

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE

February 24, 2014

2:06 p.m.

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MEMBERS PRESENT

Representative Wes Keller, Chair
Representative Bob Lynn, Vice Chair
Representative Gabrielle LeDoux
Representative Lance Pruitt
Representative Max Gruenberg

MEMBERS ABSENT

Representative Neal Foster
Representative Charisse Millett

COMMITTEE CALENDAR

HOUSE BILL NO. 218

"An Act relating to the aggravating factor at felony sentencing of multiple prior misdemeanors when a prior misdemeanor involves an assault on a correctional employee."

- MOVED CSHB 218(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 245

"An Act repealing the required local contribution to school funding; making conforming changes; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 218

SHORT TITLE: PENALTY: ASSAULT ON CORRECTIONAL EMPLOYEE

SPONSOR(S): REPRESENTATIVE(S) CHENAULT, MILLETT, HERRON, LYNN

| | | |
|----------|-----|---------------------------------|
| 01/21/14 | (H) | PREFILE RELEASED 1/10/14 |
| 01/21/14 | (H) | READ THE FIRST TIME - REFERRALS |
| 01/21/14 | (H) | JUD |

02/12/14 (H) JUD AT 1:00 PM CAPITOL 120
 02/12/14 (H) Heard & Held
 02/12/14 (H) MINUTE(JUD)
 02/21/14 (H) JUD AT 1:00 PM CAPITOL 120
 02/21/14 (H) Heard & Held
 02/21/14 (H) MINUTE(JUD)
 02/24/14 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 245

SHORT TITLE: SCHOOL FUNDING: REQ'D LOCAL CONTRIBUTION
SPONSOR(S): REPRESENTATIVE(S) T.WILSON

01/21/14 (H) PREFILE RELEASED 1/10/14
 01/21/14 (H) READ THE FIRST TIME - REFERRALS
 01/21/14 (H) EDC, FIN
 02/05/14 (H) EDC AT 8:00 AM CAPITOL 106
 02/05/14 (H) Heard & Held
 02/05/14 (H) MINUTE(EDC)
 02/07/14 (H) EDC AT 8:00 AM CAPITOL 106
 02/07/14 (H) Scheduled But Not Heard
 02/10/14 (H) EDC RPT 2DNP 3NR
 02/10/14 (H) DNP: DRUMMOND, SEATON
 02/10/14 (H) NR: LEDOUX, P.WILSON, GATTIS
 02/10/14 (H) JUD REFERRAL ADDED AFTER EDC
 02/10/14 (H) EDC AT 8:00 AM CAPITOL 106
 02/10/14 (H) Moved Out of Committee
 02/10/14 (H) MINUTE(EDC)
 02/24/14 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE TAMMIE WILSON
 Alaska State Legislature
 Juneau, Alaska

POSITION STATEMENT: Testified as prime sponsor of HB 245.

DAN BOCKHORST, Manager
 Ketchikan Gateway Borough (KGB)
 Ketchikan, Alaska

POSITION STATEMENT: Testified in support of HB 245.

SCOTT BRANDT-ERICHSEN, Ketchikan Gateway Borough Attorney
 Ketchikan Gateway Borough (KGB)
 Ketchikan, Alaska

POSITION STATEMENT: Testified in support of HB 245.

ACTION NARRATIVE

2:06:04 PM

CHAIR WES KELLER called the House Judiciary Standing Committee meeting to order at 2:06 p.m. Representatives Pruitt, Gruenberg, LeDoux, Lynn, Keller were present at the call to order. Representatives Foster and Millet arrived as the meeting was in progress.

HB 218-PENALTY: ASSAULT ON CORRECTIONAL EMPLOYEE
SENTENCING; AGGRAVATOR/DEPORTATION STATUS

2:06:14 PM

CHAIR KELLER announced the first order of business would be HOUSE BILL NO. 218, "An Act relating to the aggravating factor at felony sentencing of multiple prior misdemeanors when a prior misdemeanor involves an assault on a correctional employee."

CHAIR KELLER closed public testimony.

2:07:35 PM

REPRESENTATIVE GRUENBERG moved that the committee's rescind its action in adopting Amendment 1, labelled 28-LS0941\A.2, Strasbaugh, 2/11/14, on 2/12/14 which read:

Page 1, line 3, following "**employee**":

Insert "**; providing that deportation is not a proper factor for referral of a case to a three-judge panel for sentencing for a felony; and providing for an effective date**"

Page 1, following line 4:

Insert a new bill section to read:

"* Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT FOR SECTIONS 3 AND 4 OF THIS ACT. It is the intent of the legislature that AS 12.55.165(d), added by sec. 3 of this Act, and AS 12.55.175(g), added by sec. 4 of this Act, overturn the decision of the Alaska Court of Appeals in State v. Silvera, 309 P.3d 1277 (Alaska Ct. App. 2013), and the Alaska Supreme Court in Dale v. State, 626 P.2d 1062 (Alaska 1980) to the extent that the decisions

hold that the risk of deportation may be considered a basis for referral of a felony sentencing to a three-judge panel."

