



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Education
& Early Development

OFFICE OF THE COMMISSIONER

333 Willoughby Ave., 9th Floor, SOB
P.O. Box 110500
Juneau, Alaska 99811-0500
Main: 907.465.2800
TTY/TDD: 907.465.2815
Fax: 907.465.2806

May 9, 2024

Adam Schott
Principal Deputy Assistant Secretary
Office of Elementary and Secondary Education
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: American Rescue Plan Act and Maintenance of Equity

Dear Mr. Schott,

Thank you for meeting with the Alaska team on Monday, May 6, 2024, regarding the Maintenance of Equity (MOEquity) provision within the American Rescue Plan Act (ARP). Pursuant to your request made at our May 6 meeting, we are setting forth Alaska's final response to your office, including our understanding of what the potential penalty may be and identifying what we believe should be the Office of Elementary and Secondary Education's (OESE) final calculation under its issued guidance.

Alaska's position is that it has complied with the plain language and purpose of the MOEquity provision.

As you are aware, the MOEquity provision is a first-of-its-kind condition on a federal grant to the states which provides that a state educational agency "shall not in fiscal year 2022 or 2023, reduce State funding (as calculated on a per-pupil basis)" for a high-need school district "by an amount that exceeds the overall per-pupil reduction in State funds" for all school districts. Likewise, the provision provides that for fiscal years 2022 or 2023 the State shall not "reduce State funding (as calculated on a per-pupil basis) for any highest poverty" school district "below the level of funding (as calculated on a per-pupil basis)" provided to each school district in 2019.¹

Alaska complied with the plain language and purpose of the MOEquity condition. There is no factual dispute that Alaska did not reduce per-pupil education funding to schools in fiscal year (FY) 2021, FY2022, and FY2023. Instead, Alaska continued to fund education according to its statutory per-pupil formula and there were no school districts in which per-pupil funding from

¹ Public Law 117-2, Sec. 2004;135 STAT. 24-25.

the state was reduced. In fact, in 2022 the legislature increased the state's base student allocation (BSA) for per-pupil spending to districts from \$5,930 to \$5,960.²

Unfortunately, OESE's application of the MOEquity provision to Alaska has so far steered away from the plain language. Rather, OESE's approach involves mathematical equations and statistical analysis that do not exist in statute or regulation and fail to properly address Alaska's unique education funding system provided on a per-pupil basis. The fundamental problem from our perspective is that the law is clear and there is no dispute that Alaska never reduced per-pupil funding but instead increased funding. In such circumstances, Alaska is entitled to rely on the clear language and purpose of the provision and not be threatened with financial and reputational harm by a federal agency. As the Supreme Court has made clear "many times over many years...when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."³

Moreover, even if the MOEquity provision is somehow considered ambiguous by your office such as to justify guidelines and interpretations issued by the agency, that is not a license to penalize Alaska. To the contrary, the Supreme Court has made clear that the federal authority to place conditions on acceptance of federal funds "does not include surprising participating States with post-acceptance or retroactive conditions"⁴ and that "if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously."⁵ And as a practical matter, it is simply hard to understand why there has been any question that Alaska complied with MOEquity given the undisputed facts. Alaska has an equalized per-pupil funding formula adopted by our state legislature; that funding program is responsive to Alaska courts constitutional concerns about inequity in relation to rural Alaska children;⁶ another office of

² AS 14.17.470.

³ *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 673-674 (2020).

⁴ *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 584 (2012) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

⁵ *Id.* at 583. The reason for this constitutional check on penalizing states over a failure to comply with a federal agency's interpretation of an ambiguous grant condition is important and should be respected. As explained by the Supreme Court, conditions placed on federal grants to states should not be used to effectively coerce a state into adopting the federal government's position on how a state program should be implemented. Chief Justice Roberts warned in *Sebelius* that "[r]especting this limitation [on the federal government's authority under the Spending Clause] is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system ... Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government and individual liberty would suffer." 567 U.S. at 577.

