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VIA EMAIL: Alaska.OESE@ed.gov

Adam Schott
Principal Deputy Assistant Secretary
Office of Elementary and Secondary Education
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Fiscal Year 2023 Show Cause filing

Dear Mr. Schott:

The State of Alaska submits this show cause letter to explain why the Office of Elementary and Secondary Education ("OESE") should not suspend Alaska's authority to obligate fiscal year (FY) 2023 American Rescue Plan ("ARP") ESSER grant funds. In our previous filing, regarding FY22, we presented a comprehensive legal and factual explanation as to why a FY22 suspension would be improper. Unfortunately, OESE rejected Alaska's request. Here, we again set forth the legal and factual reasons why a suspension is not warranted as a matter of fairness and equity and why a suspension would be unlawful.

As we noted previously, the COVID-19 pandemic disrupted the education of American children and required all levels of government to respond quickly to novel and complex challenges. To meet its obligation to the children of Alaska, our State government moved quickly to direct available federal aid in the most effective and efficient way possible. This included the acceptance of ARP funds, despite federal guidance not yet being available.

Now, years later, the State is asking OESE not to suspend Alaska's authority to obligate $5,556,632 of ARP ESSER grant funds for FY23. When Congress passed the ARP, the clear purpose was to assist the states in meeting the urgent needs of the nation's school children during a national emergency. Suspending the ability to obligate funds earmarked for this purpose would be inconsistent with that intent. And, for the reasons

explained below, such a suspension would not be a reasonable response to a good-faith dispute about how to interpret a first-of-its-kind grant condition.

Additionally, in relation to FY23, we request your consideration of how the Alaska Department of Education and Early Development ("DEED") made specific informational requests to OESE on August 15, including "a full explanation of all calculations used to arrive at the amount the Department states that Alaska owes to four school districts." DEED further requested that OESE confirm that the amounts currently demanded are the final amounts that OESE believes DEED owes four districts. DEED also set out its interpretation of ARP § 2004 and provided necessary information on Alaska's government appropriations procedures. OESE did not respond to DEED's requests for information and, instead, claimed that it had never received the August 15 letter. Even after the State provided an additional letter pointing out that OESE had, in fact, received DEED's correspondence, OESE still did not respond. This course of conduct, if not corrected, would be arbitrary and capricious on its face. A suspension in these circumstances would clearly be improper. OESE has an obligation to issue a good-faith response to Alaska's requests for information prior to taking any enforcement action, including suspending DEED's authority to obligate funds.

I. BACKGROUND

In March 2021, Congress enacted ARP and provided $122 billion in education funding for the states. The bill included a novel maintenance of equity ("MOEquity") provision intended to ensure that if a state cuts education spending, school districts with higher proportions of low-income students would not receive a disproportionate budget reduction. OESE issued its first guidance regarding the MOEquity requirements in June 2021, after the funds had already been disbursed. OESE revised that guidance periodically between late summer 2021 and early 2023. During that time, OESE also apparently provided unpublished and informal compliance guidance to states.[1]

In its guidance, OESE interpreted the MOEquity provision in a way that even if a state did not make statewide reductions in education spending, the state could still be in violation of the provision. This analysis came as a surprise to many, including the State of Alaska.[2] The timing and contents of that guidance also led legal scholars to question whether it was enforceable.[3] Thus, those scholars opined that where OESE sought to

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[1] Summary of the Implementation of the Federal "Maintenance of Equity" Provision, Austin Reed, April 3, 2024, presentation to the Alaska Senate Education Committee. https://www.akleg.gov/basis/get_documents.asp?session=33&docid=32764.