Page 1, line 5:

Delete "**Section 1**"

Insert "**Sec. 2**"

Renumber the following bill section accordingly.

Page 6, following line 4:

Insert new bill sections to read:

"* **Sec. 3.** AS 12.55.165 is amended by adding a new subsection to read:

(d) A court may not refer a case to a three-judge panel under (a) of this section if the request for referral is based, in whole or in part, on the claim that a sentence within the presumptive range may result in the classification of the defendant as deportable under federal immigration law or that collateral consequences may or will result if the defendant is classified as deportable.

* **Sec. 4.** AS 12.55.175 is amended by adding a new subsection to read:

(g) A defendant being sentenced under AS 12.55.125(c), (d), (e) or (i) may not establish, nor may a three-judge panel find under (b) of this section or any other provision of law, that manifest injustice would result from imposing a sentence within the presumptive range based, in whole or in part, on the claim that the sentence may result in the classification of the defendant as deportable under federal immigration law or that collateral consequences may or will result if the defendant is classified as deportable.

* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Section 2 of this Act applies to offenses committed on or after the effective date of this Act.

(b) Sections 3 and 4 of this Act apply to offenses committed before, on, or after the effective date of this Act if the sentence is imposed on or after the effective date of this Act.

* **Sec. 6.** This Act takes effect July 1, 2014."

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REPRESENTATIVE PRUITT objected to rescinding the adoption of Amendment 1 and stated that after analyzing prior testimony, he found no reason defendants in the same sentencing situation should be identified separately.

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REPRESENTATIVE GRUENBERG opined that the adoption of Amendment 1 should be rescinded as it renders that section of the bill unconstitutional. He advised that Naturalized Americans are already a "special group" subject to deportation under federal law; Amendment 1 merely allows the court to entertain a motion to rectify the situation and state law provides no special preference. In Padilla the importance of deportation, denaturalization, and [a defendant] exiled from America is discussed. He reminded the committee that [adoption of Amendment 1] reverses a case referred to a three-judge panel which determined it was appropriate to mitigate [deportation. The case was then appealed to the court of appeals it decided deportation as a factor] was deemed appropriate, and then the Alaska Supreme Court refused to review. There hasn't been a single judge in the state that has adopted the approach [embodied in Amendment 1]. He opined Amendment 1 will "breed" litigation, [spend] public money, and more importantly, he offered that Amendment 1 is "just wrong."

[2:12:05 PM](#)

REPRESENTATIVE LYNN related his belief that when a crime has been committed there should be one set of rules for everyone and [Alaska] should not [create] a second class of citizens.

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CHAIR KELLER advised he is voting against [the motion to rescind the committee's action in adopting Amendment 1] as Alaska does not have the resources or the inclination to second guess federal immigration judges and adjust Alaska's Criminal Law to Federal Immigration Law.

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REPRESENTATIVE MILLETT noted that subsequent to discussions with Anne Carpeneti, Margaret Stock, and Ann Black, she came to certain conclusions and referred the committee to the Alaska Constitution, Article I, which read:

§ 12. Criminal Administration

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

REPRESENTATIVE MILLETT then referred the committee to State of Alaska v. Chaney, [477 P.2d 441, Alaska 1970], which resulted in the following:

AS 12.55.005. Declaration of Purpose.

The purpose of this chapter is to provide the means for determining the appropriate sentence to be imposed upon conviction of an offense. The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter. In imposing sentence, the court shall consider

- (1) the seriousness of the defendant's present offense in relation to other offenses;
- (2) the prior criminal history of the defendant and the likelihood of rehabilitation;
- (3) the need to confine the defendant to prevent further harm to the public;
- (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;
- (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct;

(6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and

(7) the restoration of the victim and the community.

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REPRESENTATIVE MILLETT directed attention to the seven issues taken into consideration when a defendant is before a [state] sentencing judge. When a non-citizen is allowed to go before a three-judge panel, they are receiving special treatment because a U.S. citizen can't use the same excuse. With regarding to prior testimony about Alaska Natives and immigrants and their families, Representative Millet suggested those discussion played on people's emotions. In fact, within the last six or seven years Alaska has had no cases involving separation of families and surmised that possibly prior testimony was regarding the federal government's actions [that resulted in] separating families. [Amendment 1] discusses state law not federal law, she opined. She further opined that the state should remain neutral regarding citizenship status and imposing criminal penalties for violations of a state law as Alaskans [must] have confidence in their courts by being sentenced similarly for the same crime. A mitigating factor for deportation should not be allowed to determine that an individual can go before a three-judge panel. Therefore, she encouraged the committee to consider the importance of Alaska's courts. She then reasoned that public safety is also a concern inasmuch as the [deportable] defendant receives a lower sentence of 364 days and is not required to be on probation or any type of supervision following release. A separate class of citizens is created when allowing an immigrant to use deportation as an excuse to get away with a crime, she noted. This amendment, however, treats all Alaskans the same, she emphasized.

