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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL,)
on behalf of THE ALASKA STATE)
LEGISLATURE,)

Plaintiff,)

v.)

HONORABLE MICHAEL J. DUNLEAVY,)
in his official capacity as Governor for the)
State of Alaska, KELLY TSHIBAKA, in)
Her official capacity as Commissioner of)
Administration for the State of Alaska, and)
MICHAEL JOHNSON, in his official capacity)
as Commissioner of the Alaska Department)
of Education and Early Development,)

Defendants.)

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

AUG 23 2019

By hy Deputy

Case No. 1JU-19-00753 CI

COALITION FOR EDUCATION EQUITY, INC.'S MOTION TO INTERVENE

I. INTRODUCTION

The Coalition for Education Equity, Inc. ("CEE") is an Alaska non-profit corporation that champions a quality, equitable and adequate public education for every Alaska child through advocacy, policy development and legal activity. CEE has a direct interest in this litigation because the Governor's actions will disrupt the funding and quality of public education in this state in violation of Article VII, Section 1 of the Alaska Constitution. In addition, CEE's members include 16 school districts that are

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entitled to state funding under Ch. 6, SLA 2018 pursuant to appropriations that the Governor seeks to invalidate. CEE's members educate 60,000 students in the state. CEE's members have a constitutional duty to provide their students with an education as required by Article VII, Section 1. The Governor's actions threaten to adversely impact and disrupt students' rights to a quality education. The Governor's refusal to release all funds appropriated by the Legislature interferes with CEE's member obligation to provide meaningful educational opportunities to their students. CEE members have a financial interest in the outcome of this case because without the resources appropriated by the Legislature CEE members cannot deliver an educational program consistent with their obligation to afford students a right to an education. The funding the Governor has put in jeopardy is the life blood for providing quality education to all of Alaska's children. No other party adequately represents the interests of CEE, its members, and all school age children in the state. CEE is entitled to intervene in this matter pursuant to Alaska R. Civ. P. 24(a). In the alternative, this Court should grant permissive intervention pursuant Alaska R. Civ. P. 24(b).

CEE has conferred with counsel for the Alaska Legislative Council, which does not oppose this motion. CEE has attempted to confer the Department of Law, but has not yet determined Defendants' position on the motion.

II. BACKGROUND

On May 4, 2018, Governor Bill Walker signed SCS HB 287 (FIN) into law as Ch. 6, SLA 2018. Chapter 6, SLA 2018 appropriated full funding for public school

districts in the state, student transportation, and a one-time supplemental grant for public schools, for the fiscal year 2020. Governor Dunleavy initially refused to execute any of these appropriations, contending that they unconstitutionally “forward fund” public education for the 2019–2020 school year. As part of this lawsuit, the Governor has agreed to execute monthly disbursements of the state aid and transportation components of the appropriations made in Ch. 6, SLA 2018. But the Governor is continuing to withhold the additional \$30 million in supplemental school district grants for FY 2020 also enacted in Ch. 6, SLA 2018. The Legislature determined, and Governor Walker agreed, that the \$30 million supplemental funds were needed to adequately fund education. The supplemental funds are distributed as grants to each school district in the state, including CEE members. The Governor’s decision to withhold supplemental funding appropriated for the 2019–2020 school year is a repeat of recent conduct by the executive branch. Earlier this year, the Governor refused to disburse supplemental grant funding appropriated for the 2018–2019 school year until after the school year ended. The Governor’s delay in releasing those funds until the school year ended precluded the use of the funds for educational services and programs. CEE submits that this withholding violates Article VII, Section 1 and Article III, Section 16 of the Alaska Constitution, and it seeks to advance its interest and those of its members and all school children in contesting the Governor’s conduct.

