

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. )

Case No. 1JU-19-753CI

HONORABLE MICHAEL J. DUNLEAVY, )  
In His Official Capacity as Governor of 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 Education and )  
Early Development for the State of Alaska, )

**ORDER RE:**  
**MOTION TO INTERVENE**

Defendants. )

The Coalition for Education Equity, Inc. (CEE) moves to intervene in this action. The Plaintiff does not oppose the intervention. The Defendants oppose the intervention.

The Plaintiff filed its *Complaint for Declaratory and Injunctive Relief and an Accounting* on July 16, 2019. Therewith the Plaintiff and the Defendants filed a *Joint Motion and Proposed Order Regarding Fiscal Year 2020 Education Funding Pending Resolution of Litigation*. The court entered the order as proposed on the day it was filed. On August 19, 2019 the Plaintiff and the Defendants filed a *Joint Motion for Scheduling Order with Expedited Consideration of Cross Summary Judgment Motions*. The court granted the *Joint Motion* adopting the parties' proposed schedule,<sup>1</sup> along with an *Order Scheduling Oral Argument*,<sup>2</sup> on August 20, 2019.<sup>3</sup> The CEE filed its proposed *Complaint in Intervention* and its *Motion to Intervene* on August 23, 2019.<sup>4</sup> The Defendants' *Opposition to the Coalition's Motion to Intervene* was filed on September 3, 2019. The CEE's *Reply in Support of Motion to Intervene* was filed on September 9, 2019 along with a *Motion for Expedited Consideration*. The court granted expedited consideration of the

<sup>1</sup> The schedule requires that the parties file cross motions for summary judgment on September 13, 2019, that they file answering briefs on September 27, 2019, that oral argument be scheduled during October 2019, and that the court enter its decision by November 8, 2019.

<sup>2</sup> Oral argument was, and remains, scheduled for October 4, 2019.

<sup>3</sup> The next day, August 21, 2019, the court agreed to move the oral argument by one hour at the request of one of the parties.

<sup>4</sup> The Plaintiff's non-opposition is noted in the CEE's *Motion to Intervene* at p. 2.

intervention issue by order entered on September 9, 2019 and therein agreed that it would rule on the intervention motion no later than September 11, 2019.

The CEE asserts that it is entitled to intervene as of right pursuant to Alaska Rule of Civil Procedure (ARCP) 24(a) or, alternatively, that the court should grant permissive intervention pursuant to ARCP 24(b). The Defendants oppose either form of intervention. The Defendants assert that the CEE's motion is untimely and that the CEE's interest in the issue before the court is fully represented by the Plaintiff.

Intervention as of right is governed by a four part test: (1) the motion must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) the applicant must show that this interest may be impaired as a consequence of the action; and (4) the applicant must show that the interest is not adequately represented by an existing party.<sup>5</sup> All four requirements must be met in order for intervention as of right to be granted.<sup>6</sup>

Whether an intervention motion is timely depends on the facts of the case and is determined by the application of a four part test: (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.<sup>7</sup> There are no fixed time standards for determining when a motion to intervene as a matter of right is timely.<sup>8</sup> Timeliness is a very fact- and therefore case-dependent determination.

In the interest of such things as the preservation of judicial resources and the encouragement of swift adjudication of issues and cases, intervention may be allowed subject to conditions and restrictions, such as limiting the claims that intervenors can address and/or their level of participation in a case.<sup>9</sup>

Another means to participate in a case without intervening is through filing an amicus curiae brief.<sup>10</sup>

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<sup>5</sup> *Alaskans for a Common Language, Inc. v. Kritzy*, 3 P.3d 906, 911 (Alaska 2000).

<sup>6</sup> *Harvey v. Cook*, 172 P.3d 794, 799 (Alaska 2007).

<sup>7</sup> *Scammon Bay Assoc., Inc. v. Ulak*, 126 P.3d 138, 143 (Alaska 2005).

<sup>8</sup> *Red Top Mining, Inc. v. Anthony*, 983 P.2d 743, 746 (Alaska 1999).

<sup>9</sup> See, *State v. Weidner*, 684 P.2d 103, 114 (Alaska 1984); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1922 (3d ed. 2008).

<sup>10</sup> See, e.g., *Alaskans for a Common Language, Inc.*, 3 P.3d at 915.