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REPRESENTATIVE GRUENBERG stated it is the legislature's duty to adhere to both the Alaska State Constitution and U.S. Constitution as ultimately, if Alaska passes a law that is possibly unconstitutional it may become a federal court's decision based upon the U.S. Constitution. Therefore, the state should be mindful of cases from the 9th Circuit, local district courts, state courts, and the U.S. Supreme Court. Representative Gruenberg specified that the only argument advanced in favor of Amendment 1 is that it is not a violation of equal protection

which was brought forth in the Silvera case and was rejected. In fact, that issue has been dispositively and adversely dealt with at every level of Alaska's court system. He then described health, age, and "all kinds of issues" that can be used as mitigating factors and [deportation] is merely one such factor. Therefore, if [non-citizens] are not allowed to use the mitigating factor of deportation, then they are being singled out in reverse. He opined there are various remedies a judge can rule that will provide equal protection to the community without deportation and separation from innocent family members. He emphasized that he is merely suggesting that the individual be allowed to make the argument and if it is unfair, unjust, or wrong, will come out before the court.

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REPRESENTATIVE MILLETT, in response to Representative Gruenberg contended that regarding adhering to both the Alaska State Constitution and U.S. Constitution, the federal government deports people and partakes in the process of deportation, Alaska does not. She then stated that a [deportable] defendant [is also allowed to use] the mitigating factors of illness, age, and others. With regard to comments about the innocent children [of the non-citizen], Representative Millett emphasized she does not want to cause a disservice to Alaskan victims and their families by allowing a [deportable] defendant the opportunity of a three-judge panel and a reduced sentence.

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REPRESENTATIVE PRUITT called for the question.

[2:30:02 PM](#)

A roll call vote was taken. Representatives Gruenberg and LeDoux voted in favor of rescinding the committee's action in adopting Amendment 1. Representatives Millett, Pruitt, Foster, Lynn, and Keller voted against it. Therefore, the committee failed to rescind its action in adopting Amendment 1 by a vote of 2-5 and HB 218, as amended, was before the committee.

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REPRESENTATIVE PRUITT moved to report HB 218, as amended, out of committee with individual recommendations and the accompanying fiscal notes.

REPRESENTATIVE GRUENBERG objected for purposes of discussion and stated he strongly supports the original bill and cannot support Amendment 1.

A roll call vote was taken. Representatives Foster, Lynn, Millett, Pruitt, and Keller voted in favor of reporting HB 218, as amended, from committee. Representatives Gruenberg and LeDoux voted against it. Therefore, CSHB 218(JUD) was reported from the House Judiciary Standing Committee by a vote of 5-2.

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The committee took a brief at-ease.

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REPRESENTATIVE GRUENBERG related that his recommendation on CSHB 218(JUD) will be to amend for the reasons he previously stated.

[2:33:19 PM](#)

The committee took a brief at-ease.

HB 245-SCHOOL FUNDING: REQ'D LOCAL CONTRIBUTION

[2:35:12 PM](#)

CHAIR KELLER announced the next order of business would be HOUSE BILL NO. 245, "An Act repealing the required local contribution to school funding; making conforming changes; and providing for an effective date."

CHAIR KELLER informed the committee there is a lawsuit [Ketchikan Gateway Borough v. State of Alaska, Superior Court Case No. 1KE 14-CI], and if the decision in that lawsuit is in favor of the Ketchikan Gateway Borough (KGB) it would accomplish the same goal as if HB 245 passed the legislature. He cautioned the committee not to advocate in favor or against the bill as it could be perceived as legislative intent and explained this hearing is solely for the purpose of gathering information.

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REPRESENTATIVE TAMMIE WILSON, Alaska State Legislature, speaking as the sponsor of HB 245, clarified that HB 245 can be passed and the lawsuit can continue forward as one does not necessarily

void the other. She then paraphrased from the following sponsor statement [original punctuation provided]:

House Bill 245 would reform the inequitable and onerous state mandate for local contributions for organized areas in the state of Alaska.