[2] *Id.*

[3] *See* Kimberly Jenkins Robinson, *Strengthening the Federal Approach to Educational Equity During the Pandemic*, 59 Harv. J. on Legis. 35, 71 (2022) ("Enforcement of the Maintenance of Equity conditions also is unlikely because the

enforce their guidance, it should focus on where the students were hit hardest by the pandemic, which in Alaska would not be the large urban districts where the students voluntarily chose to enter into the available and robust correspondence programs.[4] Another surprising outcome of the guidance is that it produced a formula that actively penalized the most equitable states, while lowering the burden on states with high inequity.[5] Consequently, Alaska, which has high and widely recognized equity in its funding, was placed under a microscope for the funding provided to some of its wealthier urban districts.[6]

In sum, OESE's guidance stated that it would make its own analysis and calculations regarding state education funding and then determine whether a state had complied with the provision. This analysis applied even where states continued to fund education pursuant to their statutory formulas, without change, throughout the pandemic. Because of this interpretation "it became very difficult, if not impossible, for legislatures to know during the budget process whether or not they would ultimately be in compliance with the Maintenance of Equity provision and take appropriate action to ensure compliance" because "compliance would ultimately become a retrospective assessment that could only be made after a state funded its education budget. . ."[7]

Department's guidance on this issue was issued in June 2021 and the requirement for Maintenance of Equity applies to the 2021-2022 and 2022-2023 school years.");

[4] *See* Robinson, *supra* note 3 at 94 ("The USDOE should be mindful of the shortcomings in the Maintenance of Equity conditions and tailor enforcement efforts on states and districts where enforcement would best serve the students hardest hit by the pandemic.").

[5] *See* David Gartner, *The Federal Role in School Funding Equity*, 109 Va. L. Rev. Online 35, 47 (2023) (The maintenance of equity requirements "lowers the burden on states with greater inequities.").

[6] Farrie, Danielle Ph.D., Kim, Robert, Sciarra, David G., *Making the Grade 2019, How Fair is School Funding in Your State*, Education Law Center (2019) www.edlawcenter.org, at p. 1 (Last visited April 1, 2024) (assigning Alaska an "A" for funding level and funding distribution and a "B" for funding effort); *see also* Baker, Bruce D., DiCarlo, Matthew, Weber, Mark. *The Adequacy and Fairness of State School Finance Systems, Albert Shanker Institute*, University of Miami School of Education and Human Development, and Rutgers Graduate School of Education (2024), https://www.schoolfinancedata.org/wp-content/uploads/2024/02/SFID2024_annualreport.pdf, at p. 20. (Last visited April 1, 2024) (ranking Alaska second in the nation for 2021 state and local K-12 funding, based on statewide adequacy, fiscal effort, and equal opportunity).

[7] Reed, *supra* note 1 (cleaned up).

As with FY22, the Alaska legislature passed an FY23 budget where the State continued to fund education by its statutory per-pupil funding formula. This formula is based on State Constitutional requirements and court decisions.[8] In those decisions, Alaska courts have applied its Education[9] and Equal Protection Clauses[10] to ensure that the State's education funding system is fair in its distribution of state funds. This equity is extremely important in Alaska due to its widely dispersed rural and remote communities, which face unique geographical challenges and that are often primarily populated by the State's Alaska Native children.[11]

Also, like FY22, for FY23 OESE made a series of changing demands for Alaska to come into compliance. For example, on March 27, 2024, OESE claimed that DEED owed the Juneau Borough School District ("JBSD") $204,309; the Anchorage School District ("ASD") $1,391,681; the Kenai Peninsula Borough School District ("KPBSD") $2,494,871, and the Fairbanks North Star Borough School District ("FNSBSD") $3,097,911—with a demand for immediate action from DEED. But, less than a month later, OESE amended those numbers to $90,148 for JBSD; $215,187 for ASD; $2,494,871 for KPBSD; and $2,756,426 for FNSBSD. OESE never fully explained how it calculated these numbers or why the numbers changed.

II. ARGUMENT

a. Suspending Alaska's FY23 funds would harm the public interest.

If OESE decides to suspend Alaska's ability to obligate grant funds, that decision would be contrary to the intent of the ARP relief program and not serve the public

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8 AS 14.17.470. The State increased its base student allocation ("BSA") for per-pupil spending to districts from $5,930 to $5,960, effective July 1, 2023.

9 Alaska Const., art. VII, Sec. 1.

10 *Id.* at art. I, Sec. 1.