In order to determine whether the CEE's motion to intervene was timely filed it would be helpful to know when its duty to intervene arose. In other words, when did the CEE know that it needed to intervene. The Defendants assert that the CEE knew about the controversy about school funding as early as May 2019. But the *Complaint* was not filed until July 16, 2019 and the CEE did not know what the Plaintiff was claiming and seeking until the *Complaint* was filed. The order adopting the parties' agreement on education funding pending the resolution of this lawsuit was also entered on July 16, 2019 and it was posted on the Alaska Court System's webpage within a day or two.<sup>11</sup> The scheduling orders were entered on August 20, 2019 and were also posted on the court's webpage within a day or two. It is unknown exactly when the CEE became aware of the various pleadings and orders but it is safe to say that given the extensive nature of its intervention pleadings (which would be indicative of considerable time and effort being expended on their preparation), which were filed on August 23, 2019, that it knew of its asserted need to intervene at least a couple of weeks before August 23. The Defendants claim that they were not notified by the CEE of the intervention issue until almost immediately before the intervention pleadings were filed.

If the CEE knew it needed to intervene as early as July 16, 2019,<sup>12</sup> about five weeks elapsed before their intervention pleadings were filed. The question is whether this is too long given the facts of this case, and whether the parties are prejudiced by that period of delay. The Plaintiffs have not asserted that they are prejudiced, although perhaps this is unsurprising given that they are more aligned with the CEE than are the Defendants. The Defendants assert that they are prejudiced.

There appear to be two primary types of prejudice that are foreseeably implicated by the CEE's intervention. The first is the possibility of upsetting the very tight schedule which has, of necessity, been established. This is substantially mitigated, in at least one respect, as explained, below. The second involves the very nature of a primary concern of the CEE, namely the minimum level of state aid necessary to satisfy the state's constitutional

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<sup>11</sup> The Alaska Court System's webpage has an area devoted to cases of significant public interest called, *Most Requested Case Files*. The instant case is listed in this area (along with a handful of other cases) and this area of the webpage contains links to the pleadings and to the orders entered in the case.

<sup>12</sup> The court cannot agree with the Defendants' assertion of some earlier point in time based on the highly-publicized nature of the dispute between the parties about education funding, for the reasons asserted by the CEE in its intervention pleadings.

obligation to fund public education in Alaska. This is a colossal issue. The Defendants correctly assert that this is a complicated and mixed question of fact and law and that answering it would be an enormous undertaking requiring a lengthy and significant discovery process almost certainly involving expert discovery. Similar litigation has taken years to complete. This second type of prejudice is closely related to the first because it, by its nature, implicates the tight timeline in place in our case. The CEE has not adequately described how this colossal issue can possibly be fully explored and litigated to a sound conclusion within the very limited time within which this case must be decided.

Will the CEE suffer foreseeable prejudice if its motion to intervene is denied? The CEE argues yes and the Defendants argue no. The CEE asserts that the possible lack of any funding whatsoever (in the event that the Defendants prevail in the instant case) would be a clear violation of the state's constitutional obligation to fund education and would severely financially disadvantage its members. The Defendants argue that the CEE could file a separate suit to press its claims and that it does not need to enmesh the instant, fast-tracked case, in its broader concerns about funding education in Alaska. The CEE points out that although the parties have agreed, and the court has ordered, that education funding continue to be paid during the pendency of this case, the agreement and order expressly omit the payment of \$30 million in supplemental school funding. The Defendants assert that the payment of the supplemental dollars is not presently implicated because under virtually any conceivable circumstance (regardless of the very existence of the present case and controversy) they would not be paid before late January or early February 2020,<sup>13</sup> by which point the agreed and ordered timeline of the instant case (under which this court will enter its decision no later than November 8, 2019) will have run its course, thus obviating the need for the parties to enter an agreement about the supplemental funding.

The CEE acknowledges the already agreed-upon and ordered schedule in our case and the CEE agrees to be bound by that schedule. Thus, the self-evident urgency driving the expedited consideration of the cross summary judgment motions (which are to be filed just two days hence) is not facially affected by the CEE's intervention—depending on the contours of such intervention, if it is allowed. While it is undoubtedly correct that the CEE's intervention will complicate this case and that it will result in more work for the

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<sup>13</sup> See, Affidavit of School Finance Manager Elwin Blackwell, dated August 30, 2019, attached to the Defendant's opposition brief as Exhibit A, at ¶¶ 2-4.

parties (and the court), these concerns are inherent any time additional parties become involved in a case.<sup>14</sup> The CEE's up-front pledge to abide by the schedule already in place goes a long way toward addressing the first of the primary forms of prejudice asserted by the Defendants, as explained above. But it does not address or resolve the second primary form of prejudice asserted by the Defendants, as explained above.

The CEE could have filed its intervention pleadings sooner. But because the tight timelines in this case are not facially affected by the CEE's intervention, the foreseeable prejudice to the parties (as asserted by the Defendants) is considerably lessened, in one respect—although this may be dependent upon the extent to which intervention may be allowed. And as noted by the CEE, by the time the parties file their cross motions for summary judgment they will have been on notice of the CEE's basic claims for about three weeks, which although that is not a long period of time, it hardly constitutes last minute notice. But this leaves unanswered the Defendants' claim of prejudice based on the very nature of the CEE's primary interest.