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III. ARGUMENT

1. CEE Has a Direct Interest in this Matter and Should be Permitted to Intervene as a Matter of Right

Alaska courts employ a four-part test to determine whether a court must grant a motion to intervene as of right: (1) the motion must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) it must be shown that this interest may be impaired as a consequence of the action; and (4) it must be shown that the interest is not adequately represented by an existing party.¹ The Alaska Supreme Court has directed that this test should be liberally construed in favor of granting access to the courts.² All four prongs are met in this case.

a. The Motion is Timely

The Alaska Supreme Court has adopted a four-part inquiry to determine whether a motion to intervene meets Rule 24's timeliness standard: (1) the length of time the applicant knew or reasonably should have known that its interest was imperiled before it moved to intervene; (2) the foreseeable prejudice to existing parties if intervention is granted; (3) the foreseeable prejudice to the applicant if intervention is denied; and (4) idiocratic circumstances which, fairly viewed, militate for or against intervention.³ But the Court has also recognized that a motion to intervene will not be considered untimely

¹ *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984).

² *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 912 (Alaska 2000) ("We favor allowing access to courts and will liberally construe Alaska Civil Rule 24(a).").

³ *Bridges v. Banner Health*, 201 P.3d 484, 491 (Alaska 2008).

if it is “filed on or before the date the answer was filed and before the trial court [makes] any substantive rulings[.]”⁴

CEE’s motion to intervene is timely under this standard. The Alaska Legislative Council filed its complaint in this matter on July 16, 2019. Pursuant to Alaska R. Civ. P. 12(a), Defendants’ answers are not due, at the earliest, until August 25, 2019.⁵ As of the date of this motion, no answers have been filed. Nor has the Court made any substantive rulings. The only actions the Court has taken to date have been to grant a Joint Motion and Proposed Order Regarding Fiscal Year 2020 Education Funding Pending Resolution of Litigation and Joint Motion for Scheduling Order. The existing parties evidently negotiated the Proposed Order Regarding Fiscal Year 2020 Education prior to commencement of the action. Neither CEE nor any other party had an opportunity to intervene prior to entry of that order because the joint motion was filed with the complaint and granted on the same day.⁶ The Joint Motion for Scheduling Order is not substantive in nature, and CEE is prepared to comply with the expedited briefing schedule set forth therein. Accordingly, no party will be prejudiced by CEE’s participation and CEE’s motion to intervene is timely under *Coonrod*.

⁴ *Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29, 33 n.12 (Alaska 2007) (citing *NW. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996)).

⁵ The deadline for Defendants’ answer may be later depending on when they were served with the complaint. See Alaska R. Civ. P. 12(a).

⁶ See *Banner Health*, 201 P.3d at 491 (directing trial courts to consider “idiocratic circumstances which, fairly viewed, militate for or against intervention” when evaluating the timeliness of a motion to intervene).

b. *CEE Has a Direct, Substantial, and Significantly Protectable Interest in the Subject Matter of the Litigation*

To intervene as of right under Civil Rule 24(a), a movant must demonstrate an interest in the lawsuit that is “direct, substantial, and significantly protectable.”⁷ This standard is satisfied when an intervenor has a direct financial interest in the outcome of the litigation and there are constitutional issues at stake.⁸

CEE easily satisfies this standard. This lawsuit implicates the validity of specific appropriations made for the benefit of CEE’s members and the State’s constitutional obligation to provide adequate funding for public education. CEE and its members have a direct and substantial interest in both of these issues. Without the appropriated funds, CEE members cannot deliver the education programs and services that students are entitled to receive. The Education Clause serves dual purposes—imposing an ongoing duty on the State to establish and maintain public schools and guaranteeing all children of Alaska a right to public education.⁹ CEE is the only party that can protect the constitutional right to an education of all school children in this case.

⁷ *Coonrod*, 166 P.3d at 33 (quoting *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984)).