The State of Alaska has a duty under [Article VII], Section 1 of the Constitution of the State of Alaska to "establish and maintain a system of public schools open to all children of the state". The Fiscal burden placed on local governments that must bear that burden is enormous and consuming. The State of Alaska provides only partial funding to organized boroughs, home-rule cities in the unorganized borough, and first-class cities in the unorganized borough to carry out the State's responsibility for education by deducting a "local contribution" of 2.6 mils from the level of state aid as stated in 14.17.410(G)(2)

In the area of Alaska outside organized boroughs, home-rule cities in the unorganized boroughs, home-rule cities in the unorganized borough, and first-class cities in the unorganized borough, the State carries out its duties for education through State "educational service areas" established under AS 14.08.031, which exempt them from the required local contribution. There are presently 19 State educational service areas, referred to as regional educational attendance areas (REAA's).

In 1963 Alaska State Legislature passed, and Governor Egan signed into law, the "Mandatory Borough Act", dictating that certain regions of Alaska; those encompassing Ketchikan, Juneau, Sitka, Kodiak Island, Kenai Peninsula, Anchorage, the Matanuska Susitna valleys and Fairbanks to form organized boroughs by January 1, 1964. Furthermore, Section 1 of the Mandatory Borough Act promised that, "No area incorporated as an organized borough shall be deprived of state services, revenues, or assistance or be otherwise penalized because of incorporation.

HB 245 removes the "required local contribution" penalty imposed by the State of Alaska on organized areas and again fulfills its Constitutional responsibility.

REPRESENTATIVE T. WILSON then added that when an area becomes a borough there is the assumption that services such as more police, and parks and recreation will be added, and yet the first issue to arise is the 2.6 mil [local contribution] tax required for something the state is currently providing. She explained that although when Alaska became a state a local contribution provision was included but when oil was discovered the state provided the municipalities' share [of local contribution] until the state ran out of money. Consequently, the state looked to the organized areas to fill the coffers for [services] that are the state's responsibility. The state developed the formula for basic needs to educate a student. She characterized this as a constitutional issue that should be rectified prior to going to court because it's the state's responsibility to ensure the state pays its share and that the issue is rectified prior to the commencement of Ketchikan Gateway Borough v. State of Alaska.

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DAN BOCKHORST, Manager, Ketchikan Gateway Borough (KGB), stated KGB supports HB 245 as it attempts to achieve the same goal as the recently filed lawsuit by KGB, which is full funding of basic need for all school districts whether they are municipal districts or Regional Educational Attendance Areas (REAA). The term "basic need," which is central to HB 245 and KGB's lawsuit, is defined in [AS 14.17.410(b)(1)] and consists of seven separate components. Beyond the technical jargon of the term, he opined that it's a straight forward and fair formula. The first component is student enrollment in each district and, he explained, there are approximately 2,200 students in the Ketchikan Gateway Borough School District which equates to approximately \$12.6 million in basic need. The second component is the school size factor that takes into consideration economies of scale as there are school districts with 15 students and others with approximately 50,000 students, such as the Municipality of Anchorage. He explained that there is an adjustment for the greater economies of scale in the larger schools. The third component is the district cost factor, which range from the base in Anchorage at 1.0 to a remote district of 2.116. The KGB District has a 17 percent increase in its cost factor, which generates \$2.7 million for Ketchikan. The fourth component is funding for special education, gifted and talented educational, vocational education, and bilingual education services and the adjustment for the KGB District amounts to \$3.7 million.

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CHAIR KELLER questioned if the factor is on the actual number of special needs students, or on after the adjustment.

MR. BOCKHORST explained that every one of [the factors] adjusts for the number of students, school size, and district cost factor; it's an adjustment that continues to build. The fifth component is vocational and technical instruction, which adds approximately \$350,000 for the KGB District; the sixth component is correspondence students, which add approximately \$150,000 for the KGB District; and the seventh component is for special education students who receive intensive services which adds \$3.3 million to the basic need for the KGB District. Mr. Bockhorst expressed the importance of the "model" as it totals \$26.2 million, which is approximately \$11,850.00 per student in Ketchikan for its basic need. He acknowledged that Alaska is a diverse state as there are 53 separate districts encompassing over 650,000 square miles. In terms of per student basic need, on one end of a spectrum the total is \$5,200 per student and on the other end the total is \$48,500 per student, which is more than nine times what it is at the lower end of the spectrum. He related that the basic need formula equalizes the districts in the state. In fact, the Department of Education and Early Development (EED) says that "all districts are considered equal at basic need." In other words, students, taxpayers, teachers, parents, and others who support schools in Alaska's 34 municipal districts have equal rights and opportunities under the basic need formula compared to those in the 19 REAAs. The aforementioned is a critical point when considering the merits of HB 245 and the Ketchikan Gateway Borough v. State lawsuit.

