

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

KRISTINE MOORE and GREGORY )  
MOORE, for themselves and as the )  
parents or guardians of their minor )  
children, JASON EASTHAM, SHANNON )  
MOORE and MALLORY MOORE; )  
MIKE WILLIAMS and MAGGIE WILLIAMS, )  
for themselves and as the parents of their )  
minor daughter, CHRISTINE WILLIAMS; )  
MELVIN OTTON and ROSEMARY )  
OTTON, for themselves and on behalf )  
of their minor children, HELENA )  
OTTON, FREDERICK OTTON and )  
BENJAMIN OTTON; WAYNE )  
MORGAN and MARTHA MORGAN, )  
for themselves and as parents of their )  
minor children, WAYNE MORGAN II, )  
PATRICK MORGAN, RILEY MORGAN, )  
and SKYE MORGAN; JERRY S. DIXON, )  
on behalf of himself and as the father of )  
KIPP DIXON and PYPYR DIXON, minors; )  
the YUPIIT SCHOOL DISTRICT; )  
the BERING STRAIT SCHOOL DISTRICT; )  
the KUSPUK SCHOOL DISTRICT; )  
NEA-ALASKA, INC.; and CITIZENS FOR )  
THE EDUCATIONAL ADVANCEMENT OF )  
ALASKA'S CHILDREN, INC., )  
 )  
 )  
Plaintiffs, )  
vs. )  
 )  
STATE OF ALASKA, )  
 )  
 )  
Defendant. )

Case No. 3AN-04-9756 Civil

**DECISION AND ORDER**

The Education Clause of Alaska's Constitution provides that "the legislature shall by general law establish and maintain a system of public schools open to all children of the state." Article VII, § 1, Alaska Constitution. In this litigation, the Plaintiffs' primary assertion is that the State has violated this constitutional provision. [Second Amended Complaint (SAC) filed December 6, 2004, at 2] The Plaintiffs acknowledge that the State has adopted "constitutionally sound course requirements, instructional standards, and testing criteria." [*Id.* at 2] But the Plaintiffs allege that the State has violated the Education Clause by failing "consistently and repeatedly to adequately fund" this constitutionally mandated education. [*Id.*]

In addition, the Plaintiffs assert that their rights to substantive due process as set forth in Article I, Section 7 of the Alaska Constitution have been violated by the State with respect to the State's education funding and testing requirements. But the Plaintiffs in this case do not allege, unlike many school funding lawsuits in other states, that their rights to equal protection have been violated. That is, the Plaintiffs are not alleging that the State is treating one group of school children within the state differently from other children in violation of the State's constitutional guarantee to equal protection.

### ***Procedural History of the Case***

This action began on August 9, 2004, when the Plaintiffs filed their complaint against the State of Alaska. The Plaintiffs consist of the parents of several Alaskan school children, three rural school districts within the state (Bering Strait,

Kuspuk and Yupiit), and two educational advocacy organizations, NEA-Alaska, Inc. and Citizens for the Educational Advancement of Alaska's Children.

### ***The Plaintiffs' Complaint***

The Plaintiffs' Second Amended Complaint (SAC) is a 54-page document that sets out their perspective on the status of education in Alaska. There, the Plaintiffs acknowledge that the State of Alaska's Department of Education and Early Development (EED) has developed detailed educational content and performance standards for Alaska's school children. Those standards, in the Plaintiffs' view, "if followed, [would] provide each child with a constitutionally adequate education." [SAC at 7]

But the Plaintiffs allege that "[t]hrough the state has spent many years defining educational adequacy, identifying the necessary components of educational adequacy, and developing objective criteria for measuring educational adequacy, it has failed to fund the very educational adequacy so defined, identified and measured. It has failed to maintain a system of education and to keep a system open to all, all in violation of Article VII, Section 1, of the Alaska Constitution." [Id. at 50]

With respect to their substantive due process claim, the Plaintiffs assert that the State has funded "education so inadequately" and has "additionally been arbitrary, capricious, and discriminatory by funding education without knowing the cost of an adequate education statewide or locally" so as to constitute a deprivation to the Plaintiffs of their right to substantive due process. [Id. at 51]

The relief that the Plaintiffs seek in their Second Amended Complaint can be summarized as follows:

(1) a judicial declaration that the current funding amount and system does not provide the children of Alaska with a constitutionally adequate education under the Education Clause and/or the Due Process Clause;

(2) a judicial declaration that specifically defines what constitutes a constitutionally adequate education;

(3) a judicial declaration that finds that the educational content and performance standards developed by the Department of Education and Early Development meet the standards necessary for a constitutionally adequate education, "recognizing that in the future that content may change;"

(4) a judicial declaration that the current standards and areas tested by the State, including the graduation exams for reading, writing, and mathematics and all benchmark exams, adequately test students on "their acquired knowledge of the constitutionally provided adequate education;"

(5) an order requiring that the State determine the cost of providing for a constitutionally adequate education as set forth in paragraphs (1) through (4) above; and

(6) after the cost of providing a constitutionally adequate education is determined, that the Court order that the State fund the education of Alaska's children accordingly.

[Id. at 52-54]

The State filed an answer to the Plaintiffs' complaint in which it denied the Plaintiffs' substantive allegations.

### ***Pre-trial motions***

In December 2004, the State filed a Motion to Dismiss Education Clause Claims. The motion sought summary dismissal of the Plaintiffs' claim that the State had violated the Education Clause because, in the State's view, the

consideration by a court of “issues related to the quality of education in Alaska is a nonjusticiable political question” and these issues are never “proper issues for the courts.” [Motion at 2] Instead, in the State’s view, “the legislature is solely responsible for determining the proper quality of education in the state.” [Id. at 9] The Plaintiffs, in opposing the State’s motion, asserted that the Education Clause accords to Alaska’s school children a constitutionally protected right to an education. They sought judicial enforcement of that constitutional right from the court, “because in Alaska, constitutional rights are the province of the judiciary.” [Plaintiffs’ Opp. at 66]

In an order dated August 18, 2005, this Court denied the State’s motion. This Court noted that both parties agreed that the Alaska Supreme Court’s decision in Hootch v. Alaska State-Operated School System, 536 P.2d 793 (1975)(Molly Hootch) was central to the determination of the issue. The Order interpreted the Molly Hootch decision “as recognizing a constitutional right to assert to a court that the State has failed to establish and maintain a public school system.” [Order re First Motion to Dismiss at 10] But, relying on Molly Hootch, this Court found that “the Education Clause does not permit or envision extensive judicial oversight into the specific educational options to be accorded to each child in the state.” [Id. at 11]

In September 2005, pursuant to the parties’ stipulation, this Court bifurcated the trial. As a result, the first trial would only address the Plaintiffs’ claims for declaratory relief. Only if this Court concluded that Plaintiffs had established a constitutional violation would there then be a second trial on the appropriate

remedy. Thus, the trial that was held before this Court in October 2006 focused solely on whether the State had violated either the Education Clause or Due Process Clause of the Alaska Constitution, and did not directly address what remedy would be appropriate in the event such a violation was established.

The State filed a Second Motion to Dismiss in 2005. In this motion, the State raised three assertions: (1) that the Court lacked jurisdiction over the State of Alaska as a named defendant because of sovereign immunity; (2) that the Plaintiffs had failed to name as defendants the Regional Education Attendance Areas (REAs), municipal school districts, and municipalities, all of whom the State asserted are necessary defendants in this action; and (3) if this case is not dismissed under either of the first two bases, then several of the Plaintiffs should be dismissed for lack of standing. [Mot. at 1]

In an order dated November 30, 2005, this Court denied the State's Second Motion to Dismiss in all respects except as to its assertion that the school districts lacked standing to assert a due process claim against the State.

With respect to the sovereign immunity defense, this Court held, "[w]hile damage recovery against the State for alleged constitutional violations is restricted, declaratory relief is not." [Order re Second Motion to Dismiss at 3]

As to the second issue, the State had asserted that because the Legislature had delegated comprehensive local control of schools to the REAs, municipal school districts, and the municipalities from which they originate, education is not only the State's responsibility but also the responsibility of its school districts. The State argued that the school districts and boroughs were indispensable

parties because their rights to local control would be impaired if the Plaintiffs are successful in this litigation. [Order at 4] In their opposition, the Plaintiffs asserted that their case is about lack of funding, and that “funding, the gravamen of this lawsuit, comes from the state.” [Id.] They cited to the Alaska Supreme Court’s decision in Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971), which held that even though the Legislature has seen fit to delegate certain education functions to local school boards, that in no way diminishes the “constitutionally mandated state control over education.” Id. at 122. Upon review, this Court denied the State’s motion to require the Plaintiffs to add all school districts and municipalities as indispensable defendants.

On the third issue presented in the State’s Second Motion to Dismiss, this Court held that the school district Plaintiffs lacked standing with respect to the due process claim based on established Alaska Supreme Court precedent. With respect to the remaining Plaintiffs and all other claims, this Court found that the Plaintiffs had the requisite standing to maintain this action.

In January 2006, the State filed a Motion to Establish Standard of Review seeking a delineation prior to the trial as to the applicable legal standard that the Court would be applying with respect to the Education Clause. The State sought an “extremely deferential”<sup>1</sup> standard of review. The Plaintiffs, however, sought to have this Court find that education is a fundamental right such that if the Plaintiffs were able to show that children are not being provided with the opportunity for a constitutionally adequate education, the State would have to prove a compelling

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<sup>1</sup> State’s Motion to Establish Standard of Review at 13.  
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reason why it is excused from doing so or the Plaintiffs would be entitled to a remedy.

By order dated June 11, 2006, this Court declined to adopt either party's analysis, finding each construct inapplicable to the Plaintiffs' claim that the government was not providing a constitutionally guaranteed education, as opposed to a claim that the government was taking away a constitutionally guaranteed right. Instead, this Court held "it is the court's responsibility to determine a constitutional floor with respect to educational adequacy and to determine if that constitutional floor is currently being met." [Order at 4 (citation omitted)] Thus, "the focus at trial with respect to this claim should be on defining the constitutional right to an education under Alaska's Constitution and determining whether the schools that have been established and maintained fulfill that constitutional right." [Order at 5-6]

Against this procedural backdrop, the trial with respect to the Plaintiffs' request for declaratory relief as to the alleged constitutional violations began as scheduled on October 2, 2006.

The trial was conducted before the Court sitting without a jury over the course of 21 days. During that time, this Court heard testimony from 28 witnesses. In addition, over 800 exhibits were admitted at trial, and the deposition testimony and exhibits of an additional 23 witnesses were filed.

On December 1, 2006, each party submitted proposed Findings of Fact and Conclusions of Law. The Plaintiffs' proposed findings totaled 140 pages; the State's totaled 148 pages. The parties also submitted a transcript of the trial



proceedings which totaled nearly 4,000 pages. Closing arguments were heard on December 19, 2006.

As the case proceeded, the issue before the Court expanded to encompass not only the adequacy of the State's funding of education, but also the adequacy of the State's oversight of education in the local school districts to which it had delegated authority. See, e.g., Plaintiff's Proposed Findings at 125 ¶ 375. See Civil Rule 15(b).

Having considered all of the evidence presented, together with the arguments and proposed Findings of Fact and Conclusions of Law submitted by counsel, this Court now enters the following:

### **FINDINGS OF FACT**

#### ***I. Alaska's Educational System***

##### ***A. An overview***

1. There are approximately 130,000 children who attend public school in Alaska. [Ex. 108 at 3] The students attend school in approximately 500 different schools. Public education in Alaska is currently delivered by 53 school districts and by the state boarding school at Mt. Edgecumbe, which is treated as a separate district. [Id.] Overall, the number of students in Alaska has remained stable for the past several years, although some districts have had increased enrollment and others have had decreased numbers of students. [Tr. 2467]

2. In FY 2005, the total revenue per student in Alaska, including state, local and federal funds, was \$10,578. However, there is considerable variation

among districts. The revenue per student in the three Plaintiff school districts for that fiscal year was \$21,265 for Bering Strait, \$21,758 for Kuspuks and \$22,578 for Yupiit. Revenue per student that year was \$8,708 for Anchorage and \$9,769 for Fairbanks. None of these amounts includes capital expenditures, pupil transportation, food service, community schools or certain grants. [Exs. 2321, 2022]

3. Districts other than Mt. Edgecumbe consist of three main types. Each of the 16 organized boroughs is a school district. AS 14.12.010. The 18 home rule and first-class cities located in the unorganized borough are also school districts. AS 14.12.010(1); AS 29.35.260(b). The remaining 19 school districts are Rural Education Attendance Areas (REAAs) in the unorganized borough. AS 14.08.021.

4. The five largest school districts in the state -- Anchorage, Mat-Su, Fairbanks, Kenai and Juneau -- educate more than 70% of the school children in Alaska. Over one-third of Alaska's school children attend the Anchorage School District. [Ex. 2364] Twenty-eight school districts -- more than half of all the districts -- educate less than five percent of Alaska's school children. [Ex. 2364]

5. At statehood in 1959, some rural schools were operated by the Bureau of Indian Affairs (BIA) for Alaska Natives. Even after statehood, the BIA continued to operate many elementary schools and regional boarding schools in rural Alaska. [Tr. 3583-88] Rural schools that were not under BIA control were under state control for the first 27 years after statehood. That system was known as the State-Operated School System. Beginning in 1976, local rural school

districts began operating as Rural Education Attendance Areas (REAs). However, some rural schools remained under BIA control until 1985. [Tr. 3583-89, 1516-17] Thus, at the time of trial, no REAA has had more than 30 years of experience with local control over education. Some REAs, like the Yupiit School District, had about 21 years of experience at the time of this trial.

6. At the time of statehood, the State did not pay for kindergarten. The State did not start providing funding for kindergarten until 1966. [Ex. 3 at 405]

7. The Alaska Constitution accords to the Legislature the responsibility to “establish and maintain” the schools in Alaska. AK. Const. Art. VII, § 1. In response to this constitutional directive, the Alaska Legislature has “established in this state a system of public schools to be administered and maintained as provided in this title.” AS 14.03.010. Children “of school age” -- generally children between the ages of 5 and 19 -- are “entitled to attend public school.” AS 14.03.070, .080. School attendance is compulsory for “every child between seven and 16 years of age.”<sup>2</sup> AS 14.30.010. The Legislature has also established a minimum number of days that schools must be in session each year. AS 14.03.030. And the Legislature has created a system for the certification of teachers and school administrators. AS 14.20.010 et seq.<sup>3</sup>

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<sup>2</sup> See AS 14.30.010 (stating that children who are temporarily ill or injured, have been excused by action of the school board, have completed 12<sup>th</sup> grade, or have a physical or mental condition that would make attendance impractical are excused from requirement to attend).

<sup>3</sup> Plaintiffs’ proposed findings cite to “numerous other instances where the Legislature has exercised its plenary power”: the requirement that Alaska history must be taught, that bilingual-bicultural education be provided, that “educational services” for gifted children be established, etc. [Plaintiffs’ Proposed Findings at 11, fn. 49]

8. The Legislature has also established the State Board of Education & Early Development, which sets education policy for the State. The Commissioner of the Department of Education & Early Development is appointed by the State Board with the governor's approval. The Commissioner heads the State Department of Education & Early Development (EED), which exercises general supervision of the public schools in Alaska, provides research and consultative services to school districts, establishes standards and assessments, administers grants and endowments, and provides educational opportunities for students in special situations. AS 14.07.010 - .020; AS 14.07.145. Roger Sampson has been the Commissioner at EED throughout the course of these proceedings.

9. Subject to these overriding provisions of state law, the Legislature has delegated to locally elected school boards the responsibility to operate public schools. See, e.g., AS 14.08.021 (legislative delegation to REAAs). School boards in Regional Education Attendance Areas (REAAs) have the authority to determine their own fiscal procedures; appoint, compensate and otherwise control all school employees; adopt regulations governing organizations, policies and procedures for the operation of the schools; and employ a chief school administrator. AS 14.08.101. State law also specifies certain duties for the local school board, including the obligation to provide an educational program for each school-age child who is enrolled in or is a resident of the district, and to develop a philosophy of education, principles and goals for its schools. AS 14.08.111.

## ***B. The State's Content and Performance Standards***

10. The adoption and refinement of educational standards has been a major reform movement for over 15 years involving many educators and other citizens throughout Alaska. [Tr. 3607-15] The development of Alaska's standards coincided with a broader national movement towards standards that began in approximately 1990. [Darling-Hammond Perp. Depo. at 43-44]

11. The State has adopted two types of standards: content standards and performance standards. Content standards are described as "broad statements of what students should know and be able to do as a result of their public school experience." [Ex. 219 at 9] Alaska has content standards in twelve subject areas: English/language arts, mathematics, science, geography, government and citizenship, history, skills for a healthy life, arts, world languages, technology, employability, and library/information literacy. [Ex. 219 at 11-36]

12. Commissioner Sampson has described the standards as "a map, if you will, as to what it was we wanted our schools and our teachers to move our kids towards." [Tr. 2349]

13. Performance standards (also termed "grade level expectations") are "statements that define what all students should know and be able to do at the end of a given grade level." [Ex. 219 at 41] The State has adopted performance standards for grades 3 through 10 in reading, writing and math, and for grades 3 through 11 in science. [Id.; Tr. 2352-53, 2834-36]

14. The Department of Education and Early Development (EED) has engaged in several rounds of standards-setting, which has been an intensive

process involving large groups of Alaskans, including educators and diverse members of the public from across the state. [Tr. 3607-13] The end result of the most recent iterations of this process is set out in the Alaska Standards booklet (revised March 2006). [Exs. 219, 2157]

15. Witnesses at trial who were asked to comment on Alaska's standards all indicated their general approval of them, although there was disagreement as to whether mastery or proficiency or exposure should be the goal with respect to some of the content areas.<sup>4</sup> For example, one of the Plaintiffs' experts, Dr. Darling-Hammond, testified that Alaska's standards are "very similar to the standards in a number of other states" and are "very much a reasonable set of appropriate standards that reflect the kinds of expectations that we have for citizens and workers and those going on to college today." [Darling-Hammond Perp. Depo. at 46]

16. Educational standards can help to bring focus to the content of what should be taught throughout the state, and the State is to be highly commended for the development of these standards.

17. However, under the Department's regulations, "[t]he content standards are not graduation requirements or components of a curriculum." 4 AAC 04.010. State law does not require school districts to adopt the State standards or to align their curriculum with the standards.

18. Instead, under existing Alaska law, each of Alaska's 53 school districts has been delegated the authority to determine what students in that

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<sup>4</sup> There was also some discussion as to whether exposure to world languages would be an important element of an education to a student who was already bilingual. See, e.g., testimony of John Davis, Ph.D. [Tr. 194]

district should be taught. State regulations provide that each school board must adopt a curriculum that “describes what will be taught students in grades kindergarten through 12.” 4 AAC 05.080(d). By State regulation, that curriculum:

- (1) must contain a statement that the document is to be used as a guide for planning instructional strategies;
- (2) must contain a statement of goals that the curriculum is designed to accomplish;
- (3) must set out content that can reasonably be expected to accomplish the goals;
- (4) must contain a description of a means of evaluating the effectiveness of the curriculum; and
- (5) **may** contain a description of the extent to which the local goals accomplish the state goals set out in 4 AAC 04.

4 AAC 05.080(d) (emphasis added).

19. Each school district is required to undertake a “systematic evaluation of its curriculum on an ongoing basis with each content area undergoing review at least once every six years.” 4 AAC 05.080(e). Kodiak Superintendent Betty Walters testified that EED requires the district’s curriculum be submitted to EED, and indicated that EED has been quite helpful to that district in providing the district with assistance in its curriculum development whenever requested. [Tr. 3095]

20. EED is required to report to the Legislature each year as to “each school district’s and each school’s progress in aligning curriculum with state education performance standards.” AS 14.03.078(5). Although it appears that most districts have indicated that their curriculum is aligned with the State standards, it is unclear the extent to which EED has actually reviewed the curriculum of each district and school to determine the extent of such alignment.

Of perhaps far greater significance, it is unclear whether EED has determined whether such curriculum is actually being taught in the classroom.<sup>5</sup>

21. The State may become more involved with a school district's curriculum in one circumstance. If a district receives Title 1 federal funding and is designated as Level 4 under the No Child Left Behind standards, EED is required to implement one or more corrective actions. 4 AAC 06.840.<sup>6</sup> One corrective action that EED may take is the implementation within the district of "a new curriculum based on state content ... and performance standards ... including the provision, for all relevant staff, of appropriate professional development that (A) is grounded in scientifically-based research; and (B) offers substantial promise of improving educational achievement for low-achieving students." 4 AAC 06.840(k)(2). There was no evidence presented at trial that indicated the State has undertaken such action in any school district.

22. The State has made model instructional units available to districts that are fully aligned with the State standards. As explained by Commissioner Sampson, "We did this almost four years ago. We have available to districts that choose to use them now 180 days' worth of lessons in reading, writing, and mathematics that are aligned to our standards and grade-level expectations." [Tr. 2404-5]

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<sup>5</sup> See Ex. 88, Response to AS 14.03.078(5), in which it appears that the Department has asked each district to respond as to whether that district's curriculum is aligned with the standards. The "survey results" there indicated that all but 2 districts (Chatham and Annette Island) have a curriculum that is fully aligned with the state standards – a finding that is inconsistent with the testimony and other evidence at trial presented with respect to both Kuspuk and Yupiit.

<sup>6</sup> See Finding of Fact #100 for an explanation of NCLB's levels.

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23. Kodiak Superintendent Betty Walters testified how the State has assisted the Kodiak School District with its curriculum: “from the department, we have all the technical assistance, as well as the guidance [ ] for programs that we choose to buy into.” [Tr. 3093] Specifically, the superintendent testified about the State’s assistance to that district when that district decided to institute a new reading program for primary students. The State’s assistance included providing all the staff development training as well as the initial materials at the State’s expense. [Tr. 3094-95]

24. Thus, although the State has developed comprehensive content and performance standards, there is neither a statewide curriculum in Alaska, nor any requirement in state law that school districts must have a curriculum aligned with the performance and content standards that the State has developed.<sup>7</sup> But for districts that seek the State’s assistance, considerable resources and assistance in curriculum development are available.

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<sup>7</sup> Unlike some other state constitutions, “the Constitution of Alaska does not require uniformity in the school system.” Molly Hootch v. Alaska State Operated School System, 536 P.2d 793, 803 (Alaska 1975). California, for example, adopted “Statewide academically rigorous content standards” in Cal. Code § 60605 (2007). That statute states that the State Board of Education must adopt statewide academically rigorous content standards in core curriculum areas. Id. Additionally, the board must “review the existing curriculum frameworks for conformity with the new standards and shall modify the curriculum frameworks where appropriate to bring them into alignment with the standards.” Id. Similarly, Arizona requires the state board of education to “prescribe a minimum course of study ... and incorporat[e] the academic standards adopted by the state board of education, to be taught in the common schools.” Ariz. Rev. Stat. Ann. § 15-701(A)(1) (2006). Additionally, the governing board of a school district must establish a curriculum which includes those academic standards. Id. at (B)(1).

### **C. Funding of Public Education in Alaska**

#### ***The State Funding Formula***

25. The State provides foundation funding to each of the school districts for children age five to twenty to attend public schools.<sup>8</sup> AS 14.03.080. Under the current formula, the Legislature has established a base student allocation, which is essentially the amount of funding per student that serves as the building block for the allocation of state educational funding to the various schools districts. AS 14.17.470. The legislative formula also includes a geographic cost differential between districts and an adjustment based on the size of the schools within a district. AS 14.17.450, .460. There is an additional 20% flat-rate adjustment for special education as well as additional funding for each student who receives intensive services. AS 14.17.420.

26. The current funding formula was adopted in 1998. When the formula changed at that time, some districts became entitled to more money and some districts would receive less than they had received under the prior formula. But the State phased-in the implementation of the new formula over time as to most of the districts whose funding was reduced. [Tr. 2077-79]

27. The school size adjustment factors and district cost factors in the current formula were derived from a 1997-98 study entitled "Alaska School Operating Cost Study," undertaken by the McDowell Group, an economic

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<sup>8</sup> Under an early-entry statute, children under five may attend kindergarten if they are prepared to enter into first grade the next year. AS 14.03.080. At one time, many districts used the early-entry provision to obtain funding for four-year olds and established a two-year kindergarten program. [Tr. 2571-72] In 2003, the legislature clarified that the early-entry provision was only for four-year-olds ready to begin public school, and the additional funding was eliminated. [Tr. 2548]

consulting firm in Juneau. The McDowell Group derived the factors from actual cost data. [Ex. 71; McDowell Depo. at 10, 17-18]

28. The McDowell study found that personnel costs -- consisting largely of teacher salaries -- were relatively uniform throughout the state. They found that although starting salaries were higher in rural Alaska, teachers in urban districts generally have greater longevity and were higher on the pay scale. [McDowell Depo. at 21-24]

29. Since 1998 the Legislature has twice commissioned experts to study the district allocation factors, and has made one adjustment to the factors based on its review of those expert analyses. [Tr. 2553-56; Exs. 213, 11]

30. Under earlier versions of Alaska's funding formula, the Legislature allotted additional money to school districts based on the actual number of students who were classified as bilingual, disabled or enrolled in vocational studies. [Tr. 2172-73] This type of additional funding is termed categorical funding.

31. Under the current funding program, a 20% addition is accorded to each district for special education students, irrespective of the actual number of such students in a district. This type of additional funding is termed block funding.

32. Statewide, the current number of special education students is approximately 14% of the total student population, which is similar to the national average. [Tr. 3744]

33. When categorical funding for special needs children was in place prior to 1998, the number of students in the special categories increased at a faster rate than the total number of students increased. [Tr. 2180, 2513-15]

34. The McDowell report that underlies the existing funding formula relied on actual existing costs to determine the school size adjustment factors and the district cost factors. [McDowell Depo. at 29-31] As a result, Mr. McDowell testified that student characteristics, including at-risk factors, would have been considered in establishing those adjustment factors in the formula. [Id. at 31-32] Moreover, the effect of school size, district cost, and the special needs factor is cumulative under the current formula – the factors are all multiplied together. As a result, districts with high costs factors or school size factors receive a considerably greater amount from the 20% special needs factor than districts such as Anchorage, which has low size and cost factors. [Ex. 2376]

35. As the Plaintiffs' expert, Dr. Salmon, acknowledged, "in most states as the percentage of poor kids increase, the funding generally decreases." [Tr. 1717] It is undisputed that that is not the case in Alaska. In Alaska, "the kids that are the poorest receive the most money on a per pupil basis." [Tr. 1717]

36. In the past few years, the Legislature has significantly increased the base student allocation and has appropriated additional funds intended to defray increased expenses including utility costs and the employer contribution to the Public Employees' and Teachers' Retirement Systems (PERS/TRS). [Tr. 2522-23]

37. When the impact of inflation is considered, the State and local contribution to education began to decline after 1988 and continued to decline into the 1990's. [Tr. 2086-92] During that same time, the number of public school students increased from approximately 101,000 students in 1988 to over 130,000 students beginning in FY 2000. [Ex. 439 at 57622] However, as a percentage of the total operating fund, state funding of education increased during that time from 24% of the state operating budget in 1988 to 32% of the state operating budget in 2000. [Ex. 2369]

### ***The State's Limited Oversight of School District Spending***

38. The Education Clause in the Alaska Constitution accords to the State Legislature the responsibility to establish and maintain schools within Alaska. Similar to most states, the Legislature has delegated substantial authority to operate the schools to the local school districts. The extent to which the State has retained oversight of the funds it disburses to the school districts is set forth in this section.

39. In order to receive state aid, school districts are required to submit a budget each fiscal year to EED, which reviews the budgets for compliance with statutory requirements. 4 AAC 09.110(a). EED will reject a budget that is "(1) not in the form required by the department; (2) not balanced; (3) does not meet the local effort provisions of AS 14.17; or (4) does not meet the minimum expenditure for instruction provision of AS 14.17.520." 4 AAC 09.120.

40. State law also requires that each school district submit to EED an independent audit of all school accounts for the school year. AS 14.14.050. The

Department reviews the audited financial statements to insure that the district has not accumulated “an unreserved year end fund balance ... that is greater than 10 percent of its expenditures for that fiscal year.” AS 14.17.505(a) & (b).

41. State law also requires that each school district budget for and spend “a minimum of 70 percent of its school operating expenditures ... on the instructional component of the district budget,” unless the district is granted a waiver from the State Board of Education. AS 14.17.520. This legislative requirement was adopted in 1998 and designed to insure that operating funds from the State that are allocated to school districts are spent on the education of children. [Tr. 2534] In the statute, the term “instructional component” is defined as “expenditures for teachers and for pupil support services.” AS 14.17.520(f). However, the regulatory definition of “instruction” includes not only teachers, but other costs such as staff travel, counselors, professional development, and school site administration, including the school principal. [Tr. 2469, 2561; 4 AAC 09.115]

42. In 2003, 32 of the 53 school districts in the state were unable to meet the 70/30 requirement, meaning they failed to budget for and spend at least 70% of their funding on the instructional component. [Ex. 276] Every one of these districts received a waiver of the 70/30 requirement, even though the EED’s Director of School Finance recommended against some of them. [Tr. 2495]

43. Commissioner Sampson has been critical of the 70/30 requirement, and has recommended that the Legislature revisit it. [Ex. 276] He noted there is “no direct correlation between districts that met the 70 percent requirement also

making Adequate Yearly Progress,” which measures student achievement. [Id. at 2] This is consistent with his view that “money [is] not the predictor of student performance.” [Tr. 2384]<sup>9</sup>

44. There is little indication in the record of legislative review of school district spending. For example, a budget request for supplemental funding for school districts prepared by EED and submitted to the Legislature by Governor Murkowski sought an additional \$20 million appropriation “to target effective instructional strategies” to help school districts “meet state targets in making adequate yearly progress.” [Ex. 357] These additional funds were appropriated by the Legislature, but the Legislature did not impose any restrictions on how the funds were to be spent by the districts. [Tr. 2564-67] The evidence at trial also indicated that neither of the legislative finance committees have undertaken to review how the school districts are spending the State funds appropriated to them. [Tr. 3777]

45. State law provides that “State funds may not be paid to a school district or teacher that fails to comply with the school laws of the state or with the

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<sup>9</sup> Several states have adopted an approach to school funding known as the 65% solution. That approach requires that schools spend a minimum of 65% of their total operating expenditures of classroom instruction. See, e.g., Ga. Code. Ann. § 20-2-171 (2006) (this law requires that each local school system shall spend a minimum of 65% of its total operating expenditures on direct classroom expenditures. Direct classroom expenditures are defined as “all expenditures by a local school system during a fiscal year for activities directly associated with the interaction between teachers and students, including, but not limited to, salaries and benefits for teachers and paraprofessionals; costs for instructional materials and supplies; costs associated with classroom related activities, such as field trips, physical education, music, and arts; and tuition paid to out-of-state school districts and private institutions for special needs students. This term shall not include costs for administration, plant operations and maintenance, food services, transportation, instructional support including media centers, teacher training, and student support such as nurses and guidance counselors.”). See also, Kan. Stat. Ann. § 72-64c01 (2006) and Tr. at 3182, testimony of Gary Whiteley.

regulations adopted by the department.” AS 14.07.070. But apart from the State’s limited review of local school board spending decisions with respect to the statutory 70/30 requirement and the requirement that the year-end unreserved fund balance not exceed 10%, Commissioner Sampson indicated that he was unaware of any other action the State had taken with regard to a district’s spending decisions. [Tr. 2440]

46. The State exercises very limited oversight as to how a school district spends the money it receives from the State to educate the children that reside within that district.