⁸ *See Coonrod*, 166 P.3d at 34 (“Here, all three churches have asserted a much more direct financial interest—eligibility for a valuable property tax exemption if the statute is valid—than the union had in Lampkin. Moreover, as discussed below, the churches’ interest is not merely financial.... When their financial interest is considered in conjunction with constitutional arguments the state is unlikely to raise, the churches’ interests are ‘direct, substantial, and significantly protectable.’”); *McCormick v. Smith*, 793 P.2d 1042, 1044 (Alaska 1990) (holding that voters have a “direct, substantial and significantly protectable” interest in recall litigation because, “[a]s voters, appellants’ interest in pursuing the recall of Smith is of constitutional dimension.”).

⁹ *Hootch v. State*, 536 P.2d 793, 799 (Alaska 1975), *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971), *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972), *Alaska State-Operated School*

With respect to the specific appropriations at issue in this case, CEE's members include 16 school districts in the State of Alaska that are entitled to state funding under Ch. 6, SLA 2018. These districts provide educational programs and deliver daily instruction to 60,000 students in the state. This lawsuit imperils the funding necessary to keep schools open and to deliver daily instruction to students. If the Court accepts Defendants' argument that Ch. 6, SLA 2018 is invalid, CEE's member school districts may be deprived of funds that have already been appropriated by the Legislature and incorporated in school budgets adopted for the 2019–2020 school year. Without the budgeted funds, some CEE members would be forced to immediately close schools, thereby depriving children in those communities the opportunity to attend school. In *Anchorage Baptist Temple v. Coonrod*, the Alaska Supreme Court recognized that an intervenor has a direct and substantial interest in a lawsuit challenging the constitutionality of a statute from which it derives a financial benefit. In that case, the benefit at issue was a tax exemption for private school housing. Here, the financial interest is even more direct. This lawsuit imperils a direct appropriation of state funds to CEE's members for the educational programs and services students attending schools are constitutionally entitled to receive.

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System v. Mueller, 536 P.2d 99 (Alaska 1975), *Tunley v. Municipality of Anchorage School Dist.*, 631 P.2d 67 (Alaska 1980), *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska 1997), *Municipality of Anchorage v. Repasky*, 34 P.3d 302 (Alaska 2001), and *Kasayulie v. State*, 3AN-97-3782 CI (Super Ct. 1999).

In addition to the financial interest and the constitutional interest of students, CEE and its members have substantial constitutional interests as well.¹⁰ Article VII, Section 1 of the Alaska Constitution provides that “[t]he 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.” In *Moore v. Alaska*, 2007 WL 8310251 (Alaska Superior Court 2007), Judge Gleason ruled Article VII, Section 1 includes an obligation to provide “adequate funding so as to accord schools the ability to provide instruction” to a standard that meets or exceeds a constitutional floor of an adequate knowledge base for children. *Id* at *76. The State’s obligation to provide adequate public school funding does not end with the Legislature’s duly enacted appropriations. The Governor is further bound by both Article VII, Section 1 and Article III, Section 16¹¹ to ensure that the State meets its constitutional obligation to adequately fund public education by actually executing those appropriations. As an organization dedicated to quality, equitable and adequate public education for every Alaska child, CEE has a direct and substantial interest in seeing that these constitutional standards are upheld in the midst of a power struggle between the executive and legislative branches of state government.

¹⁰ See *Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29, 34 (Alaska 2007) (reversing denial of motion to intervene where intervenor’s interest was not “merely financial,” but was coupled with interests of a constitutional magnitude).

¹¹ See Article III, section 16 (“The governor shall be responsible for the faithful execution of the laws.”).

