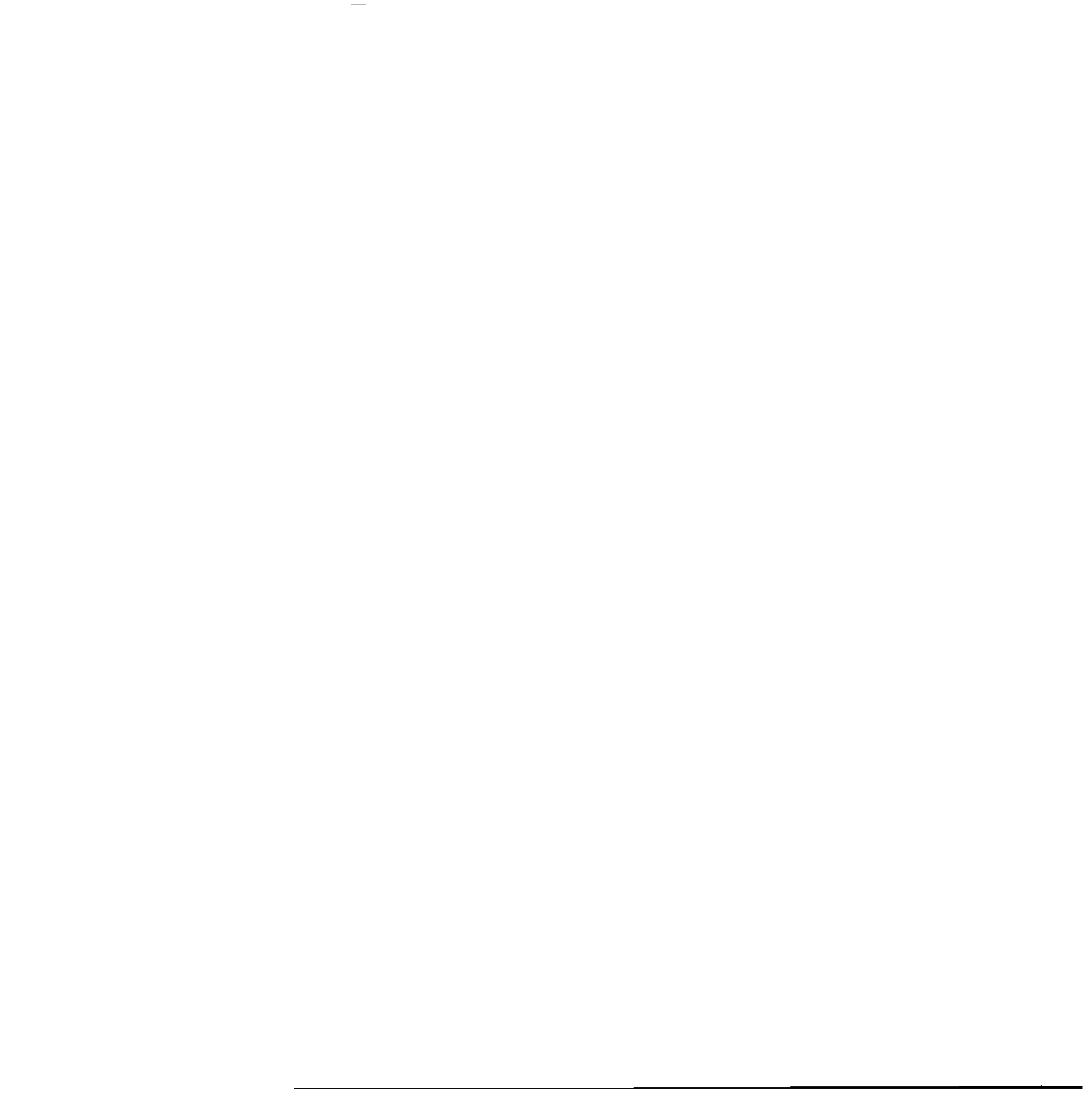


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Phone: 1 (907) 465-3892
Toll-free: 1 (800) 773-3892
Fax: 1 (907) 465-6595



Phone: 1 (907) 269-0234
Toll-free: 1 (800) 773-3892
Fax: 1 (907) 269-0238

Email: Rep.Liz.Vazquez@akleg.gov

REPRESENTATIVE LIZ VAZQUEZ
District 22 - Jewel Lake, Sand Lake, Kincaid, Dimond & N. Campbell

MEMORANDUM

Date: Tuesday, March 22, 2016

To: Rep. Wes Keller

From: Rep. Liz Vazquez *LV*

Re: HB 357 "Board Of Ed/Board of Regents Members"

