

May 6, 2014

The Honorable Sean Parnell
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: FCCS HB 278 -- Education
Our file: JU2014200389

Dear Governor Parnell:

At the request of your legislative director, we have reviewed FCCS HB 278, an education bill known as Alaska's Education Opportunity Act. The review is divided into the following subject areas with sections of the bill addressed in numerical order within each subject area:

- I. High School Graduation Qualifying Exam and Other Testing;*
- II. Charter Schools;*
- III. Correspondence Study Programs;*
- IV. Residential Schools;*
- V. Technical and Vocational Education Programs;*
- VI. Tax Credits;*
- VII. Changes in General Funding;*
- VII. Reports;*
- VIII. Miscellaneous Subjects;*
- IX. Conforming Changes;*
- X. Effective Dates.*

I. High School Graduation Qualifying Examination and Other Testing

Section 2 of the bill would require a school district to provide a secondary school student an opportunity to test out of classes in mathematics, language arts, science, social studies, and world languages. School districts are required within a reasonable time to develop assessment tools and standards for testing out of classes in these core areas.

Section 3 of the bill would repeal the current law that requires a student to pass a graduation qualifying examination as a condition of receiving a high school diploma, but would require as a condition of high school graduation that a secondary student take the SAT, ACT, or

WorkKeys assessment. The Department of Education and Early Development (department) would provide funding for a single test administration.

Section 18 of the bill would require the state Board of Education and Early Development (state board) to adopt regulations to implement the proposed requirement that students take the SAT, ACT, or Workkeys assessment, provide for the needs of special education students, and set standards for waiver.

Section 49 of the bill would amend uncodified law to require a school district, at the student's request, to issue a high school diploma to a student who did not receive a high school diploma because the student failed to pass all or a portion of the secondary school competency examination (also known as the high school graduation qualifying examination) but who received a certificate of achievement. School districts would be required to mail a notice of this provision to the qualifying student's last known address.

II. Charter Schools

Sections 9 - 13 of the bill would clarify state funding for charter schools and modify the appeal process for an application for a new charter school. Section 9 would add the requirement that the decision of a local school board approving or denying a charter school be in writing and include findings of fact and conclusions of law. Section 9 would incorporate deadlines for each step of the process.

Under current law, charter school applications that are approved or denied are submitted to the state board. Under sec. 9 of the bill, only approved applications would go directly to the state board for review and approval. If an application is denied at the local level, the bill would provide an additional level of review by the commissioner of the department. The applicant may appeal a denial to the commissioner, who would determine if the district's findings are supported by substantial evidence and if the decision is contrary to law. If the commissioner upholds the denial, the applicant may appeal the denial to the state board. If the commissioner overturns a denial and approves the application, the commissioner must forward the application to the state board for review and approval. The state board would exercise its independent judgment in evaluating the application.

Section 10 of the bill would describe the commissioner's options in processing the appeal and would set out the standard of review when the state board reviews a denial. The commissioner may (1) return the application to the local school board; (2) approve the application with or without added conditions; or (3) uphold a denial. If a denial is appealed to the state board, the state board would determine if the commissioner's findings are supported by substantial evidence and if the decision is contrary to law.

Section 12 of the bill would address the lease of space within a school district facility by a charter school. School districts must offer a charter school the right of first refusal for the lease of school district space that is not currently being used by a public school. Additionally, the

amount of the lease agreement may not exceed the true operational costs calculated on a square foot basis for the leased space.

Section 13 of the bill would address the amounts that a school district must include in a charter school budget. Current law requires that the charter school budget shall be not less than the amount generated by the charter school students less administrative costs retained by the district. Section 13 would add a cap of four percent on the administrative costs that may be retained. In determining the charter school budget, the school district may not include costs directly related to the charter school facilities, including rent, utilities, and maintenance, for the purpose of calculating the four percent cap. Under sec. 13, the district would be required to provide the charter school with a report itemizing the retained administrative costs. Section 13 would set out a list of the funding that must be included in the "amount generated" by the charter school students: funds generated by grants, appropriations, federal impact aid, the required local contribution, the voluntary local contribution, special needs students, and secondary school vocational and technical instruction. Section 13 also would require a school district to direct state aid for construction and major maintenance of charter school facilities to the charter school that generated the state aid.

