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MEMORANDUM

Date: October 21, 2019
To: Dr. Deena Bishop, Superintendent, Anchorage School District
From: Matthew Singer
Re: Preliminary Legal Opinion Regarding “Student’s Bill of Rights” Ballot Initiative

I. Introduction

You asked us to review an application for an initiative bill entitled:

An Act requiring the State of Alaska Department of Education and Early Development, the State Board of Education and Early Development, and the University of Alaska to act and make recommendations to ensure that all students in the State of Alaska receive a quality education. (19SEBR).

We conclude that the Initiative, while well-intentioned, has a number of potential legal flaws, including: (1) the Initiative fails to recognize the respective roles of DEED and local school districts; (2) the Initiative is imprecise and vague; and (3) the Initiative has no funding mechanism and creates uncertainty as to whether its objectives should be funded by the State or local communities.

II. The Proposed Initiative

The law proposed by this Initiative would add duties to the Department of Education and Early Development (DEED) and the University of Alaska Board of Regents. The Initiative, also known as “19SEBR,” contains seven sections and provides as follows:

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Section 1 would add a new section to the uncodified law providing that this act be known as the “Alaska Students’ Educational Bill of Rights.”

Section 2 would add a new section to the uncodified law that would list findings regarding various education provisions in state law and the University of Alaska, and state that the policy of the State of Alaska is to provide a quality education to students of all ages.

Section 3 would add a new subsection to DEED’s statutory duties under AS 14.07.020(a). It would require DEED to act and make recommendations relating to the safety of public schools, access to a high-quality education, voluntary pre-elementary programs, the salary and benefits of school teachers, class-size, career and technical education programs, extracurricular activities, culturally-sensitive curricula, proximity of the school to students’ homes, and student social-emotional needs.

Section 4 would require the State Board of Education and Early Development to adopt regulations to implement Section 3 of the bill.

Section 5 would add a new subsection to the duties and powers of the University of Alaska Board of Regents under AS 14.40.170(a). The board would be required to ensure an affordable and accessible education, maintain university facilities, provide academic programs and educational technology supporting lifelong learning opportunities, encourage research activities, coordinate with Alaska’s schools for teacher preparation and dual enrollment for students, collaborate with DEED and the Department of Labor and Workforce Development to prepare students for productive careers, and provide programs that contribute to Alaska’s cultural diversity.

Section 6 states the bill would be effective 90 days after enactment.

Section 7 is a severability clause.

III. Discussion

The best that can be said about the proposed ballot initiative is that it is well-intentioned but ill-considered. The Initiative seems not to appreciate or understand the current relationship between DEED and local school districts, and in several places it potentially usurps the control and authority of local school boards. Without any funding mechanism, the Initiative establishes aspirational goals but is imprecise as to how those goals will be achieved, which entities will be responsible for those goals, and how

programs designed to meet these objectives will be funded. Some of these concerns are discussed below. This memorandum is not intended to address each and every potential legal issue raised by the Initiative, but rather to provide an initial opinion about the Initiative's legal strengths and weaknesses.

A. The Initiative Ignores or Creates Ambiguity about the Role of DEED and the Role of Local School Boards

Alaska's public education system was established pursuant to the Alaska Constitution and various statutes enacted by the legislature. Article VII, section 1 of the constitution provides that "The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions."

Dating back even before statehood, Alaska's education system has long embraced local control over the daily delivery of education to Alaska school children. Consistent with this long history, the legislature has adopted a statutory scheme that clearly defines the respective roles of DEED and local school boards. Under existing Alaska law, the Department serves in an advisory and policy role, whereas local school boards are generally responsible for determining how educational funds are spent and how to fashion an appropriate education for each student.

For example, AS 14.07.020 sets forth the duties of DEED. The statute enumerates 17 different specific duties of the Department, all of which fall into the categories of general supervision of the state's school districts. DEED provides advisory and consultative services to school districts and adopts statewide minimum standards. DEED also has regulations allowing for more direct intervention in school districts with low student performance.

Local school boards, on the other hand, are generally responsible for the daily delivery of education to Alaska's students. Under AS 14.14.090, the legislature established that school boards are responsible for most of the decisions that affect the daily implementation of the State's broad education policies. For example, school boards decide how to compensate all district employees. School boards adopt "an educational program for each school age child who is enrolled in or a resident of the district." School boards decide how to evaluate and select curriculum, and how to implement preventative maintenance programs for school buildings.

A potential problem with the Initiative is that it directs DEED to implement the state's educational policy "by acting and making recommendations to ensure that" several different objectives are met, including in the areas of the safety of public schools; access by all children to a high-quality education; voluntary pre-elementary programs; recruitment and retention of teachers; class-size; career and technical education; afterschool activities; culturally-sensitive lesson plans; and distance between the school and the students' homes.

