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June 9, 2016

The Honorable Bill Walker
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811

Re: SCS CSHB 156(FIN)(efd fld H): School accountability measures
Our file: JU2016200396

Dear Governor Walker:

At the request of your legislative director, we have reviewed SCS CSHB 156(FIN)(efd fld H) relating to school accountability measures and compliance with federal law. The review is divided into the following subject areas with sections of the bill addressed in numerical order within each subject area:

I. *Parental Rights*
II. *Sex Education*
III. *Training*
IV. *Accountability*
V. *Compliance with Federal Law*
VI. *Statewide Standards-based Assessments*
VII. *Miscellaneous Provisions*
  A. *Consultation authority to improve outcomes at college and employment*
  B. *Physical examinations of teachers*
  C. *Procurement code exemption for assessment contracts*
  D. *Minimum expenditure for instruction*
  E. *Student surveys*
VIII. *Failure of Effective Dates*
IX. *Conclusion*

## I. *Parental Rights.*

Section 1 of the bill would amend AS 14.03 by adding a new section that details the rights of parents of children enrolled in public schools. This section would require school districts to adopt policies and procedures that allow a parent to object to and withdraw a child

from a standards-based assessment or test required by the state or any activity, class, or program. This section would require that district policies recognize the authority of a parent to withdraw a child from an activity, class, program, or standards-based assessment or test because of a religious holiday, with "religious holiday" being defined by the parent.

Districts would be required to notify parents at least two weeks before the occurrence of an activity, class, or program that includes content involving human reproduction or sexual matters. In section 2, "human reproduction or sexual matters" would be defined under AS 14.03.016(d)(5) to exclude curricula and materials used for sexual abuse and sexual assault awareness and prevention training required under AS 14.30.355 and dating violence and abuse awareness and prevention training required under AS 14.30.356.[1] Once AS 14.30.355 and AS 14.30.356 take effect, districts would not be required to provide parental notification two weeks before sexual abuse and assault prevention training or dating violence and abuse prevention training even if those trainings include content involving human reproduction or sexual matters. The failure of the special effective date for the exclusion of AS 14.03.016(d)(5) is discussed in VIII, below.

Section 1 would require that district policies give a parent an opportunity to review the content of an activity, class, performance standard, or program. Further, the bill would require that district policies ensure that, if a parent withdraws a child or gives permission for the absence, the absence may not be considered unlawful under AS 14.30.020.[2] Districts would be prohibited under this section from adopting a policy that would allow a parent to categorically object to or withdraw a child from all activities, classes, programs, or standards-based assessments or tests required by the state. Under this section, district policy must require that a parent object each time the parent wishes to withdraw the child from an activity, class, program, or standards-based assessment or test required by the state. Finally, this section would clarify that a school employee or volunteer may answer a question from a child about any topic.

II. *Sex Education.*

Section 18 would place limits on who may teach a class or program in sex education, human reproduction, or human sexuality. This section would require that a person who teaches these subjects possess a valid certificate issued under AS 14.20 and be under contract with the school or be supervised by someone who meets these requirements. Before a person provides instruction on these topics under the supervision of a certificated teacher, the person would have to be approved by the district's school board and the person's credentials would have to be made available for parents to review.

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[1] AS 14.30.355 and 14.30.356 were passed in 2015 and are commonly known as "Erin's Law" and "Bree's Law" respectively. Both statutes go into effect June 30, 2017 (sec. 14, ch. 2, SSSLA 2015).

[2] AS 14.30.020 provides that five days' knowing noncompliance with AS 14.30.010, the compulsory attendance statute, is a violation, punishable by a fine.

The board approval and credential availability that would be required in advance of instruction constitute special treatment for persons providing instruction in sex education, human reproduction education, or human sexuality education as compared to those providing instruction (under teacher supervision) on other topics. The disparate treatment of the two groups could be challenged under the equal protection clauses of the United States and Alaska constitutions. Since the classification neither impinges on a fundamental right (e.g., the right to vote)[3] nor involves a suspect classification (e.g., a racial group), a court likely would not give the classification a heightened level of scrutiny. The classification would more likely be subject to the lowest level of review under equal protection analysis.

