IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

KRISTINE MOORE and GREGORY MOORE, for themselves and as the parents or guardians of their minor children, JASON EASTHAM, SHANNON MOORE and MALLORY MOORE; MIKE WILLIAMS and MAGGIE WILLIAMS, for themselves and as the parents of their minor daughter, CHRISTINE WILLIAMS; MELVIN OTTON and ROSEMARY OTTON, for themselves and on behalf of their minor children, HELENA OTTON, FREDERICK OTTON and BENJAMIN OTTON; WAYNE MORGAN and MARTHA MORGAN, for themselves and as parents of their minor children, WAYNE MORGAN II, PATRICK MORGAN, RILEY MORGAN, and SKYE MORGAN; JERRY S. DIXON, on behalf of himself and as the father of KIPP DIXON and PYPER DIXON, minors; the YUPIIT SCHOOL DISTRICT; the BERING STRAIT SCHOOL DISTRICT; the KUSPUK SCHOOL DISTRICT; NEA-ALASKA,INC.; and CITIZENS FOR THE EDUCATIONAL ADVANCEMENT OF ALASKA'S CHILDREN, INC.,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

Case No. 3AN-04-9756 Civil

ORDER DENYING MOTION TO DISMISS EDUCATION CLAUSE CLAIMS

In this action, the plaintiffs assert that the State has failed to meet its constitutional obligation to provide an education to Alaska's schoolchildren. Plaintiffs'

second amended complaint asserts that the State legislature has underfunded public school education to such a degree as to violate two state constitutional provisions: the "Education Clause" set out in Article VII, Section 1, and the "Due Process Clause," set out in Article I, Section 7. This order addresses only the plaintiffs' Education Clause claims.

The Education Clause of the state constitution provides as follows:

> The 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. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The State has filed a motion seeking the summary dismissal of the plaintiffs' claim that the State has violated this constitutional provision because, in the State's view, the consideration of "issues related to the quality of education in Alaska is a nonjusticiable political question" . . . and never "proper issues for the courts." State's Motion at 2. In the State's view, the judiciary is without the authority to assess whether the State has complied with the constitutional directive that the legislature "establish and maintain a system of public schools open to all children of the State." Instead, in the State's view, "the legislature is solely responsible for determining the proper quality of education in the state." Id. at 9. As argued by the State in its briefing to this court, "If the people want more money for education, but their desire is ignored by the legislature, then the people have a remedy far more powerful than any that this court can provide. That remedy is the power of the ballot box." State's Reply at 2.

The plaintiffs, in opposing the State's motion, assert that the Education Clause accords to Alaska's school children a constitutionally protected right to an education. They assert the State has failed to provide this constitutionally-mandated level of education. They seek judicial enforcement of that constitutional right from the court, "because in Alaska, constitutional rights are the province of the judiciary." Plaintiff's Opp. to State's Motion at 66.

Each party has submitted comprehensive briefing in support of its position. This briefing includes extensive discussion of cases in Alaska that have assessed justiciability in different contexts, contains analysis of the significance and applicability of the Alaska Supreme Court's 1975 decision in the *Molly Hootch* case,[1] and compares and contrasts the numerous decisions of other state courts which have considered this issue, albeit often with different state constitutional provisions. In addition, both parties have referred extensively to the state Constitutional Convention in trying to discern whether the framers intended judicial enforcement of the Education Clause. Each party also discusses the policy implications of judicial proceedings with respect to the Education Clause. Based upon this court's review and consideration of all of the above, and for the reasons expressed below, this court denies the State's Motion to Dismiss the Education Clause claims as nonjusticiable.

I. Standard for Reviewing a Motion to Dismiss.

Under Alaska law, a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of

[1] Hootch v. Alaska State-Operated School System, 536 P. 2d 793 (Alaska 1975).

his claim which would entitle him to relief." Shooshanian v. Wagner, 672 P. 2d 455, 461 (Alaska 1983)(*quoting* Conley v. Gibson, 355 U.S. 41, 45-6 (1957)). The court is to assume that the factual allegations pled by the plaintiffs in the complaint are true and "ascertain whether or not they state a claim upon which relief may be granted." Id. Indeed, the Alaska Supreme Court has held that granting a motion to dismiss is improper if the complaint "states a claim upon which some relief may be granted, although the relief demanded may not be the kind to which the party is in fact entitled to obtain." Id., 672 P. 2d at n.5.