House Bill 357

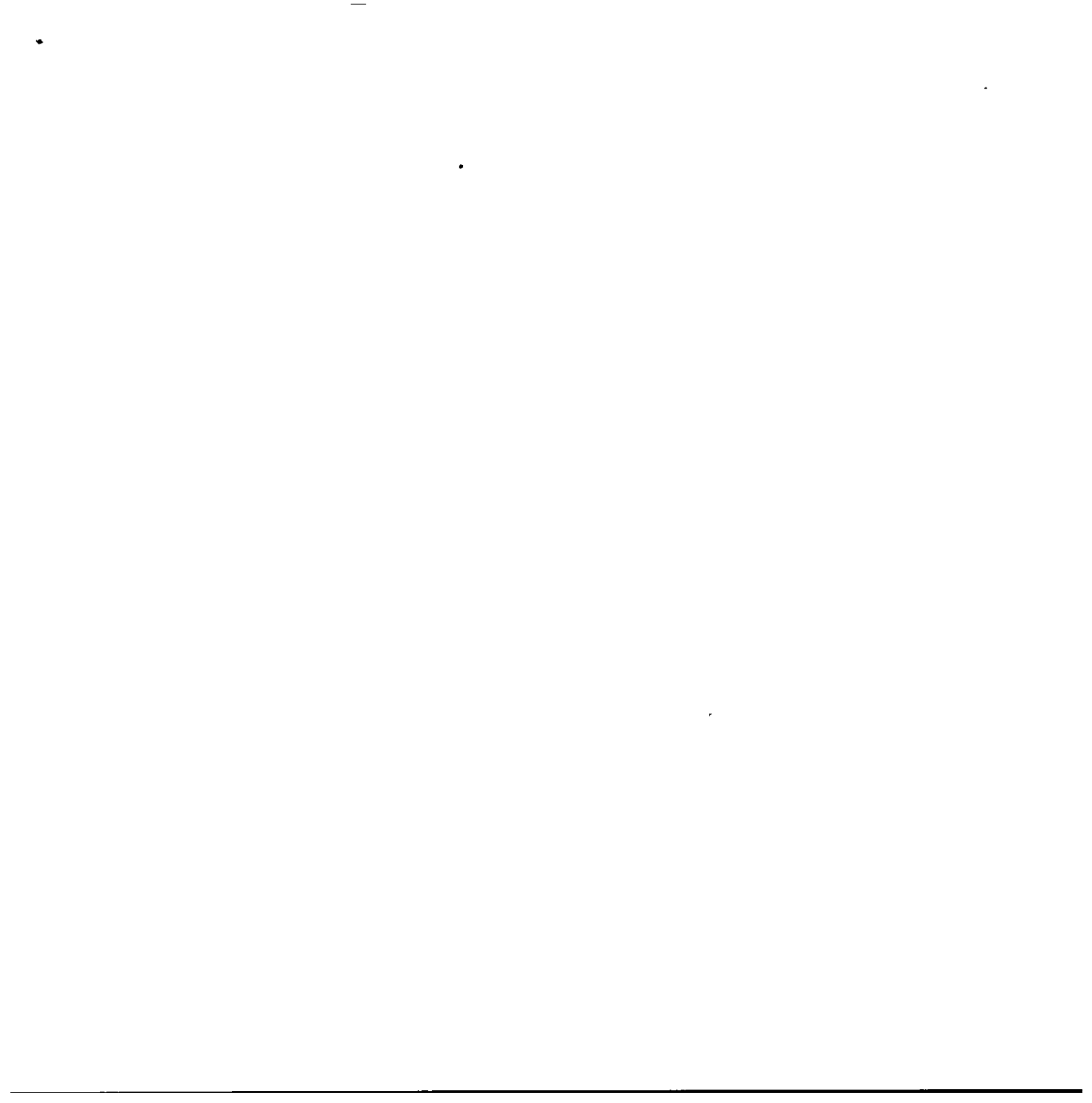
"An Act relating to the Board of Education and Early Development; and relating to the Board of Regents of the University of Alaska."

Please consider this memorandum as a request for House Bill 357 "Board of Ed/Board Of Regents Members" to be heard in the House Education Committee

Accompanying this memo are the following documents:

1. HB357 Sponsor statement
2. HB357, version A

Thank you for considering our request for a hearing on HB357. Please contact my Staff, Thomas Studler at 465-3892 with any questions.



Phone: 1 (907) 465-3892
Toll-free: 1 (800) 773-3892
Fax: 1 (907) 465-6595



Phone: 1 (907) 269-0234
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Fax: 1 (907) 269-0238

Email: Rep.Liz.Vazquez@akleg.gov

REPRESENTATIVE LIZ VAZQUEZ
District 22 – Jewel Lake, Sand Lake, Kincaid, Dimond, & Campbell

HB 357

Sponsor Statement

"An Act relating to the Board of Education and Early Development; and relating to the Board of Regents of the University of Alaska."

House Bill 357 places two legislators on the state Board of Education and Early Development and two legislators on the Board of Regents for the University of Alaska.

House Bill 357 affords improved communications between the legislature and each respective board. It opens dialogue, allows for a better understanding of successes and challenges, and provides insight into areas within each organization.

Having two legislatures serve as non-voting members on each board will allow the legislature to be better informed and more knowledgeable of each board, assists in the legislative process to support the goals and objectives of each organization, and gives improved insight to each board on the legislative process.

House Bill 357 will build the framework to shape a strong future for Alaska's educational needs.

CS FOR HOUSE BILL NO. 357()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-NINTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE VAZQUEZ

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the state Board of Education and Early Development."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

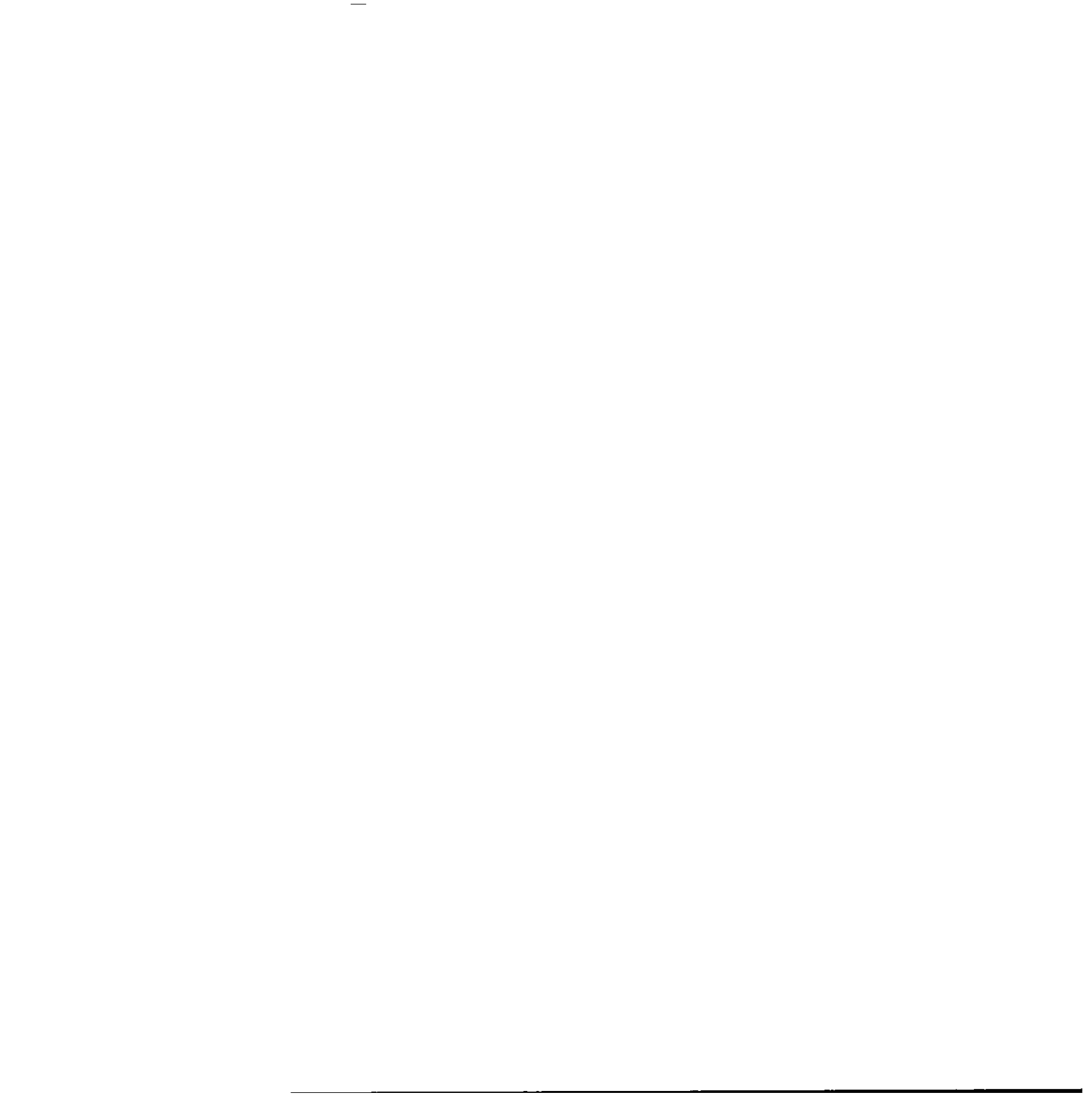
3 * Section 1. AS 14.07.075 is amended to read:

4 Sec. 14.07.075. Creation. There is created at the head of the Department of
5 Education and Early Development a Board of Education and Early Development
6 consisting of seven voting members and two nonvoting members.

7 * Sec. 2. AS 14.07.085 is amended to read:

8 Sec. 14.07.085. Appointment of members. (a) The seven voting members of
9 the board, not [NO] more than four of whom shall be members of the same political
10 party as the governor, shall be appointed by the governor, subject to confirmation by a
11 majority of the members of the legislature in joint session. In appointing board
12 members, the governor shall consider recommendations made by recognized
13 educational associations in the state.

14 (b) One voting member shall be appointed from each of the four judicial
15 districts and three from the state at large with at least one voting member representing



2 (c) The voting members are entitled to the expenses, travel, and per diem
3 allowances provided by law.

4 (d) A voting member may act and receive compensation from the date of
5 appointment until confirmation or rejection by the legislature.

6 * Sec. 3. AS 14.07.085 is amended by adding a new subsection to read:

7 (e) The two nonvoting members shall be members of the legislature. The
8 speaker of the house of representatives shall appoint one nonvoting member who is a
9 member of the house of representatives and who serves at the pleasure of the speaker
10 of the house. The president of the senate shall appoint one nonvoting member who is a
11 member of the senate and who serves at the pleasure of the president of the senate.

12 * Sec. 4. AS 14.07.095 is amended to read:

13 Sec. 14.07.095. Term of office. The voting members of the board shall be
14 appointed for overlapping five-year terms commencing on the March 1 following the
15 date of the member's appointment. Except as provided in AS 39.05.080(4), a member
16 appointed to fill a vacancy serves for the unexpired term of the member whose
17 vacancy is filled. A vacancy occurring during a term of office is filled in the same
18 manner as the original appointment.

19 * Sec. 5. AS 14.07.105 is amended to read:

20 Sec. 14.07.105. Quorum and chair. (a) Four voting members constitute a
21 quorum.

22 (b) The board shall designate one voting member of the board as the
23 chairperson who serves as chair of the board at the pleasure of the board.

24 * Sec. 6. AS 14.07.115 is amended to read:

25 Sec. 14.07.115. Removal. Voting members [MEMBERS] of the board serve
26 at the pleasure of the governor.

27 * Sec. 7. AS 14.07.125 is amended to read:

28 Sec. 14.07.125. Meetings. The board shall meet at least quarterly. Meetings
29 may be called by the chair or by a majority of the voting members of the board.
30 Meetings shall be held in Juneau unless a majority of the voting members of the board
31 changes the place of a meeting.



2 **Sec. 14.07.155. Partisan candidacy prohibited.** A voting member of the
3 board may not be a candidate for partisan political office while serving as a member of
4 the board.

5 * **Sec. 9. AS 14.43.310(b)** is amended to read:

6 (b) To assist the administering authority in selecting eligible applicants for
7 award of each of the memorial education loans under AS 14.43.250 - 14.43.325 and in
8 reviewing the memorial education loan program, the following advisory committees
9 are established:

10 (1) three Alaska state troopers, each one to be selected from and to
11 represent a state trooper region of the state by the regional commander to serve for
12 three years, for the Michael Murphy memorial education loan;

13 (2) [REPEALED]

14 (3) three members of the state Board of Registration for Architects,
15 Engineers, and Land Surveyors selected annually by the board from among its
16 engineer members, for the Harvey Golub memorial education loan; and

17 (4) three voting members of the state Board of Education and Early
18 Development, or of the staff of the Department of Education and Early Development,
19 or any combination of these, selected annually by the board, for the Robert L. Thomas
20 memorial education loan.

21 * **Sec. 10. AS 39.05.065(a)** is amended to read:

22 (a) Each voting member of the Board of Education and Early Development
23 shall be a citizen of the United States and have been a resident of Alaska for at least
24 three years.



Identifier: HB357-EED-EA-3-25-16

Department: Department of Education and Early Development

Title: BOARD OF ED/BOARD OF REGENTS MEMBERS

Appropriation: Education Support Services

Sponsor: VAZQUEZ

Allocation: Executive Administration

Requester: House Education Committee

OMB Component Number: 2736

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2017	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2017 Request	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
OPERATING EXPENDITURES	FY 2017	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

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Estimated SUPPLEMENTAL (FY2016) cost: 0.0
(discuss reasons and fund source(s) in analysis section)

(separate supplemental appropriation required)

Estimated CAPITAL (FY2017) cost: 0.0
(discuss reasons and fund source(s) in analysis section)

(separate capital appropriation required)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Not applicable, initial version.

Analysis

Sections 1 - 6 of the bill refers to the State Board of Education & Early Development.

Section 1 amends AS 14.07.075, Creation, by adding two nonvoting members to the seven voting members.