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MR. BOCKHORST reiterated that the basic need formula ensures every district [receives] adequate funding, and stated the University of Alaska Institute of Social and Economic Research (ISER) characterizes basic need as the dollar amount the state determines sufficient to provide an Alaska school child with acceptable educational services wherever the child lives. He then highlighted the following by EED: "Basic need provides all districts with needed resources based on the various formula adjustments." Under the Alaska State Constitution, Article 7, Section 1, the state has a constitutional obligation to provide adequate funding to maintain a system of public schools. On four different occasions over the course of 30 years, the Alaska

Supreme Court has stated that no other unit of government shares the duty. In fact, Judge Sharon Gleason, Anchorage Superior Court Judge, held it is the state's constitutional duty to maintain and fund a system of schools. Therefore, it is critical that basic need is recognized as adequate funding. Mr. Bockhorst pointed out that on average municipal districts receive approximately 80 percent of basic need from the state, with some [municipal districts] receiving as little as 55 percent while REAAs receive full state funding of basic need. Thus, while all districts are equalized in terms of identification of basic need, only two out of three municipal districts are not equalized in terms of funding. In other words, on an average, municipal districts are only 4/5ths equal to non-municipal districts in terms of state funding basic need, he highlighted. The 34 municipal districts required by state law to operate schools are forced to backfill [funding] and this year KGB will pay \$4.2 million for a community of 14,000 people with 2,200 students. He estimated that within the last 22 years, KGB has been forced to pay in excess of \$100 million, which is a staggering amount

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MR. BOCKHURST referred to the 2/10/14 House Education Standing Committee meeting regarding HB 245, wherein Representative Reinbold questioned "Is it truly equal protection when some pay and some don't?" He opined that Representative Reinbold's question is critical given the lack of a rational basis of the disparate treatment among districts that is evident in various materials including the work prepared by Attorney Robert Hicks for the KGB District in which he describes the stereotype that unorganized areas lack resources while municipal districts have substantial resources, which is not true. He then referred to his written testimony wherein there is a listing of the per capita income of the 53 districts in Alaska and the highest per capita income in Alaska is a REAA. The REAAs have similar income levels to boroughs that were mandated into existence. For example, the per capita income of the Delta-Greely REAA school district is virtually identical to that of the Fairbanks North Star Borough. Although, 50 years ago the Fairbanks North Star Borough voted against borough incorporation, Fairbanks was incorporated by legislative fiat. He noted that the Chatham REAA has virtually the same per capita income to the KGB District. In contrast, the Delta-Greely REAA rejected borough incorporation, and there has been no consequence. He recalled discussions at the 2/10/14 House Education Standing Committee meeting regarding the four separate school districts on the

Prince of Wales Island, of which there are three municipal districts and one is a REAA. During that hearing Prince of Wales Island expressed concern over the required local contribution when considering borough formation. Although the Prince of Wales REAA is not subject to the required contribution, he pointed out; it has the highest per capita income and is twice the size of the city school district that is subject to the required [local] contribution on the low end of the scale. Testimony provided at the 2/10/14 House Education Standing Committee meeting by the Department of Law (DOL) focused on a 17-year old case in which the Alaska Supreme Court rejected a challenge of the required local contribution based on equal protection grounds [Matanuska-Susitna Borough School District v. State of Alaska, (1997) 931 P.2d 391]. The Mat-Su case has significant weight on HB 245 issues. However, he noted disagreement since the court decided in Mat-Su that it is up to the legislature to choose an appropriate policy for funding schools. Mr. Bockhorst opined that HB 245 is a viable choice under the Mat-Su decision, but the current required [local] contribution is not viable given the prohibition on dedicated taxes and other constitutional infirmities raised in the Ketchikan Gateway Borough lawsuit. During the same meeting, DOL asserted the Alaska Supreme Court's decision stated the required contribution is a "reasonable way to deal with the lack of required contribution from Regional Educational Attendance Areas," but the court never said the disparate treatment of municipal districts compared to REAAs is reasonable. Rather, in the Mat-Su case the court determined disparate treatment is permissible by placing the interests of municipal taxpayers at the low end of the scale of rights protected by the constitution. The two justices, who weighed in on the decision, added that the method chosen by the legislature may not have been the most protective of taxing equality. In other words, the method may not have been the most fair, but could be gotten away with. He opined that is not the same as saying the disparate treatment was reasonable. Moreover, when the Alaska Supreme Court examines the equal protection claims it examines "the purpose served by the challenged statute" which was the requirement of local contributions on the part of municipal school districts. Interestingly, he noted, rather than the court applying the three-part test to the purpose of the challenged statute, it reviewed the entire body of law dealing with the foundation formula. He opined that in the Mat-Su, the borough chose a cost saving strategy of attacking the statute on its face and there was no evidence provided by the Mat-Su Borough of the denial of educational opportunities and minimal facts were presented with respect to tax payer inequity. There

were no facts showing disparities among school districts and no challenge of highly inaccurate facts stated by witnesses called by the State of Alaska. In the end, he noted, the cost saving strategy of the Mat-Su Borough failed and the analysis of Attorney Bob Hicks concluded it is a weak and vulnerable precedent.