⁶ *Kasayulie v. State* 3AN-97-3782 CI, 1999 WL 34793400 (Alaska Superior Court, September 1, 1999) (Court found that the method of funding school construction projects violated the State Constitution's equal protection and education clauses and Title VI of the Civil Rights Act because it discriminated against rural school children.).

USDOE has concluded several times that Alaska has an equalized program of education funding that passes the disparity test under the Impact Aid Program; and our state's education funding system has been recognized nationally for its equitable nature.⁷

This simply does not make sense.

A possible resolution.

As set forth above, we continue to firmly believe that Alaska has complied with the MOEquity condition. Below we suggest a compromise which is not an admission of any liability in any form but simply an effort to bring this matter to resolution. This compromise offer may not be used as an admission of liability in any proceeding.

In order to bring this matter to a resolution, we would be willing to request that our state legislature appropriate \$327,015 for the Fairbanks North Star Borough School District. This amount represents the additional funds that would be owed to the district for FY2023 if the U.S. Department of Education were to prevail in its interpretation that MOEquity applies to Alaska notwithstanding the lack of a statewide funding cut, and also takes into account elements of Alaska's state funding formula that distort MOEquity calculations. USDOE has excluded distorting elements from other state funding formulas when determining MOEquity.⁸

Please let us know if this matter can be resolved on this basis and we will notify our state legislature.

We note this proposed amount is based on calculations that exclude a short-term variable adjustment built into Alaska's state funding formula for school districts that meet certain criteria. This has been described in our discussions as a "hold harmless," but it is unique in comparison to hold harmless provisions in other states. We understand that OESE disagrees with our interpretation of the role this adjustment plays in our state funding formula, but in the interest of compromise, we hope OESE will consider Alaska's special circumstances and the important role this adjustment plays in providing equitable funding to Alaska's students.

⁷ Baker, Bruce D., DiCarlo, Matthew, Weber, Mark. *The Adequacy and Fairness of State School Finance Systems*, Albert Shanker Institute, University of Miami School of Education and Human Development, and Rutgers Graduate School of Education (2024), https://www.schoolfinancedata.org/wp-content/uploads/2024/02/SFID2024_annualreport.pdf, at p. 20. (Last visited April 1, 2024); Farrie, Danielle Ph.D., Kim, Robert, Sciarra, David G., *Making the Grade 2019, How Fair is School Funding in Your State*, Education Law Center (2019) www.edlawcenter.org, at p. 1 (Last visited April 1, 2024).

⁸ See for example, U.S. Department of Education, Frequently Asked Questions, American Rescue Plan, Elementary and Secondary School Emergency Relief (ESSER) Program, Maintenance of Equity Requirements, Updated January 23, 2023, https://oese.ed.gov/files/2023/01/2023-01-23-Update_22-0471-moequity-FAQs_Final-Version.pdf, at pp. 8-11 and 13-14 (Last visited May 8, 2024).

While many state (and federal) funding formulas include hold harmless provisions to protect districts with declining enrollments, Alaska's funding adjustment plays an important role in ensuring equitable funding for the many small and remote school districts in this state. The cost of providing education in these districts is different from other parts of the state, and their nature presents a unique challenge to enrollment stability. While enrollment fluctuations are challenging for all school districts, they are heightened for these districts.