This brings us to the last of the four timeliness factors, the idiocratic factors present in this case that militate against intervention. The idiocratic factors here are inextricably intertwined with the prejudice to the parties' factor discussed above. The issue brought to the court by the Plaintiff is a pure legal issue and it can and will be addressed in the limited period of time that we have. The colossal issue that the CEE wants to address in this case is fundamentally different insofar as it is a mixed issue of fact and law which, as explained above, will take a substantial period of time to explore and resolve. This militates heavily against allowing the CEE to intervene.

In sum, the timeliness issue is a close call.

Assuming *arguendo*, for the moment, that the CEE's motion to intervene is timely, we must still examine the remaining three factors applicable to determining whether intervention as of right has been established pursuant to ARCP 24(a). The next factor is whether the CEE has an interest in the subject matter of this action. It is undisputed that it does. The next factor is whether that interest may be impaired as a consequence of this action. If the Defendants prevail in this suit, in its present form, then the CEE's interest will

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<sup>14</sup> The Alaska Supreme Court has recognized that additional parties are always the source of additional questions, briefs, objections, arguments, and motions. *See, e.g., Alaskans for a Common Language, Inc.*, 3 P.3d at 915.

seemingly be impaired because of a possible complete lack of state funding for education.<sup>15</sup> The fourth factor is whether the CEE's interest is adequately represented by a present party.

The CEE asserts that its interests are not adequately represented or protected by any current party to this action. The Defendants dispute this assertion, noting that our supreme court has established a presumption of adequate representation when government entities are parties to a suit,<sup>16</sup> as here. The presumption can be overcome through a demonstration of collusion, adversity of interest, possible nonfeasance, or incompetence.<sup>17</sup> The Defendants argue, and the court agrees, that the Plaintiff has thus far given no indication that it will not zealously litigate its assertions in the instant case. The Defendants claim that the Plaintiff and the CEE do not have a divergence of interests but rather that the CEE merely disagrees with the tactical decisions made by the Plaintiff in terms of how it has chosen to litigate this case, noting that a difference in litigation strategy alone is not enough to justify intervention.<sup>18</sup> The CEE argues that the Plaintiff has not raised the same issue that the CEE wants to address—namely, the contours of the state's constitutional obligation to fund education and that therefore there exists a basic divergence in the asserted interests and arguments of the CEE and the Plaintiff. The CEE also disputes that it merely disagrees with the Plaintiff's litigation strategy, particularly the parties' joint motion to fund education during the pendency of this suit. The CEE argues that if the Defendants prevail in this action, the constitutional right to an adequate education of every Alaska student will be in immediate jeopardy, and that the Plaintiff has not demonstrated if or how it intends to address this. The CEE's asserted interest is considerably broader than anything brought forward by the Plaintiff and thus it appears that the CEE is correct, that its interests are not identically aligned to those of the Plaintiff.

Returning to the issue of timeliness, and particularly to the closely interwoven sub-issues of idiocratic concerns here present and the likelihood of prejudice to the present parties, it appears that the court can grant the CEE's motion to intervene, in part, while at the same time addressing the idiocratic concerns and protecting the present parties from prejudice. This can be achieved through granting intervention in a strictly limited manner.

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<sup>15</sup> It is difficult to predict what might happen if the Defendants prevail in this case, but a complete lack of funding for education, at least for some period of time, appears to be a possibility.

<sup>16</sup> *Alaskans for a Common Language, Inc.*, 3 P.3d at 913.

<sup>17</sup> *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984).

<sup>18</sup> *Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29, 36 (Alaska 2007).

Therefore, the CEE may intervene only as follows: (1) in relation to the eventualities that may come to pass if the Defendants prevail in this suit—i.e., how will state education funding be ensured in an immediate manner if the Defendants prevail and the current agreement and order for education funding during the pendency of this case expires; and (2) as part of the cross summary judgments that the present parties will be filing, addressing the issues already part of this case. The CEE may not litigate in this case the issue of the contours of the Alaska Constitution’s requirement that the state fund education, because of the enormity and complexity of the issue and any litigation thereof. The CEE’s ability to litigate that issue in an independent suit is not affected by the limitation imposed here.

The CEE may also file amicus curiae briefing in this case.

The CEE’s motion to intervene is **GRANTED IN PART**<sup>19</sup> as described above.

DATED this 11<sup>th</sup> day of September 2019 at Juneau, Alaska.



  
Daniel Schally  
Superior Court Judge

**Certification**  
Copies Distributed  
Date 9/11/19  
to Martin Wallace,  
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Patton Walsh,  
Sully Trickey  
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<sup>19</sup> To be clear, the court is granting intervention as of right, but in the event that this may be deemed inappropriate, the court is exercising its discretion to secondarily grant permissive intervention.