#### ***Federal Impact Aid***

47. The federal government provides aid to school districts to compensate for a local community’s inability to tax certain lands, including Alaska Native Claims Settlement lands and military land. This aid is known as “impact aid.” It is intended to supplant, not supplement, state funding of local schools. Federal law has established an equalization test with respect to impact aid. As long as a state passes the federal equalization test, the state is allowed to consider this federal aid in the state’s distribution formula to school districts. In other words, federal law permits the state to treat federal impact aid as if it were state money subject to the state distribution formula. [Ex. 2274] Alaska has not failed the federal equalization test since 1988. [Tr. 2572]

48. REAAs are not required to make a local financial contribution to their school districts because of the status of the land in these communities. Instead, they are eligible for federal impact aid.



49. Consistent with federal requirements, 25% of the federal impact aid goes directly to the REAA and is not considered in the state funding allocation to the REAA. Of the remaining 75%, the state deducts 90% of that amount from the amount the REAA would otherwise receive from the state under the funding formula. [Tr. 2503-04]

50. Federal impact aid has been a stable funding source for the school districts in Alaska for many years and is likely to remain a relatively secure source of funding into the future.

### ***Federal Grants***

51. Federal Title funds, including Title 1 funds, are often targeted at the needs of low income students and students with special needs. [Tr. 3739] Unlike federal impact aid, these funds are intended to supplement, not supplant, the state and local contribution to education.

52. Federal Title funds can fluctuate based on student enrollment. Also, the federal government tends to move funding from a program it does not deem as effective to one it does. Overall, however, the level of federal Title funding has been relatively stable over time. [Tr. 3721]

53. The State EED is responsible for monitoring the local school districts in the state with respect to their expenditures of federal funds. Barbara Thompson, from EED, who oversees this effort, indicated “all of the federal programs for which we receive funding have requirements, and we have a very comprehensive monitoring system to make sure that compliance is occurring.” [Tr. 3683] This monitoring effort includes site visits at least once every five years

by EED to each school to review the expenditure of these federal funds. [Tr. 3694]

#### ***D. The Assessments and Assessment Results***

##### ***The State's Assessments***

54. The State has developed a system of statewide assessments that has evolved considerably over the years. At the time of the earliest state education profile contained in this record -- 1989 -- the State administered a "norm-referenced" test. [Ex. 2286] This type of test was an "off-the-shelf" test prepared by a national testing vendor. Results were tabulated based on the percentile rank of the students compared to other students nationally. [Tr. 2906] After the State began to develop content standards, it initiated a benchmark test that was Alaska-specific. The benchmark test was used for several years in grades 3, 6, and 8. [Tr. 2849]

55. Beginning in 2005, the State began using a new test, called the Standards-Based Assessment or SBA, in every grade. This test is aligned with the State standards, which means that it tests on the Alaska standards and it does not test on content that is not included in Alaska's standards. [Tr. 2846-49]

56. The items on the Standards-Based Assessment are carefully reviewed for consistency with the standards, freedom from bias, and cultural sensitivity. The question of what score constitutes "below proficient," "proficient" and "advanced" is determined by a committee. [Tr. 2852] The record in this case contains a technical review that documents these processes. [Tr. 2841-55]

57. The State's current system of assessment is a significant educational reform for several reasons:

- The standards-based assessments are aligned with the State's standards.
- The assessments provide detailed data to educators -- not just on the overall proficiency of students in a subject area -- but also on how well the students are performing in the specific domains that make up a given subject area.
- The assessments are designed to be consistent from year-to-year and from grade-to-grade. Each student is assigned a specific identification number. This enables educators to engage in longitudinal studies, even when students transfer between districts. By tracking growth, educators will be able to identify and refine effective processes. [Tr. 2905-08]

58. The Plaintiffs and the State in this case agree that the State "has adopted constitutionally sound course requirements, instructional standards and testing criteria." Plaintiffs' Second Amended Complaint at 2.

59. The Court finds that the State's current assessment system has been carefully implemented and is a significant educational reform designed to benefit children enrolled in Alaska's public schools.

### ***Assessment Results***

60. The State Board of Education has established four levels of student proficiency in the assessments it administers. The State's Report Card to the Public defines these proficiency levels as follows:

**Advanced.** Indicates mastery of the performance standards at a level above proficient.

**Proficient.** Indicates mastery of the performance standards sufficient to lead a successful adult life.

**Below Proficient.** Indicates mastery of some performance standards but not enough to be proficient.

**Far Below Proficient.** Indicates little mastery of the performance standards.

[Ex. 106 at 39]

61. Consistent with the federal No Child Left Behind Act (NCLB), the State has adopted standards to determine whether schools are making “adequate yearly progress” (AYP) toward NCLB’s goal of 100% proficiency of all students by 2014.

62. The statewide results for the 2005 and 2006 Standards-Based Assessment results were as follows:

**Standards Based Assessment Results 2005-2006  
Percent of Students Proficient and Above**

	<b>Reading</b>	<b>Writing</b>	<b>Math</b>
<b>2005</b>	77.6	73.6	64.8
<b>2006</b>	78.8	74.9	66.1

[Ex. 2237]

63. In considering the adequacy of the educational opportunity offered in the state as a whole, the percent of advanced students is of note. In 2005, 30% of students statewide tested as advanced in reading; 27.7% tested advanced in mathematics; and 17.7% in writing. [Ex. 2021 at 56603]

64. But the Plaintiffs have not focused on the overall performance of students in the state with respect to their claim that the system is constitutionally inadequate. Rather, they assert “there is an achievement gap that illustrates that not all Alaska students have access to a constitutionally adequate education.”

[Plaintiffs' Proposed Findings at 59] The Plaintiffs point in particular to the considerable disparity in testing results between Alaska Native students and other students.

65. This achievement gap is apparent in nearly all testing results. One example from the record follows:

**Grade 3 Standards Based Assessment  
Percent of Students Proficient in Reading**

	<b>State</b>	<b>Caucasian</b>	<b>Alaska Native</b>
<b>2004-05</b>	79.1	87.4	62.0*
<b>2005-06</b>	78.9	87.8	60.1

\*Alaska Native and American Indian combined

[Exs. 114-115; Tr. 3007-17]

66. The Plaintiffs also refer to the achievement gap for those “far below proficient.” According to Les Morse, EED’s Director of Assessment and Accountability, about four times as many Alaska Native students are far below proficient in reading as Caucasian students. [Tr. 3020; Ex. 2235] There is a similar achievement gap for low-income children. Although the achievement gap indisputably exists, one of the State’s experts, Naomi Calvo, demonstrated that even though the average proficiency for Alaska Natives and students who are eligible for free and reduced-price lunch in this state is, as a whole, lower than other students, there are many individual Alaska Natives and poor children who are scoring proficient and advanced. This is true in high spending districts and low spending districts, in rural districts and in urban districts, and in districts with high concentrations of poverty and low concentrations of poverty. [Tr. 2619-29]

67. The test scores of the three Plaintiff school districts in this case are among the lowest in the state. In 2005, Yupiit had the lowest percentage of proficient students of any school district in the state in reading; Kuspuk had the second lowest; and Bering Strait had the ninth lowest. [Ex. 2380]

Representative test scores are set forth below:

**Adequate Yearly Progress (AYP) Scores  
Percent of Students Proficient in Language Arts**

	<b>State</b>	<b>Bering</b>	<b>Kuspuk</b>	<b>Yupiit</b>
<b>2003-04</b>	73.0	37.4	30.6	15.3
<b>2004-05</b>	75.5	42.6	27.7	15.6

[Ex. 2458]

68. The record contains school-by-school detail for each Plaintiff district in each academic subject tested. Within Bering Strait and Kuspuk there is considerable variation in results among the schools. For example, in 2006 within BSSD, 80% of the children in Unalakleet were proficient in reading; in Brevig Mission, 28% were proficient. [Ex. 2387] Likewise, within the Kuspuk School District, at Crooked Creek 56% of the students were proficient in reading; at Lower Kalskag, 22% were proficient. [id.]

69. The Kuspuk School District made AYP in 2005 under a safe harbor provision of NCLB that bases the AYP determination on a demonstration of a significant improvement from the prior year's test scores. [Ex. 149]

70. Test scores have also been improving in the Bering Strait School District in recent years. For example, the percent of children that have attained reading proficiency in Savoonga increased from 15% in 2000 to 34% in 2006.

[Ex. 2376] But as Dr. Davis observed, “[a]t this rate of progress we’re making, we’ve calculated about 40 to 50 years” before all children in Bering Strait will be proficient. [Tr. 168-9]

71. Similarly, Dr. Laster testified it would take about 69 years in Kuspuuk for all children in that district to be proficient at its current rate of improvement. [Tr. 1983] As the Plaintiffs correctly note, “even if districts are able to maintain the current rate of improvement, generations of children will be lost.” [Tr. 67]

72. The Yupiit School District has never made AYP. In 2006, it was at the second year of Level 4, meaning it had failed to make AYP for five years. In 2006, 18% of the children in both Akiachak and Tuluksak had achieved proficiency in reading; 32% of the children in Akiak had achieved reading proficiency. [Ex 2387]

73. In Alaska’s Accountability Workbook to the federal government concerning NCLB and the failure of many Alaskan schools and districts to meet NCLB’s annual measurable objectives (AMO), it provides “the state must establish the capability to provide the technical assistance necessary to ensure all students become proficient.” [Ex. 2273 at 43]

74. The record demonstrates that the achievement gap identified by the Plaintiffs has existed for many years. For example, in 1989, the percentage of sixth graders in the state overall that was in the bottom quartile nationwide for reading was 21.1% -- better than the national average. [Ex. 2286 at 17] But for Bering Strait, 52.7% of the sixth graders were in the bottom quartile that year, as were 54.5% in Kuspuuk and 86.4% in Yupiit. [Ex. 2286 at 33, 79, 127]

75. In 2005 – sixteen years later – 22.4% of fifth graders in the state were in the bottom quartile of the nation in language arts – still better than the national average. But for Bering Strait, 41.7% of fifth graders were in the bottom quartile, as were 60.7 % in Kuspuksuk and over 90% in Yupiit. [Ex. 109 at 5-6]

76. As Dr. Davis testified, “I think as a state, we need to begin to recognize [that] if we have profound learning challenges, students are testing consistently, generation after generation as performing less well than the majority of the population, then we ought to say it’s not enough to say, well, we gave them – we gave them equitable resources.’ We, as a greater community, have a real vested interest in making sure kids are educated; educated well. Not just from an economic point of view, but from a political point of view and a community point of view.” [Tr. 204]

### ***Other Assessments***

77. Alaskan students currently take tests that are administered nationwide. The State participates in the National Assessment of Educational Progress (NAEP), a federal testing program in reading and mathematics that is given every other year to a sample of student populations in the fourth and eighth grades. Students in Alaska are generally at or above the national average in mathematics at both grade levels. In reading, fourth graders are slightly below the national average, but eighth graders are at the national average. [Ex. 2247, 447; Tr. 2929-42] Given that Alaska has more English language learners than the national average, the improvement in test scores by eighth grade is encouraging. [Tr. 2931-36]



78. Many high school students in Alaska take national college entrance exams – the SAT or the ACT. Alaska has a higher participation rate than the national average in these exams. And Alaskan students score well above the national average on both exams in almost all years. [Ex. 2243; Tr. 2943-45]

### ***The High School Exit Exam***

79. In 1997, the Alaska Legislature mandated that all seniors graduating from high school must pass an exit exam in order to receive a diploma.<sup>10</sup> Students who do not pass the exit exam received a Certificate of Achievement instead of a high school diploma.

80. Originally, the test was to have been implemented by 2002; subsequent legislation delayed the implementation until 2004 and clarified that the test was to be a test of minimal competency in basic skills.<sup>11</sup> In its current form, the exam is designed to test for “the minimum competencies in essential skills in the areas of reading, English, and mathematics that a student should have to know in order to function in our society.” [Ex. 2270]

81. The legislative history of the exit exam reflects that this educational reform was a reaction by the Legislature to frustration that children were receiving high school diplomas but were lacking in basic skills. [Tr. 2946]

82. The Department spent seven years creating and refining the test, and giving students and educators notice about the test. [Tr. 2947-48] The delay between passage of the legislation and implementation of the exam requirement

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<sup>10</sup> Ch 58 SLA 1997.

<sup>11</sup> Ch 94 SLA 2001.

reflects the care with which the State proceeded before making this change to the education system.

83. The State acknowledges that “children have a property interest in their prospective diploma, and cannot be deprived of that property interest by a test that is unfair to them because they have not had notice of the content of the test.” [Defendant’s Proposed Findings at 78, ¶ 194]

84. The Plaintiffs’ complaint alleges that the exit exam violates students’ due process rights because it tests subjects that are not taught in the schools. For example, they assert that geometry is tested on the exit exam and that many high school students do not have the opportunity to take geometry. [SAC at 15, ¶ 54(d)] However, the level of geometry taught on the exit exam is no higher than eighth grade geometry. [Tr. 2965] Moreover, the Plaintiffs’ assertion that high schools do not offer high-school level geometry was unproven. All school officials who testified in this case testified that their secondary schools offered high-school geometry. Les Morse from EED testified that in his experience as an educator in rural Alaska, and as the state assessment coordinator working with over 700 teachers all around the state, he has not heard that geometry is not being taught in Alaska’s schools. [Tr. 2966-67] Plaintiffs have not established by a preponderance of the evidence that Alaskan students do not have the opportunity to study the requisite level of geometry before their senior year in high school.

85. As with other test scores, one of the Plaintiffs’ primary concerns is the achievement gap. A representative test result is set forth below:

**Grade 10 High School Exit Exam (HSGQE)  
Percent of Students Proficient in Reading**

	<b>Total</b>	<b>Caucasian</b>	<b>Alaska Native</b>
<b>2003-04</b>	70.1	81.8	43.5
<b>2004-05</b>	69.1	81.5	42.5

[Exs. 118, 19]

86. As then-Commissioner Holloway wrote when she released the results of the 2001 graduation exam (before passage of the exam became a requirement for the diploma):

The data I am releasing today will cause soul searching in Alaska. The analysis shows a deep divide in student achievement among ethnic groups. White students score higher than other ethnic groups, much higher on average than Native Alaska students. Why is this so? What steps do we need to take to shrink this divide? It's time for debate. It's time to find out. It's time for action.

[Ex. 68]

87. As with the other assessments, the Plaintiff school districts have performed considerably below the state average. A representative result follows:

**Grade 10 High School Exit Exam (HSGQE)  
Percent of Students Proficient in Reading**

	<b>State</b>	<b>Bering</b>	<b>Kuspuk</b>	<b>Yupiit</b>
<b>2003-04</b>	70.1	21.7	27.6	<20.0
<b>2004-05</b>	69.1	26.5	28.6	14.8

[Exs. 108-109]

88. The above charts show the results for 10<sup>th</sup> graders only. The pass rate for the high school exit exam is higher, but it is difficult to calculate because

students have up to five opportunities to take the exam, beginning in 10<sup>th</sup> grade. Also, the exam tests three subjects and students only re-take those subjects that they have not yet passed. [Tr. 2950] And some students drop out of school before graduation.

89. The high school exit exam is designed so that it should have a 100% pass rate for students who stay with the process. [Tr. 2948-60] Mr. Morse, the EED testing administrator, estimated the state-wide pass rate is currently about 90%, when all opportunities to take the exam are considered. [Tr. 2954]

### ***Graduation and Dropout Rates***

90. The graduation rate is computed based on the percent of students who began ninth grade that graduate from high school four years later. [Ex. 70 at 106] A graduate is defined as a student who has received a regular diploma. It does not include students who received a Certificate of Achievement because they did not pass the exit exam. [Id.]

91. In 2004, the graduation rate for the state as a whole was 62.9%. [Ex. 70 at 77] In 2005, the statewide graduation rate was 61%. [Ex. 108 at 57] The graduation rate for the American Indian/Alaska Native subgroup in 2004 was 47.5%. [Ex. 70 at 77-8] In 2005, it was 43%. [Ex. 108 at 57]

92. In the Plaintiff school districts, the graduation rates in 2005 were 37.2% for Bering Strait, 23.8% for Kuspuuk, and 31.3% for Yupiit. [Ex. 109 at 3-4] Bering Strait's graduation rate has fallen significantly since 2002-03, when it was 59.4%. This may be due to the introduction of the exit exam requirement since that date, but also may be due in part to the "Quality Schools" program in place

there that allows students additional time to complete their studies past 12<sup>th</sup> grade. [Ex. 105 at 3-4]

93. All of the graduation rate statistics are somewhat misleading. They do not reflect students who have obtained a GED, do not capture all transfers, and do not include those students who leave early for college. [Tr. 3471] Nonetheless, Commissioner Sampson acknowledged that the State needs to improve the graduation rate for Alaskan students. [Tr. 2398]

94. The dropout rates in the Plaintiff school districts are also considerably greater than the statewide average. [Ex. 109 at 3-4] In 2005, the statewide dropout rate was 6%. The rates in Bering Strait, Kuspuuk and Yupiit were 11.4%, 8.7%, and 10.5%, respectively. [Id.]

95. While the dropout rate may be some indication as to whether an educational program is meeting a student's needs, the evidence showed that not all students drop out because of low academic achievement. Family and work commitments, among other reasons, may also be factors. [Tr. 3470]

96. Some students drop out because they are unable to pass the exit exam. School district superintendents such as Darrell Sanborn in Unalaska who have made it a personal priority to directly oversee the education of students who did not pass the exit exam on their first attempt would appear to be having a highly positive impact not only on pass rates for that exam, but on graduation and dropout rates in that district. In Unalaska, the dropout rate was 0.6% and the graduation rate was 96% in 2005. [Ex. 109 at 3-4]

### ***E. Accountability and No Child Left Behind***

97. The State's school accountability system disseminates the results of the testing to students, parents, and the community (with due regard for student privacy). AS 14.03.123.

98. Alaska's accountability system is in compliance with the No Child Left Behind Act, 20 U.S.C. § 6301 (2003), which required all states to adopt a NCLB-compliant system as a condition for receipt of federal aid. The State's NCLB-compliant accountability system was adopted into regulation by the State Board of Education in 2003. 4 AAC 06.800 - .06.899.

99. As of the time of trial, Alaska was one of only twelve states whose standards and assessment system had been accorded full approval by the federal government as being NCLB-compliant. [Tr. 2861; Ex. 2271]

100. The Legislature has delegated to the Commissioner of Education and Early Development (EED) the responsibility to do "all things necessary to cooperate with the United States government to participate" in No Child Left Behind. AS 14.50.010. Pursuant to that legislative delegation, EED has enacted regulations consistent with NCLB to demonstrate whether schools are making adequate yearly progress (AYP) toward NCLB's goal of 100% proficiency of all children by 2014. 4 AAC 06.805. These regulations include safe harbor provisions that allow a district or school to be determined to be making AYP based on a percentage improvement of proficiency among the student population. 4 AAC 06.810.

101. Each year of non-compliance with AYP is designated as a level. For example, a school that has failed to make AYP for four years would be designated at Level 4. [See generally Ex. 2272] For schools and districts not meeting AYP, the state regulations provide for a gradually increasing series of corrective actions, including the development and implementation of improvement plans. 4 AAC 06.840 -.850.

102. Under the accountability provisions of NCLB, school districts are required to intervene at schools within their districts that have repeatedly failed to make AYP. EED has developed an improvement planning document for districts to use “as an aid [to develop their plans] if they wanted to use it.” [MacKinnon Depo. at 110]

103. For school districts that receive Title 1 federal funds that have failed to make AYP for two consecutive years, EED is required to “take appropriate action consistent with [the applicable federal regulations], including offering technical assistance [to the district] *if requested.*” 4 AAC 06.840(h)(emphasis added).

104. When a district that receives Title 1 funds has failed to make AYP for three consecutive years, EED is required “to prepare to take corrective action in the district.” *Id.* at subsection (k).

105. When a school district has failed to make AYP for four years, EED is required to:

implement one or more of the following corrective actions in the district:

(1) defer programmatic funds or reduce administrative money provided to the district from federal sources;

- (2) institute and implement a new curriculum based on state content standards adopted in 4 AAC 04.140 and performance standards adopted in 4 AAC 04.150, including the provision, for all relevant staff, of appropriate professional development that
  - (A) is grounded in scientifically-based research; and
  - (B) offers substantial promise of improving educational achievement for low-achieving students;
- (3) work with the school board of the district to replace the district personnel who are relevant to the district's receipt of the designation;
- (4) initiate procedures to remove schools from the jurisdiction of the district and provide alternative arrangements for public governance and supervision of these schools;
- (5) in conjunction with at least one other action in this subsection,
  - (A) authorize students to transfer from a school operated by the district to a higher-performing public school operated by another district; and
  - (B) provide to these students transportation, or the costs of transportation, to the other school.

4 AAC 06.840(k). See also No Child Left Behind, Public Law 107-110 at Sec. 1116(c)(10)(C).

106. This regulation gives the State the authority to defer or reduce a limited portion of a district's Title 1 funds to attempt to obtain improvements within a district that is failing to make adequate yearly progress. [Tr. 2412] As Commissioner Sampson explained, under current state laws EED has only a very limited ability to direct resources within a school district -- even with a Level 4 district -- "[i]t's no more than a 20 percent hold-back of Title 1 funds, not how they establish their other priorities." [Ex. 2272; Tr. 2412] As of the date of trial, EED had temporarily withheld a portion of Title 1 funds pursuant to this provision on only one occasion -- from the Yupiit School District in late 2005 through early 2006.



107. The AYP reporting requirements apply not only to the school as a whole, but at the subgroup level as well. Subgroups for this purpose include students with limited English proficiency and Alaska Natives, among others. 4 AAC 06.830. Pursuant to NCLB, if any subgroup within the school is not meeting AYP, then the school as a whole is not meeting AYP. 4 AAC 06.805(b)(1)(B).

108. As of trial, there were six districts at Level 4 under NCLB – districts that had failed to make AYP for at least 4 years. [Tr. 2879] EED had sent personnel to one of these districts, the Yupiit School District, in the fall of 2005 when that district had failed to submit a required district improvement plan.

109. In the fall of 2006, EED sent on-site teams to do instructional audits at three of the Level 4 districts, including Yupiit. [Tr. 2879] EED had also undertaken desk audits of the other three districts. [Tr. 2880] See 4 AAC 06.840(j)(2)(defining parameters of audits).

110. Although the federal law and state regulations accord several options to the State when intervening, to date the State's actions in lower-performing districts has been limited. As explained by Les Morse at EED, "for the most part it has typically ... been a curriculum change, a new curriculum that has been adopted and put into place." [Tr. 2870] Specifically, he testified that many lower-performing districts have changed from a graded school to a performance-based school to achieve NCLB compliance: "we have a number of districts that rather than having students go from grade 3 to grade 4 because they've – because they've gotten older, they advance through a set of levels based on

performances versus just moving through grades, and that's the most common change that's occurred to date." [Tr. 2871]

111. Schools that make this curriculum change are required to appear annually before the Board of Education to obtain a waiver from the State's regulation that requires certain units of credit for graduation. 4 AAC 03.091; 4 AAC 06.075.

112. EED has provided technical support and has arranged conferences for school districts regarding NCLB compliance. [MacKinnon Depo. at 86-87]

113. NCLB also requires that teachers be "highly qualified." The State has defined this term and implemented this requirement in 4 AAC 04.210 – 4 AAC .04.212. Under the regulations, a teacher is qualified in "elementary education" – not in specific subjects. 4 AAC 04.210. But for middle school and high school, there are a number of "core academic subjects," all of which are required to be taught by highly qualified teachers. Among the subjects included are art, theatre, music, German and Spanish. *Id.* Although Yupiit personnel have indicated that they sought to hire highly qualified vocation education teachers, there is no highly qualified designation for vocational education in Alaska regulations.

114. In the State's Accountability Workbook submitted to the U.S. Department of Education, it is noted that "the state must address a serious capacity issue at the [ ] EED. In order to comply with the many provisions of NCLB the [ ] EED must be provided with additional staff and resources required to assist districts and to implement the provisions of the accountability system." [Ex. 2273 at 16]

***F. Resources and Assistance Provided to School Districts by the State***

115. The State has presented extensive evidence, primarily through deposition testimony, of the considerable resources and assistance that EED provides to school districts. By and large, the evidence demonstrated that these resources and assistance are readily available to school districts that seek out the State's help.

***Teacher Mentoring and Principal Coaching***

116. EED began a teacher mentoring project in partnership with the University of Alaska in approximately 2003. The program is designed to reduce teacher turnover and increase student achievement by providing mentor support to first and second year teachers. [Tr. 2356-57] The mentors are "full release mentors," meaning they work exclusively as mentors and their salary and expenses are funded by the State. [Tr. 2366-67] Currently the State has approximately 30 mentors serving about 400 teachers. [Tr. 2356-57] The program involves multiple on-site visits to the school and frequent communication by telephone, e-mail, and video.

117. During the first year of the mentorship program, new teacher turnover was reduced approximately 15%. [Tr. 3152] Plaintiff NEA-Alaska's Executive Director Bill Bjork believes the program has demonstrated positive results, because "the mentoring experience helps teachers be successful at their site, and successful teachers stay." [Tr. 2269]

118. The Department has also established a coaching project for new principals. [Tr. 3153] The coaches are all retired principals and are assigned to

first and second year principals. Districts have requested that some third-year principals be allowed to participate, and EED has agreed. [Tr. 3153] Last year, the principal coaching project sponsored one on-site visit for each new principal and held four 2½-day institutes in Anchorage for all of the new principals. [Tr. 3154-56] Like the teacher mentoring program, participation by districts and principals is voluntary. [Tr. 3158]

119. The Department has also begun a voluntary superintendent coaching project for first-year superintendents. Last year, three of the five new superintendents in the state elected to participate. [Tr. 3161]

### ***Reading First***

120. Reading First is a program that EED is administering through a federal grant. [McKeown Depo. at 20-24] Stacy McKeown is the director of EED's Reading First Program and testified by deposition. Reading First is part of "a nationwide effort to improve the instructional practices of teachers, with the long-term goal being all students reading at grade level by the end of third grade." [Id. at 20]

121. The program has three key areas – "one being assessment, one being professional development, and the other one is adoption of a research-based reading program, or a program that was developed using the very best research that we know of." [Id. at 21]

122. Eligible school districts throughout the state were encouraged to apply for Reading First grants. All three of the Plaintiff school districts were eligible for the program. [McKeown Depo. ex. 1 at 55392] Bering Straits applied

for the grant, but was not among the three districts that were selected. Yupiit and Kuspuk did not apply. The program is most effective in those schools in which there is a “buy-in [or public support] from ... the district and the community.” [Id. at 100]

123. EED is working with the three districts that were selected for the grant to implement Reading First. EED pays for and trains the teachers, principals, reading coaches, and special education teachers in how to instruct students under the Reading First program. [Id. at 32] In addition, EED reviews and revises the school districts’ individual Reading First instructional plans. [Id. at 34]

124. School districts that were not selected for the funded program were invited to a free conference to discuss the Reading First program. EED also provides technical assistance and support to the unfunded districts. [Id. at 72]

### ***Formative Assessments***

125. EED has developed over 700 formative assessments that are available on-line free for teachers to use in the classroom, at the teacher’s option. [Tr. 2356] These assessments are training materials designed to guide the teaching process in the classroom and are linked to the State’s performance standards and assessments. [Tr. 3064-66]

### ***Professional Development / Teacher Certification***

126. EED provides a number of professional development opportunities for teachers and other school district personnel each year. It has been

particularly active in assisting school personnel with the interpretation of assessment data so that teachers can use the data to direct their instruction. [Tr. 2351]

127. EED has also changed teacher certification requirements to include an assessment of the teacher's ability to effectively deliver content to students. [Tr. 2358-59]

### ***Instructional and Desk Audits***

128. EED has recently implemented regulations and procedures for conducting desk audits and instructional audits in districts that have failed to make AYP for several years. [Tr. 2885; 4 AAC 06.840(j)] These audits became possible only after the department became confident that its assessment system was "completely aligned to our standards." [Tr. 2890-91]

129. In a desk audit, the department conducts an in-depth analysis of student testing results. From this audit, the department determines which districts have shown less improvement. For those districts, it conducts a curriculum instructional audit. [Tr. 2889-90]

130. The curriculum instructional audit is a detailed on-site analysis of the curriculum. During an instructional audit, the Department analyzes a school district's instructional processes. It seeks to determine whether the district has a coherent curriculum and a program of professional development that is "actually showing up in the classroom." [Tr. 2890] At trial, EED indicated it intended to conduct instructional audits in three districts during the 2006-07 school year. [Tr. 2892]

131. Dr. Davis had requested an instructional audit from EED for Bering Strait's lowest performing schools before EED had actually finished developing the instrument, but the Department did not make it available to that district because BSSD had not reached the requisite threshold of such poor school performance under the regulation to qualify. [Tr. 2403] However, EED has made detailed test data from its testing contractor available to districts, and has sponsored a training for districts as to how to analyze and use the data. [Tr. 2355-56, 2404-05, 2984-86]

### ***Consortia***

132. A number of consortia in the state work to provide additional education support. For example, the Art Education Consortium writes grants and provides training and coursework for art studies. [Sugar Depo. at 101] The Alaska State Council on the Arts also promotes art in the schools, and sponsors both trainings and direct instruction. [Tr. 2357-58] It sponsors a program called Artists in Residence, which arranges for artists in various mediums to travel to schools throughout the state at no expense to the school district, other than transportation costs. [Tr. 2358]

### ***Correspondence School Options***

133. Alaska has a range of correspondence school options for children who do not wish to or are unable to attend regular "brick and mortar" schools. The adequacy of the education at these schools was not at issue in this litigation. [See MacKinnon Depo. at 44; Miller Depo. at 101]

## ***Technology***

134. The three Plaintiff school districts each have very high student to computer ratios. In Yupiit, there are more computers for students than there are students: 447 students and 502 computers. Bering Strait has one computer for every two students, and Kuspuk has one computer for every three students. [Miller Depo. ex. at 55694]

135. EED assists school districts in obtaining federal E-Rate funding, which permits school access to technology at substantially reduced rates. [Tr. 3712-14]

136. Both BSSD and Kuspuk have received competitive grants for technology development. [Miller Depo. at 98-99] Yupiit has never received such a grant because it has never applied for this funding, although EED has invited the Yupiit School District to technical assistance sessions to help the district apply. EED's program manager for educational technology testified regarding the Yupiit School District, "sometimes it's the vision of the superintendent. I don't think they have a vision of using technology to move things forward." [Id.]