Under the lower level of review, the governmental interest in regulating the presentation of accurate information relating to sex education seems likely to be considered legitimate and the prior approval of the board and the availability to parents of the instructor's credentials appear to bear a fair and substantial relationship to the governmental interest. While it might appear that the classification could survive challenge under the equal protection clause, the facts of an individual case would affect the outcome of any potential claim. Another way of saying this is that while the bill does not appear to be unconstitutional "on its face," a school district might apply the law in a way that would not survive a constitutional challenge.

Section 18 of the bill also would require that curriculum, literature, or materials on sex education, human reproduction education, or human sexuality education be approved by the school board and available for parents to review before being used in a class or program or distributed in a school. The same equal protection analysis could be applied to this disparate treatment of instructors (i.e., as to review of their teaching materials), based on the subject matter being presented. Again, it appears the classification could survive a challenge under the equal protection clause, but the facts of the individual case would affect the likely outcome.

Under sec. 18 of the bill, in proposed AS 14.30.361(c)(2), the "credentials" of a person providing instruction relating to sex education topics under the supervision of a teacher would become public; i.e., "available for parents to review." The term "credentials" is undefined in the bill, but could be interpreted by a school district in a way that would infringe on the applicant's privacy rights. There is nothing in the legislative record, however, indicating any intent that this provision was to override whatever existing rights of privacy a presenter may have to information, such as educational records, that might fall within a broad definition of "credentials."

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[3] The United States Supreme Court has concluded that the right to education is not a fundamental right under the federal constitution. *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 33 (1973). The Alaska Supreme Court has not addressed the question of whether the right to education is a fundamental right in Alaska. In *Kasayulie v. State*, 3AN-97-3782 (1999), a trial court found that the right to education is a fundamental right under the state constitution, but this concept was tied to a basic educational program. A significant expansion of that concept would be required to conclude that the right to education in a specific subject area, such as human sexuality, is a fundamental right.

Section 18 (as amended by sec. 19) would exclude sexual abuse and sexual assault awareness and prevention training required under AS 14.30.355 and dating violence and abuse awareness and prevention training required under AS 14.30.356. As noted above, 14.30.355 and 14.30.356 do not take effect until June 30, 2017. As of June 30, 2017, because of the exclusion incorporated into sec. 18, persons teaching sexual abuse and assault and dating violence awareness and prevention courses and the materials used in those courses would not have to comply with the requirements of this sec. 18, even if matters involving sex education, human reproduction education or human sexuality education are addressed in the awareness and prevention training. The impact of the failed special effective date for sec. 19 is discussed in VIII, below.

III. *Training Requirements.*

The bill would modify the training requirements enacted in the 2015 legislative session under HB 44.[4] HB 44, as enacted, established a training schedule for seven types of training for staff at a school, including not only sexual abuse and assault and dating violence awareness and prevention, but other trainings, such as alcohol or drug-related disabilities, youth suicide awareness and prevention, crisis response, crisis intervention, and recognition and reporting of child abuse and neglect.[5] Currently, school boards must provide training on a schedule so that not less than 50 percent of the certificated staff in each school receive the training not less than every two years, and all of the certificated staff employed in each school receive the training not less than once every four years.

Sections 11 - 16 of the bill would shift the calculation from individual schools to the district as a whole. This section would require that 50 percent of certificated staff *in the district* receive the required training on the schedule described above and all certificated staff *in the district* receive the training not less than once every four years. This change evidently was made in response to district input that it is logistically challenging to track the training schedules at the school level.

Sections 11 - 16 also would remove crisis intervention training required under AS 14.33.127 from the list of trainings that must be delivered according to the schedule described in the preceding paragraph. Crisis intervention training would then be governed by the standard set out in AS 14.33.127(b): Each governing body must ensure that a sufficient number of school employees receive periodic training in an approved crisis intervention program to meet the needs of the school population.

Section 20 of the bill would expand the scope of required youth suicide awareness and prevention training. Under sec. 20, teachers, administrators, counselors, and specialists providing services to students in any grade (not just in grades 7 through 12, as under current law) would be required to receive the training.

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4 Chapter 2, SSSLA 2015.

5 *See* secs. 6-8, ch. 2, SSSLA 2015.

IV. *Accountability.*

Section 3 of the bill would require that the annual report entitled "Alaska's Public School System: A Report Card to the Public" include the performance designation assigned to the Alaska public school system. Section 4 would require the Department of Education and Early Development (department) to report the performance designation assigned to the Alaska public school system to each school district in the state.