II. The Doctrine Of Justiciability in Alaska.

The Alaska Supreme Court has addressed the doctrine of justiciability in several cases. These decisions expressly acknowledge "the difficulty inherent in precisely defining the contours of the doctrine of justiciability" and note that "it is not possible to draw the exact boundary separating justiciable and nonjusticiable questions." Abood v. League of Women Voters of Alaska, 743 P. 2d 233, 336 (Alaska 1987). Nonetheless, these appellate cases contain several guidelines useful to this court in evaluating whether the Education Clause of the Alaska Constitution is justiciable.

In the Abood case, the supreme court was asked to determine whether the legislators' alleged violation of Alaska's Open Meetings Act was justiciable. In addition, the plaintiffs asserted that the closed meetings violated "an implied constitutional right of public access to meetings of legislative units." 743 P. 2d at 334. The supreme court held that the asserted violation of the Open Meetings Act was nonjusticiable, because "the judiciary cannot compel the legislature to exercise a purely legislative prerogative." Id. at 338. Since the constitution accorded to the legislature the authority to provide for

its own rules of procedure, and the legislature itself had made its rule requiring open meetings, the supreme court held that the alleged failure of the legislature to follow its own rule "is not the subject matter of judicial inquiry." Id. at 339.

But also in the Abood case, the supreme court sharply distinguished cases in which the complaining party was asserting that the alleged conduct involved a constitutional right: "If [a party's] claim is to survive this justiciability challenge, it must involve a right protected by either the Alaska Constitution or the United States Constitution." Abood, 743 P.2d at 340. Where alleged unconstitutional conduct is asserted, the nonjusticiability doctrine does not apply. Id. at 339. Thus, in Abood, the supreme court identified a potential constitutional issue – whether the plaintiffs had an implied constitutional right to access legislative meetings -- then determined, after extensive review of proceedings at the Constitutional Convention, that the plaintiffs did not have that right. The court did not find this constitutional claim nonjusticiable – rather, it expressly considered the constitutional claim and then, upon review, concluded that no such constitutional right existed and dismissed the claim on that basis.

Other justiciability cases in Alaska follow similar analysis. In Walleri v. City of Fairbanks, 964 P. 2d 463 (Alaska 1998), the Alaska Supreme Court held that a taxpayer's action seeking to invalidate a city's contract for the sale of municipal utilities to a third party was justiciable. The trial court had found the taxpayer's action nonjusticiable, concluding that the City Council had the authority to decide whether or not to sell the utilities – which was essentially a political question. In reversing that determination, the supreme court held that the taxpayer's claim was justiciable because the taxpayer was not seeking a determination on the "rightness or wrongness" of the

city's decision to sell the utility, but was instead asserting that the sale was invalid for failure to comply with procedural provisions in the city charter. See also State v. Tongass, 931 P.2d 1016, 1019 (Alaska 1997).

The State acknowledges that the Alaska Supreme Court has found questions regarding the constitutionality of state action to be justiciable. But, referencing a footnote by the Alaska Supreme Court in *Planned Parenthood II*,[2] the State asserts that the general rule of justiciability of constitutional questions is inapplicable to rights created under the Education Clause. State's Reply at 16-18. But the issue in *Planned Parenthood II* was not justiciability. Rather, the State there was asserting that "the right to privacy is not self executing and can be given effect only through legislation." 35 P. 3d at 35. In rejecting that argument, the supreme court referenced the State's argument about the *Molly Hootch* case in a footnote. This court does not read that footnote as a limitation on the justiciability of Education Clause claims, a topic not at issue in the *Planned Parenthood II* decision.