137. Based on the current status of distance learning technology, EED's technology manager testified "I think every district could choose to offer AP courses through distance learning." [Id. at 103] She cited several examples of school districts in Alaska that have expanded their course offerings to students through this medium, including the Lower Kuskokwim School District, Southwest Region, Bering Strait, Northwest Arctic, and the Pribilofs. [Id. at 104-06]



138. This Court finds that videoconferencing is an option for many students for many courses throughout Alaska, and has particular value when there are only one or two students within a school that are interested in a particular class. Although not without its challenges and limitations, videoconferencing represents an effective tool for allowing students access to content areas that might not otherwise be accessible to them. [See, e.g., Tr. 3091-92]

139. Like most resources offered by EED to the districts, EED's technology support is "strictly voluntary ... Our goal is to talk about tools they could be using and also courses they could be accessing." [Id. at 110]

### ***Special Education***

140. The State regulates special education more heavily than it does almost any other aspect of education. Districts are required by both state and federal law to provide free and appropriate public education to all eligible special education students. The State monitors districts for compliance with state and federal special education law and funding, and holds conferences to train districts about special education. The State also administers procedures for parents to use when they believe a school district is not in compliance with special education law, including administrative complaints, mediation and due-process hearings. [Tr. 3741-44]

### ***Migrant Education***

141. The State applies for and passes on to school districts federal funds for migrant education, and assists districts in planning migrant education

programs. [Tr. 3690-91] The State is also responsible for monitoring the expenditures of these funds by the districts for compliance with federal law. [Tr. 3683]

142. In Alaska, these funds are often used to provide learning materials to children who are engaged in fishing or other subsistence activities with their families. [Tr. 3694-95]

### ***Performance Incentives***

143. In 2005, the Legislature adopted a performance incentive program. AS 14.03.126. The program provides incentive payments to all employees of schools that show designated improvement. [Tr. 2388-89] The program was initially funded by the Legislature with \$5.8 million. [Id.] In the view of Commissioner Sampson, "I think it is a practice that has tremendous potential to bring schools together as a team, to be noncompetitive with one another, and share very effective strategies and focus, aligning instruction to the standards." [Tr. 2388]

### ***Other Resources Available from EED***

144. The State has a number of other resources available for school districts and educators that seek assistance or support from the State. These include the following:

- Counselor support services, including an on-line training course for counselors, a training guide for program development of a K-12 counseling program, training in crisis response, and suicide prevention are available on request from EED. As explained by

EED staff, “how the schools choose to use counselors is totally up to the districts. And if they ask for our programmatic and technical support, we offer it, but they don’t have to.” [Danitz Depo. at 15]

- EED has a library consultant available on request from school districts to help librarians and library aides in schools throughout the state. Yupiit has taken advantage of this resource. [Tr. 583]
- Training, information and support on fetal alcohol syndrome, including a web-based training course, is available on request from EED. [Brocius Depo. at 23-24]
- Grant writing assistance is available on request. [Tr. 3774-75]
- The State assists schools that seek accreditation. [Mehrkens Depo. at 26]
- The State provides assistance regarding budget preparation and reporting requirements to school districts.
- Upon request from a district, EED is willing to travel to a district and provide assistance directly in requested areas, including “classroom observation to improve instruction, to interpreting data, to developing formative assessments.” [Tr. 2405]

145. To better help school districts access the resources of the EED, the State has assigned a staff person to each district as a contact person to facilitate that district’s communication with EED and access to its resources and assistance. [Tr. 1604]

***Pre-kindergarten and the Ready to Read; Ready to Learn Task Force***

146. Many of the witnesses who have testified in this case support the development of pre-kindergarten education, including Commissioner Sampson. [See, e.g., Tr. 2374, 3400-01, 3641-43]

147. Alaska is one of only ten states that does not offer a government supported pre-K program. [Tr. 2393]

148. In recent years, a task force named Ready to Read, Ready to Learn developed several recommendations regarding early education. Among their recommendations is that Alaska develop a statewide system of voluntary and affordable early childhood education. Such a system, the task force indicated, should be community-based and offer a variety of options to parents. [Ex. 424 at 3, 11] Several witnesses expressed concerns about pre-K education becoming a part of the K-12 school system, and believed that preschool children could be better served outside of the school system with a model that included more parental involvement. [See, e.g., Tr. 3401]

149. Pre-kindergarten education is currently available for disabled children. [Tr. 3403]

150. The State also assists with Head Start. It has provided about \$6.1 million annual funding for this program. [Tr. 3747] In addition, it has provided trainings for both school districts and Head Start programs that seek assistance in how to better communicate with the families of preschool children. [Sugar Depo. at 66] Last year, Head Start served approximately 3,600 children in about 100 communities. [Id. at 85]

### ***School Facilities***

151. The Plaintiffs' Second Amended Complaint does not allege that school facilities in this state are inadequate and the prayer for relief does not seek any capital expenditure for school facilities.

152. At trial, the Plaintiffs presented some limited evidence regarding school facilities in the state. For example, they asserted that there is a lack of "dedicated facilities for curricular areas such as art, music, physical education, and science" in school buildings in the state. [Ex. 3 at 754] But the quality of school facilities has not been directly at issue in this litigation. [See, e.g., Plaintiffs' Proposed Findings of Fact at 135-140] To the extent the current quality of school facilities is intended to have been at issue, the Plaintiffs failed to establish by a preponderance of the evidence that the school facilities in Alaska are constitutionally inadequate.

## ***II. Facts about the Plaintiffs***

### ***A. Plaintiffs Kristine and Gregory Moore***

153. The Moores live in Wasilla, Alaska with their three school age children, Jason, Shannon and Mallory.

154. The Matanuska Susitna Borough School District does not contribute funding for education up to the maximum permitted by AS 14.17.410, a fact which is relevant since the Plaintiffs are asserting that it is the State alone that is inadequately funding education. [K. Moore Perp. Depo. at 36, Disc. Depo. at 75]

155. Two of the Moore children have for the most part performed proficiently in public school; the one child of those two who is old enough to have been tested has done well on state assessments. [Moore Perp. Depo. at 32-33]

156. Ms. Moore home-schooled one of the Moore children for approximately one year in 2004-05, but after meeting with the school principal, she decided to enroll the child back into the public school system. [Moore Perp. Depo. at 16]

157. One of the Moore children has had difficulty in school, and is sometimes removed from the classroom for behavior problems. The Moores recently sought and obtained an educational evaluation for that child. At the time of Ms. Moore's depositions in July 2006, the Moores appeared to be working satisfactorily with the school with respect to that child's behavior and educational needs. [Moore Disc. Depo. at 59-65]

158. Kristine Moore has been active in the PTA at her children's schools since 1998. She is also active in regional and state PTAs as well as other education-related community advocacy groups, including committees with the State Board of Education. [Moore Perp. Depo. at 7-11] Ms. Moore testified that she has been successful in her political activities and lobbying efforts in increasing school funding. [Id. at 35-36]

159. Ms. Moore indicated that she filed this lawsuit because she does "not feel that my children have access to the same resources, and abilities, and programs, and education -- the quality of education that I had as a student." [Moore Perp. Depo. at 23] However, she testified that she believes her children

have had good teachers in general and was unable to identify any specific programs that were missing for her children other than smaller classroom sizes and more study of the humanities. [Moore Disc. Depo. at 17, 77]

***B. Plaintiffs Martha and Wayne Morgan***

160. Martha and Wayne Morgan reside in Aniak; their children attend school in the Kuspuks School District. [Tr. 2278-79; M. Morgan Depo. at 6-8] Mr. Morgan indicated that English is the primary language spoken in the community and at the school. [Tr. 2295]

161. Ms. Morgan works in the payroll department at the Kuspuks School District. [M. Morgan Depo. at 5] At the time of Ms. Morgan's deposition in March 2006, the Morgans' oldest child, age 15, was taking classes in Aniak in reading, writing, math, shop, physical education, and technology. [*Id.* at 7] He also plays basketball and travels on the school team four times during the school year. [*Id.* at 9-10] At school, he was making a canoe with his class in shop, had his own web-site, was learning Word and Excel in technology, and was studying health in P.E. [*Id.* at 8-10] From Ms. Morgan's perspective, "it would be nice to see a music class, drama class, home economics, [and] a journalism class that includes photography" taught at the high school as well. [*Id.* at 13] The Morgans' four-year-old child had been attending a two-year preschool program in Aniak administered through the school district with grant monies. [*Id.* at 22-23]

162. Wayne Morgan is the president of the school board for the Kuspuks School District. In that capacity he has a role in determining the school district's curriculum, staff salaries, superintendent compensation, and budget. AS

14.08.111. Mr. Morgan indicated he is also very active in other aspects of public service -- serving on the tribal council, the Native association, and various fish and game groups at the local, state and federal level, as well as coaching and volunteering at the local school. [Tr. 2279]

163. Mr. Morgan testified that he believes “the children of Kuspuk and elsewhere need[ ] a well-rounded education ... having choices or opportunities to experience some sort of skill or a possible career maybe after high school. And ... choices also for the upper-level-achieving kids and the lower-level.” [Tr. 2282]

164. Mr. Morgan was concerned about the exit exam and the impact it may have on students dropping out: “There’s so much focus to pass [the exit exam] and I think there’s more to life than just passing the exit exam.” [Tr. 2284]

165. Mr. Morgan indicated that he felt he was accorded more educational opportunities when he was in school in Aniak, graduating in 1984. He had classes in photography, foreign languages and pottery, which have not been available to his children. He also believes there were more teachers. And he remembered that everyone graduated then. Now, he is “saddened by the kid who [does not] get the diploma but still walks.” [Tr. 2286-88]

166. Mr. Morgan felt that the Kuspuk schools have good principals and teachers and indicated that they are paid among the highest in the state. [Tr. 2291] He also noted that the district has internet and video teleconference facilities [Tr. 2291-92], a recently established aviation ground school [Tr. 2296], a guidance counselor [Tr. 2296], local dancing and cultural weeks at the school [Tr.



2297], science and physical education classes, and four different school sports.  
[Tr. 2285, 2290]

167. Ms. Morgan testified that four Aniak high school students had elected to attend boarding school at either Mt. Edgecumbe or Galena, where it is perceived they would have more academic opportunities. [M. Morgan Depo. at 29]

168. Mr. Morgan is opposed to greater state involvement in how the local school district spends its foundation money and determines its curriculum. As he stated, "that would take away the local control." [Tr. 2297] He believes the State should assist and work with the school districts, but not control them.

***C. Plaintiffs Maggie and Mike Williams***

169. The Williams reside in Akiak, which is within the Yupiit School District. Their children have attended the Akiak School. Mr. Williams is the president of the Yupiit School Board, and has been on the board for 21 years. [Tr. 1506-07] In that capacity, Mr. Williams has a role in determining the district's curriculum, staff salaries, superintendent compensation, and budget. AS 14.08.111. Mr. Williams also served on the State Board of Education for approximately 7 years in the 1990's. [Tr. 1507]

170. Mr. Williams testified that he, along with other local community members, became involved in the development of the Yupiit School District in the early 1980's because "we wanted to get into having our people and our parents and our community starting to get involved in shaping our educational program -- because of what kind of changes we were seeing in the communities with our

kids, and no involvement from parents.” [Tr. 1516] In his view, “the overall goal was to have a culturally relevant program.” [Tr. 1519]

171. From the outset of his involvement with the Yupiit School District, Mr. Williams has viewed a major challenge to be ensuring that a culturally relevant program was provided to students when the teaching staff was from outside of the district, and often from outside of the state. [Tr. 1522]

172. Mr. Williams also expressed considerable concern over the low test scores of the students within the district: “Ever since I became a board member, our test scores have been very unacceptable.” [Tr. 1530]

173. He also expressed concern about the impact of teacher turnover: “I’ve heard many of those kids ask the new -- brand-new teachers that arrive in the fall, ‘Are you going to come back next year?’” [Tr. 1532] When asked why the turnover existed, he opined that it was burnout, or a desire to get back to the road system -- “Life is a lot harsher out there.” [Tr. 1533] The board has tried, with some success, to reduce turnover by improving teacher housing and by initiating a college course that is designed to introduce teachers and administrators to the way of life within the school district. [Tr. 1551-52]

174. Mr. Williams testified that the school district is providing vocational education skills at each school. [Tr. 1540] While he believes that art and music should be part of education, the district does not currently employ certified art or music specialists “[b]ecause we don’t have the resources.” [Tr. 1542] However, he acknowledged that the arts are offered at the Yupiit schools, but typically by

local community members, school aides, or elders, and not by a certified art teacher. [Tr. 1597, 1607]

175. To address the district's drop-out rate, Mr. Williams indicated that the district was considering hiring a counselor to work with individuals who have dropped out by engaging them in a project to renovate buildings in the district while they worked on obtaining a high school diploma. He testified these individuals could then be added to the student count in the State's foundation formula, which would provide funds to support that program. [Tr. 1602]

176. Mr. Williams indicated that the state troopers have not been responsive to requests from the school district to enforce the truancy laws. [Tr. 1572]

177. Mr. Williams indicated that the school district has tried to address student achievement by trying to align the district's curriculum to state standards, by offering tutoring after school hours, and by seeking to engage community elders in the importance of education. [Tr. 1553] He acknowledged that a prior superintendent told the school board that the achievement struggle of the district "is more a lack of will than a lack of resources." [Ex. 2130; Tr. 1593]

178. Mr. Williams indicated that the three new schools that the district had received were a welcome and much appreciated addition to the communities and had resulted in an improved attitude by both students and parents. [Tr. 1556]

179. Mr. Williams testified that if the district received additional resources, it would seek to hire highly qualified vocational education, music and physical education teachers. [Tr. 1556] He would also complete those portions

of the new schools that were not finalized because of insufficient funds, such as the outside playground. [Tr. 1556] Mr. Williams also felt that a liaison position between the school and the students' homes could benefit the school community. [Tr. 1603] And he indicated that in order to improve student achievement, the district should consider having a full-year program, offer more tutoring, and also offer additional resources via the Internet. [Tr. 1557]

180. Mr. Williams testified that he believed it is the responsibility of the local school board -- and not the State -- to determine how the district should spend the money it receives from the State. [Tr. 1566]

181. He noted that there has been a designated state person from EED assigned to the school district for some time, "but I think they have stepped up their presence ... mainly consulting with the district and to work on the strategies to help meet the accountability standards ... I've noticed that ... they have really begun to work with our district staff and those staff that need to ... work on those standards." [Tr. 1604]

182. Mr. Williams and the other school board members did not directly participate when EED personnel came to the school district in the fall of 2005 -- "It was between our staff and the State." [Tr. 1573] With respect to that State involvement, Mr. Williams indicated, "it is welcomed ... any kind of help is welcome ... We are in full support of [the AYP] goals." [Tr. 1574]

#### ***D. Plaintiff Jerry Dixon***

183. Plaintiff Jerry Dixon was a teacher with the Kenai Peninsula Borough School District from approximately 1990 to 2000. During that time, he

taught a special “Quest” program for gifted and talented younger children. He left his position with the district both because the district required him to transfer to the high school and because he was dismayed at the programs that were being eliminated by the district. [Dixon Disc. Depo. at 16-29]

184. Mr. Dixon has two children who have attended public school in Seward. He was quoted in 2002 as saying, “Seward has excellent schools and superior teachers.” [Dixon Perp. Depo. at 16] However, he believes that since that time a number of programs have been eliminated which has impacted the quality of the schools. [*Id.* at 16-21] Most notably, the Quest program that he taught has been eliminated. Nonetheless, he testified that his children have done very well in Kenai Peninsula Borough schools. [Dixon Perp. Depo. at 22-28]

***E. Plaintiff NEA-Alaska, Inc.***

185. NEA-Alaska represents over 13,000 teachers and educational support professionals. The organization’s current president, Bill Bjork, testified in this proceeding. He has been a teacher in several Alaskan schools during his career. He testified that the organization “exists to advocate for quality schools and for the professional and economic interests of our 13,000 members.” [Tr. 2233] With quality public schools, “our people can be successful ... and an adequate level of funding is critical so that we can have quality schools.” [Tr. 2255]

186. Mr. Bjork stated that there had been two decades of relatively flat funding for education, but that beginning in 2003, “the legislature provided enough money to cover inflation.” [Tr. 2243]

187. NEA-Alaska seeks adequate funding for education in this case. Mr. Bjork defined adequate funding by referring to the NEA-Alaska's web site: "Adequate funding means schools have the resources to offer opportunities for all students to achieve up to the standard -- ..." [Tr. 2262; Ex. 2028] He defined adequate by reference to a dictionary definition: "sufficient and satisfactory." [Tr. 2262]

188. In Mr. Bjork's view, a pupil-teacher ratio of 18 to 1 is ideal, based not on the total number of teachers, but on the number of students with one teacher in a classroom. [Tr. 2263]

189. Mr. Bjork readily acknowledged that "there is nothing in the world that can take the place of an engaged parent" when it comes to a child's education. [Tr. 2259] But he added, "the absence of ... an engaged parent can't be an educational death sentence for this student." Instead, he opined that schools must take up the slack in those circumstances. [Tr. 2273]

190. NEA-Alaska's members have a direct economic interest in education funding as well as a direct professional interest in providing high quality education to Alaska's students.

#### ***F. Plaintiff CEAAC***

191. Plaintiff Citizens for the Educational Advancement of Alaska's Children (CEAAC) is a nonprofit organization formed in approximately 1997. Its members include a number of school districts in the state, including each of the three Plaintiff school districts in this action. [Ex. 211; Jorgenson Depo. at 6, 171-

172] Spike Jorgensen is CEAAC's executive director and testified by deposition in this case.

192. CEAAC's purposes include ensuring "that the state of Alaska complies with its constitutional ... obligation to provide a quality education for the children of Alaska." [Ex. 211 at 21546] CEAAC has a direct interest in this litigation and seeks to obtain additional funding from the State for its members.

### ***III. The School District Plaintiffs***

#### ***A. Bering Strait School District***

193. Bering Strait School District (BSSD) is a REAA located at the west coast of Alaska. The district serves fifteen widespread and diverse Alaskan villages, and has a total enrollment of approximately 1700 students. [Ex. 109; Tr. 213] The area includes villages on the Seward Peninsula and Norton Sound as well as on St. Lawrence and Little Diomed Islands. [Ex. 44 at 18833] The distance between the two furthest schools in the district is approximately 350 miles. [Tr. 213, 147]

194. The superintendent of the district is John Davis, Ph.D., who was the first witness to testify at the trial in this case. At the time of trial, Dr. Davis had been the superintendent of BSSD for seven years. [Tr. 143; Ex. 2008] Dr. Davis was described to this Court as "an outstanding educator" by the Commissioner of Education, Roger Sampson, and this was clearly established by the evidence at trial. [Tr. 2361] Dr. Davis demonstrated deep conviction and dedication toward improving the quality of education for all children in the Bering Strait School

District, and has achieved substantial success in that regard during his tenure as superintendent.

195. The communities within BSSD vary in terms of lifestyle and student performance. Many children in the communities of Gambell, Savoonga and Diomede speak Siberian Yup'ik as their primary language. [Tr. 147-148]

196. The largest school in the BSSD is Savoonga, with 219 students and 21 certified staff members. Savoonga is located on St. Lawrence Island in the Bering Sea. [Tr. 254]

197. Several of these schools have consistently failed to make Adequate Yearly Progress (AYP) on state assessments. [Ex. 2387 at 57678-80; Tr. 160]

198. Unalakleet and White Mountain are two other schools within the district. These schools have made AYP in recent years. [Tr. 160] Dr. Davis testified that although "it shouldn't be," in his experience educational success increases as the number of generations in a family with education increases. [Tr. 299] As school board member Melvin Otton noted in his deposition, Unalakleet had a private school as well as a BIA school before statehood, so "parents that attended there, their view of education was more engrained than in a lot of the other communities." [Otton Depo. at 54]

199. Close to 100% of the students in the district are Alaska Native, and over 80% of the district is limited English proficient.

200. BSSD received \$21,265 per student (ADM) in state and federal operating (non-capital) funds in 2005. [Ex. 2321]



201. During Dr. Davis' tenure as superintendent, the BSSD school board has made many critical improvements in the quality of education within the school district. [Tr. 237-38] From Dr. Davis' perspective, the key to the district's success to date has been that "we've changed our basic philosophy. It's not about what you want to do. In other words, it's not about you; it's about what students need." [Tr. 164-65]

202. In recent years, BSSD has fully implemented throughout the district a reading program entitled "Success for All," which is an intensive, scientifically-based reading program developed at John Hopkins University. BSSD has devoted considerable time and expense toward staff development with respect to this program. [Tr. 239-43] BSSD is also striving to actively engage parents in their child's education by asking parents to sign off on homework and read with their children during the evenings. [Tr. 167] In order to obtain the funds necessary to fully implement and maintain the "Success for All" program, the district made the decision to reduce 'non-core' personnel at the district, such as counselors and vocational educators, and direct its funds toward this reading curriculum. [Tr. 315]

203. BSSD has also implemented the Quality Schools Model. Under this model, the district has eliminated traditional grades and moved to proficiency standards. The model requires that a student demonstrate proficiency on a certain topic, no matter how long that takes to achieve, before moving on to the next subject matter. [Tr. 165-66, 244] A student does not graduate until he or

she demonstrates a specified level of proficiency in all core areas of learning. [Tr. 244-47]

204. BSSD has made staff development a priority in its funding and resource allocation decisions. [See, e.g., Ex. 51, Response to Interr. # 12 which details the extensive professional development activities sponsored by BSSD during school years 1999-2005.]

205. Since the implementation of the "Success for All" reading program, BSSD student reading achievement has increased considerably, and several schools have improved their reading test scores by 100%. [Tr. 243-44]

206. In 2006, 46% of the children in the district were proficient in language arts, and 37% of the children were proficient in math. [Ex. 149] By comparison, in 2003, 34% of the students were proficient in language arts and 33% proficient in math. [Ex. 152]

207. In BSSD, 7 out of 15 schools made AYP in 2006. [Tr. 223] Three of those seven schools made AYP under the safe harbor provisions. [Tr. 223] The district as a whole has failed to make Adequate Yearly Progress, and is at the most extreme level of noncompliance -- Level 4, year 2. [Tr. 2413]

208. The district has had a high dropout rate. Approximately 34% of students at BSSD who began ninth grade graduated from high school in 2006. [Ex. 149] This compares to the statewide graduation rate of 55.58% in 2006. [Ex. 156]

209. Kerry Jarrell, the Chief Financial Officer of the Bering Strait School District, also testified at trial. Mr. Jarrell has worked for the district for 21 years.

210. Revenues that Bering Strait School District received in Fiscal Year 2005 are reflected in Exhibit 2107, which is the financial audit for that year and the most recent audit available at the time of trial. In that year, the district received \$38.57 million in non-capital government funds that were available for operating expenses. Of that amount, the district spent \$37.22 million, leaving a surplus of over \$1.3 million that year that the district retained for use in later years. [Ex. 2107 at 14, columns 1 and 3]

211. During the 2004-05 school year, the district budgeted to spend \$16.74 million on general instruction expenses. However, that budget was later modified and only \$15.76 million was spent -- the unspent remainder of nearly \$1 million was saved for future years. [Ex. 2107 at 16, columns 2 and 3] This surplus is part of the over \$1.3 million surplus identified above.

212. BSSD is one of the few rural districts in Alaska to consistently meet the "70/30" state requirement regarding allocation of funds for instructional expenses. [Tr. 154]

213. Dr. Davis' testimony that he and the school board have redirected the district's funds and resources to the classroom is fully supported by the district's financial documentation. That documentation indicates the following:

- In 1996, BSSD had 184 certified staff; in 2005, the district had 204 certified staff – an increase of 20 certified staff. During that same period, the number of students (ADM) was relatively unchanged – 1,679 in 1996 and 1,699 in 2005. [Ex. 2107 at 35070] Based on

these figures, the 2005 overall pupil-teacher ratio in BSSD was approximately one teacher for every eight students. [Cf. Ex. 2384]

- The amount BSSD has devoted to general instruction increased from \$11.94 million in 1996 to over \$20 million in 2005. Likewise, the amount devoted to special education increased from \$1.48 million to \$2.5 million during this same time frame. And the amount spent on support services (defined as counselors, librarians and professional development) nearly doubled during that time frame from \$595,884 to \$1.14 million. The large majority of the support service funds went toward professional development costs associated with the implementation of the “Success for All” reading program. During that same time frame, the total combined cost of district and school administration was actually *reduced* from approximately \$3.4 million to \$2.5 million per year. [Ex. 2107 at 35067]<sup>12</sup>

214. Part of the reason that BSSD’s surplus in FY 2005 was so high was because the State allocated additional funds to public schools late in the fiscal year. With respect to those additional funds, Mr. Jarrell testified that those funds were not spent because “[w]e didn’t simply hire teachers to reduce the pupil-teacher ratio willy-nilly,” and in part because of the problem of committing to additional staff in the face of uncertain future revenues. [Tr. 606, 612]

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<sup>12</sup> None of these figures has been adjusted for inflation.

215. Mr. Jarrell testified as to extensive cuts that had been made to the BSSD's program over the years. For example, he indicated that the number of counselors in the district had been reduced from 12 to 2. [Tr. 430] But based upon this Court's review of the financial and other district information submitted by BSSD, this Court finds that the reduction in those particular personnel was a consequence of the board's intentional redirection of funds into the classroom rather than a result of budget cuts. For example, BSSD staff's proposal to the school board for staffing in 2006 recommended a minor reduction in the hours of several educational aides in the district from the prior year, but also recommended the hiring of three new full time certified teachers – two in Savoonga and one in Golovin. [Otton Depo. ex. 7 at 26255]

216. In recent years, the State has provided BSSD with several new schools. This year the district is receiving an additional three new schools. [Tr. 150]

217. If more resources were made available to BSSD, Dr. Davis would like to add year-round staff so that the entire summer could be used for teacher training. [Tr. 225] But Dr. Davis acknowledged that his view on such a program is not necessarily shared by the school board. [Tr. 300] Currently, BSSD staff starts about one month in advance of the students each fall. Dr. Davis would also like to develop summer programs for the students, supplemental and remedial services for the students, and the district's own mentorship program. [Tr. 170-71, 199]

218. Dr. Davis noted, “Money will allow us to change things, but ... without direction, without purpose ... I’m not in favor of just spending money for spending money’s sake.” [Tr. 177] Dr. Davis opined that many students in poor rural areas in Alaska score poorly on achievement tests because some districts “haven’t effectively directed those resources that we have.” [Tr. 233] He also testified that “[t]here are districts [that] don’t use resources wisely.” [Tr. 232]

219. Within the last five years, BSSD has incorporated distance learning into its student instruction. The district has received over \$7 million in technology funding in the last five years, and its technological capability is excellent. [Tr. 273-75] Through distance learning, BSSD offers math, science and Spanish. Distance learning has reduced travel expenses and students are now able to participate in activities such as the “Battle of the Books” reading competition via videoconferencing. [Tr. 156, 275-76] BSSD also has a student broadcasting team which broadcasts on the web each week. The students have highlighted the Iditarod sled dog race, interviewing mushers and others. [Tr. 276-78; Ex. 2009] BSSD’s website also depicts student activities including students traveling to Fairbanks to participate in the University’s Geophysical Institute. Additionally, the website features student poetry, shop class projects such as kayak building, and cultural activities involving elders teaching students about Yup’ik traditions. [Tr. 281-284; Ex. 2009]

220. All communities within BSSD are accessed by air. BSSD maintains its own airplane, storage facility, pilot and mechanic. [Tr. 149-52] Although disputed to some degree by the State, this Court finds, based on the

district's available revenue, immense size and remote school sites, that the airplane is not an unreasonable use of district funds.

221. BSSD has several sports teams, including cross-country skiing, basketball, wrestling and cross-country running. These teams travel both throughout the district and to other districts by air. [Tr. 285-86]

222. BSSD has three itinerant teachers that provide vocational education in the district. [Otton Depo. ex. 7 at 26258]

223. BSSD has partnered with the other school districts to form NACTEC, a vocational center in Nome. [Tr. 290-92] This program recently received an additional \$3 million appropriation from the State to build dormitories for rural students. [Tr. 526] Among the course offerings is an intensive two-week motor vehicle driver training class. [Otton Depo. at 136]

224. BSSD has implemented a skills camp, which is a week-long intensive focus for those students who have had trouble passing the State's high school graduation qualifying exam. Since the skills camp has been implemented, Dr. Davis indicates that the student pass rate on that exam has increased substantially. [Tr. 294]

225. Dr. Davis testified that in his view, education in the fine arts is not as critical as education in core subjects such as English, math, and science. [Tr. 188-94] With respect to world languages, BSSD schools are teaching Yup'ik language and culture, and many children are already bilingual in Yup'ik and English. [Tr. 194; Ex. 2081 at 5655, 5659] Dr. Davis considers education in other languages to be a lower priority than some other content areas in the Bering

Strait School District, but would like to be able to offer foreign languages to those students who have an interest in it. [Tr. 195] Such an approach appears consistent with the school district's mission statement: "to educate our children to become self-sufficient and responsible citizens through quality programs that express high expectations for all in a safe, supportive and collaborative learning environment that reflects our children's heritage." [Ex. 2007 at 26349]

226. Dr. Davis testified that small schools in Alaska should not be expected to offer all of the courses available in large schools. [Tr. 303] Instead, his position is that "we should offer an adequate education." [Tr. 302]

227. BSSD board member Melvin Otton testified that a small rural school such as Koyuk has its advantages over an urban school such as Anchorage. Because of the considerably lower pupil/teacher ratio, there is the advantage of more interaction with the teacher. Moreover, in his view, there is the advantage of closeness to nature that rural life provides. [Otton Depo. at 131-32]

228. In BSSD, teacher turnover has been reduced significantly in the last several years and is down to 11% district wide. [Tr. 214] The schools in Savoonga and Wales had zero teacher turnover in 2005-2006. [Tr. 253] Additionally, BSSD is able to promptly replace departing staff and has no vacant positions. [Tr. 255] In Dr. Davis' view, teacher retention has improved because teachers have a sense of professional satisfaction as a result of the positive changes at BSSD. [Tr. 255, 262] Dr. Davis testified that money will not inspire a teacher to remain teaching. [Tr. 255] However, Mr. Jarrell, BSSD's chief financial



officer, did note that in his opinion BSSD has the best compensation package for teachers of any rural entity in the state. [Tr. 528]

229. Dr. Davis defines an adequate education as “an education that gives young people the tools to succeed in whatever life they choose.” [Tr. 304] Dr. Davis testified that his own children and many other students attending BSSD are receiving an adequate education, but that is due in part to the supplemental activities and education that these children, including his own, receive from their families. [Tr. 308] Dr. Davis later qualified his testimony by stating that, overall, education within BSSD was not adequate “[b]ased on the evidence of the assessment” -- that is, based on the district’s results in state testing. [Tr. 323] In his view, by the standards required of the Commissioner of Education, “we are not successful; by standards based on where we were, where we’re going, we are successful.” [Tr. 304] He also testified that he “would like to see an early childhood program,” and that the University needs to turn out teachers better prepared to teach in rural Alaska. [Tr. 324-25]

230. School Board member and Plaintiff Melvin Otton testified by deposition in this case. Mr. Otton indicated he has been on the BSSD board for 18 years, with the goal of “improving education for our children.” [Otton Depo. at 12-13] Mr. Otton attributed the improved testing scores at BSSD to a combination of things. He viewed the implementation of the district’s reading program, “Success for All,” as a critical component. And he added “probably one of the biggest factors is the parents’ involvement,” noting that the “Success for All” program requires the children to read to someone at home 20 minutes a

day. [Id. at 36-37] He also attributes the success of Bering Strait to its focus on core subject areas, its reliance on technology and its use of strategic planning.