In 2008, the Alaska State Legislature enacted a provision to provide a short-term "step down" approach to funding reductions when a school district experiences declining enrollments.⁹ This adjustment is vital for our smaller districts. Smaller school districts feel the effects of declining enrollment more intensely than larger school districts, which would be better able to absorb the funding loss.¹⁰ USDOE itself recognizes this in its guidance.¹¹

Because this adjustment is by its very nature variable and is designed to ensure equity given Alaska's unique circumstances, it should be excluded from our MOEquity calculations. In assessing MOEquity compliance, USDOE states that "in calculating MOEquity under the ARP Act, an SEA generally must use funds appropriated and allocated by the State to all LEAs for current expenditures for free public education . . ."¹² The very nature of Alaska's adjustment

⁹ This provision provides that if a school district's ADM adjusted for school size decreases by five percent or more from one fiscal year to the next fiscal year, the school district may use the last fiscal year before the decrease as a base fiscal year to offset the decrease and the decrease is adjusted each of the next three fiscal years as provided in AS 14.17.410 (b)(1)(E).

¹⁰ For example, as of October 1, 2021 the Aleutian Region School District's (ARSD) enrolled 23 students for the entire district and the Pelican School District's (PSD) enrolled 16 students. For the following school year ARSD lost 7 students or 30% of its pupils and PSD lost 4 students, or 25% of its pupils. Alaska Department of Education & Early Development, Data Center, <https://education.alaska.gov/data-center> (last visited May 8, 2024).

¹¹ U.S. Department of Education, Frequently Asked Questions, American Rescue Plan, Elementary and Secondary School Emergency Relief (ESSER) Program, Maintenance of Equity Requirements, Updated January 23, 2023, https://oese.ed.gov/files/2023/01/2023-01-23-Update_22-0471-moequity-FAQs_Final-Version.pdf, at p. 14 stating:

Certain states may see variability in the per-pupil amounts for very small LEAs caused by small changes in student enrollment which may be unrelated to whether a State has achieved the intent to maintain equity in funding. For example, in an LEA of only 100 students, enrollment of a single additional student would have an effect 27 times larger on per-pupil expenditures than it would in an average-sized LEA. As a result, the Department believes that it is consistent with the maintenance of equity requirements to allow an SEA to determine whether it has maintained equity with respect to its very small high-need and highest-poverty LEAs within a reasonable "tolerance level."
(Last visited May 8, 2024).

¹² U.S. Department of Education, Frequently Asked Questions, American Rescue Plan, Elementary and Secondary School Emergency Relief (ESSER) Program, Maintenance of Equity

provision is to target only specific school districts experiencing a specific level of student enrollment decline and only for a limited time period—three fiscal years after the enrollment decline. It is not a fixed amount going to all LEAs, in fact it is not even fixed regarding a particular LEA over the three fiscal years. Instead, the adjustment provides a funding reduction buffer that changes each fiscal year after a school district experiences the enrollment decline. If USDOE did not intend to measure funding going to all school districts, it would not have used the phrase “allocated by the State to all LEAs.” Based on USDOE’s own language, Alaska’s adjustment provision is not statewide, and is designed to promote equity by recognizing the unique nature of our small and remote districts, and therefore is the type of factor that should be excluded from MOEquity calculations.

The Office of Elementary and Secondary Education has identified the actions it will take if there is no resolution of the disagreement over compliance with the MOEquity.

We sincerely hope that OESE will accept the offer above to resolve this matter, but if not, we understand based on your explanation at our May 6, 2024, meeting that your office will take the following steps.

- A high-risk designation will be placed on Alaska’s APR-ESSER grant (award S425U210020). This does not affect any other federal grants Alaska receives.
- Any draw-down requests submitted through the G6 system would be subject to additional reporting on what the funds are being used for although USDOE will work with the state on the portion of the draw-down request that would be due to the local educational agencies (LEAs), with the intent that LEAs receive the reimbursement of funds they have already spent.
- There would be a freeze on the remaining state administration funds, which originally totaled \$1,793,536. Currently, there is approximately \$941,800 of state administration funds remaining to be drawn down.
- If Alaska wants to seek a waiver to extend the period of availability of the ARP-ESSER state administration funds, Alaska must first come into compliance with the MOEquity provision.

If our understanding as stated above is inaccurate in any way, please let us know as soon as possible.

Respectfully,



Deena M. Bishop, Ed.D.
Commissioner