11 For example, the Alaska Superior Court found that the method of funding school construction projects violated the State Constitution's equal protection and education clauses and Title VI of the Civil Rights Act because it discriminated against rural school children. *Kasayulie v. State* 3AN-97-3782 CI, 1999 WL 34793400 (Alaska Superior Court, September 1, 1999). The Alaska Legislature acted to correct these deficiencies in funding. The Alaska Supreme Court has stated that the school funding formula established by the Legislature "is intended to equalize districts by providing them with needed resources, taking into account differences among districts." *State v. Ketchikan Gateway Borough,* 366 P.3d 86, 88 (Alaska 2016). Notably, the Supreme Court has stated that state legislatures are entitled to deference over how they raise and distribute state revenues for local purposes. *San Antonio Local School District v. Rodriguez,* 411 U.S. 1, 40 (1973).

interest. Congress's intent in passing the education funding was to assist the states in meeting the urgent needs of the nation's school children during a national emergency.

Suspending the ability to obligate funds earmarked for this purpose would be inconsistent with that intent. No question has been raised that the funds have not and would not continue to be spent for the purpose intended by Congress. Moreover, it is not a reasonable action for a federal agency to take in response to a good-faith dispute with a sovereign state about how to interpret a first-of-its-kind grant condition included in federal legislation. Alaska has clearly and consistently set forth a reasonable interpretation of the ARP. The controlling legislation here forbids states from accepting federal funds and then reducing education funding because of those funds. Because no one has argued that Alaska has acted in this way, it would be unreasonable for OESE to suspend Alaska's authority to obligate funds. On the contrary, Alaska distributed state funding as it was required to do under state law.

b. Alaska complied with the plain meaning and purpose of the MOEquity provision.

The controlling statute here, PL 117-2 § 2004(b), is short and simple.[12] For high-needs LEAs, a state may not reduce per-pupil funding by "an amount that exceeds the overall per-pupil reduction in State funds. . ." [13] For the highest poverty LEAs, a state may not reduce per-pupil funding, "below the level of funding (as calculated on a per-pupil basis) provided to each such local educational agency in fiscal year 2019."[14] Thus, where state funding to LEAs on a per-pupil basis remains constant, a state should not fail this test under a plain reading of the statute. Alaska is one of those states.

When Congress enacted § 2004, it wanted to ensure that states would not disproportionately decrease per-pupil funding to the districts most in need. This demand for educational equity has long been enshrined in Alaska law as demonstrated by the fact that Alaska law does not reduce per-pupil funding to any district from year-to-year.[15] And, in fact, Alaska did not reduce its per-pupil funding amount between FY19 and FY23. Thus, all school districts—including the ones identified by OESE—received the same per-pupil funding in FY23 that they received in FYs 19-22.

Under Alaska's education funding statutes, each LEA receives state funds based on the number of enrolled students. The amount that an LEA receives per student may differ from another LEA based on a variety of factors, however, each individual district is

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12 Public Law 117-2, § 2004;135 STAT. 24-25.

13 *Id.*

14 *Id*.

15 AK LEGIS 15 (2014), 2014 Alaska Laws Ch. 15 at Sec. 28 (H.B. 278).

subject to the same general funding modifiers from year to year.[16] This is especially true for the districts in question here, considering that these districts are urban by Alaska standards. Regardless of the specifics, the most important undisputed fact is that each district receives funding based on a statutory formula that awards those funds on a set per-pupil basis. This funding structure, by its very nature, would lead a reasonable person to believe that a state such as Alaska would automatically satisfy Congress's MOEquity requirement, so long as the per-pupil funding amount was not decreased (here it remained constant) and high need/poverty districts did not experience a change in their statutory funding modifiers (which did not happen here).

Outside of a plain reading on the controlling law, OESE also failed to follow its own guidance in its determination. As we have previously explained, OESE's continued denial of Alaska excluding its hold harmless funding from its calculation is averse to both the law and solid policy.

During the pandemic students left their traditional schools to attend correspondence schools. This shift caused the traditional schools to lose large numbers of students. Even with ARP funds, this shift could have devastated the brick-and-mortar schools but, fortunately for the LEAs, Alaska school funding law had in place a mechanism that ensures that mass student migration did not immediately cause school closures or significant losses in funding.