CEE and its members also have a direct and substantial interest in the Legislature's ability to "forward fund" public education in the state. Forward funding is critically important to school district budgeting and the quality of public education in Alaska. Because of a misalignment between school district and state budgeting cycles, school districts have historically adopted annual budgets prior to the time the State's contribution is actually appropriated. This misalignment has required school districts to adopt budgets based on conservative estimates of the State's anticipated, but yet-to-be-determined contribution. As a result of this uncertainty, school districts have been forced to issue termination notices to teachers at the end of each school year, only to retract those notices when the State's operating budget eventually passes. The annual uncertainty over the level of state funding, and the resulting "pink slipping" of teachers, has a direct and negative impact on school districts' ability to attract and retain quality educators. The Legislature's practice of forward funding addresses this problem by allowing school districts to incorporate the State's actual (rather than anticipated) contribution to public school funding in their annual school year budgets. CEE and its members therefore have a direct and substantial interest in this lawsuit, which challenges the Legislature's ability to forward fund public education and threatens school districts' ability to hire and retain the best possible educators for their students.

For all of the foregoing reasons, CEE and its members have direct financial, institutional and constitutional interests at stake in this litigation that are sufficient to establish CEE's right to intervene under Civil Rule 24(a).

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c. CEE's Interests May be Impaired as a Consequence of the Action

There is no reasonable dispute that CEE's interests may be impaired as a consequence of this action. If Defendants prevail, appropriations made for the benefit of CEE's member school districts will be struck down as unconstitutional, and they will be unable to assert their financial interest in those appropriations.¹² In that event, there will be no lawfully appropriated public education funds available from the State, and the State will be in immediate violation of its obligations to provide adequate school funding under Article VII, Section 1 of the Alaska Constitution. In addition, the Governor may continue to withhold \$30 million in supplemental grant funding until after the 2019–2020 school year, just as he did for the 2018–2019 school year. Finally, school districts in this state will be forced to return to a budgeting process that is impaired by annual uncertainty over the State's contribution to education funding, resulting in the overall diminishment of the quality of education in this state.

d. No Other Party Adequately Represents CEE's Interests

Although there is a presumption of adequate representation when government entities are parties to a lawsuit, "that presumption may be rebutted and inadequate representation may be proved by a showing of collusion, adversity of interest, possible nonfeasance, or incompetence."¹³ Actual adversity of interest is not always required;

¹² *Cf. Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29, 34 (Alaska 2007) ("[T]he churches' interest in the tax exemption may be impaired as a result of these lawsuits. If the law is struck down as unconstitutional, the churches will be unable to assert their alleged constitutional or actual financial interests in the tax exemption.").

¹³ *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 913 (Alaska 2000).

even the “possible appearance of adversity of interest” may be enough to prove inadequate representation.¹⁴

In this case, the Governor’s interests are clearly and actually adverse to CEE’s interests. CEE seeks to defend appropriations that the Governor has declared unconstitutional, refused to disburse, and seeks to invalidate. It is also clear that CEE’s interests are not identically aligned with those of the Alaska Legislative Council.¹⁵ The Joint Motion and Proposed Order that the Alaska Legislative Council filed with its complaint demonstrates that its interests diverge in both appearance and fact from CEE’s interests. The Joint Motion allows the Governor to withhold \$30 million in supplemental funding appropriated to school districts under Ch. 6, SLA 2018.¹⁶ CEE contends that such withholding is unconstitutional, and that the Governor has a present obligation to disburse the supplemental funding. The Alaska Legislative Council’s stipulation on this issue is adverse to CEE’s interests in the immediate distribution of all lawfully appropriated supplemental funding.

In addition, no party adequately raises CEE’s claim that the Public Education Clause of the Alaska Constitution requires the immediate distribution of adequate school

¹⁴ See *Coonrod*, 166 P.3d at 36 (“[The State’s] contention carries with it an appearance of adversity of interest that might reasonably lead members of the public to doubt that the state will be able to defend the statute vigorously and effectively.”).

¹⁵ See *Laborers Local No. 942 v. Lampkin*, 956 P.2d 422, 439 (Alaska 1998) (permitting union to intervene where its interests were not identically aligned with the Fairbanks North Star Borough).

