and maintain a system of public education open to all.[3] The 2013 CIP could also be considered as relevant "subsequent conduct of the parties" to the extent that it provides evidence of the parties' understanding at the time that they signed the consent decree.

If the legislature declines to fund a Kivalina school replacement, it should make the reasons for not funding the construction explicit. A resolution may be an appropriate way to make these concerns clear.

The correspondence you forwarded to us between Commissioner Hanley and CEAAC does not alter the terms of the consent decree. To the best of our knowledge, only the consent decree has been filed with the court, and the court probably would not find that the letters altered the terms of the consent decree. The letters from CEAAC appear to be a clear statement of CEAAC's current position, however, and indicate that CEAAC is likely to reopen the litigation if the FY 2016 budget does not include at least incremental funding for new school construction. Under the terms of the consent decree, one way to avoid litigation is to decline to fund the Kivalina project because of concerns of erosion or viability of the school site -- including the new school site. Failure to appropriate any funding does not, however, resolve the state's constitutional obligations.

<u>The state's obligation to fund a road</u>

The consent decree does not include any reference to a road for the Kivalina school. It may be that, at the time of the litigation, the renovation plan for the school included a road. However, since the consent decree provides for a "renovation/addition" of the Kivalina K-12 school, it seems unlikely that a road was considered a part of the project at

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[2] *Hertz v. State*, 203 P.3d 663, 669 (Alaska 2010).

[3] Art. VII, sec. 1, Constitution of the State of Alaska.

the time the consent decree was entered. Under the consent decree, the state does not have an obligation to fund a road for the Kivalina school.

You have also asked whether the letters between Commissioner Hanley and CEAAC create an obligation for the state to fund a road for the Kivalina school. In our opinion, they do not. As discussed above, the consent decree determines the obligations of the state with respect to the *Kasayulie* litigation. Although other evidence, including the subsequent conduct of the parties, can be relevant to determining the parties' reasonable expectations, it is the parties' reasonable expectations at the time the consent decree was entered that are relevant. The correspondence between Commissioner Hanley and CEAAC is not contemporaneous with the consent decree, and the statements about construction of a road do not appear to be consistent with the parties' expectations at the time the consent decree was entered.

On the other hand, while the consent decree sets forth the state's obligations under the *Kasayulie* litigation, the January 7, 2015, letter from CEAAC, offers "to enter into a compromise that will allow the State of Alaska to fund the Kivalina school in installments rather than appropriating the entire amount this year. CEAAC will not reopen the *Kasayulie* litigation before July 1, 2016, subject to [the outlined conditions.]" Commissioner Hanley's March 3, 2015, letter to CEAAC states that he gives "approval of the incremental approach of funding the Kivalina project outlined [in the January 7, 2015,] letter." He also notes, however, that he cannot bind the current or future legislatures. Arguably, a court could consider CEAAC's letter a new settlement offer, and Commissioner Hanley's March 3, 2015, letter as acceptance of that offer. If that is the case, the terms of the January 7, 2015 CEAAC letter may be binding on the state, subject to judicial approval. While the January 7, 2015, letter references the need for a road, the conditions required to stay reopening of litigation until July 1, 2016, do not include a condition that the state fund a road. *See* CEAAC January 7, 2015, letter, p. 2. Nevertheless, if it is CEAAC's position that the funding for a road is needed, and the state refuses to fund a road, CEAAC may wish to reopen the litigation regardless of the state's position.

As noted above, the letters appear to be a statement of CEAAC's current position, and indicate that CEAAC views the road and school as one project, and may reopen the litigation if the state does not include road funding in this year's budget. At yesterday's meeting, Commissioner Hanley stated his belief that the letters do not obligate the state to fund a road. The Commissioner is in a better position to judge the intent of the parties in the discussions surrounding the letters. The letters from CEAAC are clear in their reference to the road, and the cost of that road. The road is described as an integral part of the school project, and also as an evacuation route for the community. If CEAAC reopens the litigation, and the court finds that the state is required to fund construction of a new school, a court may agree that the road is a necessary part of the project, as a school is of limited use if there is not access to the school. As discussed above, however, it is not clear that the state is obligated to fund a new school under the terms of the consent decree or the recent correspondence.