Section 2 amends AS 14.07.085, Appointment of members, by specifying that voting members, not nonvoting members, are required to do the following: (a) "The seven voting members of the board, not [NO] more than four of whom shall be members of the same political party as the governor, shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. In appointing board members, the governor shall consider recommendations made by recognized educational associations in the state." (b) "One voting member shall be appointed from each of the four judicial districts and three from the state at large with at least one voting member representing regional educational attendance areas." (c) "The voting members are entitled to the expenses, travel, and per diem allowances provided by law." (d) "A voting member may act and receive compensation from the date of appointment until confirmation or rejection by the legislature."

Section 3 amends AS 14.07.085, Appointment of members, by adding a new subsection that allows two members of the legislature to be nonvoting members. The speaker of the house of representatives appoints one member of the house of representatives who serves at the pleasure of the speaker of the house and the president of the senate appoints one member of the senate who serves at the pleasure of the president of the senate.

Section 4 amends AS 14.07.095, Term of office, to specify that the voting members, not the nonvoting members, are appointed to overlapping terms starting on March 1 following the date of the member's appointment unless, as provided by AS 39.05.080(4), where a member who fills a vacancy serves for the unexpired term of the member whose vacancy is filled. A vacancy is filled in the same manner as the original appointment.

Section 5 amends AS 14.07.105, Quorum and chair, to specify that (a) four voting members, not nonvoting members, constitute a quorum. (b) One designated voting board member, not nonvoting member, serves as the chair of the board at the pleasure of the board.

Section 6 amends AS 14.07.115, Removal, to specify that voting members of the board, not nonvoting members, serve at the pleasure of the governor.

Sections 7 - 14 of the bill refer to the University of Alaska and the Board of Regents.

MEMORANDUM

March 26, 2016

SUBJECT: Constitutionality of HB 357 (Work Order No. 29-LS1520A)

TO: Representative Paul Seaton
Attn: Jenny Martin

FROM: Kate S. Glover
Legislative Counsel

K.S.G. by [Signature]

You have asked for a legal opinion regarding the constitutionality of HB 357, which adds nonvoting legislative members to the Board of Regents of the University of Alaska and to the Board of Education and Early Development. Including legislative members on an executive branch board raises issues under the separation of powers doctrine and the dual office-holding prohibition in art. II, sec. 5 of the Constitution of the State of Alaska. The fact that the legislative members are nonvoting members reduces the risk that the bill, if enacted and challenged, would be found to violate the separation of powers doctrine or the dual-office holding prohibition, but it may not resolve these issues.

With respect to the separation of powers doctrine, it is generally considered a violation of the doctrine for a member of the legislative branch to also hold a position with the executive branch.¹ Both the Board of Regents and the Board of Education and Early Development have substantial authority to execute the law, adopt rules or regulations, and implement state education policies.² In addition, the Board of Regents is established under art. VII, sec. 3 of the Constitution of the State of Alaska, which provides that the regents are to be appointed by the governor, subject to confirmation by the legislature. The members of the Board of Education are also appointed by the governor under art. III, sec. 26 of the Constitution of the State of Alaska. Taking note of this constitutional authority, the Attorney General's office has recognized the important executive functions of both of these boards, and distinguished them from advisory commissions.³ Because

¹ See *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).

² See AS 14.07.165 (duties of the Board of Education and Early Development); AS 14.07.170 (same); AS 14.40.170 (duties of Board of Regents); art. VII, sec. 3, Constitution of the State of Alaska (Board of Regents governs the University of Alaska).

³ See 1976 Op. Att'y Gen. No. 44 (Dec. 27, 1976) ("The Board of Regents of the University of Alaska is altogether different from these advisory and clearinghouse commissions."); 1987 Inf. Op. Att'y Gen. No. 241 (Sept. 23, 1987) ("The Board of

these boards have the authority to make decisions and act upon them, they are not merely advisory boards.

The second constitutional issue raised by the bill involves art. II, sec. 5 of the Constitution of the State of Alaska, which states in part that "No legislator may hold any other office or position of profit under the United States or the State." The Alaska Attorney General has concluded that in this constitutional provision "of profit" modifies "position" but not "office", so that service in any "office" is prohibited regardless of whether the legislator receives compensation for that service. If a legislator exercises executive branch powers or duties the arrangement is likely to violate the separation of powers doctrine.

The Department of Law (DOL) has consistently argued that appointments of legislators to executive branch boards are unconstitutional.

Legislative membership violates art. II, sec. 5 of the Alaska Constitution, which precludes legislators from dual office-holding. *See State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 - 78 (Alaska 1980). In *Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968), the court explained the rationale is to "guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers. . . ." There is a consistent line of opinions from this office that legislators may not hold positions on executive branch boards. Cf. 1980 Op. Att'y Gen. No. 21 (September 14; J-66-212-81) (legislators may not serve on statehood commission); 1988 Inf. Op. Att'y Gen. 226 (April 12; 883-33-0022) (legislative appointments to children's trust unconstitutional); 1988 Inf. Op. Att'y Gen. 37 (July 1; 663-88-0430) (state legislator should not serve on land use advisory committee); 1989 Inf. Op. Att'y Gen. 297 (May 1; 663-89-0506) (legislators should not serve on commission to investigate Exxon Valdez spill); 1989 Inf. Op. Att'y Gen. 45 (July 1; 883-89-0111) (inclusion of legislators of Amateur Sports Authority is unconstitutional).⁴

The DOL has stated that it might be possible for legislators to serve on temporary advisory boards. In one opinion, the DOL said "It is not our opinion that either the separation of powers doctrine or the prohibition against dual-office holding absolutely forbids the formation of inter-branch committees which are established as clearinghouses for an exchange of ideas and advice on a given subject and which do not exercise

Education is the only . . . board at the head of a principal department under article III, section 26, of the Alaska Constitution and controls, at least in part, about one-third of the entire state budget. Because it is such a uniquely powerful board, our concerns about conflicts of interest and separation of powers are especially serious.").

⁴ 1996 Op. Att'y Gen. No. 883-96-0063 (May 24, 1996).

sovereign power, i.e., which do not make, execute, or declare the law, do not offend either prohibition Put another way, discussing and advising on the matter may be done by an inter-branch committee; deciding upon and acting on the matter may not."⁵ The DOL has allowed that it may be permissible for legislators to hold a position on a purely advisory committee, but neither the Board of Regents nor the Board of Education and Early Development is a purely advisory committee.