Section 14 of the bill would authorize a grant program for charter schools that are established on or after July 1, 2014. The one-time grant of \$500 for each student must be used to provide "educational services," defined to include curriculum development, program development, and special education services. If the appropriation is insufficient to cover the full amount of the authorized grant in the year of the application, the charter school may apply in a subsequent year for the balance of the grant.

Section 20 of the bill would require that a school district adopt, and the department approve, a transportation policy that addresses the transportation of charter school students. At a minimum, the policy must provide transportation services for charter school students on a space-available basis on the regular routes provided for other students.

Section 26 of the bill would increase state funding for small charter schools. The proposed changes in AS 14.17.450(d) would make it easier for a small charter school to survive the first three years of operation as well as the years when enrollment may decline to as low as 75 students. Under sec. 26, a charter school whose enrollment drops to as low as 75 students in the first three years of operation or in the previous year of operation (after the first three years) would be eligible for funding as if the school had a student count of 150 students.

Section 35 of the bill would allow a municipality to partially or fully exempt from taxation private real property leased for use as a charter school.

III. Correspondence Study Programs

Section 15 of the bill deals with three aspects of correspondence study programs: (1) an individualized learning plan; (2) a limitation on imposing requirements on a student who is advanced or proficient on statewide assessments; and (3) a student allotment, which is a payment

from the district¹ to a parent or guardian for instructional expenses for a correspondence student. The requirement of an individualized learning plan and the necessary components of a plan are currently set out in regulation. Section 15 of the bill would put the individualized learning plan requirement and its necessary elements into statute. If a student is proficient or advanced on statewide assessments, sec. 15 would prohibit the department from imposing additional requirements other than those set out in the bill regarding the individualized learning plan and the student allotment. Section 15 also moves the student allotment authorization and guidelines from regulation to statute.

As for the use of a student allotment, under sec. 15 of the bill, a parent would be able to purchase nonsectarian services and materials from a public, private, or religious organization with a student allotment if (1) the services and materials are required for the course of study in the individualized learning plan; (2) the curriculum materials and the course of study are approved by the district, are aligned to state standards, and comply with AS 14.03.090 (partisan and sectarian doctrines prohibited during school hours) and AS 14.18.060 (discrimination in instructional materials prohibited); and (3) otherwise support a public purpose. The allotment may not be used to pay for services by a family member. The student allotment would be excluded from the unreserved portion of the district's year-end fund balance. Also, the unexpended balance of a student allotment may be rolled over into the following year as long as the student remains enrolled in the correspondence program.

Section 25 of the bill would increase the state funding for correspondence study programs. The adjusted average daily membership of a district that offers a correspondence program would be multiplied by 90 percent, rather than 80 percent, after the other cost adjustment factors have been taken into account.

IV. Residential Schools

Section 22 of the bill would address the application procedure for new residential schools. Currently, by regulation, the department is not required to open an application period. Under sec. 22, the department is required to conduct an annual open application period.

Section 23 of the bill would increase the monthly per-pupil stipend for room and board expenses for residential schools by 50 percent. Section 23 does not otherwise change the funding for room and board for residential schools; the not-to-exceed amounts are set by region. For example, in Southeast, the stipend would be increased from \$820 to \$1230.

¹ The department also has authority to operate a correspondence study program but currently is not doing so.

V. Technical and Vocational Education Programs

Section 30 of the bill would increase the contribution that an employee must make to the technical and vocational education program established under AS 23.15.820 - 23.15.850 from .15 percent to .16 percent of the wages as to which an employee is required to make contributions under the Employment Security Act.

Section 31 of the bill would extend the sunset date from June 30, 2014, to June 30, 2017, for the distribution of funds to technical and vocational education programs under AS 23.15.835, would remove the five percent allocation to the University of Alaska Southeast as a program separate from the University of Alaska, would add a five percent allocation to Ilisagvik College, and would update the names of four of the entities receiving funds under AS 23.15.835.

Section 32 of the bill would change the reporting requirements for an institution that receives program funds by requiring an institution to describe its dual-credit courses and provide information regarding articulation agreements. An institution also would be required to report performance and financial data as required by regulation. Section 32 would delete the current required reporting of satisfaction indicators for participants and employers.

Section 33 of the bill would require institutions receiving technical and vocational education program funds to have at least one articulation agreement for a dual-credit vocational education course and would impose a withholding penalty of 20 percent if an institution fails to comply with reporting or articulation agreement requirements.

