



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

**Department of Education
& Early Development**

OFFICE OF THE COMMISSIONER

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March 22, 2024

Laura Jimenez
Director, Office of State and Grantee Relations
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Ave SW
Washington, D.C. 20202-6244

Re: American Rescue Plan Act and Maintenance of Equity

Dear Director Jimenez:

This is in response to your letter of March 18 and concerns our ongoing discussions regarding the State of Alaska (“SOA”) Department of Education and Early Development (“DEED”), its receipt of American Rescue Plan Act (“ARPA”) funds during the COVID-19 pandemic, and the Maintenance of Equity provision included in the ARPA.

Congress enacted the ARPA¹ on March 11, 2021, in order to provide important federal assistance to the nation in response to the COVID-19 pandemic. Section 201 of the bill provided emergency funding to alleviate the consequences of the pandemic on the nation’s school children including to address a wide range of needs triggered by the pandemic such as assistance in reopening schools safely, ensuring safe operation of the schools, and addressing students’ social, emotional, mental health and academic needs.

The ARPA included a first-of-its-kind Maintenance of Equity (“MOEquity”) provision which has been the subject of communications between our respective agencies. The new MOEquity provision required that as a condition of receiving ARPA education funding, a state could not reduce per-pupil funding to “high needs” and “highest-poverty” local educational agencies (“LEAs”).² Specifically, Congress provided that a state was not permitted to: reduce the per-pupil amount of State funding for any high-need LEA by an amount that exceeds the overall per-pupil reduction in state funding; or reduce the per-pupil amount of State funding for any highest-poverty LEA below the per-pupil amount provided to the LEA in 2018-2019. Furthermore, the FAQs issued by the United States Department of Education (“USDOE”) state “*..., if State or local funds are cut, the maintenance of equity provisions ensure that LEAs and schools serving a large share of students from low-income backgrounds do not experience a disproportionate share of such cuts in fiscal years (FYs) 2022 and 2023, and that the highest poverty LEAs do not receive*

¹ Public Law 117-2.

² Public Law 117-2, Sec. 2004;135 STAT. 24-25

a decrease in State funding below their FY 2019 level.” State funding was not cut during fiscal years 2019-2023. Instead, Alaska continued to apply and fund its base student allocation in accordance with existing state law,³ and it awarded ARPA funds to districts. **Accordingly, there is no question that the SOA has complied with the plain language and clear intent of Congress when it enacted the ARPA and the MOEquity provision.**

While the SOA did not reduce per student state funding to high-need or high-poverty LEAs during the pandemic and the funding for school districts continued to be determined based on the SOA’s equalized funding formula in state law, the SOA has responded to USDOE inquiries related to MOEquity. In this regard, a series of communications have been exchanged between USDOE and the SOA. The impetus for some of the inquiries and clarifications stems from the fact that although Congress’s intent regarding MOEquity is clear from the language of the legislation and its purpose, this was a new provision never before included in a federal grant related to education and thus federal guidance was neither immediate nor comprehensive. For example, federal guidance was first released regarding the new MOEquity requirements in the form of FAQs in June 2021 but by the fall, USDOE was seeking written comments on a variety of MOEquity implementation questions. A “Dear Colleague” letter was issued by the department in August 2021 which included preliminary analysis on some MOEquity issues. In December 2021, updated FAQs were published by USDOE. In July 2022 a regulation regarding MOEquity became effective.⁴ Also in July 2022, additional FAQs were issued by the department. The most recent FAQ was issued by the department in January 2023.

The latest communication from your office, March 18, 2024, recognizes Alaska’s highly unique circumstances compared to other states in relation to the operation of public schools such as its geography, the remote locations of municipalities, and multi-site LEAs which span large geographic areas which are not connected by a road system and often have an absence of infrastructure. We appreciate the department’s recognition of the unique and challenging circumstances of providing services including public education in such a large and geographically isolated state. The communication also describes the efforts by DEED to address questions from your department and DEED’s submission of a revised “tolerance” proposal and additional data. The department’s letter indicates that based on USDOE’s analysis to date, certain additional payments to four school districts should be made to come into compliance with MOEquity and requests information regarding a plan for how the SOA would take such action. We provide the following information.