Although including legislators on the Board of Regents and the Board of Education and Early Development infringes on executive branch authority, the risk under both the separation of powers doctrine and the dual office-holding prohibition is reduced because the legislators would not be voting members. Note, however, that the Supreme Court of Arkansas found, under similar constitutional prohibitions, that it does not matter whether a legislator who is a member of an executive branch board has the power to vote or not--membership on the board is itself a violation.⁶ The Supreme Court of South Carolina came to the opposite conclusion, and found that the fact that a legislative member is a nonvoting member can cure the constitutional problems.⁷ The Alaska Supreme Court has not decided a case addressing this issue, so I cannot provide a definitive analysis. Legislators currently serve as nonvoting members on a number of executive branch boards, but it is important to note that the boards at issue in IIB 357 are boards with the constitutional and statutory authority to govern a principal executive department and the state university and a court reviewing this might find that distinction significant.

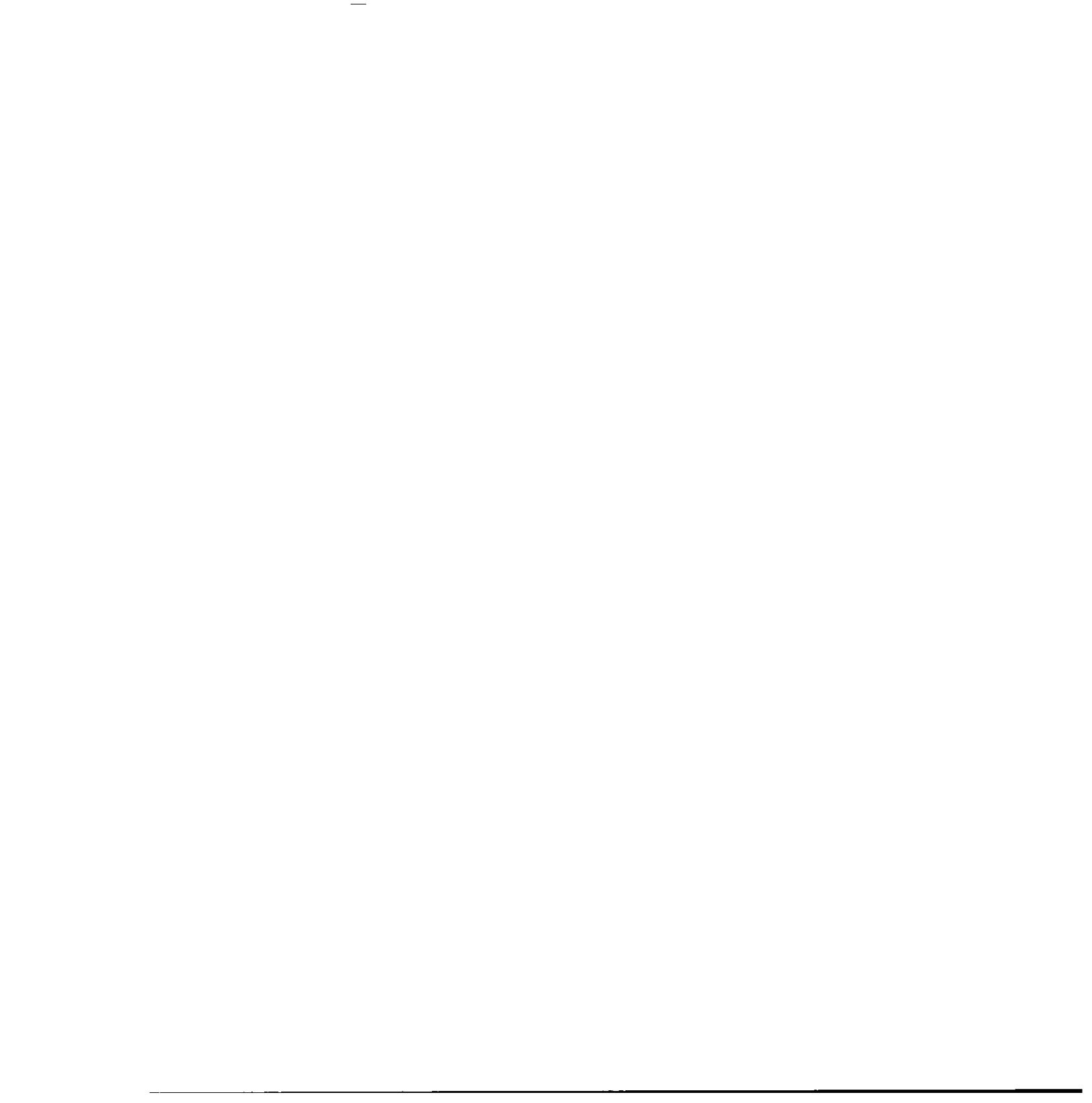
If I may be of further assistance, please advise.

KSG:dla:lem
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⁵ 1977 Inf. Op. Att'y Gen. No. J-66-265-78 (Nov. 16, 1977) (citations omitted).

⁶ *State Bd. of Workforce Ed. and Career Opportunities v. King*, 985 S.W.2d 731, 735 (Ark. 1999).

⁷ *S. Carol. Pub. Int. Found. v. S. Carol. Transp. Infrastructure Bank*, 744 S.E.2d 521 (S. Carol. 2013).



MEMORANDUM

March 26, 2016

SUBJECT: Constitutionality of HB 357 (Work Order No. 29-LS1520A)