Section 5 would require the State Board of Education and Early Development (state board) to adopt regulations providing for a comparison between the state public school system and the public schools in other states, including comparisons of student participation in standardized assessments and their performance on the assessments.

Section 6 would require school improvement plans for schools or districts that receive low performance designations, to the extent possible, to include measures that increase local control of education and parental choice and that do not require a direct increase in state or federal funding for the school or district.

Section 7 would amend the school and district accountability system so that schools may receive a high performance designation by demonstrating improvement over the performance designation for the previous year or by maintenance of a proficient or high performance designation from the previous year.

V. *Compliance with Federal Law.*

In secs. 5 and 8, the bill would delete the references to federal law in the accountability system established under AS 14.03.123. In sec. 5, the renumbered paragraph (c)(5) would require the state board to adopt regulations to implement AS 14.03.123, including "additional measures to assist schools or districts to improve performance in accordance with AS 14.03.123," but without reference to improving performance in accordance with federal law. This statutory change would not prohibit the state board from adopting regulations that comply with federal law as the board implements the accountability statute to improve student performance.

Section 5 of the bill would delete another reference to federal law in the accountability statute. AS 14.03.123(c)(5) describes the authority of the state board to provide by regulation for additional measures to improve student performance and provides that the additional measures may be unique to a certain school or district if the school or district receives federal funding not available to all schools or districts in the state. The bill would delete the limitation on this authority to adopt unique measures that is provided by the phrase "to the extent necessary to conform to federal law."

Section 8 of the bill would delete a reference to a specific federal law in the accountability statute. AS 14.03.123(f) describes certain requirements for the state accountability system. Under paragraph (f)(1) of the current statute, the federal ESEA (Elementary and Secondary Education Act of 1965, as amended) must be implemented by the department's

accountability system. The bill would delete paragraph (f)(1). Representative Keller, the bill sponsor, testified that it is unnecessary under ESEA to incorporate federal law into state statute and that deleting the references to federal law in the state accountability statute does not reflect an intent to defy federal law.[6]

Removal of the references to federal compliance from the state accountability statute would not lead to the necessary conclusion that noncompliance with federal law would be intended or required under the bill. Removal of the references to compliance with federal law in the statute might be considered relevant in an assessment of the state's potential noncompliance with federal law by the United States Department of Education. The possibility of a loss of federal funding is discussed in more detail below, in relation to the potential suspension of statewide, standards-based assessments.

VI. *Assessments.*

Under sec. 10 of the bill, the department would be prohibited from requiring a school or district to administer a statewide standards-based assessment after July 1, 2016, and before July 1, 2018; i.e., for the next two school years. This prohibition would override state and federal law that would otherwise impose an obligation on the department to require a district or school to administer a statewide standards-based assessment. The prohibition would apply notwithstanding AS 14.03.078 (department annual report to the legislature that includes progress toward implementing the accountability system); AS 14.03.120 (school, district, and department reporting requirements that include assessment results); AS 14.03.123 (the accountability system); AS 14.03.300 (assessment plans required for correspondence programs); AS 14.03.310 (student allotments for correspondence students); AS 14.07.020 (department obligation to develop a system of assessments); AS 14.07.030 (department powers); AS 14.07.165 (required regulations); or a provision of federal law to the contrary; i.e., a provision of federal law that would otherwise mandate that the department require a school or district to administer an assessment.

Section 10 also would impose the following obligations on the department:

1. The department and the state board would be required to create a plan for working with districts to develop or select statewide assessments that are approved by districts. Under the plan, the first administration of the assessments would have to occur not later than during the 2020-2021 school year;

2. The department would be required to identify unnecessary laws or regulations and areas where the laws or regulations may be changed to provide districts with greater control over public education policy in light of the enactment of P.L. 114-95 (Every Student Succeeds Act);

[6] *See* House Education Committee Hearings of March 30, 2015, and April 8, 2015.

3. By January 1, 2018, the department would be required to submit a report to the legislature describing

    a. the final plan for developing or selecting statewide assessments, as required above; and
    b. recommendations for changes in laws or regulations, as required above; and

4. The department would be required to mandate that a school or district administer a statewide standards-based assessment after July 1, 2016, and before July 1, 2018, if the United States Department of Education provides notice that it intends to withhold all or a portion of the state's federal education funding as a result of the state's compliance with sec.10 of the bill.