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MR. BOCKHURT opined that the vision of the framers of the Alaska State Constitutional was for the state to create inducements encouraging voluntary incorporation of boroughs. However, and on the basis of the constitutional record the Alaska Supreme Court concluded that the constitution encourage all intend that the formation of boroughs organize yet the state has offered disincentives and dismay with respect to incorporation of organized boroughs. Interestingly, after 55 years of statehood more than half of Alaska remains unorganized. This point is clarified by the fact that 95 out of 100 residents of organized boroughs live in organized boroughs that were formed as a result of the 1963 Mandatory Borough Act. Former Governor Jay Hammond, who served in the legislature during the adoption of the 1963 Mandatory Borough Act, observed "Attractive enough on paper, in practice the organized borough concept had little appeal for most communities. After all, why should they tax themselves for services received from the state in gratis." The required contribution imposed on boroughs is identified by some as the greatest disincentive to voluntary incorporation. He highlighted that the guarantee in the Alaska Constitution, Article 1, Section 1, that leaves no room for interpretation or three-part test of the interests of taxpayers at the low end of the scale. The guarantee is found in 52 SLA 1963, as follows:

Chapter 52, SLA 1963

"No area incorporated as an organized borough shall be deprived of state services, revenues, or assistance or be otherwise penalized because of incorporation."

MR. BORKHORST opined that it is undeniable today that boroughs are severely penalized because of incorporation, particularly when it comes to funding of basic need. During the 2/10/14 House Education Standing Committee meeting it was observed that the legislature amends laws all the time and the 1963 promise, which exists in the uncodified laws of the state, could be readily abolished by legislative action whenever the legislature chooses to do so. However, the state's citizens, he opined, rely on the guarantee when voting to incorporate, as in the case

of Ketchikan, Juneau, Sitka, and Kodiak, or take comfort if they are forced into incorporation, as was the case in Fairbanks, Kenai, Anchorage and Mat-Su. He urged the committee to keep the promise and support HB 245.

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MR. BOCKHORST opined that at least the following five elements of the Alaska Constitution have been violated.

Article I, § 1. Inherent Rights

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article VII, §1. PUBLIC EDUCATION.

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.

Article IX, § 7. Dedicated Funds.

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska. [Amended 1976]

Article II, § 15. Veto

The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in

appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.

Article IX, § 13. Expenditures

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

MR. BOCKHORST pointed out that the last three elements are the basis of the KGB lawsuit. He referred to the "red block" [Ketchikan Gateway Borough, Written Testimony before the House Judiciary Committee in Support of HB 245, Repealing the Required Local Contribution to School Funding, pages 2-5] which symbolizes impairment of the vision of the constitutional framers with respect to promotion and strength of Alaska's local government system, while also breaching of the 1963 promise that local governments would not be penalized.

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REPRESENTATIVE T. WILSON clarified that certain REAAs do pay impact aid into the formula. With HB 245 [each district] will continue to have a portion of its impact aid [credited] toward the formula as the districts receive the same amount of credit for their impact aid, "although it is different," she opined. In response to Chair Keller, Representative T. Wilson explained that impact aid [supports local school districts with concentrations of children who reside on Indian lands, military bases, low-rent housing properties, and other federal properties, or who have parents in the uniformed services or employed on eligible federal properties. The law refers to local school districts as local educational agencies, or LEAs].

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CHAIR KELLER related his understanding that the intent is to be in lieu of property taxes that would otherwise be collected if it was in private ownership.

REPRESENTATIVE T. WILSON agreed and advised [the federal government] pays into areas that may not have property tax or personal taxes to go with it, although some may have sales tax.

She clarified that HB 245 is not requesting every area become a borough, but if there are to be more boroughs the [legislature] must incentivize and not penalize.

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REPRESENTATIVE FOSTER, referring to the remarks that some REAAS may have per capita income similar to other areas in the state that are not REAAs, pointed out that the Wade Hampton Area, which would include Emmonak and Hooper Bay, is in an area where its per capita income is very low. In fact, it is the poorest area of the state. Representative Foster suggested that large communities would receive funds that would replace property taxes that would go toward local education. He further suggested that larger communities could possibly lower their property taxes and pass the savings on to property tax payers, or keep the property taxes the same and add those to local schools.