TO: Representative Wes Keller
Attn: Janet Ogan

FROM: Kate S. Glover
Legislative Counsel



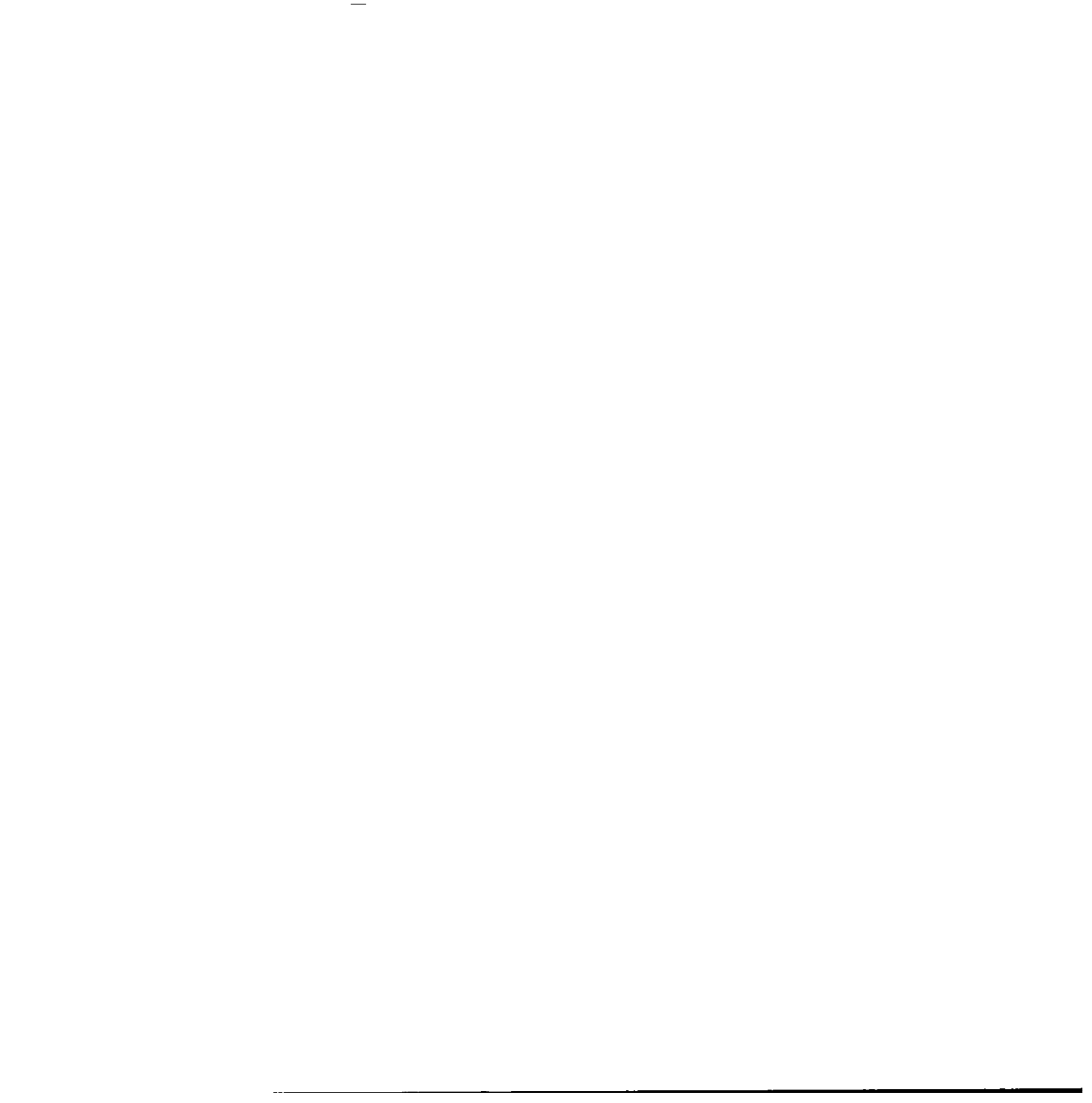
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