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MEMORANDUM

April 29, 2023

SUBJECT: DEED Regulatory authority (Work Order No. 33-LS0790)

TO: Senator Löki Tobin
Attn: Trevor Bailly

FROM: Megan A. Wallace
Chief Counsel



You asked about the source of a department's regulatory authority and whether a department can adopt regulations without clear statutory authority directing it to do so. You clarified that you are particularly interested in the regulatory authority of the Department of Education and Early Development (DEED).

The statutory criteria for the adoption of regulations are set out in the Administrative Procedure Act (AS 44.62) (APA). The APA establishes the procedural requirements for adopting regulations and gives general criteria for their content and the authority needed to adopt them.¹

AS 44.62.180 - 44.62.290 set out the main procedures for adoption of regulations. The main guiding principals for the adoption procedures are to provide notice of proposed regulations and to give persons in the state an opportunity to comment on the regulations (orally or in writing). Within each of these categories, the APA sets up more detailed criteria.

The APA requires that a regulation be (1) consistent with the statute authorizing its adoption, (2) reasonably necessary to carry out the purpose of that statute, and (3) within the scope of authority conferred by that statute.

AS 44.62.030 reads as follows:

Sec. 44.62.030. Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.²

¹ See AS 44.62.020 - 030.

² Emphasis added.

Under AS 44.62.020, "each regulation must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."³ Statutory authority to adopt regulations may narrow and specific, or it may be quite broad.⁴ The authority may be discretionary, allowing an agency to adopt regulations, or mandatory, requiring the adoption of regulations.

In the Alaska Administrative Code, a department will list the statutory authority for adopting a regulation immediately after the the text of the regulation. The specific statutory authority for a particular regulation may be a new or existing statute specifically on the subject. Or it may be a statute that confers general authority to adopt regulations for the particular department.⁵

Several different statutes authorize DEED to adopt regulations. Most broadly, AS 14.07.060 provides:

Sec. 14.07.060. Regulations. The board shall adopt regulations that are necessary to carry out the provisions of this title. All regulations shall be adopted under AS 44.62 (Administrative Procedure Act).

This gives the department broad authority to adopt regulations necessary to implement the legislature's statutory directives. There are also a number of provisions relating to specific programs, some of which *require* DEED to adopt regulations, and others that grant DEED the discretion to adopt regulations.⁶

³ The Alaska Supreme Court has interpreted the words "in accordance with standards prescribed by other provisions of law," to mean that "if standards are prescribed by provisions of law other than those contained [in AS 44.62], then they must be recognized and adhered to. This language does not mean that regulations cannot be validly adopted by an administrative agency 'unless' standards have been prescribed." *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 590 (Alaska 1960).

⁴ The court later described *Boehl*, *supra* note 4, as a case "where the legislature has delegated broad authority to an agency with expertise to regulate a narrowly defined field", noting that acceptable statutory authority can range from a situation where an Act's "purpose and standards are explicit and detailed" to "general limitations and policy statements ... sufficient to guide administrative discretion" before invalidating a statute allowing withholding or reduction of appropriations by the governor that delegated "the exercise of sweeping power over the entire budget with no guidance or limitation." *State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1143 (Alaska 1987).

⁵ For example, *see* AS 14.07.060.

⁶ *See* AS 14.03.280 (charter schools); 14.11.132 (construction, rehabilitation and improvement of schools and education-related facilities); 14.12.180 (regional resource centers); 14.17.920 (financing of public schools); 14.20.025 (instructional skills required

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If I can be of other assistance, please advise.

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to obtain a limited teacher certificate); 14.25.005 and 14.25.060 (teachers retirement system); 14.30.194 (voluntary mediation process for disputes relating to the education of children with disabilities); 14.40.600 (community colleges); 14.56.110 (state library distribution and data access center); and 14.56.340 (library assistance grants).