IV. The Baker v. Carr factors.

In assessing the justiciability of various questions presented to the court, the Alaska Supreme Court has referred to the approach adopted by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962). Baker identified various elements that a court could consider when the question of justiciability is raised.

In Alaska Wildlife Alliance v. State, 74 P. 3d 201, 207 (Alaska 2003)(citations omitted), the state supreme court referenced Baker and set out the operative analysis as follows:

[2] State v. Planned Parenthood of Alaska, 35 P. 3d 30, 38 n.55(Alaska 2001).

> A claim implicates the political question [justiciability] doctrine when there is (1) a textually demonstrable commitment of the issue to a coordinate political department; (2) the impossibility of a court's undertaking an independent resolution of the case without expressing lack of respect due coordinate branches of government; and (3) the need for adherence to a political decision already made." We also consider whether there are any "judicially discoverable and manageable standards for resolving the issue.[3]

With respect to the first factor, the State here argues that it is the legislature that has been specifically charged with the responsibility to "establish and maintain a system of public schools" under the Education Clause of the state constitution. The State asserts this constitutional language demonstrates a "textually demonstrable commitment" that the legislature alone shall be responsible for school establishment and maintenance. Stated differently, the State asserts that the judiciary is precluded from assessing whether the legislature has fulfilled its constitutional responsibility to establish and maintain a system of public schools.

But the state supreme court has never interpreted this Baker factor to mean that judicial review of alleged constitutional violations is unavailable simply because the constitution directs a separate branch of government to undertake a responsibility. Rather, as discussed above, this Baker provision has been applied when a party is challenging internal conduct, particularly within the legislature, and no constitutional rights are implicated. "Under Alaska's constitutional structure of government, the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 913 (Alaska 2001)(citation omitted).

[3] The state supreme court has varied in its recitation of the Baker factors from case to case. Cf., e.g., Tongass, 931 P. 2d at 1019. See also Chemerinsky, E., *Federal Jurisdiction* 142 (Little, Brown 2d ed. 1994).

The state supreme court also held in that decision, "[t]he separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution. In light of the separation of powers doctrine, we have declined to intervene in political questions, which are uniquely within the province of the legislature. But under the same doctrine, we cannot defer to the legislature when infringement of a constitutional right results from legislative action." Id. at 913-914 (footnotes omitted).

The State also argues that this court should decline to hear the Education Clause component of this case under Baker because there are no "judicially discoverable and manageable standards for resolving" this issue. In effect, the State asserts that even with a constitutional right to an education in Alaska, this court should decline to review the plaintiffs' claim that this right is not being fulfilled because there are no standards this court can apply to that determination. The State quotes from D.S.W. v. Fairbanks North Star Bor. Sch. Dist., 628 P. 2d 554 (Alaska 1981) in support of this argument. In that case, the Alaska Supreme Court held that a student could not bring an action for damages against a school district for negligent classification, placement or teaching of disabled students. The court found "that the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education." 628 P. 2d at 556. Instead, the court noted that administrative procedures, including a right of judicial review, were in place to address concerns regarding the specific education plan for each child. Id. at 557. In the supreme court's view, since the level of success that would have occurred had mistakes not been made would be "incapable of assessment," an additional right to money damages was held inappropriate. Id. at 556. D.S.W. does not address the constitutional right to

education. While the decision may be helpful in its discussion of the difficulties in establishing acceptable standards for education, it should not serve as a basis for this court to refuse to consider the plaintiffs' challenge under the Education Clause in this declaratory judgment action. "To say otherwise would have the effect of eliminating the education provision from our constitution."[4]

This court shares the State's observation that the passage of regulations defining educational aspirations does not necessarily define the scope of the *constitutional* right under the Education Clause.[5] The scope of that constitutional right will be the subject of future proceedings in this action. But the difficulties inherent in defining that scope and in assessing compliance with the Education Clause should not preclude this court from undertaking its constitutional responsibility to insure that the constitutional right of Alaska's school age children to an education is being achieved.[6]