REPRESENTATIVE T. WILSON interjected there is a certain amount of money that can be added to local contribution, but it is capped by the federal government to maintain "equalization." For example, she explained, Fairbanks' portion is approximately \$28 million and is shy \$13 million for the cap, so theoretically it could take the \$13 million and "fill up" what Fairbanks can give as a local contribution. However, Fairbanks cannot put the remaining \$15 million toward schools as it is part of the "equalization" the federal government determines as a cap. Representative T. Wilson related that the question was asked whether in lieu of bonding the money could go to a school building, and the answer was "not if it goes over the amount of the cap." Hopefully, [the federal government] would give [the money] back to Fairbanks; although it may be put into other borough needs nothing more into schools for equalization purposes.

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REPRESENTATIVE LEDOUX noted the equal protection clause in KGB's [lawsuit] is missing and the lawsuit appears to be based on taxes dedicated to a specific purpose.

MR. BOCKHORST agreed that at this point KGB's litigation does not include equal protection claims, partly due to KGB's financial concerns. Regrettably, he expressed, the Mat-Su precedence creates an encumbrance on [equal protection claims] and the precedence would have to be [overturned] in a lawsuit.

He opined that KGB is not a rich community and thus it chose solid arguments that did not have to overcome that precedent [of equal protection].

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SCOTT BRANDT-ERICHSEN, Attorney, Ketchikan Gateway Borough, confirmed that KGB's claim doesn't pursue equal protection. He then referred to the red block [on the model], which represents an unconstitutional dedicated tax because the money is dedicated to education spending and cannot be used for any other purpose. He noted that federal impact aid money does not go through the [constitutional] legislative appropriation process, as it is not appropriated and the governor never has an opportunity to veto it. In KGB's case the amount [of required local contribution] is \$4.2 million and based upon DEED's estimates for fiscal year 2014, the statewide amount is \$221 million which is approximately 2.5 times the next largest type of tax revenue the state receives, outside of petroleum related revenues, he explained.

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REPRESENTATIVE LEDOUX reiterated that the presentation appeared to focus on the equal protection argument, but the lawsuit there does not include equal protection.

MR. BOCKHORST stressed that equal protection is actually driving KGB's lawsuit, but due to the Mat-Su decision pursuing equal protection claims would significantly add to the cost of the lawsuit. Therefore, KGB determined it would focus on issues that are impairments to the circumstances and methods by which the state is operating. In further response to Representative LeDoux, he opined [local contribution] is unfair and a burden for KGB to backfill the state's underfunding of basic need. A burden which he expects to grow. In fact over the last 20 years, it's a burden that has cost KGB over \$100 million. He remarked that KGB's taxes are significant and the [lawsuit] attempts to establish fairness with respect to funding of schools.

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MR. BRANDT-ERICHSEN echoed earlier remarks that the motivation behind the lawsuit is fairness. He related that there aren't many folks who don't grasp the fairness concept; the concern is regarding the cost of the lawsuit. He directed attention to the

spreadsheet in member's packets depicting, on a district-by-district basis, how much each district might cost the state additionally based upon EED's fiscal year 2014 budget. Generally, the total [underfunding of the basic need] is about \$199 million and the reason it is less than \$221 million, he explained, is that the state would retain more federal impact aid. Currently, the state retains 90 percent of federal impact aid from REAAs and the remaining 10 percent the REAAs get to keep is used as an incentive for REAAs to apply for the aid so otherwise the aid doesn't come in and the state cannot intercept it, he remarked. The state withholds 90 percent of "eligible" impact aid for municipal districts and, he explained, the eligible amount is determined by a ratio of voluntary contributions to all contributions. He further explained that if the state pays all of basic need, the state would take 90 percent of the federal impact aid from all districts. The amount of federal impact aid Anchorage and Fairbanks retains would be reduced and all districts would be treated the same at 90 percent of the total amount of federal impact aid. He advised that it is completely within the legislature's purview to change the percentage to any percentage it prefers. There are similarities and differences, he pointed out, in the Federal Impact Aid Program, and Payments in Lieu of Taxes (PILT.) Federal lands cannot be taxed and PILT is a payment to counties, local governments in lieu of the taxes they would otherwise collect. The Federal Impact Aid Program bases the funding related to federally connected children and a portion of the tax base is available to fund education. For example, KGB receives approximately \$1 million in PILT funding and zero funding through the Federal Impact Aid Program. He explained that the two programs are distributed differently in that REAAs and municipal districts that receive zero funds through the Federal Impact Aid Program, and other REAAs and municipal districts that receive huge amounts of funding through the Federal Impact Aid Program. He noted that the only objection the committee has heard is, "Where the money is going to come from?" From where the funding will come is something KGB cannot advise the legislature about.