The hold harmless statute, codified at AS 14.17.410(b)(1)(E), helps alleviate the burden to districts that lose more than 5 percent of their average daily membership from one school year to the next. Under that statute, in the first year following a decrease in student population, that district is still eligible to receive "75 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the first fiscal year after the base fiscal year." If the district's population does not return following that year, then the district may only receive "50 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the second fiscal year after the base fiscal year." The number further decreases to 25 percent for the third year, and then nothing for any following years. Of course, this statute stops being operational if, for example, the district's student population returns due to a global pandemic ending.[17] But, make no mistake, this is not "per-pupil" funding; this is specialized funding to help ensure that districts do not experience an abrupt and unexpected change in funding from one year to the next due to unforeseen factors.

Essentially, Alaska's hold harmless statute permitted the State to fund imaginary students for a limited time following a period of mass student migration. This funding

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[16] By general, we mean modifiers based on size and location. This is different than modifiers based on factors such as special education modifiers.

[17] AS 14.17.410(f).

mechanism was necessary to assist districts in navigating the pandemic. However, it would be unsustainable and illogical for the State to continue to fund these imaginary students into perpetuity, thus why the statute has a decreasing amount awarded per year. It is also why the statute halts hold harmless funding where the students return to school.

OESE rejected DEED's request to remove hold harmless funding from its calculations. This stance is not based in the law, or even OESE's own guidance. Congress did not state that hold harmless funding must be included in any analysis of state funding for education. Instead, Congress was pragmatic. Congress wanted to assist the SEAs and LEAs in navigating through, and emerging from, a global pandemic without injuring those students who are most at need.[18] Unfortunately, it appears that OESE has lost track of that guiding principle.

OESE's guidance reasonably supports the conclusion that DEED should have been permitted to exclude hold harmless funding from its calculation. OESE's FAQ 17 states that "*[a]n SEA may determine* that some current expenditures, however, are not appropriate for MOEquity determinations. For example, if, in addition to allocating funds under a State's primary funding formula, the State reimburses an LEA for specific expenses. . . such State funds may, by necessity, vary by LEA annually. . ." The same answer goes on to say that OESE is looking to "guaranteed" funding to the LEAs, not special funding, thus "if a State can document a one-time appropriation for a specific purpose. . . then those funds may be excluded from MOEquity calculations."

In OESE's April 11 letter, it stated that Alaska's hold harmless funding must be included in its MOEquity equation because "Alaska's hold harmless funding. . . [does] not meet this definition of one-time funding because [it] impact[s] LEA across multiple fiscal years." But this is simply not true. While hold harmless funding *could* impact an LEA for more than one year, that impact is not guaranteed since whether a school receives this funding, and the amount of the funding, is based on the dynamic variable of student attendance. Moreover, OESE's explanation is not only at odds with the reality of the situation; it is also at odds with OESE's own guidance. First, in line with OESE's guidance DEED, an SEA, is informing OESE that hold harmless funds "are not appropriate for MOEquity determinations." When making this assertion, it is not only OESE's guidance that makes clear that Alaska is entitled to deference on its determination of what funds should be included in Alaska's MOEquity calculation. The

[18] *See, e.g.,* H.R. 1319 – American Rescue Plan Act of 2021, Congress.gov https://www.congress.gov/bill/117th-congress/house-bill/1319#:~:text=The%20program%20provides%20grants%20to,or%20financial%20hardship%20are%20eligible (last visited August 14, 2014).

USDOE, relying on Supreme Court precedent, has also found that deference is owed to a State's "characterization of funds raised. . . pursuant to the State's own statutes."[19]

Moreover, OESE has stated that its focus is on *guaranteed* funding. Hold harmless funding is far from guaranteed. As noted earlier, if students came back to school following a global pandemic, hold harmless funding would cease. But if those students did not come back, *a different amount* of funding would be allocated to the district in its second year of decreased ADM to help offset any harm to the district. During and following the pandemic it was impossible to guarantee whether the grocery store would have food on the shelves next week (at least in Alaska), much less for any LEA to guess whether it would receive hold harmless funding for the following year. Despite the tumultuous nature of that period, OESE so far has claimed that hold harmless funds fall into the category of "guaranteed" funds. This is factually and legally incorrect, in conflict with OESE's own guidance, and in any event is such a close and debatable proposition that it cannot serve as a reasonable basis to conclude that Alaska failed to reasonably comply with the MOEquity provision.