V. The *Molly Hootch* case.

Both parties agree that the Alaska Supreme Court's decision in the *Molly Hootch* case is central to this court's determination of the State's motion to dismiss. In that case, 28 Native Alaskans of secondary school age sought to compel the State of Alaska to provide secondary schools in their communities of residence. They asserted that the Education Clause of the State Constitution "establishes a right to secondary schools in [the plaintiffs'] communities of residence." 536 P. 2d at 798. The plaintiffs specifically

[4] Coalition for Adequacy and Fairness in School Funding v. Chiles, 680 So. 2d 400, 409 (Florida 1996)(Overton, J. concurring).
[5] See State's Reply at 14.
[6] The plaintiffs' complaint proposes specified standards which they assert constitute the constitutional requirements under the Education Clause. See, e.g., Second Amended Complaint at ¶22. In denying this Motion to Dismiss, this court is expressing no opinion as to the merits of the plaintiffs' contentions on this point.

argued that the phrase "public schools open to all children of the State" within that constitutional provision created "a right to be educated in their villages." Id. at 799.

The supreme court denied the plaintiffs their requested relief. In so doing, the supreme court first expressly and unequivocally held that the Education Clause has two aspects: "It imposes a duty upon the state legislature, *and it confers upon Alaska school age children a right to education.*" Id. at 799 (emphasis added). Only after finding that the Education Clause conferred upon Alaska's children a right to education did the court then hold that the constitutional right to education did *not* include the right to attend a secondary school in one's community of residence. The court added that the Education Clause in the constitution "appears to contemplate different types of educational opportunities including boarding, correspondence and other programs without requiring that all options be available to all students." Id. at 803. And the court added that "different approaches are appropriate to meet the educational needs in the diverse areas of the state." Id. In that regard, the court quoted the United States Supreme Court's observation that "there will be more than one constitutionally permissible method" of solving the financing and managing of a statewide public school system. And the legislature's efforts to tackle the problems "should be entitled to respect." Id. at 803-804, *quoting* San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 42 (1973). Thus, the Alaska court concluded that the Education Clause "permits some differences in the manner of providing education." Id. at 804.

In short, this court reads the *Molly Hootch* decision as recognizing a constitutional right to assert to a court that the State has failed to establish and maintain a public school system. The Alaska Supreme Court, in its *Molly Hootch* decision, does

not express an intention to confer upon the legislature absolute and complete discretion to determine that it has complied with its constitutional mandate that schools be established and maintained. Instead, the court made clear that Alaska's school children have a "constitutional right to an education" but that the Education Clause does not permit or envision extensive judicial oversight into the specific educational options to be accorded to each child in the state.[7]

VI. The Constitutional Convention.

Both parties devote attention in their briefing to a discussion of whether the framers of Alaska's Constitution intended the public to be accorded the right to seek judicial review as to whether a public school system had been established and maintained. See, e.g. State's Memo at 10-13, 20-25; Plaintiffs' Opp. at 31-38. And yet, both parties agree that the constitutional framers did not directly address or resolve the issue of justiciability. See, e.g., State's Memo. at 20: "the issue of justiciability was never discussed at the convention." In these circumstances, the various views expressed at the Constitutional Convention do not "provide a reliable guide to what the constitutional convention as a whole intended by the adoption of the phrase in question, or what it meant to the voters who ratified the constitution." Warren v. Boucher, 543 P. 2d 731, 735 (Alaska 1975). See also Warren v. Thomas, 568 P. 2d 400, 401 n.3 (Alaska 1977).

[7] See also Breese v. Smith, "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and *which do not directly and sharply implicate basic constitutional values*." Breese v. Smith, 501 P. 2d 174, n. 59 (Alaska 1972)(*quoting* Epperson v. Arkansas, 393 U.S. 97, 104 (1968)(emphasis added).