First, expenditures of state funds require an appropriation from the Alaska legislature.⁵ The appropriation process is set out in the Executive Budget Act.⁶ In accordance with state law, the Governor may submit supplemental appropriation requests to the legislature for consideration. Alaska’s 33rd Legislature is currently in session, which ends on May 15, 2024. If a supplemental appropriation is included in the final enacted budget, then the process to make payments could occur. However, if a supplemental appropriation is not in the final enacted budget, then a

³ Alaska Statute (AS) 14.17.470.

⁴ 87 FR 34790.

⁵ Alaska Const., art. IX, sec. 13.

⁶ AS 37.07.010- 07.130.

supplemental appropriation would need to be considered by the legislature during the legislative session beginning in January 2025.

Second, and importantly, we wish to reiterate that the SOA has met the MOEquity requirements set out by Congress – State funding per-pupil remained the same in accordance with state law and was not changed during the pandemic.⁷ A suggestion that SOA failed to meet Congress’s plain language requirements regarding MOEquity is concerning for several reasons. Initially, it appears that the only rationale that could support a contention that the SOA did not meet MOEquity would be that a mix of federal agency regulation and guidelines effectively changed the plain language of the statute which of course is not permissible. Moreover, even if the statute establishing the MOEquity condition was ambiguous, which it is not, there is no question that MOEquity is a first-of-its-kind condition placed on a federal education grant and that there was significant confusion regarding how the federal agency was interpreting the statutory language as evidenced by the different FAQs, regulations, and guidelines issued by USDOE over a significant period after Congress passed ARPA. Add to that the fact that ARPA was emergency federal funding provided to states in response to an international pandemic and it becomes clear that an application of the MOEquity funding rules beyond the statute’s plain and ordinary meaning could trigger significant constitutional questions.

Alaska enjoys a good working relationship with USDOE and is certainly not looking for a constitutional law legal dispute. But we would be remiss not to note that although the federal government has the ability to place conditions on a state’s acceptance of federal funds, there are limits to that authority under the Constitution.⁸ For example, the Supreme Court in *Pennhurst State School and Hospital v. Halderman*⁹ ruled in favor of Pennsylvania in a suit regarding a federal grant which was subject to conditions that the state contended were ambiguous. The Supreme Court stated that “[t]hrough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or retroactive conditions” and that “if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously.”¹⁰ Similarly, in *National Federation of Independent Businesses v. Sebelius*¹¹ the Supreme Court determined that the Medicaid expansion provisions of the Affordable Care Act went beyond what the states would have expected when they had agreed to participate in Medicaid and accept federal funds. And in the context of ARPA, the Eleventh Circuit ruled last year that a condition placed on states’ receipt of federal grant money that sought to restrict states’ taxation authority (an offset condition) violated the Spending Clause because of its ambiguity.¹²

Here, the MOEquity provision was a new provision not previously attached to federal education grant funding – and it was attached to emergency funding during a pandemic. Additionally, if the plain language and intent of the bill is not applied and instead MOEquity is considered an

⁷ Alaska Statute (AS) 14.17.470.

⁸ See *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁹ 451 U.S. 1 (1981).

¹⁰ *Id.* at 20; 25.

¹¹ 567 U.S. 519, 132 S.Ct. 2566 (2012).

¹² *West Virginia v. U.S. Department of the Treasury*, 59 F.4th 1124 (11th Cir. 2023).

ambiguous provision that required multiple complex interpretations over time by a federal agency, we are in a circumstance that squarely implicates the Supreme Court's concern that conditions placed on the receipt of federal money must be unambiguous and not beyond what a state would have expected when it agreed to accept federal funds in order to comply with the Tenth Amendment.

We have outlined above the steps that would be necessary for the State to meet what USDOE currently perceives to be obligations under the MOEquity provision. But we do want to urge your office to further review the steps taken by DEED so far in response to requests for information. Most importantly, we urge that USDOE focus on the fact that SOA has clearly met the plain language requirements and plain purpose of Congress's inclusion of MOEquity: Alaska did not cut state spending. Alaska continued to apply its per-pupil spending law set out in AS 14.17.470 and did not seek to take advantage of federal funds to reduce state education spending. We look forward to further communication with your office.

Respectfully,



Deena M. Bishop, Ed.D.
Commissioner

cc: Lacey Sanders, Director, Office of Management and Budget
Sarah Laven Jones, Management and Program Analyst, U.S. Department of Education