In sum, OESE's guidance is ambiguous in a manner that would create surprise for any SEA that has already accepted and utilized ARP funds. A plain reading of the statute and guidance would lead any reader to a clear conclusion: a state that does not decrease any per-pupil funding will be in compliance with the MOEquity provision and if that state decides to award special funding to an LEA to help the LEA during that pandemic, that funding will be excluded from MOEquity requirements. Here, Alaska followed its statutory per-pupil school funding law and funded all district pursuant to that formula for FY23. Because the per-pupil funding in these districts did not decrease, Alaska complied with any reasonable interpretation of the MOEquity provision.[20]

c. OESE's interpretation is unconstitutional.

As noted above, OESE released its first round of guidance three months after ARP funds were disbursed. In that guidance, OESE recognized that "some States may have already completed their appropriation process for FY 2022 before MOEquity provisions

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[19] *In the matter of Wyoming Department of Education, IDEA Proceeding*, No. 22-38-O, at 12 (April 17, 2023) https://oha.ed.gov/oha/files/2023/04/2022-38-O.pdf (last visited August 13, 2024), *affirmed by In the matter of Wyoming Department of Education, IDEA Determination*, No. 22-38-O, at 7 (June 23, 2023) https://oha.ed.gov/oha/files/2023/06/2022-38-O-S.pdf (last visited August 13, 2024).

[20] Alaska's reasonable interpretation of the MOEquity provision and any alternative interpretation of the law offered by OESE will be considered by the courts in accordance with the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*. ___ U.S. ___, 144 S. Ct. 2244 (2024), *overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

were enacted."[21] Despite that recognition, OESE emphasized that "no State should delay awarding and allocating ARP ESSER funds to its LEAs until local MOEquity data are available. . . To the contrary. . . funds should be allocated to LEAs expeditiously as their availability is essential. . ."[22]

Essentially, OESE told the states to spend ARP money despite no state being aware of what strings may be attached to that money. OESE then proceeded to create a complex formula of strings that were completely unforeseeable. This course of action has led legal scholars to question the enforceability of those strings.[23] This is based on the simple fact that after-the-fact unforeseen grant conditions are unconstitutional.

As DEED has previously pointed out, the federal government may place some conditions on a state's acceptance of federal funds.[24] But the Supreme Court has made clear that this ability "does not include surprising participating States with post-acceptance or retroactive conditions" and that "if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously."[25] In *Pennhurst State School and Hospital v. Haldernan*[26] the Court ruled in favor of Pennsylvania in a suit regarding a federal grant which was subject to conditions that the state contended were ambiguous. Similarly, in *National Federation of Independent Businesses v. Sebelius*[27] the Supreme Court determined that the Medicaid expansion provisions of the Affordable Care Act went beyond what the states would have expected when they had agreed to participate in Medicaid and accept federal funds. Further, in the context of ARP the Eleventh Circuit ruled last year that a condition placed on states' receipt of federal grant money that sought to restrict states' taxation authority (an offset condition) violated the Spending Clause because of its ambiguity.[28]

Moreover, as noted above, Alaska's equalized education funding formula has been set by the Alaska Legislature and is based on two State Constitutional requirements: that the Legislature "establish and maintain" a system of education[29] and that all Alaskans,

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21 MOEquity FAQ at question 8.

22 *Id.*

23 *See* Robinson, *supra* note 3; *see also See* Gartner, *supra* note 5.

24 *See South Dakota v. Dole*, 483 U.S. 203 (1987).

25 *Id.* at 20; 25.

26 451 U.S. 1 (1981).

27 567 U.S. 519, 132 (2012).

28 *West Virginia v. U.S. Department of the Treasury,* 59 F.4th 1124 (11th Cir. 2023).

