



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

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Delivered Via Email

The Honorable Cathy Giessel
Senate President
Alaska State Senate
State Capitol Room 111
Juneau, AK 99801
Email: Senator.Cathy.Giessel@akleg.gov

The Honorable Bryce Edgmon
Speaker of the House
Alaska State House of Representatives
State Capitol Room 208
Juneau, AK 99801
Email: Representative.Bryce.Edgmon@akleg.gov

Re: *Fiscal Year 2020 Operating Budget Legislation*

Dear Senate President Giessel and Speaker Edgmon:

The Department of Law believes that recent legislative action regarding education spending for fiscal years 2020 and 2021 presents a constitutional problem. Although proposed spending for K-12 education was included in each of the budget proposals presented by the executive branch (November 30, December 15, and February 13), the operating budget bill being debated by the House does not include a K-12 appropriation for FY20. It appears that the intent of the House of Representative is to rely solely on an appropriation included in the education funding bill enacted in 2018 (HB 287). It appears that the House is also proposing a similar approach to funding education for FY21.

In the Department of Law's opinion, the 2018 appropriation that "forward funded" education by committing a future legislature and governor to spend future revenues on education, is unconstitutional. This forward funding violates the Alaska Constitution's: (1) prohibition against dedicating revenues, (2) general framework providing for an annual budget where the legislature and the governor can consider funding priorities in comparison to revenues and make decisions accordingly, and (3) provision granting the

Governor line item veto authority. Unless the Legislature appropriates education funding for FY20, there will be no lawful appropriation for education funding for that year. Repeating the same practice would risk education funding for FY21.

Unlike past forward funding appropriations that committed *current* year revenues to be spent in future years, both the appropriation in HB 287 for FY20 education spending and the appropriation included in the current committee substitute for HB 39 for FY21 education spending would require the expenditure of *future* year revenues. This action unconstitutionally dedicates revenues and sidesteps the constitutionally required annual budgeting process including the governor’s line-item veto.

Article IX, section 7 of the Alaska Constitution provides that “the proceeds of any state tax or license shall not be dedicated to any special purpose.”¹ In considering this constitutional prohibition against dedicating state revenues, the Alaska Supreme Court has emphasized the importance the constitutional convention delegates placed on “preserv[ing] control of and responsibility for state spending in the legislature and the governor,”² and that the purpose of the dedicated funds prohibition was to ensure “that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented.”³

The Alaska Constitution includes a specific provision setting forth a budget process in which all state spending needs are considered on an annual basis. Article IX, section 12 mandates that the governor submit a budget “for the next fiscal year” that sets forth “all proposed expenditures and anticipated income of all departments, offices, and agencies of the State.”⁴ The legislature, in turn, has the responsibility to determine how much to spend and on what and to pass appropriation bills authorizing annual spending which are then subject to the governor’s line item veto power and the legislature’s authority to override a veto.⁵ In light of these provisions, the Alaska Supreme Court has described Alaska’s budget process as requiring that legislators consider the competing

¹ Art. IX, sec. 7.

² *Sonneman v. Hickel*, 836 P.2d 936, 938 (Alaska 1992).

³ *Id.* at 938–39.

⁴ Art. IX, sec. 12. The budget must be submitted “at a time fixed by law” which the legislature has established as December 15 in the Executive Budget Act. AS 37.07.020.

⁵ Art. IX, sec. 13 (“No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations at the end of the period of time specified by law shall be void.”); Art. II, secs. 15 and 16 (Governor’s authority to strike or reduce items in an appropriation bill and the legislature’s authority to override a veto).

demands for state funding each year. For example, the Court ruled that the legislature and the governor have a “joint responsibility ... to determine the State’s spending priorities on an *annual* basis.”⁶ And the Court in its recent permanent fund dividend decision pointed out that “[a]bsent another constitutional amendment, the Permanent Fund dividend program must compete for *annual* legislative funding just as other state programs.”⁷

As you are aware, the operating budget proposals provided on November 30, December 15, and February 13 all included proposed appropriations for FY20 K-12 spending. But as of the date of this letter, the operating budget bill being debated by the House does not include a K-12 appropriation.⁸ The Department of Law believes that the Alaska Supreme Court would find that the 2018 forward funded appropriation was (1) an unconstitutional dedication of state revenues, (2) a violation of the Alaska Constitution’s annual budget process, and (3) an unconstitutional attempt to circumvent the governor’s line item veto power. Under this analysis removing K-12 education appropriations from the FY20 operating budget and relying solely on an action of the legislature in 2018 that committed future revenues would leave education unfunded in FY20.

The legal analysis does not change simply because of the importance of education funding. The Supreme Court pointed out in *Southeast Alaska Conservation Council*:⁹

dedicating funds for a deserving purpose or a worthy institution is an attractive idea. Our constitutional founders were aware of the power of the dedication impulse. They decided that the good that might come from the dedication of funds for a particular purpose was outweighed by the long-term harm to state finances that would result from a broad application of the practice.¹⁰

We are aware that in a context other than education funding Legislative Legal Services has expressed a similar concern that an appropriation that seeks to commit future revenues rather than current year revenues is an unconstitutional dedication of revenues.

⁶ *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 93 (Alaska 2016) (emphasis added).

⁷ *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017) (emphasis added).

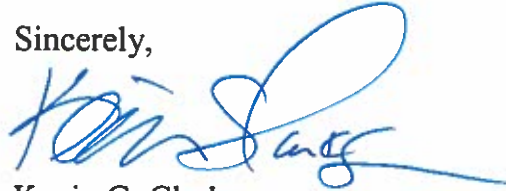
⁸ Moreover, additional forward funding appropriations based on future revenues have been included in the proposed budget bill for FY21: (1) FY21 education funding that would not go into effect until July 1, 2020 and (2) a future appropriation from the Constitutional Budget Reserve Fund for a reverse sweep.

⁹ 202 P.3d 1162 (Alaska 2009).

¹⁰ *Id.* at 1176-77.

I am in the process of fully vetting this issue and plan on issuing a formal attorney general opinion on the subject in the near future. But I thought it was important to raise this concern with you now so you can consider this information as you continue your deliberations on the FY20 budget.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin G. Clarkson". The signature is fluid and cursive, with a large loop at the end.

Kevin G. Clarkson
Attorney General