[Id. at 20, 47-48]

231. When asked why some schools in the BSSD were not showing as much improvement as others, Mr. Otton indicated that some of the reason might be problems in the community, such as use of drugs and alcohol and excessive bingo-playing. [Id. at 59] And some of the reason might be personnel related – some schools might have stronger principals or staffs. [Id. at 50] Mr. Otton added:

And the other thing that probably plays a part is the community as a whole, how does a community view education. And my view – and this is my personal view - is that some of those communities that have low scores, some of the parents are not involved to an extent to where they are ensuring that their child have enough rest, that they are at school constantly, that the child's behavior is conducive to learning. Those type of things. They play a part.

[Otton Depo. at 50] Mr. Otton testified that he felt his children's education at BSSD is adequate. But he added, "to be on a more equitable basis with other students they probably could have used a little more opportunities." In this regard, he proposed a structured music course. [Otton Depo. at 134-35]

232. Dr. Davis has conferred with Commissioner Sampson regarding those schools within BSSD that are not yet demonstrating success. Dr. Davis has asked the Commissioner for assistance: "If you've got an idea on how we can make it work better in this community or that community, I'm open. Let's not wait any longer, you know, partner with me." [Tr. 2361]

233. Dr. Davis has requested specific funds and assistance from the Department which has not been provided. BSSD was not awarded one of the Reading First grants. BSSD was not able to obtain an instructional audit from the Department, even for its schools that had repeatedly failed to make AYP, although BSSD requested it. [Tr. 2403] Given that in some of the BSSD schools, less than 20% of the children are proficient in some subjects, this decision by the State to refuse to provide this assistance is of concern. [Ex. 2387 at 57678-80] But Dr. Davis also acknowledged the ways in which the State has been particularly helpful, including its assistance after the White Mountain fire, its mentorship programs, its development of content and performance standards, and the overall philosophical change that the State EED has developed – which Dr. Davis characterized as a change in working for the school districts, and not the other way around. [Tr. 327]

234. The Plaintiffs have failed to establish by a preponderance of the evidence that the additional services that BSSD seeks to provide to its students could not be provided to those students using the funds that are currently available to the district. Although the district's audited financial statements for several years were submitted as exhibits to this Court, no budget analysis to demonstrate the lack of available funds for the additional services sought was presented. As Mr. Jarrell acknowledged, Alaska law accords to school districts the discretion as to how to spend the revenues it receives. [Tr. 503] Indeed, the testimony indicated that BSSD had substantial unspent funds at the end of the

2005 fiscal year, which presumably could be devoted toward such resources should the district elect to do so.

235. Based on the evidence presented at trial, this court finds that the children in the Bering Strait School District are being accorded a meaningful opportunity to achieve proficiency in reading, writing, math and science, and are also accorded the opportunity for meaningful exposure to the State's other content standards. This is due both to the adequacy of the resources that have been provided to the district and the effective use of those resources that has been made to educate the children that reside there.

***B. Kuspuk School District***

236. The Kuspuk School District is a REAA with ten schools in eight villages serving approximately 414 students. [Ex. 2011 at 58416-22, Ex. 2321] The district is located along the Kuskokwim River in western Alaska, from Stony River to Kalskag. The majority of the population is Yup'ik or Athabascan. [Tr. 1934] The majority of students have limited English proficiency (90%) and are low income (80%). [Tr. 1934]

237. The current superintendent of the school district is Dr. Martin Laster, who testified as a witness at the trial in this case. He was named Superintendent of the Year in Alaska when previously employed at Craig. At the time of trial, Dr. Laster had been at Kuspuk for just one year. [Tr. 1929-30]

238. The evidence at trial demonstrated that student achievement has increased significantly during Dr. Laster's brief tenure as superintendent at Kuspuk.

239. The Kuspuuk School District and six of its schools made adequate yearly progress in the 2005/06 school year, a considerable improvement over the prior year. [Tr. 1937; Ex. 2444 at 11] However, a majority of these schools and the district made AYP through the safe harbor provisions. [Ex. 149] Overall, in 2006, approximately 35% of the children in the district were proficient in language arts and about 26% in math. [Ex. 149] The school in the small village of Red Devil has made AYP, despite its small size. [Tr. 1962; Ex. 2387 at 57682] The performance of small schools can vary greatly from one year to another, and the performance of a few children at such a school can affect whether the school makes AYP. [Tr. 1990; Ex. 2387]

240. In 2005, the Kuspuuk School District received total operating (non-capital) revenues of \$21,758 per student (based on Average Daily Membership) from federal, state, local and other sources. [Ex. 2321]

241. The district has taken considerable steps to integrate technology into its curriculum and instruction. In a technology grant application, the district's then-superintendent noted, "just increasing bandwidth and providing hardware will not magically enhance curriculum and instruction. How the district uses technology in the classroom and trains staff is critical in addressing standards so that our students are successful in the traditional as well as the global society. We must provide high-quality professional development for our teachers." [Ex. 2313 at 56213]

242. The district offers several video teleconference classes, including aviation/ground school, algebra, geometry, newsletter/yearbook, advanced English, and guidance counseling services. [Ex. 2311 at 56210]

243. The school district's web site also indicates that it offers courses in cultural expression and the arts, as well as physical education, science, mathematics, and advanced placement literature, among other courses. [M. Morgan Depo. ex. 3]

244. The Kuspuk School District employs the standards-based model of instruction. The school board actively supports this non-graded standards/mastery based approach to student learning, sometimes called the quality school model, and recruited the current superintendent with that in mind. [Tr. 2291]

245. Dr. Laster testified that many children in the district come to school with limited English proficiency, and speak primarily in Yup'ik -- a language with an oral, not written, tradition. Because of this background, many students come to school with less ability to learn to read and write English than students in many other parts of the state. [Tr. 1936] But Dr. Laster also sees many strengths in the district, noting the strong support from many parents and from the school board. He described the board as "innovative and ... wanting to do whatever it takes to help their children be the best they can be." [Tr. 1935] Further, this Court has reviewed Kuspuk's district and school improvement plans that have been filed with this Court and finds that they, too, demonstrate a clear direction and

motivation to improve student performance with clearly articulated strategies toward that end. [Ex. 2108]

246. Dr. Laster explained the curriculum changes in math he had made based on teacher recommendations during his first year as superintendent. He also insured that the district staff obtained professional development to implement that curriculum. [Tr. 1938] He has strived to realign the district's curriculum to conform to the State's standards. [Tr. 1994] This Court was fully persuaded by Dr. Laster's statement that "we are in good faith really working to try to get those core competencies to students: reading, writing and math. But it's really important to have an interdisciplinary approach; [a]n approach that respects the community that kids come from, the culture that they come from, that engages them in a way that grabs them and has them working on stuff that is really meaningful to them." [Tr. 1975-76]

247. Dr. Laster listed the various teachers he would like to add to the district. These positions included a librarian/reading specialist, more teachers at the middle grade levels, nurse/social worker positions, and a certified specialist in each of the arts, music, and world languages to serve the entire district. [Tr. 1944-45] He acknowledged that there is currently some art and music taught in the villages as part of the cultural learning component of the schools' instruction. [Tr. 2004-05] Dr. Laster testified that with adequate resources, he believes it is a reasonable expectation to achieve 100% proficiency in the KuspuK district by 2014. [Tr. 1983] He added, "Whether it's realistic or not, it is the expectation." [Tr. 1941]

248. Dr. Laster described an adequate education as having two components. First, an adequate education would accord to a student the ability to pass the high school graduation qualifying exam, show proficiency on the Standards Based Assessments, and meet the content standards or graduation requirements. Second, Dr. Laster believes there is a more philosophical component to an adequate education – the ability to be successful in both the traditional and global societies. [Tr. 1955]

249. The Kuspuks school district has about 414 students. A review of Kuspuks website as of September 20, 2006 indicates the following positions are each staffed at the district office:

- Superintendent
- Teacher, SPED
- Family Literacy Director / Teacher, primary
- Vocational Counselor
- Education Support
- Federal and State Programs Director
- Student Services Coordinator
- School Readiness Coordinator
- Director of Special Education
- Media Center Coordinator
- Director of Curriculum and Instruction
- Curriculum Support and Technology Director
- Technology Communications Coordinator
- Community Learning Center Director

[Ex. 2011]

These positions are in addition to the ten other positions identified on the website at the district office for facilities maintenance, business manager, maintenance and support, systems engineer, etc. [Ex. 2011 at 58415-16]

250. The Plaintiffs failed to present any evidence that all of these district-level positions were essential to the operation of the district, such that the



funds that were expended for at least some of these personnel could not be instead directed toward the students' classrooms and the various additional staff that Dr. Laster seeks to hire for the district. [Ex. 185, proposed cost saving measures for the District Office] <sup>13</sup>

251. Testimony was provided about the school in Red Devil, which has 14 students from K through 12, with just one teacher. Dr. Laster testified that three teachers there would be the ideal number to meet all of the students' needs. This Court inquired why there was only one teacher at that site, since the amount of funding received for those 14 students would approximate \$300,000, (14 x \$21,758 per ADM) and the average teacher salary was approximately \$50,000 plus benefits. No clear response was given, other than the lack of certainty in funding had caused the available resources to be directed elsewhere. Certainly, the Plaintiffs' own description of the challenges of educating children at a school as the sole teacher would appear to support directing more of the district's resources away from the district offices and into the school sites. [Ex. 2407 at 7-12]

252. Overall in the district, the pupil/teacher ratio is 13 students for every 1 teacher, but this includes the certified personnel at the district office. [Ex. 2384]

253. A review of Kuspuuk's June 30, 2005 audited financial statements reveals the following:

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<sup>13</sup> The Court notes that Commissioner Sampson testified that "the first thing that happened" when he arrived at the Chugach School District as its superintendent was that he reduced the number of certified staff in the district office from 7 to 2 – "myself and an assistant." [Tr. 2332]

- During FY 2005, the district's net assets increased from \$3.577 million to \$4.142 million. [Ex. 182 at 22994]. Liquid assets increased from \$472,597 to \$1,095,747. [Id. at 23019]
- The "highlights" section of the district's 2005 financial report states: "The overall financial position of the district has greatly improved from the previous year with an increase of fund balance of \$412,691." [Ex. 182 at 22995 (emphasis in original)]
- The district's financial report identified the current financial issues facing the district as (1) maintenance of enrollment; (2) increased cost of health insurance; (3) increased PERS and TRS contributions; and (4) increased costs of fuel. No other budget challenges were identified as necessary to provide for the education of Kuspuk's students. [Ex. 144 at 22995-96]

254. In FY 2005, the statewide average for administration expense per student (ADM) was \$1,167. For Bering Strait, the amount was \$1,423. Certainly one would expect a higher than average administrative expense for that district simply given the logistical challenge of the schools' locations. For Kuspuk, the administration expense per student that year was \$2,587. [Ex. 2381]

255. The Plaintiffs did not present persuasive evidence as to why the Kuspuk School District did not spend some or all of the extra funds it had in 2005 toward the hiring of new teachers or instructional support staff.

256. The Plaintiffs have failed to establish by a preponderance of the evidence that the additional services that Kuspuk seeks to provide to its students

could not be provided to those students using the funds that are currently provided to the district. Although the district's audited financial statements for several years were submitted as exhibits to this Court, no budget analysis to demonstrate the lack of available funds for the additional services sought was presented.

257. The evidence at trial was inconclusive as to whether children within the Kuspuk School District are currently being accorded a meaningful opportunity to receive an education in the State's content and performance standards. While the Plaintiffs have failed to persuade this Court that the resources allocated to this district are insufficient, the evidence at this time is inconclusive as to whether the resources in that district are being adequately directed to student learning so as to accord to the children in that district a meaningful education. The gravamen of this case, as Plaintiffs have expressly asserted, has been about funding. Very limited testimony was presented about Kuspuk's curriculum, its alignment with the State's standards, the professional development available to its staff, the communities' involvement in their schools, and the other components of its educational system. But it does appear that under Dr. Laster's leadership, the district is making significant headway toward providing a meaningful opportunity to learn for the children of this district.

### ***C. Yupiit School District***

258. The Yupiit School District consists of three schools: Akiachak, Tuluksak, and Akiak. Akiachak School has approximately 210 to 215 students from kindergarten through 12<sup>th</sup> grade (K-12). Akiak School has about 100

students K-12; and Tuluksak School has approximately 160 students K-12. [Tr. 1025] Together, the district has about 475 students. Other than the children of teachers, all of the students are classified as Alaska Native and over 80% have limited English proficiency (LEP). Most of the children's first language is Yup'ik. [Tr. 1026-27] The district is in the Kuskokwim River basin in western Alaska.

259. In 2005, the district's overall student/teacher ratio was about 11 to 1. [Ex. 320] During that fiscal year, the district received total operating revenue per student (ADM) of \$22,578. [Ex. 2321]

260. The State has recently provided the Yupiit School District with new schools for each of its sites. Akiachak's new school opened in December 2005. Cynthia Reilly, the district's former business manager, testified that the children take a lot of pride in the new schools, particularly since they had so much less for so long. [Tr. 3536-37]

261. The record in this case includes a video of the new schools. [Ex. 2025] The Tuluksak School is representative. It is bright and airy, and integrates local culture in its design. It has a chemistry lab with extensive supplies in the cupboards, a home economics classroom with a stove and other kitchen equipment, a counselor's office, a music room complete with equipment such as music stands, and a science lab. There is a full size gym, including extensive gym equipment in which a number of children can be seen playing basketball on the video. (Evidently the wrestling mat is being improperly stored because a stand has not been purchased for it, which will diminish its useful life.) There were large bathrooms for the students with modern conveniences. A large

stainless steel commercial kitchen adjoined the lunchroom. There is a computer lab with approximately 20 new computers with flat screen monitors. There appeared to be new large screen televisions on the walls in the classrooms, and many computers are present in the classrooms as well. A note on a blackboard offered piano lessons and gave a phone number. The library appeared quite welcoming with many different types of reading environments – sofas, chairs, etc.<sup>14</sup>

262. During the filming of the video, there was a class going on in the shop room. There is an extensive staff workroom in the school. Some of the rooms were not being used for their intended purposes. For example, evidently the school board might be meeting in the home economics room when it meets in Tuluksak.<sup>15</sup> In contrast to the interior of the school, the playground was in disrepair, with the lone basketball hoop leaning over precariously.

263. A negative consequence of the new schools is that the district's utility bills have substantially increased due to the larger size of the facilities which has been compounded by the increase in cost of fuel itself. [Ex. 197]

264. Yupiit's test scores are the lowest in the state. In 2006, the district failed to make Adequate Yearly Progress for the fifth year in a row. Twenty percent of the students in the district as a whole tested proficient or higher in

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<sup>14</sup> During the filming of the video, it was pointed out that the encyclopedia set was quite dated – from 2000. However, evidence submitted at trial indicated that in 2003, Yupiit had received a grant for library materials, but failed to spend all of the grant within the requisite time, despite repeated notices from the State. As a result, \$68,000 of the grant funds were lost and not used to acquire more library materials at that time. [Prussing Depo. at 34, 39]

<sup>15</sup> But see Slats Depo. ex. 2, which lists courses for home economics, weight lifting/conditioning and health/P.E., among others, as being offered in Akiak.

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language arts: 19% tested proficient or higher in math. The graduation rate for the district that year was 25%. [Ex. 149] However, the scores do show some improvement from prior years. For example, in 2003 less than 15% of the students were proficient in language arts and approximately 7% were proficient in math. [Ex. 2245C]

265. Allen Stockton testified at trial. He is the principal of the Akiachak School. He has been Akiachak's principal for one year; for nine years prior to that he was a certified social studies teacher in Akiachak. [Tr. 1021-22, 1059] Although a new principal, Mr. Stockton chose not to participate in the State's coaching program for new principals. [Tr. 1066]

266. Mr. Stockton testified about the skills he has learned while teaching at Akiachak: "You learn how to change the way you teach from the way you were taught ... The longer you're there, the more you understand where they come from, their history, what the people in that region have been through, what they've experienced. You start to get a small glimpse of where they're coming from." [Tr. 1023]

267. Akiachak's classroom teacher/pupil ratio is 16 to 1. [Tr. 1076-77] In addition to the regular classroom teaching staff, Akiachak also has a counselor specialist with a background in social work and three classroom aides who are Yup'ik and speak the Yup'ik language. The school has a special education teacher, together with three special education aides (19 students are special needs students). [Tr. 1025, 1077-79] Akiachak also has a half-time literacy coordinator who helps in the Yup'ik immersion classroom and with one-on-one

reading instruction. The school also has a guidance counselor with a background in social work who also provides one-on-one counseling to students. When the additional certified staff are considered, the pupil/teacher ratio is approximately 12 to 1. [Ex. 320]

268. Akiachak offers vocational education courses, including carpentry. It also offers geometry and a regular math course to its 8<sup>th</sup> graders. The school is now moving toward an integrated math series, in which all basic math disciplines are offered in four, one year courses. Akiachak has also taught pre-calculus principles and planned to offer advanced placement calculus in 2007. [Tr. 1061-62] Akiachak also offers “Math Lab” for students who are not achieving up to their grade level in math. [Tr. 1063]

269. Akiachak offers study in geography, government, and at least three levels of language arts. There is also a journalism class that includes publication of a monthly paper that is distributed in the community. After-school tutoring recently became available at EED’s insistence after it went to the district in the fall of 2005. [Tr. 1064-65, 1079-80]

270. Akiachak also offers physical education. [Tr. 1065] And the school has a variety of sports teams, including cross-country, wrestling, girls volleyball, boys and girls basketball and Native Youth Olympics. Every sports team travels outside the district to destinations that include Anchorage, Dillingham, Bethel and Bristol Bay. [Tr. 1066-67] Students who want to participate in sports are never turned away. [Tr. 1068]

271. Mr. Stockton testified that in his view, the Akiachak school needs the following additional resources: more training for paraprofessionals, another literacy or reading specialist, and everything “from more custodial time to more training, more aides, more classroom instructors.” [Tr. 1030] He also sees a benefit in having a community liaison to work with families to explain the importance of attending school and state testing. In this regard, he noted, “[s]ome of our parent[s] and grandparents have such a distaste in their mouth from the way the western education system has been presented to them ... they’re not as likely to become involved.” [Tr. 1044] The Yupiit School District provides instruction in arts and music with an emphasis on local arts and dancing. It also has classes in health and nutrition. [Exs. 2115, 2115A; Tr. 1596-97]

272. The new Yupiit schools are wireless and fully equipped with new video conferencing, computer equipment, and high speed internet access. However, Yupiit has chosen not to pursue student courses in distance learning. Mr. Stockton indicated the technology was unreliable. [Tr. 1069, 3543] Cynthia Reilly, the district’s former business manager, testified that many of the teachers took distance delivery courses and that students could have done the same thing, “but ... it just never was emphasized.” [Tr. 3543] As a result, the Yupiit School Board does not have any courses available through distance learning. Art classes are taught by members of the community which has been funded for several years by grant monies. [Tr. 3543-44]



273. The Yukon-Kuskokwim Health Corporation (YKHC) has clinics and social workers in all three Yupiit villages to provide mental health services. YKHC is involved with the schools in areas such as suicide prevention, tobacco use, and other health issues. [Slats Depo. at 55-58]

274. Dr. James Smith, one of the State's experts in this case, testified that he visited the Akiak School on an in-service day, but no organized in-service was occurring, and one teacher was watching tapes of NFL football. [Tr. 2701] But he also testified that he "found each and every one [of the teachers] to be articulate, enthusiastic and motivated to teach the kids at Yupiit." [Tr. 2700]

275. Joe Slats testified by deposition in this case. Mr. Slats resides in Akiachak and is the superintendent of the Yupiit School District. He assumed this position in the fall of 2000.

276. At the time of Mr. Slats' deposition in 2006, his administrative certification from the state had lapsed, and he indicated he needed to take additional coursework before he could renew it. [Slats Depo. at 38-40] There was no indication in the record that any action had been taken by either the district or the State with respect to Mr. Slats' certification status. See AS 14.20.370; 4 AAC 12.325.

277. Mr. Slats indicated that in recent years, staff turnover in the district has been reduced and that the past year the district had to hire the fewest number of replacement teachers in the history of the district. [Slats Depo. at 48]

278. To help new teachers understand the local culture and language, the district offers a University-level course at no cost to all of the teachers on Yup'ik language and culture. [Id. at 50-51]

279. Mr. Slats indicated that the district has six vocational educational teachers. He added, "We do have very fine shop classes at all three sites." [Id. at 72]

280. If provided with additional funding, Mr. Slats indicated that he would first seek to hire highly qualified vocational education teachers and fine arts teachers at each of the three sites. He would also aim to hire a social worker at Tuluksak and a person to address the alternative needs of those students that are not college bound. He would also consider bringing on an itinerant nurse for the schools. Salary increases for current staff would not be a priority, as he believes the current salaries paid by the district are competitive. [Slats Depo. at 109-11]

281. In Mr. Slats' view, "academics [are] not for all students;" he believes the Yupiit schools should offer more than academics. [Slats Depo. at 128-29] He indicated the low test scores of the children attending Yupiit Schools was because "our students are ... not fluent in this language or any language." [Id. at 124]

282. Mr. Slats is considering establishing an alternative program for drop-outs, and was intending to present a proposal on this topic to the school board at its next meeting. [Slats Depo. at 77-80]

283. The district also has a curriculum director who has been working over the past several years to develop age-appropriate culturally relevant materials. [Tr. 1049] However, Cynthia Reilly, the district's former business manager, testified that even though the school board sets the curriculum "it doesn't get really enforced. So I would say that [the curriculum] is kind of set by the teaching staff of the year and their principals at each site." [Tr. 3545]

284. In a survey to staff from November 2005, considerably less than half of the teachers surveyed indicated that the district curriculum contains clearly defined standards, learning objectives, timeframe and pacing guides or suggested and required textbooks and instructional materials. [Prussing Depo. ex. 5 at 54902] Approximately 55% of the teachers indicated that the district's curriculum was not usable or helpful to the teachers in planning their lessons. [Id.] Over 90% of the teachers indicated that the curriculum was not communicated to the children's parents. [Id.]

285. Although the district has failed to meet AYP for many years, Mr. Slats indicated that no new curriculum had been adopted by the board. Akiachak had implemented an alternative governance plan as required by NCLB. He explained this plan as a decision to hire a person who is working on attaining administrative certification from the state, to act as "dean of students" to address student discipline issues. This is planned so that the principal can be "more of an education leader for the teachers and would have more time to work with teachers in classrooms." [Slats Depo. at 147]

286. Cynthia Reilly was called as a witness on behalf of the State. Ms. Reilly was the business manager at Yupiit for approximately five years until June 2006. [Tr. 3520-21]

287. Ms. Reilly testified that in her view, “there were sometimes [funding] decisions made that had other priorities besides the classroom ... Maybe cultural, maybe personal, well-being of the superintendent.” [Tr. 3564] When asked what type of oversight the State had over financial decisions made by the board, Ms. Reilly indicated, “I think they see our budget and they see our financial statements on a month-to-month basis. I don’t believe that they look too closely, that I know of.” [Tr. 3565]

288. A comparison of Yupiit’s operating budget between FY 2004 and FY 2006, demonstrates the following:

- Total revenue over this two-year period increased from \$6.2 million to \$7.48 million -- a total of nearly \$1.5 million -- due primarily to increased funding from the State of Alaska.
- During that time, the amount spent on instruction by the district increased only \$102,000 – from approximately \$2.69 million to \$2.79 million.
- During that same three-year time frame, spending for administration at the school sites decreased about 4.9%.
- Meanwhile, spending at the district office for administration and administration support increased over 37% during that same time period -- from \$448,694 to \$616,656 – an increase of over \$160,000

– an amount considerably greater than the dollar amount increase spent for instruction.<sup>16</sup>

[Ex. 2106]

289. No explanation at trial was provided as to why the additional funds that the district received were directed primarily toward a substantial increase in expenditures at the district administrative offices. Despite the increased funding, the number of teachers in the district decreased from 46 in FY 2004 to 39.5 in FY 2005, while student enrollment increased from 434 to 445 students during that same time. [Ex. 2282]

290. The low level of student achievement at Yupiit is long-standing. In 1991, Yupiit's schoolchildren had a national percentile rank between 3% and 12% in national testing administered at that time. [Ex. 174 at 5302]

291. One of the Plaintiffs' experts, Dr. Ray Barnhardt, a professor at the University of Alaska, has been involved in educational improvement efforts in Yupiit for some time. Dr. Barnhardt testified by deposition about a ten-year study sponsored by the National Science Foundation that resulted in "a full complement of rural school reform initiatives in place [to stimulate] a reconstruction of the role and substance of schooling in rural Alaska." [Ex. 18 at 3] Yupiit was one of the districts that participated in the study, which emphasized the use of culturally responsive educational standards. [Ex. 18 at 4; Barnhardt Depo. ex. 13]

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<sup>16</sup> Dr. Van Mueller, one of the Plaintiffs' experts, testified the reason he focused on the schools and not the district when conducting his curriculum audit is because "the heart of instruction is at the [school] building, not the district office." [Tr. 743]

292. In Dr. Barnhardt's view, there is "every indication that you can provide every bit as good of an educational experience in a small village school as you can in a large urban school. You just have to do it differently, and the problem is how do you get teachers, districts, schools and so on to the point where they do something different?" [Barnhardt Depo. at 33] In his view, a small school "can provide a range of options that have the same long-term effect in terms of students having the opportunity to learn the knowledge and skills that they need to function as adults in whatever arenas they're going to work in." [Id. at 35] He testified that "a basic, adequate curriculum ... could be done in a small school, and it could be done in a way that those students would be every bit as well prepared as students who go to a larger school, they just wouldn't have as many items on the smorgasbord to choose from, just the main difference between the small and large schools." [Id. at 163-64] In his view, the key to success is a "strong principal, effective leadership, involvement of the community ... [and] a major shift in the curriculum." [Id. at 146]

293. That Yupiit's achievement has remained low even after Dr. Barnhardt's ten-year involvement with the school district is evidence of the deep-seated nature of the problems in this district.

294. Under state regulations effectuating NCLB (4 AAC 06.805-899), school districts that do not make adequate yearly progress for several years in a row are required to prepare and submit a district improvement plan to the EED. In late 2005, Yupiit had failed to submit the required plan for over one year, despite repeated requests from EED for the plan. [Tr. 2360]

295. Because the district improvement plan had not been submitted, EED withheld \$670,000 from the district in Title 1 federal funds for several months. These funds were withheld contingent upon Yupiit's filing of an acceptable district improvement plan. [Tr. 2360-65, 3163-73; Ex. 201] Barbara Thompson from EED testified that it was this withholding of funds that finally got the district's attention. [Tr. 3733]

296. In late 2005, EED sent three people to Yupiit to assist the district in formulating its improvement plan. In addition, two EED staff went at the same time to conduct monitoring of NCLB and federal grant compliance – a monitoring visit that is scheduled for all districts at least once every five years. [Prussing Depo. at 130; Tr. 1070-72, 2361-65, 3163; McKeown Depo. at 82-86]

297. Gary Whiteley, an independent consultant, headed the team from EED that went to Yupiit. Mr. Whiteley testified that on the first day he met with Yupiit staff to review their curriculum. Based on that review, he determined that the district had “a wide range of partially implemented programs ... [t]here wasn't a particular level of coherence.” [Tr. 3168] Mr. Whiteley testified that he told Mr. Slats that the district was a “mile wide and an inch deep. You have so many initiatives and so many things going on that I think you need to decide what you're not going to do.” [Tr. 3170] After that first day, Mr. Whiteley then worked with Assistant Superintendent Diane George to develop the district's improvement plan – Mr. Slats evidently did not participate. [Tr. 3171]

298. Mr. Whiteley's role at Yupiit did not include a review of the district's finances. Mr. Whiteley testified that the educators in Yupiit did not raise the issue

of money or the need for more resources with him at all during the time he spent in the district facilitating the development of the district's improvement plan. [Tr. 3178]

299. At trial, when asked whether more money would help Yupiit, Mr. Whiteley testified:

I think money can always help, but I think in Yupiit's situation I think more money might exacerbate until they got focused. I think they might develop and acquire things that still might lead to incoherence. So I think until they take some measures to really figure out what they're going to do, how they're going to do it and how they plan to measure it, I would be concerned, that I don't believe money would fix the issue as it stands.

[Tr. 3172]

300. Stacy McKeown from EED also went to Yupiit at that time. She described her purpose as "just [to] get everyone in alignment between their schools and with the district, and to get them to start thinking about what data they needed to collect in order to guide their instruction ... So that's basically what we spent the majority of our time out there doing, was just talking about how you use data to drive your instruction." [McKeown Depo. at 85-86]

301. Based on her involvement with the Yupiit School District, Ms. McKeown summarized her understanding of Yupiit's curriculum as follows:

Yupiit doesn't have an adopted curriculum ... because the curriculum that they use, it's called Guided Reading. That's what they use out in Yupiit, and it is sort of a teacher-directed methodology. ... And so with Guided Reading, when you have really at-risk kids, it doesn't quite meet their needs all the time, because it's not quite systematic and explicit enough for students who are really struggling. ... Like, for instance, in Guided Reading, if you are working with a struggling reader, you sort of -- the teacher leaves it up to the kid to kind of figure out -- let's say they come across an unknown word. And they might say something



like, “Well can you look at the picture, or can you think of what the word might be” ... Whereas, with struggling readers, as I mentioned earlier, you need to be very systematic and explicit. And you need to say, “That word is garage. What is the word garage? Okay. Go back to the beginning of the sentence and read the whole sentence again. So because Guided Reading doesn’t necessarily address all the needs of those more struggling readers, we suggested some supplemental and intervention programs. We actually bought them some supplemental and intervention programs.