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CHAIR KELLER questioned why is Mr. Brandt-Erichsen so sure there would be additional state funding provided because the constitution is clear the state's responsibility is to provide an open public school system. He opined that if HB 245 were to pass, [the state] would not necessarily fill the backfill as there could be less overall money distributed equitably in the

state. Furthermore, he stated, Mr. Brandt-Erichsen presumes in his statement that the option would be additional funding from the state.

MR. BRANDT-ERICHSEN posited that there are two relevant factors. First, he pointed out that the educational funding statute includes a provision for a pro-rata reduction if it is short-funded. He explained that if the amount needed to fully fund basic need is "X" dollars and the legislature provides "X" minus "Y," the shortage is spread pro rata across all the districts. Secondly, if the state has to provide \$200 million to maintain basic need for KGB it is probably not going to receive an increase in per student funding, or as much supplemental funding. However, the aforementioned depends upon the legislature and the governor. Based upon KGB's observations this year, the governor is recommending increases in the base student allocation over a three year period. Mr. Brandt-Erichsen related his belief that the public, legislature, and governor place a sufficient value on education as compared to other choices, and therefore it is unlikely that education would receive less than basic need funding from the state at a time of declining state revenue.

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CHAIR KELLER posed a scenario in which the legislature made the [visual aid block area] formula equitable, and questioned whether federal equity laws would prevent an organized municipality from adding [funding] to the school system in their area. He further questioned the effect of eliminating the local contribution cap completely.

MR. BRANDT-ERICHSEN explained that the cap is in place and much of the current formula is designed to capture as much federal impact aid as possible. In 1985 when the current formula was adopted, federal impact aid totaled approximately \$100 million and the state intercepted about \$60 million, which is similar to today except that all of the other costs have increased so there is a greater consideration, he opined. The state is required to meet a disparity test statewide in order to intercept any of the money and, he explained, that by eliminating 5 percent of students who receive the least amount of money together with 5 percent of students who receive the most amount of money, the 90 percent in the middle must be within 25 percent of each other. He further explained that basic need is the formula everyone receives and then the voluntary contribution maximum is 23 percent, and with 23 percent as a maximum there is not a chance

of going over 25 [percent]. He continued that state law limits voluntary contributions to 23 percent and if that limit is removed municipalities can provide more. Unfortunately, he advised, one of the consequences is that if the 25 percent disparity is exceeded the state could no longer intercept a portion of the federal impact aid and it would go directly to the districts.

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CHAIR KELLER remarked that if the state makes an equitable distribution of state funds, the state should be eligible for impact aid. Furthermore, if impact aid is delegated by federal law for a certain criteria of students, he questioned should the state would have to adjust its equitable formula to match [the federal government]. He posed a scenario that the state advises the federal government [it did not want federal impact aid], and then the state could design a formula that would be equitable for all Alaskans taking into account [the seven components of basic need]. He surmised that the confusion factor seems to be focused on impact aid.

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REPRESENTATIVE T. WILSON explained that this is a discussion about the basic needs formula that the state put into place. "It would not adjust at all with what we are asking how much impact aid comes into the state, it would not at all affect the additional amount the municipalities do." There are changes that could be implemented, as currently [municipalities are] bonding 70-30 and once that figure is equal the legislature could determine not to bond with municipalities as municipalities would be receiving additional funding. She mentioned that she has been advised that [municipalities] attempt to get the money back through capital projects. She opined that the state will never be equitable as long there are those that are governmental entities and those that are not. Currently, for the REAAs, the state takes care of their buildings as they are on the capitol maintenance list because at this point they are not taxing in any fashion. She pointed out that there are areas that could tax and areas that could try to tax, but there would be very little to tax not just because of the economy because so much of the areas are federal or state lands. She opined that Alaska's founding fathers preferred organized areas as they add extra money into education, maintain most of their buildings even if it is a 70-30 or 60-40 ratio, it is money the state does not have to [spend]. If the ultimate

goal is to be organized, the required [local contribution] must be addressed first, she opined.

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REPRESENTATIVE FOSTER related his understanding that the base student allocation should guarantee a certain level of funding. He then posed a scenario in which HB 245 were to pass and the legislature did not fully fund the \$200-plus million [for education], and asked whether that would result in the REAAs, as in the Wade Hampton School area, experiencing a reduction in education funding.

REPRESENTATIVE T. WILSON clarified that currently if the state chooses not to fully fund the formula, [funding] would be equally divided. For example, if HB 245 passes and next year [the legislature] determines the [state] can only fund \$1.2 billion rather than \$1.6 billion, that amount would be divided equally amongst all of the districts, she explained.

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ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:34 p.m.