Section 34 of the bill would define "articulation agreement" and "dual credit."

VI. Tax Credits

Sections 36 - 47 of the bill would expand the types of cash contribution that serve an educational purpose and that, if made by a taxpayer, would entitle the taxpayer to a credit against the net income tax, the mining license tax, the fisheries business tax, or the fisheries resource landing tax. The proposed allowable contributions must be accepted for

- (1) instruction, research, and educational support purposes by a public or private nonprofit elementary or secondary school;
- (2) vocational courses, programs, equipment, and facilities by a nonprofit regional training center recognized by the Department of Labor and Workforce Development or an in-state apprenticeship program registered with the United States Department of Labor under the National Apprenticeship Act;
- (3) a facility by a public or private nonprofit elementary or secondary school;
- (4) the funding of a scholarship awarded by a nonprofit organization to a student to defray the cost of a dual-credit course, including tuition, textbooks, registration,

on-campus room and board at a postsecondary institution, and transportation to and from a residential school or a postsecondary institution;

- (5) construction, operation, and maintenance costs for a residential housing facility by a state-approved residential school;
- (6) childhood early learning and development programs operated by a nonprofit organization, tribal entity, school district, the department, or through a state grant;
- (7) science, technology, engineering, and math programs provided by a nonprofit organization or school district for staff and students in grades kindergarten through 12; and
- (8) expenses associated with operating a nonprofit organization dedicated to providing education opportunities that promote public service.

Sections 38, 41, 44, and 47 of the bill would define "dual-credit" and "nonprofit organization" for the each type of tax. Because of the delayed effect of other acts affecting the tax credits, each tax credit amendment is stated twice, once with a July 1, 2014, effective date and once with a January 1, 2021, effective date. A constitutional challenge may be triggered by the inclusion of a tax credit for contributions to a private elementary or secondary school. Because tax credits do not involve the expenditure of public funds, we believe a court would find these tax credits constitutional.² We find support for this position in *Arizona Christian School Tuition Organization v. Winn*, – U.S. –, 131 S.Ct. 1436 (2011) where the court held that a tax credit does not constitute an expenditure of taxpayer funds, which is a requirement to qualify for taxpayer standing in federal court.

VII. *Changes in General Funding*

Section 21 of the bill would modify the debt reimbursement program that currently authorizes the state to pay 60 percent of the payments for principal and interest made by a municipality for school construction, additions to schools, and major rehabilitation projects and education-related facilities that exceed \$200,000. To be eligible for the 60 percent reimbursement, a local election approving the indebtedness must occur before May 1, 2015. If the approval election occurs on or after May 1, 2015, sec. 21 would authorize the state to pay 50 percent of the reimbursable debt.

Section 24 of the bill would address the total amount that would be used for calculating the 23 percent maximum voluntary local contribution to education that may be made by municipalities and boroughs to their school districts. The 23 percent limit would be applied to the total of (1) the district's basic need for the fiscal year under AS 14.17.410(b)(1) and (2) any additional funding distributed under AS 14.17.410(b). AS 14.17.410(b)(1) describes the factors

² Article VII, sec. 1 of the Alaska Constitution provides, "[n]o money shall be paid from public funds for the direct benefit of any religious or other private educational institution."

that are used to calculate a district's basic need: Basic need is the adjusted average daily membership multiplied by the base student allocation. AS 14.17.410(b) also spells out how the adjusted average daily membership is calculated. Section 24 of the bill refers first to the calculation of basic need and separately to "additional funds," i.e., in addition to basic need. The legislature may distribute additional funds according to the adjusted average daily membership without using the base student allocation. *See, e.g.,* sec. 55 of the bill. Since adjusted average daily membership is calculated under AS 14.17.410(b), sec. 24 refers to additional funding distributed under AS 14.17.410(b).

Sections 27 - 29 of the bill would provide for annual increases to the base student allocation for fiscal year 2015 through fiscal year 2017. The base student allocation will increase in fiscal year 2015 by \$150 to \$5,830; in fiscal year 2016, by an additional \$50 to \$5,880; and in fiscal year 2017 by an additional \$50 to \$5,930.

Section 55 of the bill would require the department to distribute as state aid to districts \$42,953,500 for fiscal year 2015, \$32,243,700 for fiscal year 2016, and \$19,904,200 for fiscal year 2017, according to the adjusted average daily membership for each district calculated under AS 14.17.410(b)(1)(A) – (D).

