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 RE: STATE'S MOTION TO ESTABLISH STANDARD OF REVIEW

Before the court is a motion filed by the State which seeks an order from this court delineating the applicable legal standard to apply in this case with

respect to the Education Clause of Alaska's Constitution. Specifically, the State seeks an order that "the court will uphold the constitutionality of legislative actions to fund and implement . . . the Education Clause unless the court finds that the legislature's actions have been so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice." State's Motion at 1 (citation omitted). The Plaintiffs do not object to the entry of an order delineating the applicable law prior to trial, but seek a very different order on the merits. The Plaintiffs assert that this court should find that education is a fundamental right. They have proposed an order that would provide (1) "that it is the duty of this Court to determine what constitutes an education that is consistent with the right to an education guaranteed by the Alaska Constitution," (2) that "Plaintiffs have the burden of proving by a preponderance of the evidence what constitutes a constitutional education, and whether the opportunity to receive that constitutional education is available to all children of Alaska," and (3) "If the Plaintiffs succeed in showing the system of education available to all children of Alaska fails to provide the opportunity for an education in keeping with the Constitution, the Defendant must prove a compelling reason why it is excused from doing so." Plaintiffs' Proposed Order at 2.

This Court has given careful consideration to the legal arguments presented by both parties, and has extensively reviewed the case law of the Alaska Supreme Court cited by the parties, together with cases from other states interpreting other state constitutional provisions. Based upon that review, this court finds as follows:

In the *Molly Hootch*[1] case, the Alaska Supreme Court recognized "the dual aspect" of the Education Clause: "It imposes a duty upon the state legislature, and it confers upon Alaska school age children a right to education." 536 P. 2d at 799. In this court's view, the State's proposed legal standard in this case would subsume the constitutional right to education within the legislative duty to establish and maintain schools. The State asserts that this Court should look only at whether the legislature has established and maintained schools. It maintains that "under the plain language of the Education Clause, the scope of a child's right under the Education Clause is not relevant to the issue of whether the legislature has performed its duty." State's Motion at 7. This is so, because in the State's view, the Education Clause "does not create any rights other than the right to attend the schools that have been established and maintained by the legislature." Id. at 8. Thus, the State asserts that this court should accord an "extremely deferential" standard of review of the legislature's provision of education. Id. at 13.[2]

[1] 536 P. 2d 793 (Alaska 1975)

[2] In support of its argument that this court should adopt a deferential rational basis standard of review, the State cites to a portion of the *Molly Hootch* decision that quoted the U.S. Supreme Court's statement that "within the limits of rationality, the legislature's efforts to tackle [the public school system] should be entitled to respect." *Hootch*, at 803-804, *citing San Antonio Independent School District v. Rodriguez*, 36 L. Ed 2d 16, 48 (1973). But significantly, the Alaska Supreme Court stated in reference to that quote, "We are not here confronted with the question presented by the San Antonio Independent School District Case, and accordingly, our citation of it is not to be construed as passing on the applicability to the Alaska Constitution of its ultimate holding." 536 P. 2d at 804. And this court disagrees with the State's assertion that the Alaska Supreme Court recognized in *Molly Hootch* that "the child's right is limited to the right to attend the schools created by the legislature" when that court noted that the implication of the trial court's holding was "that no fundamental right to education was violated." State's Motion at 9, citing 536 P. 2d at 807 (emphasis deleted). In fact, the supreme court expressly declined to rule on that issue and remanded the equal protection claim back to the trial court for determination "after the presentation of such evidence as may be desirable." *Id.*

This court finds that it is the court's responsibility to determine "a constitutional floor with respect to educational adequacy"[3] and to determine if that constitutional floor is currently being met. In so doing, this court is well aware of the Alaska Supreme Court's statement in *D.S.W. v. Fairbanks North Star*, 628 P. 2d 554, 555 (Alaska 1981): "classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how and what a child should be taught, and any layman might and commonly does have his own emphatic views on the subject." Although stated in the context of an educational malpractice lawsuit for damages, the supreme court's observations in *D.S.W.* would appear to have equal validity in the context of this litigation. Hence, as intimated by this court in earlier proceedings, it appears improbable that this court will find that the constitutional guarantee of an education should be defined as rigorously as the aspirations set out in state regulations. This court also notes that in *Molly Hootch*, the Alaska Supreme Court held, "unlike most state constitutions, the Constitution of Alaska does not require uniformity in the school system." 536 P. 2d at 803.

The parties in this case agree that the Alaska Supreme Court has never explicitly held that the right to a public education is a fundamental right under the Alaska Constitution. Yet in *Breese v. Smith*, 501 P. 2d 159 (Alaska 1972), the supreme court quoted the Education Clause and stated that the clause "guarantees all children of Alaska a right to public education." Id. at 167. The

[3] *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y. 2d 307, 315 (N.Y. 1995).

court also referenced the right to privacy (which indeed formed the basis of the court's decision in that case.) After identifying these two separate rights – the right to an education, and the right to privacy -- the court began its analysis "with the established premise that children are possessed of fundamental *rights* under the Alaska constitution." Id. at 167 (emphasis added). *Breese*, however, was decided prior to *Molly Hootch*, where the Supreme Court expressly declined to determine whether education was a fundamental right for purposes of equal protection analysis.

In this court's view, if the Alaska Supreme Court were to reach the question, it would likely determine that the right to education is a fundamental right, since this right derives expressly from a provision in the State's Constitution. And yet with respect to the Education Clause claim, the compelling state interest analysis proposed by the Plaintiffs does not appear directly applicable, because the claim here is not that the government is taking action that deprives an individual of a right, but rather that the government has failed to take adequate action so as to accord to its citizens a guaranteed right. As the State notes, this case is focused on the adequacy of the provision of a government service and not on the alleged deprivation of a right as a result of a government action. State's Motion at 10. As such, neither a compelling state interest nor rational basis analysis seems applicable to the Education Clause claim.[4] Rather, the focus at trial with respect to this claim should be on defining

[4] *Cf. Lakeview School District No. 25 v. Huckabee*, 91 S.W. 3d 472, 495 (Ark. 2002) (Many states. . . appear to get lost in a morass of legal analysis when discussing the issue of fundamental right and the level of judicial scrutiny. . . This court is convinced that much of the debate over whether education is a fundamental right is unnecessary.

the constitutional right to an education under Alaska's Constitution and determining whether the schools that have been established and maintained fulfill that constitutional right.

DATED this 11th day of June, 2006.

Sharon Gleason
Judge of the Superior Court

I certify that on 6-12-06
a copy of the above was mailed to each of the following at their addresses of record:
Administrative Assistant

middleton/sato
AG- Strasbaugh/Slotnick
clerk
trickey

The critical point is that the State has an absolute duty under our constitution to provide an adequate education to each school child.")