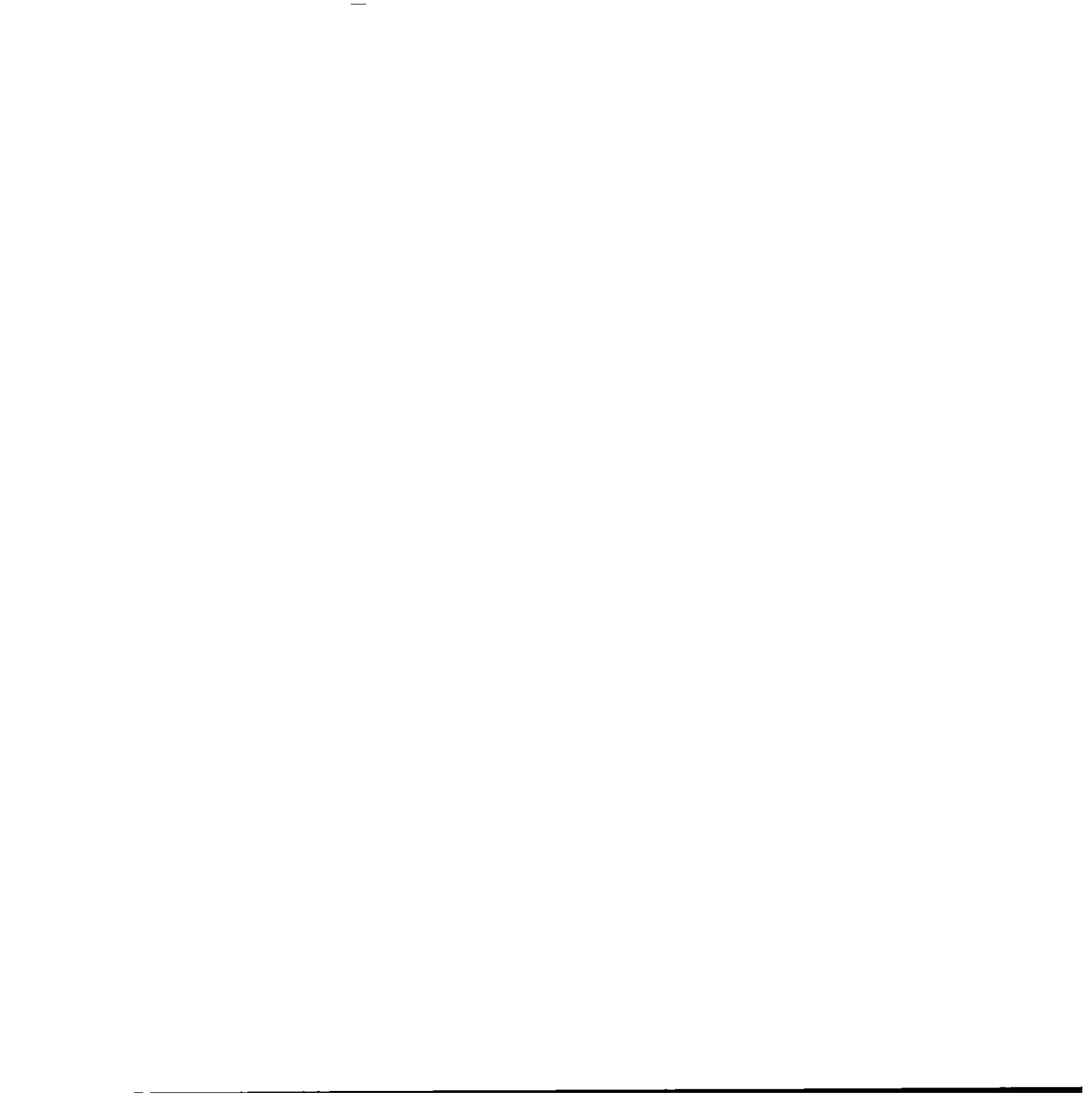
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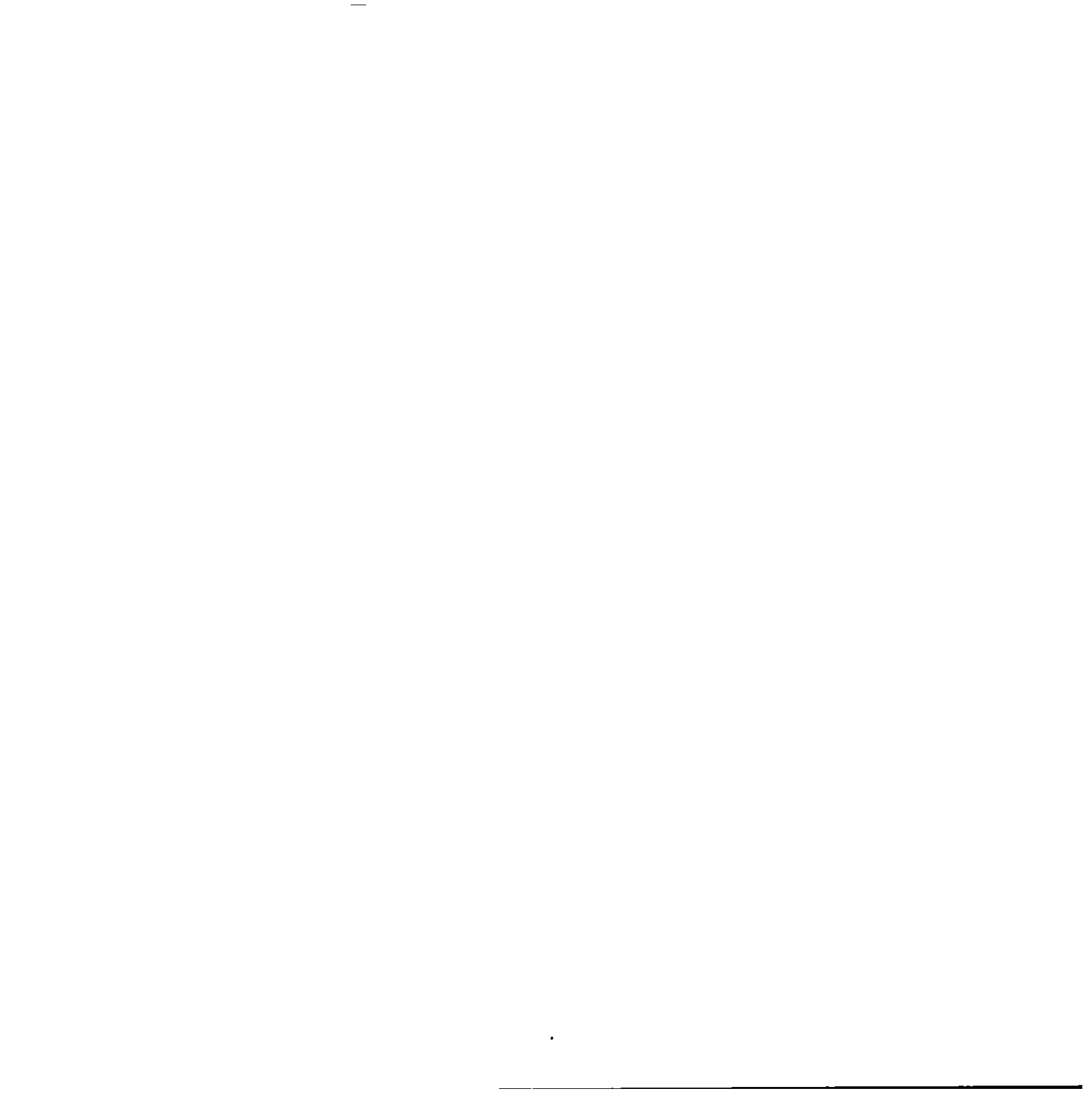
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KSG:dla
16-348.dla