[McKeown Depo. at 92]

302. The District Improvement Plan was completed with the EED’s assistance on November 1, 2005. Review of that plan demonstrates that at least as of that time, Yupiit did not have a reading curriculum in place in its classrooms, or at least a reading curriculum that is “grounded in scientifically-based research.” 4 AAC 06.840(k)(1)(A). The district’s improvement plan that was drafted with EED’s assistance simply recognizes that “[t]he National Reading Panel endorses implementation of a comprehensive and balanced literary program for student K-6.” The plan then states “[t]he district is developing a program.” [Ex. 2423 at 58652] <sup>17</sup>

303. In FY 2005, the Yupiit School District received approximately \$3,612,480 to educate the children at Tuluksak (160 students x \$22,578). At about that time, 15% of the children at that school were proficient in language arts, and 21% were proficient in math. [Ex. 155] Tuluksak’s school improvement plan, drafted with EED’s assistance, budgeted approximately \$16,000 -- less than ½ of one percent of those revenues -- toward improving their children’s proficiency in language arts and math. The plan included \$7,500 for textbook

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<sup>17</sup> One example of a detailed District Improvement Plan with concrete steps for improvement is from Bering Strait at Exhibit 2432.

replacement, \$3,500 for a consultant, and \$3,500 for 2 teachers to attend an unspecified national conference. [Ex. 2395 at 36028]

304. The improvement plans also required that the three school sites conduct weekly meetings and submit the logs of those meetings to the department. The schools were advised on the use of formative assessments, use of constant monitoring of student progress, and adapting instruction to conform to what is working in the classroom. The weekly meetings were for teachers to discuss the results of these new practices. [McKeown Depo. at 82-95; Tr. 3167-68, 3171-72]

305. Mr. Slats was not supportive of the weekly meetings of teachers and staff that the State required in early 2006. He stated, "I have concerns about that it is taking away from the freedom of the teachers to teach a course. Basically, you're taking the freedom of the teachers and restricting them to the data." [Slats Depo. at 116]

306. Ms. Reilly testified that the State's intervention was quite helpful in two of the three schools within the district. In her view, "there's the need to hold [the district] accountable or ... you need to meet this benchmark. There are some very good teachers out there who really want the best for their kids." [Tr. 3563-64]

307. EED has continued to monitor the Yupiit School District from Juneau. [Tr. 2401] EED sent additional personnel to Yupiit for four days in January 2006 to instruct teachers and principals how to obtain data from student testing to assist in developing instruction. [McKeown Depo. at 91-92] In addition,

EED has done approximately three audio conferences with all three sites since November 2005.

308. Ms. McKeown also indicates that she has been having bi-weekly contact with the literacy leader at the Akiak school in Yupiit, “talking to her about reading and literacy in her school, and what are some things she can do to improve.” [McKeown Depo. at 94]

309. In the fall of 2006, EED conducted an instructional audit process at Yupiit, which is a detailed on-site review of the school district’s educational processes. [Tr. 2402, 2883-92]

310. When asked what measures could be taken for the Yupiit school district, Mr. Whiteley indicated there needed to be effort both in what he termed the district’s “internal capacity” and also external measures. [Tr. 3176] When asked to identify what external measures were appropriate, he indicated, “withholding funds, asking for an improvement plan, going and visiting, having curriculum teams maybe support” the district. [Tr. 3176] He acknowledged that there are two components to effective educational finance: in addition to adequate resources, there has to be adequate oversight and accountability to make sure that a district is working effectively. [Tr. 3181] Mr. Whitely testified that he was unaware of any oversight of the district’s fiscal decisions, other than auditing requirements. [Tr. 3203-04] But in his view, “what’s more important would be curriculum and program oversight than actually the finances.” [Tr. 3204]

311. With respect to EED’s visit to Yupiit in the fall of 2005, Superintendent Slats testified that he believed that it improved proficiency scores

in English reading and writing, and math. But in his view that is not demonstrative of a "better education." [Slats Depo. at 155] Instead, he testified, "when our students are not going to be afforded the opportunity to learn more about their language and culture and when our students are being encouraged to lose their language, when our students are going to be missing out on what they could learn about their language and culture ... It's the whole idea behind the No Child Left Behind Act. ... What it's doing is that it's taking away our opportunity to teach the immersion program and the other Yup'ik language and culture focus." [Slats Depo. at 155-56]

312. The Plaintiffs have failed to establish by a preponderance of the evidence that the additional services that Yupiit seeks to provide to its students could not be provided to those students through redirection of the funds that are currently provided to the district. Although the district's audited financial statements for several years were submitted as exhibits to this Court, the Plaintiffs did not present a budget analysis to demonstrate the lack of available funds for the additional services sought.

313. School officials indicated they would use extra money to hire more vocational, art, and music teachers. But it is not vocational, art, or music teachers of which Yupiit students are in desperate need at this time. Rather, this Court finds by a preponderance of the evidence that it is a structured basic curriculum that is lacking in this district that would accord to these students the opportunity to learn how to read and write in English and understand basic math. Although several witnesses testified as to the many dedicated and well-

intentioned teachers at Yupiit, and this Court has found by a preponderance of the evidence that the district is provided with sufficient resources to meet these basic educational needs, the majority of the children at Yupiit are not being provided with the opportunity to acquire the basic tools they need to succeed in both traditional and global societies.

#### ***IV. Facts about Several Non-Plaintiff School Districts***

##### ***A. Fairbanks North Star Borough School District***

314. Fairbanks North Star Borough (FNSB) has approximately 14,600 students and 34 school sites including four high schools, four middle schools, one junior-senior high, 19 elementary schools, and three charter schools. Of the total student population, 35% is eligible for Title 1 federal funding, 11% is limited English proficient, and there are approximately 50 different language backgrounds. [Tr. 3434-35] FNSB's largest school has 1,302 students and its smallest has 98. [Tr. 3434-36] Ninety-three percent of the teachers are highly qualified under NCLB. The total revenues from all sources received by the district on a per student basis are \$9,769 per year. [Tr. 3436]

315. FNSB offers a large variety of classes, included advanced placement classes. The district also offers fine arts courses, including music and art. When a school is too small for a single fine arts teacher, the district has worked to develop shared programs such as "art liaisons." These are non-art teachers teaching art to students by presenting art lessons prepared by certified art teachers. [Tr. 3438-39] FNSB offers elements of geometry every year to

students beginning in kindergarten and running through twelfth grade. [Tr. 3440-48] In addition to the core subjects, the district also offers vocational education courses and specialized reading courses. [Tr. 3448-50]

316. Dr. Ann Shortt was called as a witness by the State to testify in this case. Dr. Shortt has been the superintendent of FNSB for five years. Prior to that she had been the assistant superintendent for three years. [Tr. 3430-32]

317. Dr. Shortt testified that there is no way that all of the students in the FNSB will be proficient by 2014, and that more money would not change her view. [Tr. 3455-56]

318. FNSB's pupil-teacher ratio is considerably higher than the Plaintiff school districts, averaging between 23 and 26 students for each teacher. Dr. Shortt testified that this was an intentional decision made by the local school board, because the higher ratio has allowed the district to offer more programs than they otherwise would have been able to offer to its students. [Tr. 3458-59]

319. Dr. Shortt believes that local control is extremely important. She believes it allows a district to offer the types of programs and services best suited for its students. [Tr. 3471-72]

320. FNSB did not make AYP because of certain subgroups scores, including limited English proficient students and students with disabilities. Alaska Native and American Indian students in this district did make AYP in 2005-06 in both language arts and math. The district as a whole scored 82% proficient in language arts and 70% in math. Alaska Native students scored 69% and 56% in those areas, respectively. [Ex. 149] FNSB has closed the achievement gap

between Alaska Native American female elementary students and Caucasian students. [Tr. 3450-51]

321. A preponderance of the evidence at trial demonstrated that the students within FNSB are being accorded a meaningful opportunity to achieve proficiency in reading, writing, math and science, and are also accorded the opportunity for meaningful exposure to all of the State's other content standards.

***B. Unalaska School District***

322. Unalaska is located 900 miles out on the Aleutian chain. The Unalaska School District has two schools: one with approximately 150 students in kindergarten through fourth grade and one with approximately 250 students from fifth through twelfth grade. It also offers a locally-funded pre-K program of about 50 to 60 children, and provides scholarships to low income children for that program.

323. The district is similar in size to both the Kuspuk and Yupiit School Districts, with about 400 students. However, unlike those two Plaintiff districts, Unalaska's two school sites are in the same community.

324. Total funding per pupil for Unalaska was approximately \$13,000 in 2005. This includes local, state and federal contributions. [Tr. 3487]

325. The district has a total of 31 teachers for its approximate 400 students from K through 12, which results in a pupil/teacher ratio of about 13 to 1. [Tr. 3488-91] In addition, there are approximately 10 classroom aides. [Id.]

326. The district has set up a dual credit program with the University of Alaska to enable students to obtain college credit while in high school. It also

offers all core subjects, including biology, chemistry, physics, statistics, geometry, trigonometry, and calculus. Unalaska also has a band and offers several art classes. [Tr. 3490-97; Ex. 2021]

327. The School District's superintendent, Darrell Sanborn, was called as a witness for the State in this case. Mr. Sanborn has been the superintendent of the Unalaska City Schools for seven years and was recognized in 2006 as the Superintendent of the Year. [Tr. 3480-82]

328. Mr. Sanborn personally counsels any sophomore who does not pass the high school graduate exam during that year, and formulates each such student's plan of study so as to maximize that student's chance of success on the exam. Last year, 100% of his senior students graduated. He also makes lists of every student in the district who has tested below proficient and reviews that information with the child's teacher so as to best structure a plan for each child that is designed to achieve proficiency. [Tr. 3505]

329. Unalaska made AYP in 2006. For the district as a whole, 88% of the students were proficient in language arts and 78% were proficient in math. [Ex. 149]

330. Mr. Sanborn testified that the education offered to children by the Unalaska School District is adequate – indeed, he indicated he was very proud of the education offered in the district.

331. A preponderance of the evidence at trial demonstrated that the students within the Unalaska School District are being accorded a meaningful opportunity to achieve proficiency in reading, writing, math and science, and are



also accorded the opportunity for meaningful exposure to all of the State's other content standards.

***C. Kodiak Island Borough School District***

332. The Kodiak Island Borough School District (KIBSD) has up to 15 schools in nine communities. There are six schools in Kodiak. Some of the small communities' school populations, particularly two logging camps, periodically fall below ten and then those schools are closed. [Tr. 3072-73] KIBSD serves approximately 2,679 students.

333. KIBSD receives revenue of approximately \$11,000 per student per year. [Tr. 3073] Of the communities outside Kodiak, all but one are accessible only by air or boat. [Tr. 3072]

334. Superintendent Betty Walters was called to testify for the State in this case. In her testimony, she explained how in the smaller schools within the district, a change in status of a single child can affect whether the school will meet AYP. For example, a high school student who decides to take a semester off may be counted as a drop out even though the student later returns to school. Nonetheless, some of Kodiak's village schools have consistently made AYP. [Tr. 3085]

335. KIBSD adapts the delivery of courses and experiences to its schools' circumstances. For example, some courses are delivered by correspondence or video-conferencing to remote areas and some by itinerant teachers. These course include world languages, sciences and the arts. [Tr. 3119-21]

336. KIBSD has found the State's education resources very helpful, including the mentoring program, special education monitoring and mediation, staff development, and curriculum review. [Tr. 3093-97]

337. KIBSD did not meet AYP in 2006, solely because of the low score of students with disabilities. [Ex. 149] For the district as a whole, 84% of the students were proficient in language arts and 70% were proficient in math. For Alaska Native students, the percentages were 73% in language arts and 57% in math. [Id.]

338. Superintendent Walters testified that she believed the education offered to children in the Kodiak Island Borough School District was adequate.

339. A preponderance of the evidence at trial demonstrated that the students within the Kodiak Island Borough School District are being accorded a meaningful opportunity to achieve proficiency in reading, writing, math and science, and the opportunity for meaningful exposure to all of the State's other content standards.

#### ***D. Other Non-Plaintiff School Districts***

340. Some evidence about several other non-plaintiff districts is in the record, from which the Court makes the following findings:

##### ***Chugach School District***

341. Chugach School District is a REAA located on Prince William Sound.

342. The current Commissioner of Education, Roger Sampson, was the superintendent of Chugach School District in the 1990's. While there, he

successfully implemented a standards-based approach to education that has since been adopted in other districts. This approach was referred to during the case as the “Chugach model” or “standards-based model.” [Tr. 2336]

343. While at Chugach, Commissioner Sampson was very successful in improving student achievement for Chugach – its test scores rose significantly. [Tr. 2343] In 2001, Chugach received the Malcolm Baldrige Quality Award for its achievements. [Tr. 2346]

344. Chugach is a relatively small school district. It has appeared on some charts introduced in evidence in this case as one of the highest funded districts in the State. [Ex. 43 at 3] This is because Chugach receives many grants for which it is a conduit – the grants are distributed to other districts. [Tr. 2344]

***Lower Yukon School District***

345. The Lower Yukon School District is one of the six districts in the state at Level 4, year 2 under the State’s AYP accountability system. As a result of this status, EED sent a team to this district in the fall of 2006 to perform an instructional audit. [Tr. 2892]

***Annette Island School District.***

346. The Annette Island School District is located in Metlakatla in Southeast Alaska. The population is almost 100% Alaska Native. [Tr. 2322-23] In the late 1970’s, the children in the Annette Island School District were generally performing in approximately the 30<sup>th</sup> to 40<sup>th</sup> percentile on nationally-normed assessments. [Tr. 2326] In 2006, Annette Island made AYP. In the

district as a whole, 74% of the students were proficient in language arts and 65% were proficient in math. For Alaska Natives, the scores were slightly higher – 75% proficient in language arts and 66% in math. [Ex. 149]

## ***V. Plaintiffs' Experts***

347. The Plaintiffs presented the testimony of several experts and submitted the reports that they had prepared, as to which the Court makes the following findings:

### ***A. Mueller and M. Smith's Curriculum Audit***

348. Van Mueller, Ph.D. and MaryJo Smith, Ph.D. presented to the Court what they termed a "curriculum audit."

349. Dr. Mueller has a doctorate in Education Administration, and was a professor in Educational Policy and Administration at the University of Minnesota until receiving emeritus status there in 1997. [Ex. 3 at 839-840]

350. Dr. Smith has a doctorate in Philosophy in Educational Psychology – Psychological Foundations, with an emphasis in Statistics, Measurement and Evaluation. [Ex. 3 at 866-871]

351. To prepare the curriculum audit, Drs. Mueller and Smith surveyed 28 school districts in Alaska about their curricula. They also surveyed 26 districts regarding projected expenses; the result of those surveys was called a "costing-out" survey. [Ex. 3 at 714; Tr. 1121, 1123]

352. The curriculum audit was intended to allow “the authors to assess the breadth and depth of the curriculum offered at the building level” in Alaska’s schools. [Ex. 3 at 367]

353. The testimony at trial regarding the curriculum audit revealed numerous deficiencies in the research methodology that was used. Among these deficiencies were the following:

354. The assessment of the secondary curriculum was based solely on “courses available.” [Ex. 3 at 762] For example, specific math courses such as geometry and trigonometry were each listed on the survey form, and the respondent was instructed to indicate if that specific course was taught. However, many districts that submitted responses do not have specific “courses” with labels such as “geometry,” but instead provide curriculum in “levels,” such as English 1 or Math 4. Some districts in Alaska follow what is sometimes referred to as the “Chugach model,” in which subjects are not taught according to a student’s age or grade level, but rather according to the student’s skill or proficiency. Drs. Mueller and Smith were not aware of this, and the survey was not designed to include this aspect of education in Alaska. [Tr. 868, 1323-26] Thus, when the survey indicates that a certain percent of the secondary schools do not teach geometry, it means only that those schools do not have a course labeled “geometry.” [Tr. 973-74] No effort was made to determine the schools that actually taught geometry concepts to students. [Tr. 732-33] Dr. Mueller testified: “We could’ve ... listed a whole group of mathematical principles and simply asked people to tell us where they taught them, but that was a different

study for a different purpose, and it did not meet our needs. It is possible to determine that, but that wasn't part of what ... we were attempting to accomplish." [Tr. 974]

355. The survey did not attempt to determine if there were students at a school who were ready for and interested in a class that was identified as not being taught. For example, the study indicates that "calculus was **not** taught in 78% of the secondary schools." [Ex. 3 at 739 (emphasis in original)] But there was evidently no effort made to determine whether there were any students at these schools that sought to take calculus but could not do so because it was not available for them. This is particularly problematic given that 25% of the responding schools had fewer than 20 students, and at least one junior high school was included within the secondary schools. [Tr. 1181, 1417; Ex. 2441]

356. The survey asked school districts to identify students who were enrolled in correspondence courses through Alyeska Central Schools or enrolled in the Cyber Schools. [Ex. 3 at 766] It did not ask about the other forms of distance learning available in the state. Dr. Mueller testified that they were not fully aware of the other available correspondence and distance learning options. [Tr. 883] The survey also did not address other alternative delivery methods such as itinerant teachers or short term intensive learning experiences. [Tr. 1243]

357. At the elementary level, the survey respondents were asked to identify "curricular areas" that were taught. Ninety-three percent of the respondents indicated that they taught reading. When asked whether the other 7% of schools were teaching reading, Dr. Mueller responded, "we don't speak to

the other 7%. This statement stands on its own.” [Tr. 885] As Dr. Mueller acknowledged, the only way to really determine what was being taught would be to look at “the course outlines, the detailed subjects, the materials being used” -- an approach that was not done in this survey. [Tr. 893]

358. The “costing-out” study looked at the staffing requirements necessary for providing a diverse curriculum using a conventional delivery system model – “where we have teachers in front of students in classrooms.” [Tr. 941]

359. Although the costing-out study used a conventional delivery system model, Dr. Mueller testified, “We don’t think the conventional model of delivering schooling is at all appropriate for ... many of the smaller districts in Alaska.” [Tr. 949]

360. Dr. Mueller acknowledged that using Mueller and Smith’s costing-out model for the Skagway school would result in over 50 teachers being necessary for only 110 students. [Tr. 930-41] Yet, Skagway was determined by the Plaintiffs to be among the most successful schools in the state with its existing number of teachers. [Ex. 14; Tr. 943]

361. A substantial majority of the districts that Drs. Mueller and Smith selected for inclusion in the survey were members of Plaintiff CEAAC. Dr. Mueller testified this was intended “to show that there were disproportionate numbers of inequities in student outcomes and opportunities to learn in those CEAAC districts.” [Tr. 768-70, 975]

362. Superintendents chose which schools to include in the survey. The intent of Drs. Mueller and Smith was that superintendents would pick one high performing and one low performing school. However, apart from their selection of schools in Anchorage, they made no attempt to determine whether the schools chosen had been accurately selected or whether they were representative of Alaska schools in general. [Tr. 781-82] Except for about four superintendents who met directly with Dr. Smith, representatives of Plaintiffs NEA-Alaska and CEAAC contacted the districts and provided them with the surveys and instructions on how to fill out the survey. [Tr. 794, 842] The survey contained few directions and key terms were not defined. [Tr. 843-44] According to Dr. Mueller, respondents “freelanced the directions.” [Tr. 814]

363. District responses to the survey were inconsistent. For example, two districts submitted a combined response for all their schools -- 9 schools in one instance and 14 in the other. [Tr. 809-10 (Southeast Island District-9 schools), 814-16 (Lake Peninsula District-14 schools)] There were at least three different versions of the survey. [Tr. 856-61] But Drs. Mueller and Smith did not attempt to standardize the responses.

364. There was no attempt made to determine the course content when a respondent listed a course as “other English” or “other Math.” Instead, the survey results only report whether a class with a given label was offered. [Tr. 1265-78, 1306-08, 1325] Moreover, although Drs. Mueller and Smith were aware that a common practice in rural secondary schools is to rotate the class



offerings each year, they do not explain this practice in their report, and were inconsistent in how they reported it. [Tr. 1195, 1295-1301]

365. The tabulation of the results of the survey in both the initial report and at trial was inconsistent when the respondents had filled in “N/A” or left an answer blank. [Tr. 1270-77, 1309-12, 1385]<sup>18</sup>

366. Whether some schools do not offer geometry was an important evidentiary point in this case. Drs. Mueller and Smith’s expert report claimed that 24% of the secondary schools in their study did not teach geometry. On cross-examination, however, Dr. Smith admitted that the surveys indicated that only 3 schools out of 49 reported that they did not teach geometry. [Tr. 1384-85] Those 3 schools were each very small -- with 9, 19, and 12 secondary students. [Tr. 1378-82] And there was no effort made to discern the readiness of children at these schools for geometry or any review of the actual math curricular offerings at these schools.

367. This Court specifically finds that Plaintiffs have failed to prove by a preponderance of the evidence the allegation in Paragraph 54(d) of the Second Amended Complaint that “26% of secondary schools did not offer courses in geometry.” Moreover, this allegation has also not been proven even if amended as suggested by the Plaintiffs to mean 26% of a representative survey of secondary schools.

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<sup>18</sup> Dr. M. Smith testified that she should have had a separate scoring for responses marked “N/A,” rather than treating them inconsistently. [Tr. 1311] Dr. Mueller was emphatic that: “N/A” meant “no,” despite written instructions on the audit form asking only about courses that were “applicable” to the school. [Tr. 910-18]

368. In the course of her testimony at trial, Dr. Smith admitted that there were inconsistencies in how she had reported the data in the report. On re-direct examination, Dr. Smith testified that the percentage of courses “not taught” as reported in the curriculum audit had an expected error rate of plus or minus 20%, which was designed to account for any inconsistency. [Tr. 1385, 1424-26]

369. Based on all the evidence presented to this Court at trial, this Court finds that simply counting up the courses that are offered at one particular time from a specific list of courses that has been prepared by the surveyor is an inappropriate and inaccurate method by which to assess the educational opportunities available to children, and particularly those children that attend very small schools.

370. For all these reasons, the Court does not accord any weight to the curriculum audit, the costing-out study, or the conclusions drawn from those studies. [Ex. 3, Appendices C, E and applicable portions of the Executive Summary at 363-383] Moreover, although the underlying curriculum audit responses are part of the record, when these surveys are viewed separately from the expert report, they are hearsay, and will not be relied upon to support a finding of fact. [Exs. 2030 – 2100] In light of this finding, the State’s motion to strike these portions of the experts’ report pursuant to the Daubert/Coon standard is moot.

***B. Linda Darling-Hammond***

371. Dr. Darling-Hammond is a highly respected educator at Stanford University in the areas of teacher education, school reform, research methods, and curriculum. [Darling-Hammond Depo. at 6]

372. Dr. Darling Hammond reviewed Alaska's content standards and concluded that they are "appropriate in their breadth and depth." [Ex. 221 at 2] Likewise, she concluded that Alaska's performance standards "are appropriate definitions of what students should learn at each grade level in reading, writing, mathematics and science to master the Alaska standards." [*Id.* at 3]

373. Dr. Darling-Hammond testified that schools in Alaska are not meeting the State's content and performance standards because they are not teaching certain curricula (and therefore by implication school children in Alaska do not have the opportunity to meet those standards). Yet Dr. Darling-Hammond was careful to point out that her opinion was based on the "curriculum audit" by Mueller and Smith. [Darling-Hammond Depo. at 54-56, 107-09] Because this Court has accorded no weight to the results reported in the Mueller and Smith curriculum audit, it accords little weight to Dr. Darling-Hammond's opinions to the extent those opinions are based on that audit.

374. Dr. Darling-Hammond also testified that schools in Alaska are not meeting the State's content and performance standards because of a perceived lack of trained librarians at each school. Again, because Dr. Darling-Hammond stated that her opinion was based on the curriculum audit, her opinion can be accorded little weight. [Darling-Hammond Depo. at 57] As noted elsewhere in

these findings, other evidence presented to this court indicates that EED has provided library support to schools without librarians. And, while school librarians may be quite helpful in a school,<sup>19</sup> the Plaintiffs have not established by a preponderance of the evidence that a school librarian at every school site is of such critical importance to the maintenance of a school so as to be mandated by the Education Clause of the Alaska State Constitution.

375. Dr. Darling-Hammond's report also addresses teacher salaries, specifically in REAAs. However, this court found more persuasive on this issue the testimony of the personnel from the Plaintiff school districts, who consistently testified they believed their current salaries to teachers were quite competitive, and expressed a desire to hire *additional* staff at current salary levels, rather than increasing the salaries of existing staff.

376. Dr. Darling-Hammond persuasively testified that teacher quality impacts student performance, and "that that effect is actually typically stronger for the students with the greatest number of educational needs." [Darling-Hammond Depo. at 65]

### ***C. Mueller and Smith's School Site Survey***

377. Dr. Mueller and Dr. Smith also prepared a report regarding their school site visits in 2005. [Ex. 6] This report appears to simply restate the comments from interviewees. For example, the report states that "[t]he school has a difficult time bringing teachers into the village because the village housing is substandard and very expensive." [Ex. 6 at A-6] The basis for this apparent allegation of fact or expert opinion, however, was not actual investigation by an

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<sup>19</sup> See Ex. 356.

expert, but rather an unconfirmed and casual comment made by an unknown teacher. [Tr. 1395] This court was presented with substantial direct evidence about each of the Plaintiff school districts from such sources as school staff, EED personnel, school district documentation, and EED data and other records. The court finds the information from those direct sources to be considerably more reliable, particularly as the court had the benefit to consider any cross-examination presented with respect to that evidence. Moreover, the concerns that this court identified with respect to the curriculum audit prepared by Drs. Mueller and Smith create a considerable degree of skepticism by this Court with respect to these experts' work in other areas. Accordingly, the Court has accorded no weight to Drs. Smith and Mueller's Site Visit Report.

***D. Mueller's Paired District Study***

378. Over the State's objection at trial, the Court admitted a pre-litigation study conducted by Dr. Mueller and a colleague who did not testify. [Ex. 1] Very little testimony was received on this study, and it does not appear that it was relied upon in any significant way by Dr. Mueller or Dr. Smith in reaching their conclusions in this case.

379. The information the districts reported on in the study is from 1997 or earlier, and is therefore of marginal relevance to this case, which is assessing the constitutionality of the education provided at this time. [Ex. 1]

380. The pairs of schools that are compared in the study are dissimilar. For example, two large high schools in Fairbanks North Star Borough School District are compared with a small 7-12 school in Southwest Region REAA but

the schools are very different in demographics, size, location and other variables. [Ex. 1 at 16213].

381. The purpose of the paired district study was a litigation feasibility study for Plaintiff CEAAC. [Tr. 685]

382. While most components of the paired-study were not helpful to the issues before the court at this time, and were not relied upon by this Court in making its findings and conclusions, the report does contain a discussion on curriculum standards that this Court found to warrant consideration in the context of this litigation:

The state has a responsibility to guarantee each student access to a commonly-offered instructional program. Local districts should have responsibility for deciding what to offer *beyond* the state's requirements, but the state must provide an adequate instructional program to all students ...

Thus, state-directed inputs (a common curriculum) and assessment of outputs are required to insure that each student achieves at the minimum acceptable level.

[Ex. 1 at 16136-37, (emphasis in original)]

#### ***E. Richard Salmon's Analysis of Alaska's School Finance***

383. Dr. Richard Salmon also testified on behalf of the Plaintiffs in this litigation. Dr. Salmon is a professor in the Department of Educational Leadership and Policy Studies at the Virginia Polytechnic Institute and State University. He has a doctorate degree in Educational Administration, and has been active as a consultant in school funding issues throughout the nation. [Ex. 3 at 844-847; Tr. 1621]

384. Dr. Salmon, together with Nat Cole, prepared a feasibility study on the potential for school funding litigation in Alaska that was admitted into evidence. In that review of Alaska's school finance system he concluded, "unfortunately, per pupil ... expenditures are higher among those districts with high percentages of Alaskan Native children. This is the fundamental challenge that this case will present to the Plaintiffs' attorneys and experts." [Ex. 2 at 16485]

385. Consistent with that fiscal reality, Dr. Salmon acknowledged that in Alaska, "The kids that are the poorest receive the most money on a per pupil basis." [Tr. 1717] The question Dr. Salmon's report poses is "whether Alaska has **sufficiently** recognized the variance in educational needs of pupils who attend its public schools?" [Ex. 3 at 452 (emphasis in original)]

386. Dr. Salmon was forthright in his testimony to this Court when he acknowledged that in his view, there are no states that adequately fund education for poor children. [Tr. 1712]

387. Dr. Salmon's report is comprised of six chapters. [Ex. 3, Appendix B] The first four chapters present a comparative analysis of Alaska's school districts, focusing largely on funding and to a lesser extent on demographic differences among districts. Chapter V of his report is an adequacy study, and Chapter VI presents what he terms "Fiscal Equity and Wealth Relationship Statistics." [Ex. 3 at 443]

388. The information presented in Chapters I-IV is grouped by differences among school district type. The report and testimony examine the

statistics in three different ways: by Average Daily Membership (“ADM”), by “adjusted ADM,” and by “weighted adjusted ADM.”

389. Average Daily Membership is a statutory term which means “the aggregate number of full-time equivalent students enrolled in a school district” during a designated student count period. AS 14.17.990.

390. “Adjusted ADM” is the ADM adjusted for local contribution and multiplied by the factors that the State uses to allocate education funding to school districts under AS 14.17: school size factor, district cost factor, special needs factor, correspondence students, and intensive students.<sup>20</sup> See AS 14.17.410(b)(1). Dividing total state and local funding by adjusted ADM essentially reverse engineers the State’s allocation formula.

391. “Weighted adjusted ADM” is not a term used or defined under Alaska law. Under this approach, Dr. Salmon added an additional weight for at-risk children. [Tr. 1652] “Weighted adjusted ADM” per Dr. Salmon adds one child to the adjusted ADM for every child in a school district who is eligible for free and reduced lunch. [Tr. 1652-54, 1733] It is Dr. Salmon’s term, although he did not conduct any research into how much it costs to educate an at-risk child. [Tr. 1733] He did note, however, that “[m]any states across the United States now and particularly since the passage of No Child Left Behind are weighting youngsters or adding additional money in one way or another for at-risk children.” [Tr. 1652]

392. Dr. Salmon testified that Alaska’s current system of educational financing discriminates against REAAs. [Tr. 1713] Yet Dr. Salmon’s charts

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<sup>20</sup> See AS 14.17.410.



demonstrate that under the existing funding formula in Alaska, in FY 2002 REAAs received the most revenue per student from all sources when compared to boroughs and cities within the state when computed by ADM. [Ex. 3 at 500]

393. Dr. Salmon's analysis did not include Title 1 funds, but did include federal impact aid. The Title 1 monies would go to benefit the very groups that he claims are disadvantaged by the Alaska system, namely REAAs and poor children. [Tr. 1740-41] However, Dr. Salmon persuasively testified that it is inappropriate to consider federal Title 1 funds when comparing relative funding among school districts. [Ex. 3 at 696]

394. When Adjusted ADM is considered, then medium and small boroughs and cities received considerably more revenue than REAAs per Adjusted ADM in FY 2002 (\$5,887 versus \$5,052). Large boroughs and cities received about the same as the REAAs per Adjusted ADM (\$5,040). [Ex. 3 at 503] But the State persuasively demonstrated that calculating revenue per student based on adjusted ADM is effectively undoing the funding formula established by the State, and is an inappropriate means of assessing the amount of revenue per student. [Tr. 1740-49]

395. Using Dr. Salmon's weighted adjusted ADM analysis, in FY 2002 REAAs received the least money (the least money, that is, per "adjusted weighted students," which is not the same as actual students). [Ex. 3 at 505] Using his adjustments, medium and small boroughs and cities were computed at \$5,003; large boroughs and cities at \$4,235 and REAAs at \$3,994.