¹⁶ Joint Motion at p. 2 (“Without prejudice to the Plaintiffs’ claims for relief, the monthly disbursements will not include the additional \$30 million in school district grants for FY20 also enacted in the 2018 appropriation law in section 4, ch. 6, SLA 2018.”).

funding in order to protect the right of school children to receive a quality education. In past litigation, the State has strategically side-stepped arguments that would require the courts to define the contours of its funding obligations under Article VII, Section 1.¹⁷ In CEE's absence, it is likely to do so again. Thus, no other party adequately represents CEE's interests in ensuring that the State's constitutional funding obligations under Article VII, Section 1 are taken into account in resolving this litigation.

For all of the foregoing reasons, CEE should be permitted to intervene as of right pursuant to Alaska R. Civ. P. 24(a).

2. In the Alternative, the Court Should Grant Permissive Intervention Pursuant to Alaska R. Civ. P. 24(b)

Alaska R. Civ. P. 24(b) provides that “[u]pon timely application anyone may be permitted to intervene in an action when an applicant’s claim or defense and the main action have a question of law or fact in common.” “In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Additionally, the Supreme Court has stated that “additional parties are always the source of additional questions, briefs, objections,

¹⁷ See *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 102 (Alaska 2016) (Stowers, J., concurring) (“[L]ike Justice Winfree, I am concerned that the court was not given the opportunity to decide the dedicated funds question controlled by article IX, section 7 of the Alaska Constitution as presented by this appeal in the fuller context of the public schools clause of article VII, section 1 of the Alaska Constitution. I do not believe that this court’s opinion today necessarily determines that the State’s required local contribution would survive constitutional scrutiny under article VII, section 1—it might, it might not—but the parties intentionally did not litigate this question either in the superior court or this court, and notwithstanding pointed questions by several justices in oral argument inquiring into the potential application of article VII, section 1, the parties adamantly insisted that constitutional provision was not in issue.” (emphasis added)).

arguments and motions, [and] where no new issues are presented, the most effective and expeditious way to participate is by a brief amicus curiae and not by intervention.”¹⁸

CEE’s claims in this case are timely,¹⁹ and share common questions of law with the claims asserted by the Alaska Legislative Council—whether the Governor is constitutionally bound to execute the Legislature’s public school appropriations. CEE’s claims also present new issues—including whether the Governor’s refusal to execute the appropriations made in Section 4, Ch. 6, SLA 2018 directly violates the State’s obligation to provide adequate public education funding under Article VII, Section 1 of the Alaska Constitution. It is evident from both the Alaska Legislative Council’s initial complaint and the Joint Motion filed with it that the primary dispute between the existing parties relates to the scope of the Legislature’s authority to appropriate public school funding on a biannual basis and the separation of powers between the executive and legislative branches of government. CEE and its members seek to protect distinct financial and constitutional interests in the midst of this power struggle. CEE maintains that the State has a constitutional obligation to provide adequate funding for public education, regardless of any dispute between the Governor and the Legislature. Accordingly, the Governor’s conduct does not merely interfere with the Legislature’s appropriation power. It is also a direct and independent violation of the Alaska Constitution’s public education clause. No other party has meaningfully raised this issue.

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¹⁸ *State v. Weidner*, 684 P.2d 103, 114 (Alaska 1984).

¹⁹ *See* Part III.1.a., *supra*.

Finally, CEE's intervention will not result in any undue delay or prejudice to any existing party. CEE is aware of the expedited briefing schedule ordered by the Court pursuant to the parties' Joint Motion for Scheduling Order. If CEE is permitted to intervene, it agrees it will be bound by the Court's scheduling order. CEE's participation as a party will therefore not result in any undue burden or delay.

IV. CONCLUSION

For all of the foregoing reasons, the Court should grant CEE's motion to intervene.

DATED at Anchorage, Alaska this 23rd day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2019, a true and correct copy of the foregoing was served by email and mail, postage prepaid, upon the following:

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