29 Alaska Const. art. VII, § 1.

urban and rural, are entitled to equal protection under Alaska law.[30] Given the fact that school funding in Alaska is carefully constructed to meet these state conditions and legal requirements, it is important to recognize that the Supreme Court has warned that conditions placed on federal grants to states should not be used to effectively coerce a state into adopting the federal government's position on how a state program should be implemented. For example, Chief Justice Roberts warned in *Sebelius* that:

> [r]especting this limitation [on the federal government's authority under the Spending Clause] is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. . . Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government and individual liberty would suffer.[31]

The MOEquity provision here was a first-of-its-kind provision not previously attached to federal education grant funding. If the plain language and intent of the bill is not applied and instead MOEquity is considered an ambiguous provision, Alaska should not be penalized by requiring it to expend substantial additional funds in a manner that is contrary to its established equitable funding system. A requirement otherwise would be unconstitutional. In particular here, if the State had managed to understand and comply with the current articulation by OESE of the MOEquity provision, this would have required the legislature to *not* distribute money under the statutorily required state funding formula but rather to have changed the distribution to give more money to four urban districts—resulting in less money to other school districts. Since there would have been no way to know Alaska had to change its statutory funding formula, there would have been no way to avoid being in the position we are now, with OESE demanding retroactive payments to some districts, while creating inequity with other districts.

When OESE released its guidance, the results were surprising. Section 2004 of the APR appeared to only apply where the state cuts its education budget.[32] However, OESE interpreted the statute differently. Thus, "the conditions of compliance were not all clearly known to legislatures when they agreed to accept these federal funds. . ."[33] Because OESE's statutory interpretation would amount to an after-the-fact policy driven amendment to the plain reading of § 2004, it cannot be applied to Alaska. Moreover, as noted above, the Supreme Court has made clear that conditions placed on federal grants

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30 *Id.* at art. I, § 1.

31 567 U.S. at 577.

32 Public Law 117-2, § 2004; 135 STAT. 24-25; Reed, *supra* note 1.

33 Reed, *supra* note 1.

to states cannot be used to commandeer or effectively coerce a state into adopting the federal government's opinion about how a state program should be implemented.[34]

d. OESE ignored good-faith questions raised by DEED

When a government agency enforces a statute, its enforcement must not be arbitrary or capricious. An action may be arbitrary or capricious where the agency "entirely failed to consider an important aspect of the problem."[35] That is what happened here where OESE failed to acknowledge various aspects of the problem that DEED raised in previous correspondence.

In its August 15 letter, DEED made various informational requests to OESE. First, DEED asked OESE for "a full explanation of all calculations used to arrive at the amount the Department states that Alaska owes to four school districts." Second, DEED requested that OESE confirm that the amounts currently demanded are the final amounts that OESE believes DEED to owe the four districts. Third, DEED provided a well-reasoned argument regarding its interpretation of § 2004. Finally, DEED provided necessary information on Alaska's government appropriations procedures.

Despite having received all this information, OESE did not respond and instead claimed that it had never received the letter. Even when the State provided an additional letter pointing out that OESE had, in fact, received DEED's previous correspondence, OESE did not respond.

OESE's failure to respond to DEED's letter and the good-faith issues raised in that letter is arbitrary and capricious on its face. Thus, OESE has an obligation to issue a good-faith response, with legal citations and calculations, prior to taking any enforcement action, including suspending DEED's authority to obligate funds.

III. CONCLUSION

Alaska's interpretation of the first-of-its-kind equity provision is reasonable. The State did not decrease per-pupil funding for any school districts and followed its statutory formula. In these circumstances, it would not be consistent with the public interest or Congress's intent to block funds earmarked for education. Moreover, it would be an arbitrary and capricious action given the agency's failure to respond to Alaska's requests for an explanation of how OESE came to its conclusions regarding FY23. And such an action would amount to an unconstitutional effort to leverage a federal agency's spending power to enforce its vision of how a core state program should be conducted by a

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[34] *Sebelius,* 567 U.S. at 577.

[35] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983).

sovereign state. For these reasons, we urge OESE not to suspend Alaska's authority to obligate funds during the pendency of any litigation.

Sincerely,

TREG TAYLOR
ATTORNEY GENERAL

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