396. Alaska's funding system does not include an adjustment for at-risk children. Many witnesses, including the State's witnesses, agreed with the concept that it costs more to educate "at-risk" students.<sup>21</sup> Nonetheless, Dr. Salmon's assumption that all "at-risk" children cost *twice* as much to educate as all other children was arbitrary, and not supported by his own research or any research presented to this Court at trial. He admits that he does not know what the proper weighting should be, and that there is no consensus on this issue among experts. [Tr. 1733-34]

397. Dr. Salmon's report includes statistics on the following aspects of school districts: number of accredited schools, percentage of students receiving special education services, percentage of students classified as having migrant parents, dropout rates, graduation rates, attendance rate, retention rate, percent minority students, percent students eligible for free and reduced price lunches, student test scores, and percent of students who passed the high school exit exam. [Ex. 3 at 592-626] These statistics demonstrate that REAAs have the lowest high school graduation rate, the lowest attendance rate, the highest dropout rate, the highest percent of poor students and the lowest test scores when compared to school districts in boroughs and cities. [Ex. 3 at 626]

398. In Chapter IV of his report, Dr. Salmon introduces the concept of "high-wealth boroughs and cities" and "low-wealth boroughs and cities." Using what he described as a "Synthetic Assessed Valuation Per Weighted Adjusted Average Daily Membership," he classified Bristol Bay, North Slope, Skagway, Unalaska, and Valdez as high wealth, and Craig, Hoonah, Hydaburg, Lake and

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<sup>21</sup> See, e.g., testimony of Dr. James Smith at Tr. 2780, 2725-26.  
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Peninsula, Northwest Arctic, St. Mary's, Tanana and Yakutat as low wealth. [Ex. 3 at 711] This chapter was added to his report at the request of one or more directors of CEAAC. [Tr. 1708-10] CEAAC had suggested that Dr. Salmon pursue the idea that REAAs were discriminated against. [Tr. 1710] But Dr. Salmon concluded, after applying his adjustments and weights, that high-wealth districts have the largest local revenue contributions and receive the least state revenue. [Ex. 3 at 632, 634] This is consistent with an equalized system.

399. Chapters I through III of Dr. Salmon's report support a conclusion that the average REAA receives more funding from the State than the average city and borough school district. It also demonstrates that the average REAA has more challenges within its student population than the average city or borough school district. [Exs. 2321, 2367, 2368, Ex. 3 at 450-626]

#### ***F. Salmon and Driscoll's Educational Econometric Assessment***

400. In Chapter V of his report, Dr. Salmon teamed with Plaintiffs' expert Dr. Lisa Driscoll to perform what they called an "Educational Econometric Assessment" to ascertain a baseline revenue requirement to fund education in Alaska. [Ex. 3 at 685]

401. This study originated from an analysis that ranked school districts in the state from most successful to least successful. That type of analysis was originally not intended to be used for any purpose other than to identify a set of schools to visit or to study. But evidently Plaintiff CEAAC asked Dr. Salmon to use the data to "put some sort of price figure on what it cost to provide educational services that were judged to be comparable to what the so-called

successful school districts were providing in Alaska and assuming that the so-called successful schools were according to Alaska's definition of adequate." [Tr. 1701] The basic premise behind a successful district study is that once the cost of an adequate education in a successful district is known, that cost can be used to estimate the cost for an adequate education in all districts of the state. [Tr. 1762]

402. Dr. Salmon referred all questions about this chapter to Dr. Driscoll, who also testified at trial. Dr. Driscoll is an Assistant Professor of Educational Leadership at Virginia Polytechnic Institute and State University, with a doctorate in Educational Administration. [Ex. 3 at 874]

403. In attempting to define a successful district, Drs. Salmon and Driscoll analyzed variables from a spreadsheet provided to them by Dr. Cole. [Tr. 1689] After running two regressions, they determined that the following variables should define a "successful district": grade six reading score; percent free and reduced price lunch; percent minority; dropout rate; and FY 2001 State and Local Revenues Per ADM. [Ex. 3 at 686-88] Although the report describes several other variables that could have been used in a successful district study -- such as pupil/teacher ratios or teacher salaries -- those other variables were not used. [Ex. 3 at 685; Tr. 1892-96] Dr. Salmon testified that "we selected a district that we consider virtually perfect." [Tr. 1764]

404. The inclusion of "percent minority" as a definition of success in the successful district study - in which the optimal district is defined as one that has no minority students - makes this study race-based and inappropriate for this

Court to rely upon. Interestingly, each expert said the other expert was ultimately responsible for the selection of the variables used. [Tr. 1766-77, 1851-52]

405. Moreover, it is illogical to include minority status or poverty as factors that define a “successful” district. Having a high percentage of minority students or a poor student population does not make a district unsuccessful. Indeed, the data that Salmon and Driscoll used to rank districts indicate that districts with high minority populations and a high percentage of poor students - like Annette Island - can be very successful. [Ex. 2443; Tr. 1899-1907]

406. The results of the study clearly show the effect of including race and poverty in the definition of “successful.” [Ex. 14] Districts such as Yakutat and Annette Island -- which have high test scores and low dropout rates, and also high percentages of minority and poor students -- rank far below districts with considerably lower test scores that also have a smaller percentage of minority and poor students.

407. It is also illogical to include revenue as a factor that defines the optimal district. The report states, “that this model is based on the premise that the successful school districts are those districts that are deemed successful by common criteria and are not necessarily those districts that are high spending districts.” [Ex. 3 at 688]

408. The report used the “successful schools” analysis to make an estimate of the total amount of money that would be needed to fund an adequate education. The estimate for FY 2001 was \$1.374 billion. [Ex. 3 at 689] At trial, Dr. Salmon admitted that this number was incorrect. [Tr. 1794-96] A rough

estimate performed at trial using Dr. Salmon's methodology indicated that state and local funding already exceeded the amount necessary for an adequate education under this analysis, and that when federal funding was included in the estimate, Alaska's total funding was far more than the minimum needed under Dr. Salmon's calculation. [Tr. 1816-21]

409. For the foregoing reasons, this Court has accorded no weight to Chapter V of the Salmon/Driscoll report. [Ex. 3 at 682-89, see also Tr. 2591]

#### ***G. Salmon's and Driscoll's Equity Statistics***

410. The final chapter of Dr. Salmon's report was also co-authored with Dr. Driscoll, and is entitled "Fiscal Equity and Wealth Relationship Statistics, FYs 2001 and 2002." [Ex. 3 at 691]

411. Dr. Salmon presents several "equity statistics" in Chapter VI of his report. [Ex. 3 at 693] Among them is the federal range ratio, which is the federal law that determines whether Alaska is permitted to deduct impact aid. This test allows a disparity of 25% in funding amounts among school districts within a state. Dr. Salmon testified that this disparity test is a conservative test that only six or seven states could pass. Alaska passes this test. [Tr. 1647-48] He also testified that Alaska's score on the federal range ratio was quite good. [Tr. 1695]

412. The fact that the State passes the federal disparity test provides support for a finding that the State's system of funding education is equalized.

#### ***H. Nat Cole's History of Education in the State of Alaska***

413. Nat Cole was the Deputy Commissioner of Education from 1974 through 1980. From 1983 to the present, he has worked as a consultant and

expert witness to school districts, educational organizations, and governments in the areas of school finance, school law and school litigation. He holds a doctorate in Educational Administration. [Ex. 3 at 835]

414. Dr. Cole's expert report is entitled "A History of Education in the State of Alaska." It covers the history of education in Alaska dating from the Russian Alaska days, through the Alaska territorial days, and continuing after statehood.

415. Dr. Cole indicates that "he developed the school foundation funding program that went into effect in fiscal year 1988." [Ex. 3 at 385-440] That program remained in effect until 1998 when the Legislature enacted the foundation formula that is currently in effect. Dr. Cole did not support the current funding formula, but acknowledged that it came about because of concerns that "some districts were over-funded and some were under-funded" under the 1988 funding program and "therefore we need a system to shift that money." [Tr. 2181-82]

416. In Dr. Cole's view, "[t]he two major lessons we should have learned since 1988 are (a) the State's failure to continue state support at a level to offset the increased cost of education, and (b) the failure of the State to adequately address the problem of students who are performing below proficient on tests devised to measure progress." [Ex. 3 at 427] Dr. Cole believes that the State should spend about twice as much as it currently does for education, and enact an income tax if necessary to that end. [Tr. 2193-94]

417. Dr. Cole ran an analysis that sought to determine the correlation between student test scores within a district and the amount of state and local funding the district received. His analysis showed that there is very little correlation between the amount of state and local dollars spent on education instruction and student test scores. [Ex. 3 at 434] From that analysis he concluded, “[i]t might imply that a little more money might help, but it doesn’t necessarily imply that.” [Tr. 2108]

## **VI. Defendant’s Experts**

### **A. James Smith, Ph.D. and Naomi Calvo**

418. Dr. Smith and Ms. Calvo together prepared an expert report intended to address four topics: (1) the relationship between funding and student achievement, (2) the relationship between demographic factors and student achievement, (3) the correlation between funding levels and achievement, percent poverty, percent minority, and drop-out rate, and (4) whether the lowest performing school districts receive the least educational resources. [Ex. 43 at 2]

419. At trial, Ms. Calvo testified first and was qualified as an expert in analytic methods in education finance, including statistics. [Tr. 2597]

420. With respect to the first and third topics, Ms. Calvo’s analysis concluded that the highest spending schools in Alaska demonstrated the least proficiency in test scores. [Ex. 43 at 5] “The ten lowest performing districts received, on average, 77 percent *more* state operating funds per pupil than the ten highest performing districts.” [Ex. 43 at 15 (emphasis in original)] But when



the analysis is controlled for various demographic factors such as poverty, percent minority, and percent limited English proficient, then it is less of a negative relationship between funding and achievement. [Tr. 2637]

421. Based on that analysis, Ms. Calvo concluded that when considering student achievement in relationship to school district funding in Alaska, if extra money was added, "we would not expect to see a performance increase." [Tr. 2636] She opined that this may be because Alaska's spending on education has reached a level at which there would be diminishing marginal returns. [Tr. 2645] Ms. Calvo's analysis also demonstrated that "some [districts] are clearly doing a better job of educating students with access to the same level of resources than others are." [Tr. 2615]

422. With respect to the second topic, her analysis demonstrated the relationship between specified demographic factors and student achievement as follows:

- There is no statistical relationship between the size of the district and student test scores, when controlling for other demographic factors;
- On average, districts with higher percentages of Alaska Native students have lower test scores;
- Schools with higher percentages of economically disadvantaged students tend to have lower test scores;
- At the school level, the percentage of special education students corresponds with lower test scores.

- On average, districts with higher percentages of limited English proficient (LEP) students have lower test scores.

[Ex. 43 at 9-10]

423. On the fourth topic, based on her statistical analysis of data from the State Department of Education, Ms. Calvo concluded that education funding in Alaska “is being targeted to the lowest performing districts.” [Tr. 2611]

424. Ms. Calvo’s analysis is consistent with the other evidence at trial that Alaska is directing the most funding to those school districts that are the lowest performing on state assessments.

425. Dr. James Smith testified immediately after Ms. Calvo. Dr. Smith has a doctorate degree in Education Administration and was qualified as an expert in the areas of school finance, curriculum and instruction and education adequacy issues. [Tr. 2695] He has testified in a number of school funding lawsuits throughout the nation.

426. Dr. Smith presented an analysis of Ms. Calvo’s statistics. Among his conclusions was his view that Alaska’s schools tend to be inefficient. [Ex. 43 at 17-20] In this regard, he noted “it’s well-documented that schools and other governmental agencies when they receive additional funds, tend to spend the money the same way that ... they were already spending it. They tended to spend more money on the same inputs. So, if there’s a general increase in funding in a school district, the most likely outcome is that salaries will go up, and it’s less likely that you’ll see any activities that will change student behavior. ... I

tend to agree with Dr. Davis ... there are exceptions -- but schools tend to be run for the convenience of adults.” [Tr. 2719-20]

427. Dr. Smith does not support targeted or categorical funding, such as Title 1 funding, that constrains the way that the money the school district gets can be spent. [Tr. 2721-22] In his opinion, it has two problems: “One, it constrains how those people who are closest to individual students can use the resources ... [T]hey get captured by bureaucrats who worry about the rules and not so much about the outcomes ... The second [problem] is that if you follow the rules and spend it the way the funder says, the way the state says or the federal government says, then you’re relieved of accountability for the outcome because the answer is always, I spent it the way you told me.” [Tr. 2722]

428. Instead of targeted funding, Dr. Smith “always recommend[s] block grants to the maximum extent that it’s possible.” [Tr. 2722-23] But, in his view, there is also a need for a “strong accountability system that goes with that so there are consequences for not producing the desired outcomes.” [Tr. 2723]

429. Dr. Smith discussed what he termed the “progressive discipline” approach of No Child Left Behind, which Alaska has also adopted. In his view, when addressing low performing districts,

[T]he first step is [to] require a plan. ... If that doesn’t work, then you provide assistance. First you offer assistance, then you provide assistance, and then ultimately the State, then, takes drastic measures such as replacing the superintendent, taking over the district. . .

I would just add that the last one, the taking over the school district and sending educators into school districts, does not have a happy track record around the country. When you take over a school district, it’s much like taking over Iraq. People are not happy about

it in the community and the faculty that remains tends to try to reject the assistance. So it requires a great deal of diplomacy and a great deal of hand-holding and a capacity building at the local level.

[Tr. 2724-25]

430. Dr. Smith also testified: “Every school that I’ve seen that’s a turn-around school, that’s gone from low performance to high performance, has done it without additional money. I should be clear. Many of them have project grants and things like that, but essentially the way they’ve done it is to stop doing what they were doing, figure out what works and what doesn’t work, quit doing those things that don’t work, and start doing things that are likely to have a higher payoff.” [Tr. 2739]

431. Dr. Smith acknowledged that he has been a strong proponent of pre-kindergarten programs in other school funding lawsuits in which he has been involved, and personally supports it. [Tr. 2822] But he questioned the wisdom of simply adding a pre-K program in a lower performing school district: “I don’t think that [pre-K] would necessarily be successful in school districts that are struggling to educate kids k-12 to append another two grades onto it.” [Tr. 2767]

***B. Michael Wolkoff***

432. Michael Wolkoff is an economics professor who holds a doctorate in Public Policy Studies. [Tr. 3216] He has testified in a number of educational finance cases throughout the nation. [Tr. 3217]

433. Dr. Wolkoff testified in this case with respect to three aspects of the teacher labor market: (1) teacher pay; (2) measurable characteristics of

teachers and mobility behavior; and (3) the extent to which teacher characteristics impact student test scores. [Tr. 3219]

434. With respect to teacher pay, Dr. Wolkoff concluded that in 2003-04, Alaska's average teacher pay was the 10<sup>th</sup> highest in the nation. [Tr. 3227] However, when that pay is adjusted for cost of living, its ranking drops to 41<sup>st</sup> (although Dr. Wolkoff expressed some concern regarding the accuracy of the CPI adjustment). [Tr. 3230] Dr. Wolkoff also compared teacher salaries in Alaska to other Alaskan salaries, and determined that Alaska teachers' pay is comparable to that of Alaskans in comparable occupations. [Tr. 3233; Ex. 224 at 13] Based on his analysis, Dr. Wolkoff concluded that teacher pay in Alaska is competitive.

435. As to the second topic, Dr. Wolkoff testified that teachers who work in off-road districts are, on average, paid more than teachers who work in districts on the road system. [Tr. 3248] But he also determined that the more remote districts do have "somewhat less experienced teachers, approximately a year and a half less." [Tr. 3249] Yet he found that teachers in both on and off-road districts have on average at least eight years teaching experience. [Tr. 3249-50] Overall, he concluded the differences among the teacher population in on-road vs. off-road school districts were not sizeable. [Tr. 3264]

436. He also looked at the number of teachers who moved from off-road to on-road, and on-road to off-road. He determined that there is a net impact each year of about 30 teachers leaving off-road schools – or about one-half of one percent of the total work force. Significantly, the teachers moving to

off-road schools had more teaching experience and were more likely to have advanced degrees than those who left the off-road schools. [Tr. 3258-62]

437. Dr. Wolkoff's third topic explored five teacher characteristics and their impact on student achievement. [Tr. 3265] Like Dr. Darling-Hammond, his analysis indicated that highly qualified teachers have a positive impact on student achievement. [Tr. 3288-89] He did note, however, that it is very difficult to identify what it is about certain teachers that make them more effective than others. [Tr. 3289-90] He did not analyze whether highly qualified teachers would have a stronger impact on lower performing students than on higher performing students. [Cf. Darling-Hammond Perp. Depo. at 65]

### **C. Gerald Covey**

438. Gerald Covey was the Commissioner of Education from 1991 through 1995. He has been a private consultant since that time. [Ex. 2118 at 43521] Before becoming Commissioner, he worked at the Northwest Arctic Borough School District for many years, and was superintendent of that district from 1987 through 1991. [Id.] At trial, he was qualified as an expert in the history and status of education and education reform in Alaska. [Tr. 3583]

439. Mr. Covey presented a summary of the history of education in Alaska. He noted that when the price of oil fell in the 1980's, "From that moment on, it was a whole different relationship between public education and the legislature of the State of Alaska. From that moment on, accountability entered into the conversation as it had never entered before." [Tr. 3602] It was at about this same time that the Legislature developed the chart of accounts for school

district reporting, so that the State could see how the school districts were spending government funds. 4 AAC 06.120. [Tr. 3594-95]

440. Beginning in 1991, upon appointment as Commissioner of Education, Mr. Covey undertook the development of the content standards for education in the state – to create “a definition of what kids should know and be able to do.” [Tr. 3609]

441. On cross-examination, Mr. Covey testified that he believed the State’s content standards “should be taught to all children of Alaska.” [Tr. 3659] But he added, “It’s not the decision of the people who make the standards; it’s the decision of the people who operate the schools what actually is taught.” [Tr. 3662]

442. With respect to the REAAs that were created in the late 1970’s and early 1980’s, Mr. Covey testified that in his opinion, “15 years is about enough time to get on your feet and get up and running.” [Tr. 3617]

443. Mr. Covey prepared an expert report for this case that addressed three questions: (1) is the education offered by Alaska’s school system adequate; (2) will increasing education funding to the current system improve public education; and (3) how do family and community impact student achievement? [Ex. 2118 at 43503]

444. Mr. Covey’s assessment as to the adequacy of the education offered by Alaska’s school system looked at the educational opportunities within the state, the educational reforms undertaken since 1991, and the funding equities. With respect to Alaska’s school funding program, he opined that “no

group of urban or rural students have been or are favored or disenfranchised by Alaska's school-funding program. Our government has consistently relied on a reasonable formula to distribute funds, has frequently studied the funding mechanism to improve it, and has adjusted it as necessary to more accurately reflect school-district needs." [Ex. 2118 at 43508]

445. On the second question Mr. Covey opined that increased education funding would not improve public education in Alaska. [Ex. 2118 at 43509-11, 43517-18] This opinion was based not on a statistical analysis, but on his observations over the course of his career in Alaska. He noted that when he was in Kotzebue during the mid 1970's until mid 1980's, education spending was increasing "at a record pace." [Ex. 2118 at 43509] But, "As the realities and challenges of delivering education to locally controlled rural school districts set in, two things became obvious. First, the issues of rural education could not be solved by new schools, new curricula, lower student-teacher ratios, higher educator salaries or anything else money could buy. And second, the academic results we had hoped to achieve quickly would take a long time to realize." [Ex. 2118 at 43511] He added, "You can pump all the money [in the] world into bad processes and all you get is bad processes and you get poor results from bad processes." [Tr. 3641]

446. In responding to the third question, Mr. Covey opined that "schools cannot undo or override the impacts of family and community. Strong or weak, successful or unsuccessful, our schools are a reflection of our communities." [Ex. 2118 at 43516]



447. Mr. Covey's report also indicates that if additional money were to be spent on educating children, he believes the most beneficial expenditure would be to provide a "state-approved high-quality pre-kindergarten program for all children in Alaska." [Ex. 2118 at 43518] But he did not believe that pre-K education should turn "into a part of the education foundation and a responsibility of the public schools." [Tr. 3643]

448. Mr. Covey defined the State Department of Education's role as "to provide assistance and support to school districts that are seeking to improve themselves." [Tr. 3640] He believes that the State should intervene in lower performing districts; he defined "intervention" to mean: "the Department would go in and would look at what's going on and possibly make some recommendations for change." [Tr. 3633]

449. With respect to the Yupiit School District, Mr. Covey opined that the appropriate course of action would be to wait and see what happens based on the State's involvement with the district in the fall of 2005. "If that intervention fails to produce the result we want, it would be my recommendation that the commissioner go right back out there, that he has a meeting with the public. He has the very same conversation he had with people in Chugach when he went there. You tell me what you want and you tell me what you're willing to commit to and I will stand by you until we get there, until we make some improvements, until we get this district going where we want it to go." [Tr. 3647]

**D. James Guthrie, Ph.D.**

450. James Guthrie was the State's final expert at trial. He has a doctorate degree in Educational Administration. [Tr. 3840] At trial, he was qualified as an expert in education finance and public policy and indicated he had testified approximately 30 times throughout the country as an expert witness, primarily in the area of education finance. [Tr. 3848, 3846]

451. Dr. Guthrie provided some statistics about Alaska's financing of public education relative to the other states:

- Alaska ranked fifth in the nation in 2001-2002 in the percentage of state and local revenue spent on public schools. [Ex. 2328 at 56340]
- Alaska spends a considerably greater amount of state revenue versus local revenue on its schools compared to the U.S. mean. [Ex. 2328 at 56338] It has been the variation in local contribution within a state that has been a principal source of litigation in many other states – an issue not as pronounced here given the significantly larger state contribution. [Tr. 3862-63]
- Alaska's per capita expenditures by state and local governments for public education was first in the nation in the 2001-02 school year. [Ex. 2328 at 56345]

452. The No Child Left Behind Act has an aspirational feature that suggests, but does not require, that states allocate 40% more than their base revenue per pupil to low income students. [Tr. 3869] Alaska meets this aspirational requirement in its school funding, and is the second most equitable state under this analysis. [Ex. 2328 at 56349]

453. Dr. Guthrie indicated that the majority of states do not have a weighted formula provision for at-risk students, and he did not believe adding such a formula necessary for Alaska. [Tr. 3875]

454. Dr. Guthrie also observed that Alaska uses Average Daily Membership (ADM) – or students enrolled – to compute funding. Most states use average daily attendance for school finance purposes. The use of average daily attendance, instead of membership, is an inducement to school districts to have children actually attend school. [Tr. 3866]

455. Dr. Guthrie's opinion is that Alaska's system of public education, K-12, is adequate because Alaska has "a plan for enabling students in this state to achieve to high standards ... [and] it's generating and distributing resources in a manner which enables school districts to do [the components of the plan]." [Tr. 3856-57]

456. In Dr. Guthrie's view, Alaska's educational plan includes the learning standards that the State has developed, which he found to be "sufficiently rigorous and inclusive." [Tr. 3939] It also includes the state testing system "so that the State has a chance of appraising the degree to which a student, a school, a district or the whole state is making progress toward those learning expectations." [Tr. 3872] The State also provides the school districts with technical assistance to help districts "build their capacity toward achieving these goals." [Tr. 3872] And it has developed teacher credentialing to try to "link teacher qualifications to the learning expectations so that we can train teachers in what it is that the state wants to be accomplished." [Tr. 3872-73]

457. Dr. Guthrie did not address whether students in Alaska are actually being provided with a realistic opportunity to achieve the State's expectations, nor did he address the State's role with respect to those schools or districts in which a substantial majority of the children did not appear to be achieving the State's standards, based on the test scores and other data available.

## ***VII. The Status of the State's Current Role in Education***

### ***A. Is more funding needed?***

458. Based on all of the evidence presented at this trial, this Court finds that the Plaintiffs have failed to demonstrate that the State of Alaska is inadequately funding public education for its children at this time.

459. The Court does find, based upon consideration of all the evidence, that there are at least a few schools within this state in which children are not being accorded an adequate opportunity to receive basic instruction in the subjects tested by the State: reading, writing, math, and sciences. Clearly, as former Commissioner Covey acknowledged, "we have a very serious issue" with student achievement at some schools in the state. And based on the substantial evidence presented in this proceeding, this Court agrees with his conclusion that "we cannot buy our way out of the problem." [Tr. 3637]

460. Likewise, former Commissioner Shirley Holloway testified persuasively: "[I]f money were the answer, we had it on the North Slope. If

money were the silver bullet, we would have nailed it ... It's just far more complex than just having money." [Tr. 3420]

461. Commissioner Sampson also testified in this regard: "My belief is that money was not the predictor of student performance." [Tr. 2384] The Commissioner further stated:

[W]e have examples of many schools in many districts where children are excelling from all of our ethnic groups. They're – they're getting similar resources, similar assistance from the department, they're operating under the same performance and content standards, the same assessment system. There's – there's many factors beyond just identifying the standards and funding that's making a difference on whether students reach proficiency or not.

[Tr. 2438]

462. The State has proven by a preponderance of the evidence that it is adequately funding education for school children within the State of Alaska. The evidence fully supported the testimony of Commissioner Sampson in this regard, who stated he believes the State is:

very adequately funding education. That is not to say that I don't support additional funding for K-12. I do. What I don't support is a blanket increase in funding. I'm absolutely a champion for targeted specific funding that we know is either new and has potential to give us great results or something that is already proven that more want to replicate, but just to add more money without targeting where the money goes, we spend a tremendous amount of money, we have tremendous challenges. There's enough money there to educate our kids well, but we have to stop doing things that are hard to change, that aren't getting us a return for our investment for kids.

[Tr. 2441-42]

***B. Is local control working?***

463. As noted throughout these findings, many witnesses in this case, on both sides of this dispute, testified that they firmly supported local control of school spending, curriculum and hiring -- a preference that has an established basis in the history of education both in Alaska and throughout the nation.

464. Yet based on evidence presented at trial, a preponderance of the evidence has demonstrated that there are at least some schools in the Plaintiff school districts in which the available resources have not been adequately or effectively directed to the classroom. In short, there are schools in which children are not being accorded an adequate opportunity to learn the very basic fundamentals as tested by the State.<sup>22</sup>

465. Even at schools in which student performance has been extremely poor, and has shown no improvement for many years, the State has failed to provide an adequate oversight role with respect to either the considerable State funds that it disburses or with respect to the delivery of instruction to the children in those schools. In short, the State has failed to take meaningful action to maximize the likelihood that children at these troubled schools are accorded an adequate opportunity to acquire proficiency in the State's standards when a school has demonstrated an unwillingness or inability to correct this situation on its own.

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<sup>22</sup> As stated above in the court's findings, this court has found that to be the case in the schools at Yupiit, and possibly the case at Kuspuk schools.

466. Commissioner Sampson recognized the potential need for further legislative oversight in these very few troubled districts:

I think that the best possible education, the potential rests with the local community. That doesn't always work, but my thought would be, legislature, have two types of arenas which you allow delivery of education. One would be leave it as it is now with local control there, provided we're getting results for kids, and that, to me, doesn't mean that every student is proficient. We take them how they come. It's our job to move them forward. So if we're seeing growth and progress with those kids, I think the local community is doing a good job and the local district.

If they're not, then maybe we need to assist if, in fact, they're [not] using the resources in the best way that might result in higher achieving students. Example: I support extracurricular activities. I think that it can be valuable in engaging kids, but at what point do you continue to fund extracurricular activities at whatever level when your kids aren't showing any progress in reading and the deficiency – or proficiency levels are very low. At some point, maybe we need to not ask for new resources but redirect how we use some of those resources, and maybe that's a system that the legislature could direct down.

[Tr. 2452-53]

467. The Commissioner also recognized that while State oversight is not without its challenges, sometimes it is easier to implement changes when directed from outside the school district: "sometimes I do think that superintendents and other leaders in those communities, they need to be able to push and point the finger that it's a different agency or someone that's requiring us to do these things that are uncomfortable. Change is hard. It's hard for communities, it's hard for schools." [Tr. 2364-65]

468. Under existing state law, EED appears to have virtually no authority to direct how a school district uses its State funds to educate the children within a school district, no matter how poorly the district's students

perform. See 4 AAC 06.840(k). And to the extent EED might have any such authority, it has never exercised it. As explained by Commissioner Sampson, even for districts that are repeatedly failing to make AYP, EED “has the ability to direct resources to a minute level [in a school district]. It’s no more than a 20% hold-back of Title 1 funds, not how they establish their other priorities.” [Tr. 2412]

469. The State has severely restricted its own available options for providing meaningful remedial direction in underperforming school districts. It can defer a portion of federal funds only. Or it can institute and implement a new curriculum. The other options provided by regulation are truly a last resort and, according to several witnesses at this trial, would likely meet with minimal success – replacing district personnel in cooperation with the school board, or removing schools from the jurisdiction of the district and providing for alternative arrangements for public governance and supervision of such schools. 4 AAC 06.840(k).

470. The Legislature has also elected to allow each school district to determine its own curriculum. Such an approach has considerable benefits for many local communities and students within those communities, as it allows each district to adjust its curriculum to the unique needs and interests of its community.<sup>23</sup> But to the extent that it permits a school district to adopt a curriculum that is not aligned with the State’s content and performance standards, or not to adopt any meaningful curriculum at all, it does not maximize

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<sup>23</sup> The model is not without its detractors. For example, Spike Jorgenson of Plaintiff CEAAC opined: “there’s no reason to have every school district rediscovering what a decent curriculum is.” [Jorgensen Depo. at 69]



the likelihood that all children within the State are going to be accorded a meaningful opportunity to achieve proficiency on the State's assessments.

471. The State has also elected to exercise very little oversight as to how school districts are spending the money the districts receive from the State. There is very little oversight to insure that these resources are being effectively directed toward student learning. Yet, based on the evidence presented at trial, it appears that a majority of school districts are adequately directing these resources toward educating the children within their districts, and are also striving to align their curriculum with the State's content and performance standards.

472. While many witnesses testified about the benefits of local control over education, many witnesses also recognized that if a school district is not demonstrating an ability to provide a basic education to their children, then the State needs to intervene. As testified to by Shirley Holloway, former Commissioner of Education:

I do think we have a responsibility to intervene. And I think, though, the kind of regulations that we have in place now give some real clear direction for that kind of intervention. And I think we need to intervene, and I think we need to intervene earlier than we have in the past. And I think we need to be very assertive about that because one of the things the research shows us, that if a child is in a classroom where very little learning is going on, for several years in a row, we never make that up.

And so time is really important ... we just cannot afford to allow children to languish in these classrooms without having the interventions and the remediation that they need to be proficient in our world. And so I feel very strongly that the State needs to take a strong role, not ... aggressive in a negative way, but aggressive in that we have the interests of the young people at heart, and that we have a responsibility and obligation to educate every child in this state.