These provisions relating to assessments and compliance with federal law are within the legal authority of the legislature, but raise questions as to the possible withholding of federal funds due to noncompliance with the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act (NCLB) and the ESEA as amended by the Every Student Succeeds Act (ESSA). Under either reauthorization act, ESEA requires states that receive federal funding to implement annual assessments in mathematics and reading/language arts for grades 3 - 8 and once in grades 10 - 12 and in science once in grades 3 - 5, 6 - 9, and 10 - 12. In the 2016 - 2017 school year, states will operate primarily under NCLB and in the following year under the ESSA.

The state's failure to implement the assessments required under ESEA provides grounds for the United States Department of Education (USED) to withhold all or a portion of the department's Title I, Part A,[7] administrative funds (ESEA section 1111(g)(2) (20 U.S.C. 6311(g)(2). USED has authority to suspend and then withhold all or a portion of the state's Title I, Part A, programmatic funds (GEPA (General Education Provisions Act, enacted as part of Public Law 103-382 (the Improving America's Schools Act of 1994)) section 455 (20 U.S.C. 1234(d)). Failure to implement the assessment provisions of ESEA could mean that the state would be out of compliance with other federal programs that rely on statewide assessment results, including the School Improvement Grants (SIG) program; ESEA Title III; Part B of the Individuals with Disabilities Education Act (IDEA); programs for rural schools under ESEA Title VI; migrant education under ESEA Title I, Part C; and programs focused on professional development and other supports for teachers, such as ESEA Title II.

As described above, under sec. 10 of the bill, if the USED gives notice that it intends to withhold all or a portion of the state's federal education funding as a result of the department's compliance with sec. 10, the department would be obligated to require a district or school to administer a statewide standards-based assessment in the next two school years. This would provide protection from the loss of federal funds. Also, since USED may provide notice of intent

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[7] Title I, Part A, of ESEA provides financial assistance to districts and schools with high numbers or high percentages of children from low-income families to help all children meet challenging state academic standards.

to withhold funds, the department would need to be prepared to then require that assessments be administered.

Section 10 of the bill would be enacted as AS 14.07.175. Section 23 would repeal AS 14.07.175 on July 1, 2020.

VII. *Miscellaneous Provisions.*

A. *Consultation authority to improve outcomes at college and employment.*

Section 9 would permit the department to consult with (1) the University of Alaska to develop secondary education requirements to improve student achievement in college preparatory courses; and (2) businesses and labor unions to develop a program to prepare students for apprenticeships or internships that will lead to employment opportunities.

B. *Physical examinations of teachers.*

Section 17 would permit a school district to require physical examinations of teachers as a condition of employment and would provide that districts are not required to pay the cost of physical examinations for teachers.

C. *Procurement code exemption for assessment contracts.*

Under sec. 21 of the bill, the State Procurement Code (AS 36.30) would be amended to exempt contracts of the department for student assessments required under AS 14.03.123 (the accountability system) and AS 14.07.020 (department's duty to develop a system of assessments).

D. *Minimum expenditure for instruction.*

Section 22 would repeal AS 14.17.520, which requires that a school district budget for and spend a minimum of 70 percent of its school operating expenditures in each fiscal year on the instructional component of the district's budget. AS 14.17.520 also includes a procedure for department and state board review of district budgets and audits for compliance and for waiver requests.

E. *Student surveys.*

Section 24 would repeal the amendment of AS 14.03.110(a) enacted by House Bill 44 in the 2015 legislative session.[8] The 2015 amendment would prohibit all questionnaires or surveys in a school without written parental permission, effective June 30, 2017. Under current law, if a questionnaire or survey does not inquire into personal or private family matters that are not a matter of public record or the subject of public observation, it can be administered without

[8] *See* sec. 4, ch. 2, SSSLA 2015.

written parental permission. Section 24 of the bill would allow the current language of AS 14.03.110(a) to remain in effect, since the 2015 amendment would not become effective before it would be repealed by sec. 24. This change was evidently made at the request of the Alaska Association of School Boards, which distributes an annual "School Climate and Connectedness Survey" to students.