Is there a limit to the state's liability?

You have also asked whether the state's monetary obligation is limited. The consent decree provides a monetary limit to the extent of the state's liability. It specifies that the "[a]mount of appropriation" for the Kivalina K-12 school renovation/addition is "to be determined by the Department of Education and Early Development's November 2013 Capital Improvement Project process . . . ." In that document, the department does not include a Kivalina renovation/addition project, but does include a Kivalina replacement school, with a state share of $43,237,399.00.[4] Under the terms of the consent decree, if the legislature appropriates the $43,237,399 for a replacement school for Kivalina in the budget, effective July 1, 2015, the legislature will likely meet the state's obligations under the consent decree.

Because the consent decree specifically provides that the amount of the appropriation would be determined through the 2013 CIP process, the consent decree places the risk of a project that exceeds the budget on Kivalina. If the project exceeds the costs estimated in the 2013 CIP, the state may not be required to provide additional funding. If the legislature takes this approach, the state will have met its obligations and CEAAC would not have a strong argument for reopening the litigation.

Limiting liability through the budget

You have also asked us to address whether the legislature could include intent language in the budget to limit its liability if the cost for the school project increases in the future, or intent language indicating that the legislature will not fund the Kivalina school this year, because the project is not ready, but intends to fulfill the state's obligations next year, if the legislature's concerns are met. Including this language in the budget is probably not appropriate, as this may violate the confinement clause of the Constitution of the State of Alaska.[5] If the state wishes to alter the terms of the consent decree

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[4] http://education.alaska.gov/facilities/initial/FY15ConstructionList.pdf.

[5] Art. II, sec. 13, Constitution of the State of Alaska. Under art. II, sec. 13, Constitution of the State of Alaska, "bills for appropriations shall be confined to appropriations." The legislature's power to attach intent or qualifying language to an appropriation has significant limits. In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001), the Alaska Supreme Court established a five-part test for substantive contingencies related to appropriations:

> [T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the

because it does not believe the project is ready for funding, the legislature should work with the department and the attorney general's office to encourage the attorney general's office to negotiate new terms in a consent decree. Note, however, that the legislature has an obligation, independent of the consent decree, to "establish and maintain a system of public schools open to all children of the State."[6] If the legislature wishes to change the terms of the consent decree, the legislature should be prepared to offer an alternative that would adequately meet the educational needs of the children of Kivalina.

Another option discussed at the meeting is to appropriate the full amount of funding in the FY 2016 budget, but to appropriate that money to a fund, rather than appropriating it directly to the Northwest Arctic Borough School District. In our opinion, this would satisfy the state's obligation under the terms of the consent decree and the constitution. The money could be appropriated to the department for construction of the Kivalina K-12 replacement school, and the department could continue to work with the school district and the village to finalize plans for school construction. A potential problem with this solution, however, is that funds in the capital budget would lapse if "substantial, ongoing work on the project" has not "begun within five years after the effective date of the appropriation."[7] The unexpended balances of the fund could also be reappropriated in subsequent years. CEAAC may not find this solution acceptable for that reason. On the other hand, given the uncertainty of future legislative appropriations under any circumstances, CEAAC may be willing to accept this solution. You may wish to discuss this proposal further with the Attorney General and the department.

If we may be of further assistance, please advise.

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> appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. Language that falls outside this standard is unenforceable because it violates the confinement clause of the Constitution of the State of Alaska.

[6] Art. VII, sec. 1, Constitution of the State of Alaska. In constitutional terms, the state has some flexibility to use boarding, correspondence, or other programs to provide education in rural areas of the State. *Molly Hootch, et al., v. Alaska State-Operated School System, et al*, 536 P.2d 793 (Alaska 1975) (settled on remand for consideration of equal protection claims).

[7] AS 37.25.020.