VII. Reports

Section 52 of the bill would require in uncodified law that, by June 15, 2015, the Department of Administration shall present to the legislature a written proposal for a salary and benefits schedule for school districts, including an evaluation of, and recommendations for, teacher tenure.

Section 53 of the bill would require in uncodified law that, by June 15, 2015, the department shall prepare and submit to the legislature a report on the benefits and disadvantages of using prototypical designs for school construction in both the Railbelt and rural areas.

Section 54 of the bill would require in uncodified law the Legislative Budget and Audit Committee to procure two studies to be completed by June 15, 2015, by an entity or entities with expertise in school finance to evaluate the current education funding provisions, identify strengths and deficiencies and validate the current provisions, recommend changes to current provisions, or recommend alternate methods of education funding. The first study must include consideration of (1) stable funding for basic educational needs and an ancillary system of providing funding above basic needs; (2) mechanisms and proportions for state and local contributions to school funding; and (3) methods for funding alternative school options, such as charter and residential schools and correspondence programs. The second study must include consideration of current funding under AS 14.11 - AS 14.17, which includes both operational and facilities funding, with particular focus on (1) the school size factor under AS 14.17.450, including the most recent school operating cost data and the criteria used in the McDowell Group study of 1998; and (2) the district cost factor under AS 14.17.460, including the recent cost data and the criteria used in the study of the Institute of Social and Economic Research of 2005.

VIII. Miscellaneous Subjects

Section 5 of the bill would prohibit the department or the state board from entering into a contract with or participating in an organization that requires the state to cede any autonomy or control over education standards and assessments.

Section 6 of the bill would add a requirement that a public school include in its annual report to the department information on the number, attendance, and performance of students with active duty parents or guardians.

Section 8 of the bill would authorize state funding for eligible schools to bring Internet access up to 10 megabits of download per second.

Section 17 of the bill would prohibit the department from expending any money to implement standards under the Common Core Standards Initiative.

Section 48 of the bill would amend uncodified law to authorize the department to award a grant to a nonprofit organization for a pilot project to expand science, technology, engineering, and mathematics education to underserved and unrepresented middle school students enrolled in public school. The pilot project would expire on June 30, 2017.

Section 50 of the bill would repeal AS 14.20.147(b), an obsolete subsection that addresses the transfer or absorption of a school operated by a federal agency into a school district.

Section 51 of the bill would repeal sec. 3, ch. 91, SLA 2010, that repeals AS 14.11.121 and AS 14.11.126, effective on July 1, 2015. Under the bill, those two sections of current law would remain in effect after July 1, 2015, allowing the department to participate in a federal grant program for construction, lease, and maintenance of charter school facilities, should any funds become available under that program.

IX. Conforming Changes

Sections 1, 4 - 7, 11, 16, 17, and 18 of the bill would make conforming changes necessitated by the repeal of the high school graduation qualifying exam or by the need to update terminology.

X. Effective Dates

Section 56 of the bill would provide that the provisions addressing charter school application and appeal procedures would apply to applications filed with a local school board on or after July 1, 2014.

Section 57 of the bill would provide standard language indicating that a regulation adopted under the bill would not take effect before the effective date of the provision of the bill implemented by the regulation.

Section 58 of the bill would provide that sec. 57 of the bill (regulations adoption) and sec. 31 of the bill (technical and vocational education program extension and revision of allocations) would take effect immediately.

Section 59 of the bill would provide that sec. 28 of the bill (fiscal year 2016 base student allocation) and secs. 32 - 34 of the bill (technical and vocational education program reporting changes and penalty provision) would take effect on June 30, 2015.

Section 60 of the bill would provide that sec. 29 of the bill (fiscal year 2017 base student allocation) would take effect on July 1, 2016.

Section 61 of the bill would provide that secs. 37, 40, 43, and 46 of the bill (repeated tax credit provisions for each tax type) would take effect on January 1, 2021. *See* discussion of secs. 36 - 47, above.

Section 62 of the bill would provide that, except for the special effective dates provided in secs. 58 - 61 of the bill, the bill would take effect July 1, 2014, if enacted into law.

XI. Conclusion

Other than as noted, we see no legal issues with the bill.

Sincerely,

/ s /
Michael C. Geraghty
Attorney General

MCG/LBW/jhb