VIII. *Failure of effective dates.*

On May 5, 2016, the House of Representatives failed to adopt the effective date clauses of the bill, thereby removing secs. 26 - 29 of SCS CSHB 156(FIN) from the bill. Without the effective date clauses, the bill would become effective 90 days after enactment,[9] rather than according to the special effective dates previously included in the bill. With the removal of sec. 26, the state board's authority to adopt regulations under the bill would take effect 90 days after enactment, rather than immediately.

With the removal of secs. 27-28, the effective dates in this bill would not coordinate with certain related future effective dates under HB 44.[10] The special effective date for sec. 2 of SCS CSHB 156(FIN) would be removed. As previously noted, Section 14 of HB 44 requires training for (1) sexual abuse and assault awareness and prevention; and (2) dating violence awareness and prevention, but does not take effect until June 30, 2017. Section 2 of this bill would exclude curricula and materials for those trainings from "human reproduction or sexual matters" as used under sec. 1. Under sec. 1 of this bill, if instructional content involves human reproduction or sexual matters, parents must receive two weeks' notice. Section 2 of this bill would take effect 90 days after enactment, well before the statute requiring sexual abuse and dating violence training will take effect. If districts provide sexual abuse or assault or dating violence awareness and prevention training before June 30, 2017, it appears districts would have to provide the two-week notice to parents, if the content involves human reproduction or sexual matters.

The removal of the special effective date for sec. 19 (under sec. 27) would operate in a similar way. Section 19 of this bill would exclude sexual assault and dating violence awareness and prevention training required under HB 44 from the special requirements that would apply under sec. 18 to those who teach sex education, human reproduction education, or human sexuality education. Section 19 would take effect 90 days after enactment, but the training requirement, as noted above, does not take effect until June 30, 2017. It appears that, if sexual abuse and assault or dating violence awareness and prevention training occurs before June 30, 2017, instructors of that training would need to comply with sec. 18 of this bill, if matters of sex education, human reproduction education, or human sexuality education are covered.

The removal of sec. 27 of SCS CSHB 156(FIN) also invalidates the special effective dates that would have been provided by secs. 12, 14, and 16 of this bill. Sections 12, 14, and 16

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9 *See* Alaska Constitution, art. II, § 18.

10 Sections 6-8, 14, 15, ch. 2, SSSLA 2015. We expect the revisor of statutes to address the date discrepancies in the publisher's instructions (although the revisor cannot change the effective dates for secs. 2, 12, 14, 16, 19, and 20).

refer back to the provisions of HB 44 that require trainings for certificated staff according to a specified schedule (50 percent of staff trained every two years, 100 percent trained every four years). Before the failure of the effective dates, those sections would not have taken effect until June 30, 2017, when the sexual abuse and assault and dating violence awareness and prevention training requirements of AS 14.30.355 and 14.30.356 take effect. With the failure of those delayed effective dates, secs. 12, 14, and 16 would now take effect 90 days after enactment. However, since the training required under AS 14.30.355 and AS 14.30.356 will not be in effect at that time, it appears that the secs. 12, 14, and 16 will only be operative when the training requirements under AS 14.30.355 and AS 14.30.356 take effect.

The removal of sec. 28 of SCS CSHB 156(FIN) invalidates the special effective date provided by sec. 20. As described in III, above, sec. 20 would expand the scope of required suicide prevention training under AS 14.30.362 to include teachers, administrators, counselors and specialists providing services to students in any grade (not just in grades 7 through 12, as under current law). AS 14.30.362 takes effect under HB 44 on July 1, 2016. For this reason, sec. 20 had a special effective date of July 1, 2016 (under sec. 28). The expanded scope of required suicide prevention training would take effect 90 days after enactment, likely to be in September or October, 2016. The more limited version of AS 14.30.362 would be in effect from July 1, 2016, until the expanded version would take effect 90 days after enactment. Since the requirement applies to trainings required over the course of a school year, this relatively short period when the more limited version of AS 14.30 362 is in effect seem likely to have little impact on districts.

Section 29 of SCS CSHB 156(FIN) would have provided a special effective date of July 1, 2016, for the provisions of the bill that would not have a special effective date under secs. 26 - 28. With the removal of sec. 29, those provisions would all take effect 90 days after enactment. In light of the typical school year calendar, this delayed effective date should also have little impact on districts.

VIII. *Conclusion.*

Except as noted, the bill presents no constitutional or other legal concerns.

Sincerely,

CRAIG W. RICHARDS
ATTORNEY GENERAL

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