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⁷ *S. Carol. Pub. Int. Found. v. S. Carol. Transp. Infrastructure Bank*, 744 S.E.2d 521 (S. Carol. 2013).



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.

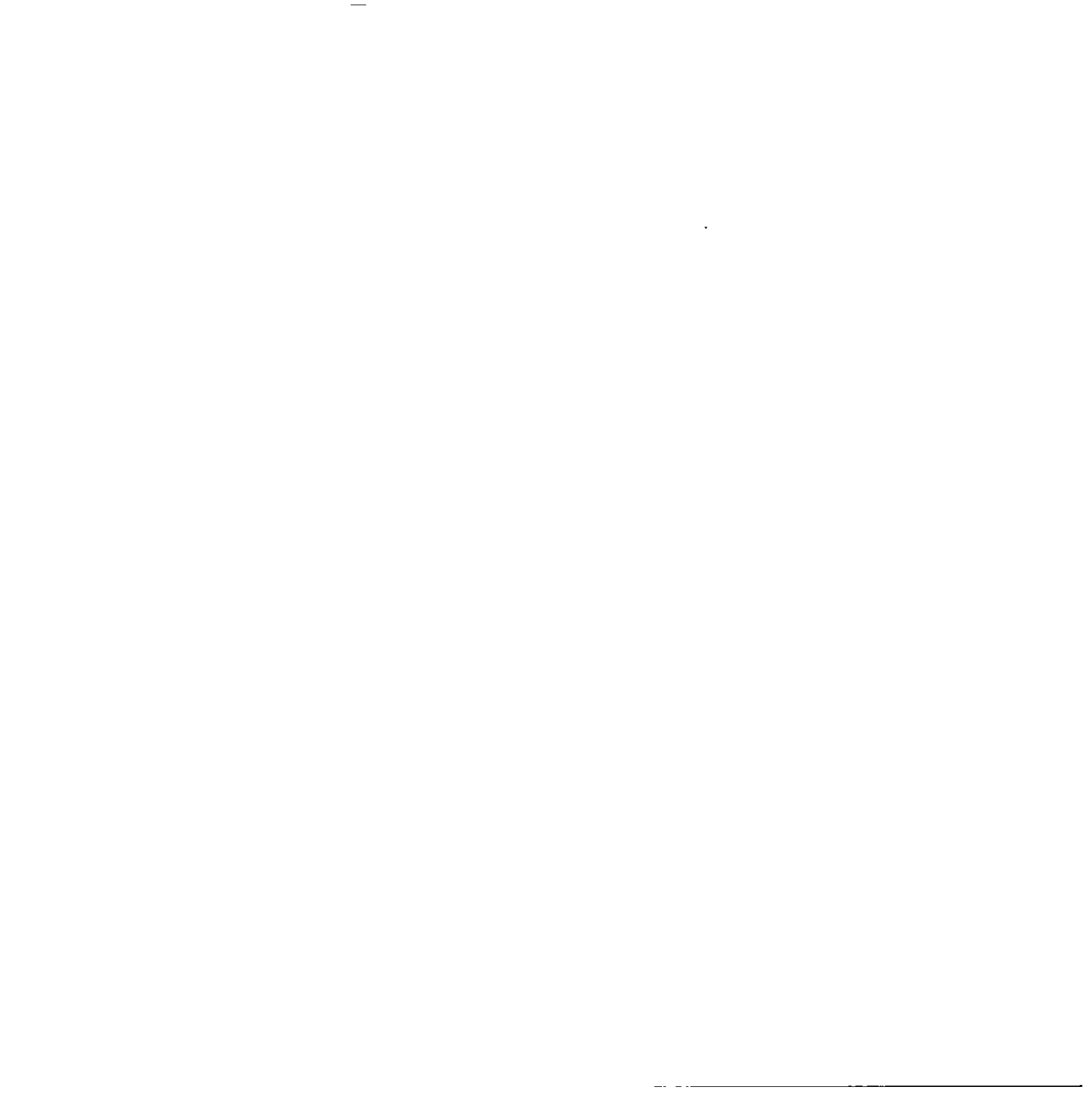
First, legislators or their staff are always welcome to attend Board of Regents meetings. Meetings are open to all members of the public and are commonly web streamed live.

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.



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.

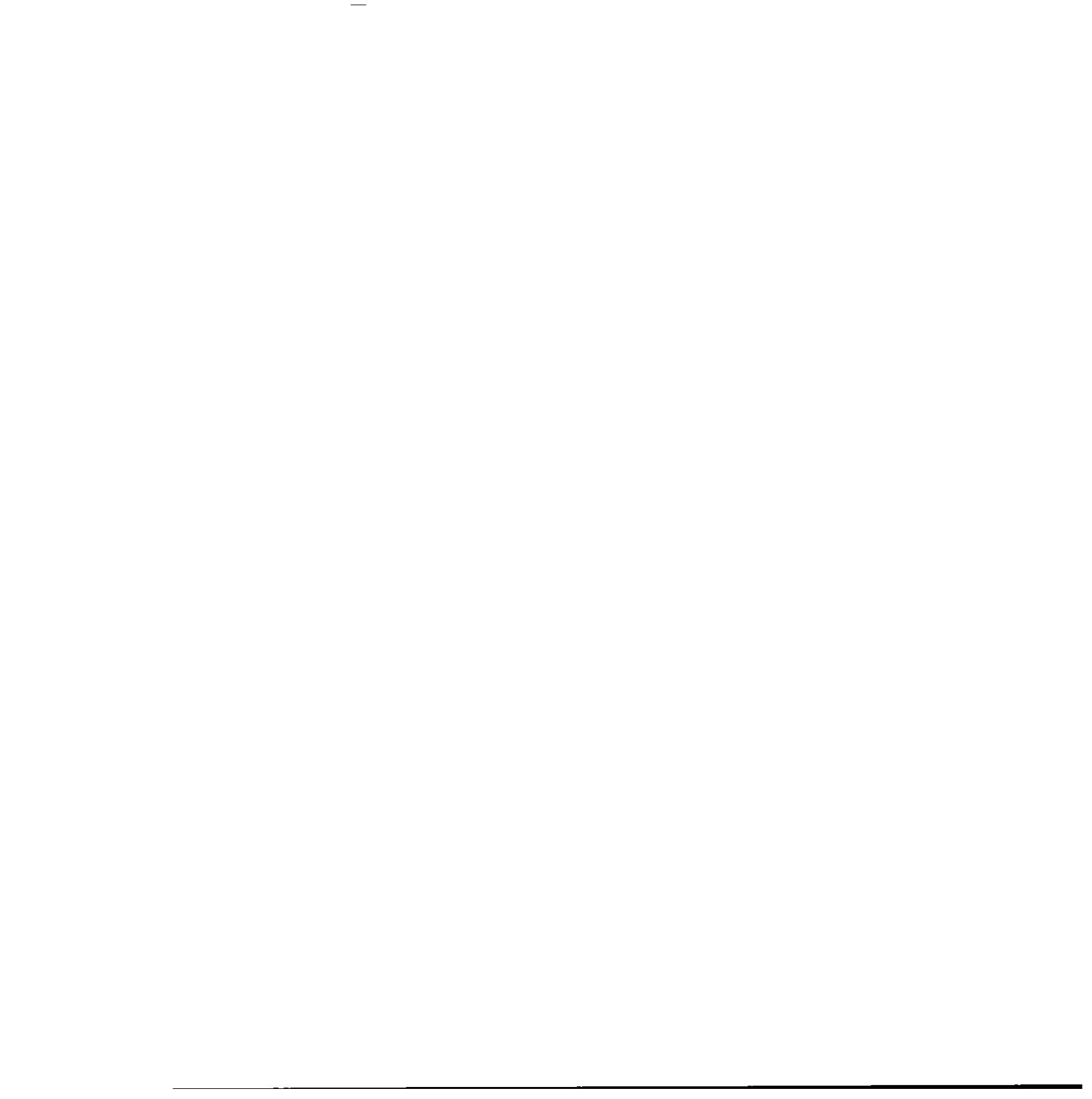
2007 Alaska Op. Atty. Gen. 1

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



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