[Tr. 3424-25]

473. Similarly, Spike Jorgenson of Plaintiff CEAAC acknowledged the benefits of the State standards and assessments. But to him, “the thing that’s missing from that are all of the instructional strategies and the really important things that teachers do in order to help kids learn. And we haven’t put that together for the teachers yet. And until we do, we aren’t going to have good results.” [Jorgenson Depo. at 72]

474. As Paul Prussing from EED testified, each child is in the school system for only a few years, so that there is only a limited amount of time to teach each child the fundamentals. Therefore, prompt intervention is critical: “You have 720 days to teach these kids how to read. Every day is precious. Those kids that are in intensive [reading status] are the ones that are so far behind that the odds are against them, and you need to intervene quickly.” [Prussing Depo. at 95]

475. The importance of both the family and community to educational success was recognized by many witnesses throughout the trial. Problems with absenteeism, drug and alcohol abuse, lack of community support, and other factors are often beyond the control of the school. [Tr. 2706, 2711] But as Bill Bjork testified, “the absence of ... an engaged parent can’t be an educational death sentence for this student.” [Tr. 2273] Commissioner Sampson also acknowledged, “[a]lthough we are not to blame for the many ills of our society and the troubles that students bring with them to our classroom, we can no longer use that as an excuse for the lack of student performance.” [Tr. 2431]

476. The evidence at trial clearly established that considerably greater oversight by the State over the education of Alaska's children, at least at the state's most seriously underperforming schools, is critically needed. Whether such oversight is constitutionally mandated by the Education Clause of Alaska's Constitution is a determination to be made only after careful consideration of the relevant legal rulings on this issue.

## **LEGAL ANALYSIS**

### ***I. The Education Clause in Alaska***

The Education Clause of the Alaska Constitution provides: "The legislature shall by general law establish and maintain a system of public schools open to all children of the State." Art. VII, § 1. The Alaska Supreme Court has addressed this constitutional provision in several opinions.

The primary Alaska Supreme Court decision regarding the Education Clause is Hootch v. Alaska State-Operated School System, 536 P.2d 793 (Alaska 1975). In Molly Hootch, a number of students who resided in small rural communities filed suit seeking to compel the State to provide secondary schools in their communities of residence. Students seeking a secondary school education in rural Alaska at that time were required to attend state-operated boarding schools. The students asserted that the phrase "open to all children" in the Education Clause created a right to be educated in one's own community. Id. at 799. In addressing this constitutional issue, the Supreme Court indicated it would "look to the intent of the framers of the constitution concerning the nature of the right

itself, the problems which they were addressing and the remedies they sought” to determine the nature of the right as it relates to the students’ arguments and the remedies that they sought. Id. at 800.<sup>24</sup>

As discussed by the Supreme Court in Molly Hootch, at statehood there was a dual system of education in Alaska. Id. The U.S. Bureau of Indian Affairs operated schools for Alaska Native students; the Alaska territorial government operated schools attended primarily by non-Natives. At the Alaska Constitutional Convention, there was consensus that this dual system of education should be ended. The Supreme Court held that “[i]n view of this history, we conclude that art. VII, § 1 was intended to ensure that the legislature establish a system of education designed to serve children of all racial backgrounds.” Id. at 801. And it was in this context that the phrase “open to all” should be interpreted -- as “a unitary phrase embodying a requirement of nonsegregated schools.” Id.

But the Supreme Court also found that with respect to education in the state of Alaska, “[i]t seems likely that the drafters of the constitution had in mind the vast expanses of Alaska, its many isolated small communities which lack effective transportation and communication systems, and the diverse culture and heritage of its citizens.” 536 P.2d at 803. Thus, the Court concluded that unlike most state constitutions, Alaska’s Education Clause “does not require uniformity in the school system.” Id. Instead, the Court found that Article VII, § 1 of the state constitution “appears to contemplate different types of educational opportunities including boarding, correspondence and other programs without

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<sup>24</sup>See also “The Methodological Middle Ground: Finding an Adequacy Standard in Alaska’s Education Clause, 24 Alaska Law Review 73 (2007).  
Moore, et al. v. State of Alaska, 3AN-04-9756 CI  
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requiring that all options be available to all students.” Id. The Court “conclude[d] that art. VII, § 1 permits some differences in the manner of providing education” and “that different approaches are appropriate to meet the educational needs in the diverse areas of the state.” Id. at 803-04. Based on this analysis, the Court held that the Education Clause did not entitle the Plaintiffs in that case the right to attend secondary schools in their home communities, and that they had been afforded a constitutionally adequate right to an education through the boarding school opportunity accorded to them, absent an equal protection claim. Id. at 804-05.<sup>25</sup>

An earlier reference to the Education Clause by the Alaska Supreme Court is found in Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971). There, the Juneau borough had adopted an ordinance that required the local school district to participate in centralized accounting. The school board brought suit, seeking a permanent injunction against the borough. The Alaska Supreme Court held that the injunction was warranted because of the Education Clause, which specifies that the Legislature has ultimate responsibility for education. 491 P.2d at 122.

The Court held with respect to the clause:

This constitutional mandate for pervasive state authority in the field of education could not be more clear. First, the language is mandatory, not permissive. Second, the section not only requires that the legislature ‘establish’ [sic] a school system, but also gives to that body the continuing obligation to ‘maintain’ the system. Finally, the provision is unqualified; no other unit of government shares responsibility or authority. That the legislature has seen fit to delegate certain educational functions to local school boards in order that Alaska schools might be adapted to meet the varying

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<sup>25</sup> The case was remanded to the trial court on the equal protection claim, where it was eventually settled between the parties. Tobeluk v. Lind, 539 P.2d 873, 975 (Alaska 1979).

conditions of different localities does not diminish this constitutionally mandated state control over education.

491 P.2d at 122.

The Supreme Court again referred to the Education Clause in Breese v. Smith, 501 P.2d 159 (Alaska 1972). There, a student was suspended because his hair violated the school's hair length regulation. The student asserted, among other claims, that the suspension violated his right to an education under Art. VII, § 1 of the Alaska Constitution. The Supreme Court invalidated the suspension. Although the Court's decision in Breese was based on the right to liberty set forth in Art. I, § 1 of the Alaska Constitution, the decision also referred to the Education Clause, which the Court stated "guarantees all children of Alaska a right to public education." 501 P.2d at 167.

The same month that the Alaska Supreme Court issued its decision in the Molly Hootch case, it decided Alaska State-Operated School System v. Mueller, 536 P.2d 99 (Alaska 1975). That case presented the question of whether the State-Operated School System was a state agency for purposes of service of process. In holding that the school system was a state agency, the Court referred to the Education Clause and held that the system "is performing the clearly governmental function of furnishing education to the children of Alaska in the unorganized borough (for which the legislature is required to provide by article VII, section 1 of the constitution)." 536 P.2d at 102.

The Alaska Supreme Court again cited to the Education Clause in Tunley v. Municipality of Anchorage School District, 631 P.2d 67 (Alaska 1980). There, the Anchorage School Board had decided to close two elementary schools. Parents

of students affected by the decision filed suit seeking to prevent the school closures. The Plaintiffs asserted, among other arguments, that the schools could only be closed with the State's consent. In rejecting this argument, the Supreme Court held that there were no statutes or regulations that required the district to obtain the State's consent. Id. at 78. The Court also recognized that "[t]he Anchorage School Board was created by authority of the state legislature, and is the delegated state authority to govern its school district and manage the operations of the schools within that district." Id. at 75. The Court added, "Historically, Americans have considered schools to be an extension of the local community. Thus, although state legislatures possess plenary power over the educational system, local initiative with respect to education is so highly regarded that most states have delegated extensive authority over the actual administration of the schools to local institutions." Id. at 75, n. 17 (*quoting Project, Education and the Law: State Interests and Individual Rights*, 74 Mich. L. Rev. 1373, 1380 (1976) (footnotes omitted)).

In Matanuska-Susitna Borough School District v. State, 931 P.2d 391 (Alaska 1997), a group of borough school districts, parents and individual tax payers brought an equal protection claim alleging that the educational interests of local school children had been negatively effected by the state's statutory system of providing aid for costs of school construction. Id. at 394. Under the statutory system, REAA districts received 98% state funding for school construction, whereas non-REAA districts received only 70% state funding. Id. at 396, *citing* AS 14.11.005-.019. The Plaintiffs asserted that the differential treatment

between the REAA districts and non-REAA districts violated their rights to equal protection of the law under the state constitution. The Supreme Court dismissed the aspect of the plaintiffs' claim that was based on educational opportunity, ruling that "the individual Plaintiffs have failed to [ ] show that disparities in the local contribution required of districts translate into disparities in the educational opportunities available to students." Id. at 397. With respect to that aspect of the equal protection claim that focused on the construction funding disparity, the Court found the economic interest asserted to be "at the low end of the continuum of interests protected by the equal protection clause" such that the state need only show its objectives were legitimate. Id. at 398, (*quoting Atlantic Richfield Co. v. State*, 705 P.2d 418, 437 (Alaska 1985), *appeal dismissed*, 474 U.S. 1043 (1986)). The Court concluded that the state's objective in its public school foundation program – "to assure an equitable level of educational opportunities for those in attendance in the public schools of the state" – was legitimate. Id. at 399 (*quoting* AS 14.17.220). In this regard, the Court cited to the Education Clause and its constitutional mandate to the legislature to "ensure equitable educational opportunities across the state." Id. The Court then found that the funding formula bore the requisite "fair and substantial relationship" to the government's educational objectives. Id.<sup>26</sup>

Finally, the Alaska Supreme Court addressed the Education Clause in Municipality of Anchorage v. Repasky, 34 P.3d 302 (Alaska 2001). At issue was

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<sup>26</sup> In a concurring opinion, Justice Matthews, joined by Justice Rabinowitz, noted that the Mat-Su case presented "no claim that funds available to any Alaska school district are insufficient to pay for a level of education which meets standards of minimal adequacy." 931 P.2d at 405.



whether the Anchorage mayor could veto components of the school district's budget. The Supreme Court, in a 3-1 decision,<sup>27</sup> held that the mayor had this veto power. The Court, citing to its decision in Macauley,<sup>28</sup> recognized that “while the legislature has delegated significant local control over education, this Court has made it clear that the Alaska Constitution mandates ‘pervasive state authority in the field of education.’” 34 P.3d at 306. The Plaintiffs had asserted, among other arguments, that a mayoral veto power would be substantially irreconcilable with state law. Id. at 310-315. But the Court held the mayoral veto power was not irreconcilable because such action “in our view, does not detract from the school board’s role in proposing a budget, deciding how to spend amounts appropriated and setting educational policy, or administering expenditures after appropriation.” Id. at 313.

Although not an Alaska Supreme Court decision, the 1999 trial court decision in Kasayulie v. State, (3AN-97-3782 CI) is also instructive. In Kasayulie, the REAA Plaintiffs sought a declaratory judgment that the State’s method of funding for schools in rural areas of the state violated the Education Clause, among other claims. The State argued that the Education Clause did not require the State to provide buildings for schools, but only required the State to establish and maintain a school system. Id. at 4. The trial court disagreed and held that “facilities funding is an integral part of education and as such is inseparable from the state’s obligation to establish and maintain a public education system.” Id. The Court granted the Plaintiffs’ motion for summary judgment, finding that the

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<sup>27</sup> Justice Fabe did not participate in the case.

<sup>28</sup> Macauley v. Hildebrand, 491 P.2d 120, 122 (Alaska 1971).

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State's failure "to provide adequate funding for [school] facilities in rural areas violates the Education Clause." *Id.* at 6.

## ***II. Education Clause Litigation in Other States***

Every state in the union has some form of an education clause in its state constitution which requires the state legislature to provide its school children with a free public education. There has been a great deal of litigation regarding education in other states. The cases have focused primarily on school funding, and have typically taken the form either of equity claims or adequacy claims.

"The equity approach relies on the equal protection provisions of the federal or applicable state constitution to argue that students in poor districts are not afforded the same educational opportunities as students in more affluent districts. In contrast, the adequacy approach, based exclusively on the general 'education clause' of the applicable state constitution, rests on the premise of a constitutional guarantee of a minimum standard of education for all students."<sup>29</sup> The equity approach was generally the approach first used in school funding litigation, whereas the adequacy approach has been the focus of more recent litigation.

The history in two states with adequacy litigation – Arkansas and North Carolina – is illustrative.

In 2002, the Arkansas Supreme Court in Lake View School District No. 25 of Phillips County v. Huckabee, 91 S.W.3d 472 (Ark. 2002), recapped that case's

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<sup>29</sup> The Oregon Legislature's Constitutional Obligation to Provide an Adequate System of Public Education, 42 Willamette L. Rev. 489, 503 (2006).

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10-year history. The case had begun in 1992, and in 1994, a trial court judge ruled that the school funding system then in place in Arkansas violated the Education Clause and the Equality provisions of the Arkansas Constitution. Id. at 477. The judge stayed the effect of the order for two years so as to enable the Arkansas General Assembly to enact a constitutional school funding system that would be in accordance with the court's opinion. Id.

In 1995, the Arkansas legislature responded by enacting a new school funding system. Id. Over the next four years, the Arkansas legislature passed a number of additional school funding provisions which culminated in 1999, when the General Assembly appropriated funds for public education totaling more than \$1.6 billion and established the Arkansas Comprehensive Testing Assessment and Accountability Program (ACTAAP) to assess and evaluate academic progress and performance in public schools. Id. at 478-79.

In 2001, the trial court ruled that the post-1994 school funding system was still unconstitutional on the twin grounds of inadequacy under the Education Article and inequality under the Equality provisions of the Arkansas Constitution. Id. at 479. On appeal, the state argued that an adequate education in Arkansas would be impossible to define. Id. at 486. The state also argued that there was no correlation between enhanced school funding and better student performance. Id. at 488. Additionally, the state pointed to the ACTAAP program for assessing and evaluating student performance in English and mathematics as a positive step that the state had already taken. Id.

The Arkansas Supreme Court agreed with the trial court's ruling of continued unconstitutionality. Its opinion noted "Arkansas' abysmal rankings in certain key areas respecting education." Id. Specifically, the Court noted the results of the State's own benchmark testing for eighth-grade students in April 2000 showed that statewide, only 16% of the students were proficient or above in math, and in the Little Rock School District only 9% were proficient or above. Id. Additionally, the court noted that 58% of Arkansas high school students entering state universities needed remediation in either English or math. Id. The Arkansas Supreme Court held that the "State has an absolute duty under our constitution to provide an adequate education to each school child" and that "the State has not fulfilled its constitutional duty to provide the children of this state with a general, suitable, and efficient school-funding system." Id. at 495.

Most recently, on May 31, 2007, the Arkansas Supreme Court at long last issued an order concluding the Lake View litigation after finding that Arkansas' "public-school financing is now in constitutional compliance." Lake View v. Huckabee, \_\_\_ S.W.3d \_\_\_ (Ark. May 31, 2007) 2007 WL 1560547, Slip Op. at 10. The court acknowledged the state legislature's substantial infusion of additional funding into public school facilities. In addition, the court acknowledged the increased legislative funding per student, as well as the increased categorical funding for English language learners, students qualifying for free or reduced lunch, and students in alternative learning environments. The court noted that teacher salaries were found to be competitive with the surrounding states. And the court acknowledged "a critical component" of the

legislative undertaking: “the comprehensive system for accounting and accountability, which has been put in place to provide state oversight of school-district expenditures.” Id. See A.C.A. § 10-3-2102.

North Carolina’s school funding litigation began with Leandro v. State, 488 S.E.2d 249 (1997). In that case, the North Carolina Supreme Court held that “the North Carolina Constitution does guarantee every child of the state the opportunity to receive a ‘sound basic education.’” 488 S.E.2d at 259. The court then, “with some trepidation,” proceeded to define a sound basic education, and noted “[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.” Id. at 259, 254.

Ultimately, the North Carolina Supreme Court defined a “sound basic education” as one that provides students with at least:

- (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society;
- (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation;
- (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training;
- and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

488 S.E.2d at 255, *citing* Rose v. Council for Better Educ., Inc., 790 S.W. 2d 186, 212 (Ky. 1989).

The North Carolina Supreme Court also provided a list of evidentiary factors that the trial court should consider in determining whether a sound basic

education was being provided: (1) educational goals and standards adopted by the legislature; (2) the level of performance of the children on standardized achievement tests; (3) the level of the State's general educational expenditures and per-pupil expenditures; and (4) any other relevant factors. 488 S.E.2d at 259-60.

Using the evidentiary standards set out in Leandro, the case of Hoke County Board of Education v. North Carolina, 599 S.E.2d 365 (N.C. 2004) went to trial. There, the Plaintiffs presented evidence of: (1) comparative standardized test score data; (2) data on student graduation rates, employment potential, and post-secondary education success; (3) deficiencies pertaining to the educational offerings in Hoke County schools; and (4) deficiencies pertaining to the educational administration of Hoke County schools. Hoke, 599 S.E.2d at 381. Based on that review, the trial court ruled that the education in Hoke County was constitutionally inadequate under the Leandro standard for essentially two reasons: that the State had "(1) failed to identify the inordinate number of 'at-risk' students and provide a means for such students to avail themselves of the opportunity for a sound basic education; and (2) failed to oversee how educational funding and resources were being used and implemented in Hoke County schools." The trial court then ordered the State "to reassess its Hoke County educational obligations." 599 S.E.2d at 390.

On appeal, the North Carolina Supreme Court affirmed these determinations, and upheld the trial court's ruling, holding that the trial court had appropriately "(1) informed the State what was wrong with Hoke County schools; (2) directed

the State to reassess its educational priorities for Hoke County; and (3) ordered the State to correct any and all education-related deficiencies that contribute to a student's inability to take advantage of his right to the opportunity to obtain a sound basic education." 599 S.E.2d at 390.

***III. Is there a constitutional right to pre-kindergarten education in any other state?***

Three state supreme courts have examined the specific issue of whether children in their state have a constitutional right to pre-kindergarten education. All three of those supreme courts have held that such programs are not constitutionally required; all three found that the issue is a matter of public policy best left to the legislature. See Hancock v. Commissioner of Education, 822 N.E.2d 1134 (Mass. 2005); Lake View School District No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002); Hoke County Board of Education v. North Carolina, 599 S.E.2d 365 (N.C. 2004).<sup>30</sup>

In 2005, the Massachusetts Supreme Court discussed the history of education reform in Massachusetts in Hancock. 822 N.E.2d at 1134. Among the milestones the court examined was the decision by the Massachusetts Supreme Court in McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516 (Mass. 1993), in which the Court held that the Commonwealth had failed to

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<sup>30</sup> New Jersey has also addressed pre-kindergarten education. Abbott v. Burke, 748 A.2d 82 (N.J. 2000). Abbott, however, was premised on a statutory right to pre-kindergarten education. N.J. Stat. Ann. § 18A:7F-16 provides that "[e]arly childhood programs shall be distributed to all school districts with high concentrations of low-income pupils, for the purpose of providing full-day kindergarten and preschool classes and other early childhood programs and services."

fulfill its constitutional obligation when it delegated responsibility for public education to local communities and the State's education funding relied almost exclusively on local property taxes. Hancock, 822 N.E.2d at 1137. After the McDuffy decision, Massachusetts passed the Education Reform Act of 1993. Id. The act declared that its goal was to provide a high quality public education that would extend to all children “the opportunity to reach their full potential and to lead lives as participants in the political and social life of the [C]ommonwealth and as contributors to its economy.” Id. at 1138. (quoting G.L. c. 69, § 1). The act “radically restructured the funding of public education across the Commonwealth.” Id.

The Plaintiffs in Hancock claimed that public education in their districts had not improved significantly since 1993 and that the Commonwealth was still in violation of its constitutional obligation to educate children. Id. The Massachusetts Supreme Court assigned a trial court judge to serve as a master to the Supreme Court. Id. That judge recommended that the Supreme Court order the Department of Education to undertake a wide-ranging study that would include ascertaining the cost of implementing seven curriculum frameworks, including free preschool for all three and four year olds. Id. at 1156.

The Massachusetts Supreme Court disagreed with that recommendation and refused to order the study. In this regard, the Massachusetts Supreme Court held:

[T]he study ... is rife with policy choices that are properly the Legislature's domain. The study would assume, for example, that in order to fulfill its constitutional obligation under the education clause, the Commonwealth “must” provide free preschool for all three and four



year old children “at risk” in the focus districts, and presumably throughout the Commonwealth thereafter. That is a policy decision for the Legislature.

Id. The Massachusetts court also held that “[o]ther programs might be equally effective to address the needs of at risk students.” Id. at 1157. The court discussed the complexity of education policy in general and noted the “disagreement between competent experts on how best to remediate a nonperforming or poorly performing school district.” Id. (*quoting* dissent of Greaney, J.). The court held that because of that complexity and disagreement, “we leave it to the [Governor] and the Legislature[ ] to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children.” Id. (*quoting* McDuffy, 615 N.E.2d at 554).

Similarly, the Arkansas Supreme Court in Lakeview School District No. 25 v. Huckabee, 91 S.W.3d 472, 501 (Ark. 2002), addressed, among many other issues, whether a constitutionally adequate education required a pre-kindergarten program. The State argued that while it might “agree that as a matter of public policy pre-kindergarten programs may be one way to increase student achievement, it does not agree that such programs are mandated by the Arkansas Constitution.” Id. at 500. The Arkansas Supreme Court agreed and held, “the trial court could not order the implementation of pre-school programs. That is a public-policy issue for the General Assembly to explore and resolve.” 91 S.W.3d at 501.

The North Carolina Supreme Court came to a similar conclusion in Hoke County Board of Education v. North Carolina, 599 S.E.2d 365 (N.C. 2004). In

that case, the State conceded the need for assistance for “at-risk” prospective enrollees in Hoke County, but the North Carolina Supreme Court held that “there is a marked difference between the State’s recognizing a need to assist ‘at-risk’ students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in a singular fashion.” Id. at 393. In the North Carolina Supreme Court’s view, requiring the state to provide pre-kindergarten programs to at-risk children was a specific court-imposed remedy and that “specific court-imposed remedies are rare, and strike this Court as inappropriate.” Id. The court reasoned that public school education was a matter “clearly designated in our state Constitution as the shared province of the legislative and executive branches” and although the evidence presented supported providing additional assistance to “at-risk” children, the evidence “d[id] not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government’s other branches.” Id.

#### ***IV. The Legislative Delegation of Responsibility Under Alaska Law***

The Education Clause places the responsibility upon the Alaska State Legislature to “establish and maintain schools” within the state. An issue that has been raised in this litigation is the extent to which the Legislature can delegate that constitutional responsibility to school districts. Several Alaska Supreme Court cases have addressed this delegation issue in different contexts.

In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the Fairbanks borough and school district brought an action challenging the constitutionality of the Executive Budget Act. That Act allowed the governor to withhold or reduce appropriations, including appropriations to municipalities and school districts, when revenue shortfalls were anticipated. The Plaintiffs argued that the Act was unconstitutional for two reasons: first, because it impermissibly delegated power over appropriations to the executive branch instead of the legislature, and second, because “the statute lack[ed] standards to guide the exercise of administrative discretion.” Id. at 1142.

The Supreme Court quoted with approval from Synar v. United States, 626 F.Supp. 1374, 1386 (D. D.C. 1986), which held, “[w]hen the scope [of the delegation] increases to immense proportions ... the standards must be correspondingly more precise. The essential inquiry is whether the specific guidance ‘sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.’” Synar, 626 F.Supp. at 1386-87 (*citation omitted*).

In Fairbanks North Star Borough, the Alaska Supreme Court noted that the governors had actually exercised their powers under this Act quite narrowly. But “the issue in this case is not what has been done under the statute; rather it is what can be done. The limited exercise of authority undertaken [by the governors pursuant to the Act] cannot save a statute which amounts to legislative abdication.” 736 P.2d at 1144. The Alaska Supreme Court held that the Act was unconstitutional “because it authorizes the exercise of sweeping power [by the

governor] over the entire budget with no guidance or limitation” from the Legislature. Id. at 1142-43.

The Alaska Supreme Court again examined the issue of delegation in Municipality of Anchorage v. Anchorage Police Dep't. Employees Assn., 839 P.2d 1080 (Alaska 1992). In that case, the Municipality sought to have a binding arbitration provision in the Municipal Code declared unconstitutional. It argued that the use of an arbitrator impermissibly delegated the Assembly's legislative power and that there were insufficient standards to guide the arbitrator's decision. Id. at 1085. But the Alaska Supreme Court disagreed and upheld the provision, holding that “[i]n light of the elaborate and detailed structure which guides the arbitrator's decisions and guards against arbitrary action we conclude that the Code's delegation of legislative authority is constitutional.” Id. at 1089.

The court also cited with approval to Professor Davis, who stated:

The focus should not be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards. The key should no longer be statutory words; it should be the protections the administrators in fact provide, irrespective of what the statutes say or fail to say. The focus of judicial inquiries thus should shift from statutory standards to administrative safeguards and administrative standards.

1 K. Davis, *Administrative Law*, § 3:15, at 206-07.

More recently, the Alaska Supreme Court examined the issue of delegation in Usibelli Coal Mine, Inc. v. State, Dep't of Natural Res., 921 P.2d 1134 (Alaska 1996). Usibelli was challenging regulations promulgated by the Department of Natural Resources (DNR) regarding royalty rates. Usibelli argued, among other issues, that the regulations were unconstitutional because of a lack of sufficient

standards and procedures in the legislative delegation to DNR. The Supreme Court, however, upheld the legislative delegation, finding that “coal leasing on state lands is a narrow area or field, [and] this is a delegation of ‘broad authority to an agency with expertise to regulate a narrowly defined field.’” Id. at 1145 (citations omitted). Moreover, the Court concluded “there are sufficient standards and procedural safeguards to ensure the valid exercise of agency authority in this case.” Id. In its discussion, the Court noted, “We have adopted a sliding-scale approach in analyzing the validity of a delegation of authority.” 921 P.2d at 1144 (citing Fairbanks North Star Borough, 736 P.2d at 1143). “The constitutionality of a delegation is determined on the basis of the scope of the power delegated and the specificity of the standards to govern its exercise.” Id.

#### ***V. Delegation of Education Responsibility in Other States***

Several states have examined the issue of delegation within the specific context of education. In Butt v. California, 842 P.2d 1240 (Cal. 1992), the Richmond School District announced that it lacked the funds to complete the final six weeks of the 1990-91 school year and that it was going to close its schools early. Parents of children who attended the schools brought an action seeking to compel the state to take action to prevent the planned closings. The California Court articulated the issue before it as follows: “Whether the State has a constitutional duty, aside from the equal allocation of educational funds, to prevent the budgetary problems of a particular school district from depriving its students of ‘basic’ educational equality.” Id. at 1243. The State argued that it

had no constitutional duty to ensure prudent use by local administrators of the funds distributed to each district and that the State's refusal to intervene must be upheld as rationally related to its policy of local control and accountability. Id. at 1247.

The California Supreme Court held that the State had a duty to oversee the District's financial management of the funds that the State distributed to it. "Public education is an obligation which the State assumed by the adoption of the Constitution." Id. at 1248 (citations omitted). It is "the State's ultimate responsibility for public education [and it] cannot be delegated to any other entity." Id. (citations omitted). "The State's responsibility . . . extends beyond the detached role of fair funder or fair legislator. In extreme circumstances at least, the State 'has a duty to intervene.'" Id. at 1253.

The California Supreme Court also disagreed with the State's argument that "[a]llowing the District's students to absorb the consequences of District mismanagement ... was necessary to preserve the State's compelling educational policy of local autonomy and accountability." Id. In response to that argument the Court held that:

The legislative decision to emphasize local administration does not end the State's constitutional responsibility for basic equality in the operation of its common school system. Nor does disagreement with the fiscal practices of a local district outweigh the rights of its blameless students to basic educational equality.

Id. at 1254.

Although the California Supreme Court upheld the trial court's order approving an emergency State loan and appointment of an administrator to take temporary charge of the District's operation, the court also noted that:

[N]othing in our analysis is intended to immunize local school officials from accountability for mismanagement, or to suggest that they may indulge in fiscal irresponsibility without penalty. The State is constitutionally free to legislate against any recurrence of the Richmond crisis. It may further tighten budgetary oversight, impose prudent, nondiscriminatory conditions on emergency State aid, and authorize intervention by State education officials to stabilize the management of local districts whose imprudent policies have threatened their fiscal integrity ... The State's plenary power over education includes ample means to discourage future mismanagement in the day-to-day operations of local districts.

Id. at 1255-56.

In Claremont Sch. Dist. v. Governor, 794 A.2d 744, 751 (N.H. 2002), the New Hampshire Supreme Court examined whether the New Hampshire legislature and governor had the obligation to adopt standards of accountability to ensure delivery of a constitutionally adequate education. Like many education cases, Claremont has a lengthy litigation history that began in 1992. Id. at 745.

In the initial litigation, the New Hampshire Supreme Court "specifically acknowledged that the task of defining the parameters of the education mandated by the constitution is in the first instance for the legislature and the Governor." Id. at 746 (*citing* Claremont, 635 A.2d at 1375). After that ruling, the New Hampshire legislature attempted to draft comprehensive reform legislation, but further litigation ensued.

In Claremont II, the State argued that it was only accountable for devising a system to deliver a constitutionally adequate education. Id. at 751. However, the

New Hampshire Supreme Court disagreed and held that accountability was more than creating a system to deliver an adequate education:

Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty.

Id. at 751. While the court held that the State may delegate its duty to provide a constitutionally adequate education to local school districts, “it must do so in a manner that does not abdicate the constitutional duty it owes to the people.” Id. at 755.

In Campaign for Fiscal Equity, Inc. v. New York, 100 N.Y.2d 893 (N.Y. 2003), the State argued that the Board of Education’s mismanagement of revenues was responsible for the failure to provide a sound basic education to New York City school children. Id. at 921. The New York Court of Appeals disagreed:

[T]he State’s argument on Board of Education mismanagement fails for a [ ] basic reason. ... [B]oth the Board of Education and the City are “creatures or agents of the State,” which delegated whatever authority over education they wield. Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights.

Id. at 922 (internal citation omitted).

In Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee, 91 S.W.3d 472 (Ark. 2002), the Arkansas Supreme Court held that the State had not fulfilled its duty to provide the children of this state with a general, suitable, and efficient school-funding system. The Court held:



No longer can the State operate on a “hands off” basis regarding how state money is spent in local school districts and what the effect of that spending is. Nor can the State continue to leave adequacy and equality considerations regarding school expenditures solely to local decision-making.

Id. at 511.

Similarly, in Hoke County Board of Education v. State, 599 S.E.2d 365 (N.C. 2004), the North Carolina Supreme Court found that the local school board was not “strategically allocating the available resources” so as to accord to the at-risk children within Hoke County a constitutionally adequate education. 599 S.E.2d at 388-89. The Supreme Court held the State accountable for “fail[ing] to oversee how educational funding and resources were being used and implemented in Hoke County schools.” Id. at 390. In doing so, it rejected the State’s argument that it should not be held responsible for the local school board’s misallocation of funds, because that would “undermine the authority of ... [local] school boards.” Id. at 389. Instead, by holding the State accountable, the court “placed responsibility for the school board’s actions on the entity – the State – that created the school board and that authorized the school board to act on the State’s behalf.” Id.