VI. Education Clause litigation in other states.

As both parties discuss in their briefing, there has been extensive litigation in many other states regarding the role of the judiciary in overseeing the provision of education pursuant to a state constitutional provision concerning education. The range of perspectives on this issue is about as broad as the number of state courts that have addressed the issue. Moreover, there are differences in the wording of these various state constitutional provisions. And, in some cases, other state constitutional provisions have a direct bearing on a state court's analysis of its education clause.

As acknowledged by the State,[8] the majority of state courts that have addressed this issue have held that the state judiciary has both the responsibility and the authority to insure that the state government has complied with its constitutionally specified obligation to provide the children of the state with an education. Some of the reasoning set forth by other courts in support of these decisions that was persuasive to this court follows:

> *This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: "The judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches." Hugo L. Black, The Bill of Rights, 35 N.Y. U. L. Rev., 865, 870 (1960).*

Lake View School District No. 25, et. al., v. Huckabee, et. al., 91 S.W. 3d 472, 483 (Arkansas, 2002).

[8] See State's Memo at 32.

"No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above the master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid. . . A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course, to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

Wyoming v. Campbell County School District, 32 P.3d 325, 331-332 (Wy. 2002) *quoting* Alexander Hamilton, Marbury v. Madison, 2 L. Ed 60 (1803).

[W]e have not been unmindful of the magnitude of the principles involved, and the respect due to the popular branch of the government. . . Fortunately, however, for the people, the function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline. . . [We] cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; [we] cannot pass it by because it is doubtful; with whatever doubt, with whatever difficulties a case may be attended, [we] must decide it, when it arises in judgment.

Edgewood Indep. School Dist. v. Kirby, 777 S. W. 2d 391, 394 (Texas 1989); *quoting* Morton v. Gordon, Dallam 396, 397-2398 (Texas 1841).

With full recognition and respect . . . for the distribution of powers in educational matters among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches. That because of limited capabilities and competences the courts might encounter great difficulty in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action on the part of the Legislature or the executive is neither to be ignored on the one hand nor on the other to dictate judicial abstention in every case.

Board of Educ., Levittown Union Free School District v. Nyquist, 57 N. Y. 2d 27, 39 (N.Y. 1982), appeal dismissed, 459 U.S. 1138 (1983).

The above quotes represent only brief excerpts from a small portion of the multitude of decisions that have been issued in other states with respect to state constitutional challenges to legislative school funding determinations. Certainly, as the State here has capably noted, there are a number of decisions to support the State's position that challenges under a state's education clause are nonjusticiable. But this court has concluded that the principles expressed above by other courts are more in accordance with the views expressed by the Alaska Supreme Court when it has considered the justiciability of other state constitutional challenges, and consistent with that court's express recognition in *Molly Hootch* of the right to education that the Education Clause confers upon Alaska's schoolchildren.

VII. Policy considerations.

The State also cautions this court against embarking on a path that would require the court to address fundamental questions of educational policy in an effort to determine the "proper amount of funding needed to satisfy the constitutional obligation to provide for education." State's Memo. at 40. But this concern, and the related concerns about enforcement raised by the State in its motion, should not serve as a basis for this court to completely refuse to undertake its responsibility to insure that the right to education set forth in the Alaska State Constitution is being realized. Rather, these arguments may be more applicable to defining the court's role in determining whether the Education Clause has been violated, and, if so, in structuring an appropriate remedy.[9]

[9] See, e.g., Montoy v. State, 112 P. 3d 923 (Kansas 2005); Leandro v. State of North Carolina, 488 S.E.2d 249 (N.C. 1997); Charlet v. Legislature of the State of Louisiana, 713 So. 2d 1199 (La. App. 1 Cir. 1998).

Conclusion

For the foregoing reasons, the State's motion to dismiss the First Cause of Action based on its assertion that the Education Clause is nonjusticiable is DENIED.[10]

Dated this 18th day of August, 2005.

Sharon Gleason
Judge of the Superior Court

8-18-05

Middleton
Slotnick
Tricky
Goad
Strasbaugh

[10] Still pending before this court is the State's second motion to dismiss to dismiss all counts based on sovereign immunity, a failure to join necessary parties, and standing.