Several of the categories for which the Initiative directs DEED to "act" are in areas that heretofore have been the sole responsibility of school boards. For example, school boards have a specific statutory mandate to "establish procedures for the review and selection of all textbooks and instructional materials at least once every 10 years, including textbooks and curriculum materials for statewide correspondence programs, before they are introduced into the school curriculum." AS 14.14.090(7). The Initiative, however, directs that DEED shall implement the state's education policy by acting and by making recommendations to adopt a "culturally sensitive curricula." Similarly, the Initiative directs DEED to act to ensure that "public schools receive the tools, including salaries and benefits, to attract and retain highly-qualified professionals." This provision of the Initiative appears to conflict with AS 14.14.090(1), which establishes that school boards are to set compensation for all district employees.

It is unclear how the Initiative and existing law would be implemented. Because the Initiative directs DEED to not only make recommendations but also to "act," it is at least conceivable that DEED, or a judge, could interpret the Initiative as usurping the school board's role in selecting curriculum or establishing salaries. At best, and as discussed below, the Initiative is vague and creates ambiguity about the respective roles of DEED and school boards.

B. The Initiative Contains Important Aspirational Objectives, but Could be Attacked as Imprecise and Vague

The Initiative contains a number of aspirational statements, seeking for example to ensure that all students receive a high-quality education, in modern schools, with culturally sensitive curriculum, taught by highly-qualified professionals. These aspirational objectives are policy statements that collectively convey a vision for Alaska's public education system. The challenge is how to convert these aspirational statements into actual policy, practices, and expenditures, and in determining which entities are responsible for these tasks.

The Initiative proponents describe their proposal as establishing “an education standard for students in K through 12 public schools, the University of Alaska system, and voluntary pre-elementary programs in order to ensure that all Alaskan students, of all ages, have access to high-quality public education.” But a “standard” is typically something that can be measured or defined. It might be more accurate to describe the Initiative as proposing “goals” or “aspirations” rather than a concrete standard. The Initiative uses vague, aspirational language rather than any sort of discernable, measurable benchmark. For example, the Initiative proposes that all students should have access to “high-quality public education.” But there is no definition or measure of “high quality.” Likewise, the Initiative requires that the school districts receive the tools, including salaries and benefits, to attract “highly-qualified professionals.” The Initiative provides no standard by which to determine whether a professional is “highly qualified.” Nor is it clear whether the Initiative anticipates that DEED will begin dictating salaries to school boards, or how this would work in light of the collective bargaining agreements between school boards and teachers unions throughout Alaska.

Sometimes, courts will find that a law is so vague that it is “void for vagueness.” In other instances, the agency or the legislature is left to resolve ambiguity through the adoption of new regulations or additional statutes. The Initiative, as written, leaves open the possibility of post-enactment legal challenges, or to interpretation by DEED or the legislature that may or may not be consistent with what the authors of the Initiative intended. One of the risks with imprecise ballot initiative language is that it creates uncertainty about future implementation and future litigation.

C. The Initiative Creates Uncertainty About Funding Obligations

The Initiative creates potential uncertainty about which entity or entities are responsible to fund the various aspirational goals stated in the Initiative. By its express language, the Initiative places a duty on DEED to act and to make recommendations. There is no express directive to school districts, but many of the Initiative’s goals would necessarily have to be implemented and evaluated at the local school level. For example, if a student is not receiving frequent one-on-one attention from a teacher, as called for by the Initiative, could a parent sue the district and assert that its provision of an education to the student was violating the clear policy of the State as reflected in the Initiative? It seems likely that the Initiative, if enacted, could diminish the role of school boards, could create room for conflict between school boards and DEED, and could lead to other unanticipated legal disputes.

IV. Conclusion

The Initiative is a well-intentioned but poorly-executed effort to address perceived problems with Alaska's public education system. With regard to the policy choices reflected in the Initiative, those should be left to each voter to evaluate. From a lawyer's perspective, the Initiative is concerning because it seems to have been written without consideration to the long-established statutory roles of DEED and school boards, and without consideration to how the Initiative's vague "standards" would actually be implemented in the real world.

The legislative process is slow, frustrating and inefficient for a lot of reasons, but one of those reasons is that grappling with significant societal challenges, and balancing state and local control, is complicated. Reducing the delivery of public education to a short "bill of rights" may be an appropriate and savvy way to engage the public in a discussion about the direction of the State's education system, but it raises some legal concerns as discussed above.