## ***VI. Substantive Due Process***

In addition to their claims under the Education Clause of the Alaska Constitution, the Plaintiffs assert that certain components of the current education system in Alaska violate their substantive due process rights. Specifically, the Plaintiffs assert that the state-required graduation exam is

“fundamentally unfair” because “not all courses or content which are tested in the exam are available to each child” in the State. [Plaintiffs’ Proposed Findings of Fact and Conclusions of Law at 138-140.] The Plaintiffs also argue that the funding formula’s flat 20% add-on for special education, bilingual education, gifted education, and vocational education violates due process because the formula does not account for the varying needs of the students in each district and results in the “arbitrary denial of those services to some students.” Id. Finally, the Plaintiffs argue that the Legislature’s funding of REAA school districts is arbitrary and capricious and that “depriving them of a constitutional education more readily available to children in other school districts [is] contrary to the due process clause.” Id.

The Alaska Supreme Court has held that as a general rule, “[t]he standard for establishing a substantive due process violation is rigorous. A due process claim will only stand if the state’s actions ‘are so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice.’” Church v. State, Dep’t of Revenue, 973 P.2d 1125, 1130 (Alaska 1999) (quoting Application of Obermeyer, 717 P.2d 382, 386-87 (Alaska 1986)).

Likewise, in Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974), the Supreme Court held “[s]ubstantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose.” (citing Mobile Oil Corp. v. Local Boundary Comm’n, 518 P.2d 92, 101 (Alaska 1974)). The “constitutional guarantee of substantive due process assures only that a

legislative body's decision is not arbitrary but instead based upon some rational policy." Id.

In deciding whether an ordinance violates substantive due process "[i]t is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people." Id.

A court's inquiry into arbitrariness begins with the presumption that the action of the legislature is proper.<sup>31</sup> The party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists. This burden is a heavy one, for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification.

527 P.2d at 452.

More than 27 years later, the Alaska Supreme Court reiterated that "[t]he party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists." Griswold v. Homer, 34 P.3d 1280, 1284 (Alaska 2001)(*quoting* Concerned Citizens, 527 P.2d at 452). In Griswold, the Supreme Court held that a change in a zoning ordinance did not violate Griswold's substantive due process rights because the change was consistent with the city's comprehensive zoning plan, was enacted to serve the general interests of the community, and was supported by legitimate, nondiscriminatory justifications. Id. at 1284.

A different substantive due process standard applies when fundamental rights are at stake. In that case, the strict scrutiny standard of review would

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<sup>31</sup> Citing Leege v. Martin, 379 P.2d 447, 452 (Alaska 1963); DeArmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962).

apply to the substantive due process claim. See Treacy v. Municipality of Anchorage, 91 P.3d 252, 268 (Alaska 2004). Under this standard, the government is prohibited “from infringing on fundamental liberty interests unless that infringement is narrowly tailored to serve a compelling state interest.” Id. at 268.

In Treacy, the Alaska Supreme Court recognized that parents have a fundamental right to control the upbringing of their children. However, the Court upheld the constitutionality of the city’s juvenile curfew ordinance “[b]ecause the municipality’s interest is sufficiently compelling, and because the ordinance presents the least restrictive alternative for meeting all of its stated goals.” Id. at 269.

Finally, the due process clause also requires that the government can not act in a manner that is “fundamentally unfair.” See, e.g., Sands v. Green, 156 P.3d 1130 (Alaska 2007); State, DNR v. Greenpeace, Inc., 96 P.3d 1056 (Alaska 2004).

As Plaintiffs note, this concept was raised in the context of high school graduation exams in Debra P. v. Turlington, 644 F.2d 397 (5<sup>th</sup> Cir. 1981). There, the federal court held that the state of Florida could not administer its exit exam “until it has demonstrated that the [test] is a fair test of that which is taught in its classrooms.” Id. at 408. Thus, the court put the burden on the state of Florida, not the Plaintiffs, to demonstrate that the testing material was covered. There, the Plaintiffs were African-American, and had asserted that their lower pass rate on the test was due to the present effects of past intentional segregation.

Based upon consideration of the Findings of Fact and the Legal Analysis as set forth herein, this Court enters the following:

## **CONCLUSIONS OF LAW**

### ***I. The Education Clause***

1. The Alaska Constitution requires that the Legislature “establish and maintain a system of public schools.” Art. VII, § 1. The primary question in this case – whether the public education system in Alaska is constitutionally adequate – can not be framed solely in terms of funding, but must also address the opportunity for children to obtain an education. Funding is just one component of the State’s public school system.

2. The Legislature has the ultimate responsibility and plenary power over the education of Alaska’s children. Macauley v. Hildebrand, 491 P.2d 120, 122 (Alaska 1971). It has chosen to delegate that responsibility in large part to the local school districts operating throughout the state. Certainly, the Legislature has the authority to delegate this important responsibility, so long as it establishes adequate standards to guide the local districts. See, e.g., Hertz v. State, 22 P.3d 895, 903 (Alaska 2001). However, the Legislature retains both the constitutional “responsibility and the authority” to maintain the schools in this state. Macauley, 491 P.2d at 122.

3. In addition to delegating the operation of schools to the local school districts, the Legislature has delegated supervision of education to the executive branch, through the creation of the State Board of Education and the

Department of Education and Early Development. The Plaintiffs have maintained this action against the State of Alaska. It is both the legislative and executive branches' actions or inactions that are at issue with respect to the provision of education in Alaska. See generally Municipality of Anchorage v. Anchorage Police Dep't. Employees Ass'n., 839 P.2d 1080, 1089 (Alaska 1992).

4. This Court has carefully considered all the evidence presented in this case, together with the applicable Alaska case law and, to a lesser extent, the determinations by other courts regarding educational adequacy pursuant to their constitutions. Based upon those considerations, this Court determines that the State's constitutional obligation to maintain schools has four components.

5. First, there must be rational educational standards that set out what it is that children should be expected to learn. These standards should meet or exceed a constitutional floor of an adequate knowledge base for children. Second, there must be an adequate method of assessing whether children are actually learning what is set out in the standards. Third, there must be adequate funding so as to accord to schools the ability to provide instruction in the standards. And fourth, where, as here, the State has delegated the responsibility to educate children to local school districts, there must be adequate accountability and oversight by the State over those school districts so as to insure that the districts are fulfilling the State's constitutional responsibility to "establish and maintain a system of public schools" as set forth in Article VII, § 1 of Alaska's Constitution.

### ***The Content and Performance Standards***

6. As to the first component, considerable evidence was presented at trial regarding the development and refinement of the State's content and performance standards. The Court also heard from many witnesses -- for both the Plaintiffs and the State -- that the standards represent an appropriate road map for what children in Alaska should learn. The extensive evidence presented on the State's standards all leads readily to the conclusion that these standards are thorough and appropriate educational standards for Alaska that meet or exceed the constitutional threshold of an adequate education.

7. Several state courts have adopted a list of skills -- often called "capabilities" or "competencies" -- that must be included in an adequate education.<sup>32</sup> These have also been referred as the "Rose factors,"<sup>33</sup> after the Kentucky case in which such standards were articulated.

8. In determining the State's compliance with the Education Clause, this Court does not find it necessary or appropriate to adopt the State's existing content and performance standards as a constitutional definition of educational adequacy. The Plaintiffs do not dispute the adequacy of the State's standards. See, e.g., Pls. Proposed Findings at 42, ¶115. In these circumstances, it is sufficient that the State has demonstrated that it adopted a comprehensive set of content and performance standards through an extensive collaborative process, and that the resultant standards define an education that meets or exceeds the "constitutional floor" of an adequate education.

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<sup>32</sup> See, e.g., cases listed at Plaintiffs' Proposed Findings at FN 238.

<sup>33</sup> Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989).

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9. This Court also finds that the Education Clause does not require the State to insure that each child achieves proficiency in the content and performance standards. Stated differently, the Education Clause does not make the State a guarantor that each child will actually achieve proficiency in the performance standards. Instead, this Court finds that the Education Clause requires the State to take ultimate responsibility for insuring that each child in this state is accorded a meaningful opportunity to achieve proficiency in reading, writing, math, and science – the four subjects encompassed within the State’s performance standards.<sup>34</sup>

10. With respect to the State’s content standards on subjects other than reading, writing, math, and science, it is sufficient from a constitutional standpoint that each student receives meaningful exposure to those other content standards during the course of that child’s schooling. This Court does not interpret the Education Clause of the Alaska Constitution to require, for example, that there be a certified music teacher, vocational education teacher, art teacher, or librarian in each school. Such an approach is consistent with this Court’s reading of the Molly Hootch decision, in which the Alaska Supreme Court recognized that “educational programs may well require special design to confront the divergent problems presented, [such that] a uniformity requirement

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<sup>34</sup> Former Commissioner Holloway testified persuasively on this topic, when she stated: “we’ve always had adequate money to teach kids to read, write and compute. And schools, that’s their major responsibility. If we don’t give kids the ability to read, write, and compute, if that toolkit isn’t there and very proficient, we have virtually taken away from them the choices that are out there for them to make to enrich their lives and to be more economically viable. So, you know, I’m a basic skills gal. I think that every young person in this state has got to be proficient in reading, writing, and math.” [Tr. 3397]



in the Alaska education system might well prove unworkable.” Hootch, 536 P.2d at 803.

11. A related issue on educational content is the topic of pre-kindergarten. Many witnesses for both the Plaintiffs and the State testified that pre-kindergarten programs can contribute to academic success by helping to make young children ready for formal education. Yet there appears to be no consensus as to the age to best apply “pre-kindergarten” programs, or whether they ought to be provided in the public schools or outside of the school system. Although there is considerable evidence that pre-kindergarten programs may be beneficial to children, it is not the Court’s role to make such policy determinations.

12. The Education Clause, on its face, requires that the State “establish and maintain a system of public schools.” At statehood, public schooling began after kindergarten. The State now provides a public school system available to children beginning at age five.<sup>35</sup> This Court does not read the Education Clause of the Alaska Constitution to accord to preschool age children the right to a public school education.

### ***Assessments***

13. It is undisputed that the State has developed a comprehensive system to assess student proficiency in reading, writing, and math, and that it intends to also assess proficiency in science. The testimony of Les Morse, Director of Assessment and Accountability at EED, was particularly persuasive as to the careful attention to detail that has been invested by EED staff and many

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<sup>35</sup> AS 14.03.080(d).

educators throughout the state that led to the development and continued refinement of the State's assessment standards.

14. The Plaintiffs do not assert that the State's current assessment system fails to adequately or accurately assess proficiency in the subjects tested. See, e.g., Plaintiffs' Proposed Findings at 44-48.

15. While it may be that the State is required to exercise sufficient oversight over school districts to insure that each school accords to children meaningful exposure to each of the State's other content areas, this Court finds that formalized testing in each of those other content areas is not constitutionally required.

16. This Court finds that the State's assessment system meets its constitutional obligation with respect to this component of an adequate education under the Education Clause.

### ***The Adequacy of the Funding***

17. With respect to the adequacy of the funding, as set forth above in this Court's *Findings of Fact*, this Court has found with respect to each of the Plaintiff school districts that the Plaintiffs failed to establish by a preponderance of the evidence that the Legislature has failed to accord the school districts sufficient funds with which to provide to their children adequate instruction on the State's content and performance standards.

18. This Court also finds that the Plaintiffs failed to establish by a preponderance of the evidence that the State of Alaska has underfunded

education in other parts of the state, or in the state as a whole, to such a degree so as to constitute a violation of the Education Clause.

19. The Plaintiffs assert that the achievement gap between Alaska Native students and other students is demonstrative of an underfunding of education. But this Court found persuasive not only the evidence regarding all of the various school districts that was submitted, but also the testimony of the State's experts and other witnesses on this issue. There are many parts of the state in which children are being accorded a meaningful opportunity to achieve proficiency on the State's performance standards and receive meaningful exposure to the State's other content standards. Although the achievement gap is a serious concern in this state, the Plaintiffs failed to establish by a preponderance of the evidence that additional funding to the school districts would reduce or remedy this gap.

20. In conducting their analyses of the sufficiency of educational funding in Alaska, the Plaintiffs and their experts have generally excluded federal or grant funding, and have asked this Court to evaluate the sufficiency of only state and local funds. But the Court concludes that all funding should be included in an analysis of the adequacy of Alaska's educational funding system.

21. The Alaska Constitution does not specify any source of funds that must be used by the Legislature to provide the system of public schools that is required under the Education Clause. The State is required to insure that education is adequately funded, but in so doing it may consider all sources of

funding, including private foundations, individual philanthropists, the federal government, or any number of combined sources.

22. At statehood, the State depended heavily on federal money for education, and several statutes demonstrated the intent of the new state to obtain as much federal money as possible.<sup>36</sup> In Molly Hootch, the Alaska Supreme Court held that to interpret the Education Clause to require a large expenditure of state money -- in that case the cost of local secondary schools in each rural community -- "would have been considered preposterous" at the time of statehood.<sup>37</sup> It follows that the framers intended that the State should continue to receive and spend federal money in providing a system of public school funding.<sup>38</sup>

23. There is no evidence that the State has used federal funds in a manner inconsistent with federal law. The State has been found to have an equitable financing scheme under federal law, and there was no evidence that the federal Title funds have been used to supplant, instead of supplement, state or local funds.

24. The Plaintiffs have argued that REAAs are disadvantaged by Alaska's system of education finance. However, the evidence in this case persuasively demonstrated that REAAs receive considerably more funding per student than the average city or borough. Moreover, in Mat-Su v. State, the Alaska Supreme Court held that the funding systems within the state do not need

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<sup>36</sup> AS 14.50.030-14.50.080.

<sup>37</sup> Hootch, 536 P.2d at 804.

<sup>38</sup> See Hoke County Bd. of Educ. v. State, 599 S. E. 2d 368, 395 (N.C. 2004) (trial court properly considered federal funding in adequacy determination).

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to be equivalent: “Given the differences in constitutional status between REAAs and boroughs and city districts, we hold that the legislative decision to exempt REAAs from the local contribution requirement, while requiring contributions from borough districts, was substantially related to the legislature’s goal of ensuring an equitable level of educational opportunity across the state.”<sup>39</sup> In addition, REAAs have the opportunity to become boroughs, and many have. That will change how the funding formula applies to them, but it will not change the fundamental fact that they contain small, rural schools and that effective methods of delivering education to such schools must be considered by local school districts – which the evidence demonstrated is already occurring in many districts throughout the state.

25. One of the Plaintiffs’ experts, Dr. Nat Cole, testified that the state system of education is inadequate because state funding has not kept pace with inflation. But failure to keep up with inflation does not make a system constitutionally inadequate. This Court rejects the idea that the Education Clause requires that funding always be at the historical high-water mark and must be inflation-proofed. Funding can be higher in years of higher revenue without creating an obligation to keep funding at that level or to inflation-proof future education funding. The Education Clause requires only that education funding be adequate to provide a meaningful opportunity to meet the State’s standards, not that it always be at 1988 levels. Second, the opinion that education throughout the state is inadequate because it is not at the 1988 level is inconsistent with the opinion of Plaintiffs’ other experts, Dr. Mueller and Dr.

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<sup>39</sup> Matanuska-Susitna Bor. Sch. Dist. v. State, 931 P.2d 391, 400 (Alaska 1997).  
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Smith, who both opined that education in the state is definitely adequate in some places -- even though funding it is no longer at the 1988 levels. [Tr. 743, 1248-49]

26. The Plaintiffs also criticize the present State education funding formula enacted by the Legislature in 1998, and instead favor the formula put into place in 1988. The Legislature currently allocates operational funding to districts through a formula that contains "adjustments" based on legislatively-selected factors, including school size, district cost factors, special needs, intensive instruction, and correspondence instruction.<sup>40</sup> The evidence presented indicated that the current formula was carefully considered and represents a rational approach to educational funding.

27. The Plaintiffs have asserted the existing formula is constitutionally deficient because it fails to adequately weight for at-risk students. The State's operational funding formula (as distinct from specially designated state or federal grants) results in unrestricted funding that can be spent by the school district for any of its educational programs. Therefore, in assessing the constitutional adequacy of the formula, it should be considered globally, rather than separating out the factors that are contained within each part of the formula. When viewed from that perspective, the evidence persuasively demonstrated that Alaska's formula provides more money where educational need is greater. Accordingly, the formula's failure to expressly weight for at-risk students does not present a constitutional infirmity.

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<sup>40</sup> See AS 14.17.

28. The Plaintiffs also object to the present funding formula because it is based on “block” funding for “special needs” students. The Plaintiffs’ expert, Dr. Cole, recommends a return to categorical funding that was used in the 1988 formula. Based on the evidence presented at trial, including the reasons for the change to block funding, the Court concludes that the State’s formula for “block” funding of special educational needs at 20% is a rational method of allocation. [Tr. 2722-23]

29. Under the Education Clause, funding for a public education system is constitutionally inadequate only if it is proven that the existing resources are not sufficient to accord to children a meaningful opportunity to be educated.<sup>41</sup> Plaintiffs have failed to demonstrate that the Education Clause of the Alaska Constitution requires the State of Alaska to allocate more money to school districts. The Court’s conclusion does not imply that spending more money at this time would not have an effect on specific educational outcomes, or for specific schools, classrooms, or students.<sup>42</sup> There may be, in particular, a benefit in specifically-targeted spending for incentives for education that could be beneficial. But based on the current level of spending, and the other evidence presented at trial, the Plaintiffs have failed to demonstrate that the State is constitutionally obligated to appropriate more money to local school districts for education at this time.

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<sup>41</sup> The Plaintiffs have not raised any equal protection claim in this litigation. The Plaintiffs’ due process claim is addressed separately.

<sup>42</sup> It may be that the Legislature will need to accord to EED additional funding to insure that the school districts are meeting the State’s duty to provide a constitutionally adequate education to Alaska’s school children.

30. The Plaintiffs have failed to establish by a preponderance of the evidence that the existing funding formula or any of its components are constitutionally infirm. But this Court expresses absolutely no opinion as to whether, from a policy standpoint, there should be any adjustments to or replacement of the existing formula or any of its components. Whether the Legislature chooses to adjust or replace the funding formula, or any of the components of the funding system, are all appropriate policy determinations for the Legislature to address as it may deem warranted.

#### **Accountability and Oversight**

31. The extensive evidence in this case demonstrated that a considerable majority of the children in this state are being accorded a constitutionally adequate education. This is best demonstrated by the many districts in which a substantial majority of the children have achieved proficiency on the State's assessments, as well as the additional evidence the State presented from several non-Plaintiff school districts. And it is also clear that EED is providing substantial assistance and support to those school districts that seek out its services. EED is also exploring many educational strategies in an effort to increase the number of students in the state who attain proficiency.

32. The Court also finds that the concept of local control over the delivery of public education is deeply ingrained in state educational policy and the history of education in Alaska and elsewhere. In Tunley v. Municipality of



Anchorage Sch. Dist., for example, the Alaska Supreme Court included the following quotation:

Historically, Americans have considered schools to be an extension of the local community. Thus, although state legislatures possess plenary power over the educational system, local initiative with respect to education is so highly regarded that most states have delegated extensive authority over the actual administration of the schools to local institutions.<sup>43</sup>

33. Similarly, in Breese v. Smith, the Alaska Supreme Court quoted with approval the following United States Supreme Court observation:

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint ... By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.<sup>44</sup>

34. But Alaska's Constitution makes the Legislature -- not the local school districts -- ultimately responsible for maintaining Alaska's schools. Clearly, the Legislature has the authority to delegate that responsibility. And this Court has found the Legislature has provided the school districts with a constitutionally sufficient amount of funds to undertake that responsibility. But the State's responsibility does not end with adequate funding. If a school, despite adequate funding, is failing to accord a child with a constitutionally

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<sup>43</sup> Tunley v. Municipality of Anchorage Sch. Dist., 631 P.2d 67, 75 n.17 (Alaska 1981) (quoting Project, Education and the Law: State Interests and Individual Rights, 74 Mich. L. Rev. 1373, 1380 (1976); see also Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.")).

<sup>44</sup> Breese, 501 P.2d at 174 n.59 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (footnotes omitted and ellipses inserted by the Alaska Supreme Court)).

adequate education -- such as failing to give that child a meaningful opportunity to acquire proficiency in the State's own performance standards -- then the concept of local control must give way because that school is not being maintained as required by the Education Clause.

35. In many respects, EED has done a truly commendable job in improving education for Alaska's children. This Court has reviewed the testimony of all of the EED personnel, including the extensive deposition testimony that was submitted. Each person demonstrated a deep commitment toward improving education for all of Alaska's children. The depth of that commitment was perhaps most evident in the testimony of Roger Sampson, the current Commissioner of the Department of Education and Early Development.

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

37. This is not to indicate that each local school district is constitutionally precluded from having its own curriculum. In Molly Hootch, the Alaska Supreme Court expressly sanctioned the use of different educational programs throughout the state. 536 P.2d at 803. The Supreme Court recognized that there is a particular benefit in Alaska, given its diversity of people, to accord to each school district the ability to use a curriculum that will be responsive to the cultural and other needs of each community. Id. And yet the definition of a basic education in Alaska, particularly after the passage of No Child Left Behind, must encompass providing to each student a meaningful opportunity to learn to read and write in English, and to perform basic math computations.

38. The Education Clause does not require the State to “take over” these troubled school districts or fire key personnel. Indeed, evidence introduced at trial indicated that such approaches may well be counterproductive. Commissioner Sampson’s suggestion -- that the Legislature look to according EED more authority to direct a school district’s resource allocation into the classroom -- may result in considerably greater success. The exact nature of those additional efforts should be for the State, in the first instance, to determine. But this Court finds that the efforts taken as of trial, particularly with respect to the Yupiit School District, are constitutionally inadequate. While the Court recognizes that the State had taken some steps in the right direction in Yupiit as of that date, the State has not satisfied its constitutional obligation to the children in that district to accord them an adequate education. In short, the schools in Yupiit are not being adequately maintained as required by Alaska’s Constitution.

The evidence at trial demonstrates that Yupiit does not have an educational plan and a well-grounded curriculum in use in its classrooms that together aim to insure that each child is accorded a meaningful opportunity to achieve proficiency on the State's performance standards and meaningful exposure to the State's other content standards.

39. There is "no silver bullet" in education, and as the evidence regarding Bering Strait School District clearly demonstrated, there is a benefit in experimentation and in according to local school districts the opportunity to direct their funds in the manner that they believe will best meet the needs of students within their district, particularly given the great diversity within this state. But the Alaska Constitution sets some limits. If generations of children within a school district are failing to achieve proficiency, if a school or a district has not adopted an appropriate curriculum to teach language arts and math that is aligned with the State's performance standards, if basic learning is not taking place for a substantial majority of a school's children, then the Constitution places the obligation upon the Legislature to insure that the State is directing its best efforts to remedy the situation. Here, the evidence has persuasively demonstrated that more funding is not the answer. For the State to fail to take a considerably more directive role in the face of chronically poor performance, at least for the children in Yupiit, amounts to an impermissible "legislative abdication" of the State's constitutional responsibility to maintain public schools in this state. Fairbanks, 736 P.2d at 1144.

40. Based on the evidence presented at trial, it would appear likely that the majority -- perhaps the substantial majority -- of school districts within this state are meeting the State's constitutional obligation to provide an adequate education to Alaska's children. The State's accountability standards, in which each school's and district's testing results are widely disseminated, together with EED's support services and assistance, appear to provide sufficient standards and oversight for the majority of districts, at least from a constitutional perspective.

41. In order to achieve compliance with the Education Clause's requirement to maintain a system of public schools, the State must do, at a minimum, two things. First, it must establish clear standards for school districts that are necessary for the district to retain full local control. These standards must focus on whether the school district is fulfilling the State's constitutional obligation to provide an education to the children within the district. In short -- the State must insure that each school district has a demonstrated plan to provide children a meaningful opportunity to achieve proficiency in the State's performance standards, and meaningful exposure on the remaining content standards -- and insure that the district's plan is fully implemented and actually in use in the district's classrooms. Second, the State must exercise considerably more oversight and provide considerably more assistance and direction to those schools that are identified as failing to meet the State's constitutional obligation, in a concerted effort to remedy the situation.

42. It is the State, at this juncture, that should have the first opportunity to address how best to achieve these two requirements. In determining which districts require greater oversight, for example, it is the State that should determine how to make this assessment, and the factors that would guide that determination. These issues are clearly more appropriate for education policy-makers to address in the first instance, rather than this Court.

43. At the Constitutional Convention, Delegate Armstrong, who served on the committee that drafted the Education Clause, provided general remarks about the committee's reason for proposing that clause: "We had to recognize that the public schools were our responsibility and that it was our duty to provide for all children of the state in matters of education."<sup>45</sup>

44. Although this Court had the privilege to hear from many concerned educators and parents throughout the state during the course of this proceeding, perhaps Dr. Davis summarized this issue the best: "as a state, we need to begin to recognize [that] if we have profound learning challenges, students are testing consistently, generation after generation as performing less well than the majority of the population, then ... it's not enough just to say, 'well, we gave them ... equitable resources.'" [Tr. 204] This Court has found that the State has accorded constitutionally adequate funding for education. But the Education Clause requires that the State must provide considerably more than funding to fulfill its constitutional obligation to maintain a public school system in this state, and particularly its underperforming schools.

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<sup>45</sup> Available at: <http://www.law.state.ak.us/doclibrary/conconv/48.html>

45. Each of the Plaintiff school boards, and particularly the Yupiit School Board, is to be commended for opting to become a Plaintiff in this action. In doing so, each was subjected to the intensive scrutiny that is so often a component of the legal process. The Yupiit School Board President persuasively expressed his deep concern about the low achievement levels of the students in his district. He testified that he welcomes the State's assistance to help the district's children. And this Court was also persuaded that the teachers in Yupiit are enthusiastic and motivated to teach the children in that district to the best of their ability. Likewise, many witnesses -- for both the Plaintiffs and the State -- demonstrated a heartfelt motivation to improve the quality of education for Alaska's school children. Ultimately, the Alaska Constitution makes the State responsible for according all of the children in Alaska the opportunity to learn. To date, it has not fully met that responsibility.

46. At this juncture, this Court recognizes that the legislative and executive branches of government, and not the Court, are in a considerably better position to address these issues. So as to accord the State an opportunity to do so, this decision is being stayed for a period of one year.

## ***II. Substantive due process***

47. The Plaintiffs have also asserted several substantive due process arguments. With respect to their funding claims, for the same reasons set forth above with regard to the validity of the State's funding under the Education Clause, the Plaintiffs have failed to demonstrate that the funding

formula has “no rational basis.” Griswold v. Homer, 34 P.3d 1280, 1284 (Alaska 2001). Accordingly, those claims are dismissed.

48. The Plaintiffs have also asserted that the high school graduation exam violates their rights to due process. In this regard, they assert that education is a fundamental right, and thus the high school diploma is also a fundamental right. They then assert that the State has failed to present a compelling reason before depriving students of their right to receive a diploma. [Plaintiffs’ Proposed Findings at 139]

49. The State acknowledges that a high school diploma is a property interest, and thereby entitled to due process protection. But the State asserts that the evidence at trial supports a conclusion that all students in the state are accorded an adequate opportunity to learn the subject matter on the exit exam. [State’s Proposed Findings at 78, ¶194; 114, ¶ 89]

50. This Court need not determine whether education is a fundamental right to resolve this issue, because an individual does not have a fundamental right to receive a high school diploma. Thus, the heightened standard of a substantive due process analysis advocated by the Plaintiffs is inapplicable.

51. And yet the State is required to proceed with “fundamental fairness” when taking action that could deprive a person of a property interest such as a high school diploma. This Court has found that in some areas of the state, children are not being accorded a meaningful opportunity to acquire



proficiency in the very material that is tested on the exit exam.<sup>46</sup> The State is to be commended for its careful efforts in the development and testing of the exit exam, and for according substantial notice of the exam prior to its effective date. Yet given the State's constitutional shortcomings in addressing the educational needs of children at all schools in the state -- and specifically as has been found with respect to the three Yupiit schools -- it is fundamentally unfair to those children to condition the receipt of a high school diploma on the test at this time. Cf. Debra P. v. Turlington, 644 F.2d 397 (5<sup>th</sup> Cir. 1981).

52. Thus, for those children in Yupiit, and at any other school that is identified by the State as not receiving an adequate education as defined herein, (or identified by this Court if necessary in future proceedings), this Court finds that the High School Graduation Qualifying Exam can not be used to preclude a child from receiving a high school diploma. This restriction shall remain in effect until the State demonstrates to this Court that it has undertaken sufficient oversight and remedial efforts at these schools such that a constitutionally adequate educational opportunity is being provided.

53. In order to give the State the opportunity to address this concern in the first instance, this component of this Court's order is also stayed for a period of one year. During that time, the State may continue to administer the HSGQE throughout the state, and the status of any high school diplomas for

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<sup>46</sup> The State has asserted that the testimony that courses in English and math are taught at Yupiit demonstrates that the children are receiving an adequate education on the exam's subject matter. But as the State quite capably demonstrated with respect to Drs. Mueller and Smith's curriculum audit, the fact that a listed course is taught or not taught is not necessarily demonstrative of the educational opportunity actually being provided to students. [See State's Proposed Findings at 144]

students at constitutionally inadequate schools can be addressed as needed at further proceedings. Of relevance could be the extent of any remedial services offered to students in the interim who have not yet passed the exam.

### **CONCLUSION**

The Education Clause of Alaska's Constitution provides that "The legislature shall by general law establish and maintain a system of public schools open to all children of the State."

For the reasons set forth in this decision, this Court finds that the State of Alaska's funding of public education fully comports with the Education Clause. The Plaintiffs' claims with respect to inadequate funding are, accordingly, dismissed.

However, this Court has found that the State has violated the Education Clause in one significant respect. Although the State may delegate its responsibility to maintain public schools to local school districts, as it has done, it has failed to exercise adequate supervision and oversight. Specifically, it has failed to identify those schools within the state that are not according to children a meaningful opportunity to acquire proficiency in the subject areas tested by the State and meaningful exposure to the other content areas in the State's educational standards. And as to those schools that are deficient in that regard, the State has failed to provide adequate supervision and oversight in a concerted effort to remedy that situation.

This Court has also found that because the State has failed to meet this component of its constitutional responsibility to maintain a public school system, the due process rights of children in those underperforming schools are violated when the State conditions the receipt of a high school diploma on successful passage of the High School Graduation Qualifying Exam. It is fundamentally unfair for the State to hold students accountable for failing this exam when some students in this state have not been accorded a meaningful opportunity to learn the material on the exam -- an opportunity that the State is constitutionally obligated to provide to them.

ORDER

IT IS ORDERED that the effective date of this decision shall be stayed for a period of one year until June 21, 2008 so as to accord to the State the opportunity to address the issues presented herein prior to any further court proceedings.

DATED this 21<sup>st</sup> day of June, 2007.

Sharon Gleason  
Sharon Gleason  
Judge of the Superior Court

I certify that 6-21-07 a copy  
of the above was mailed/faxed to each of the  
following at their addresses of record  
[Signature]  
Judicial Assistant

handed to: Atk  
Sato/Cain  
Middleton  
Trickey