

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF EDUCATION AND EARLY DEVELOPMENT**

In the Matter of:)
)
KETCHIKAN GATEWAY BOROUGH)
SCHOOL DISTRICT,)
)
Appellant.) OAH No. 09-0517-EED

DECISION

I. Introduction

The Ketchikan Gateway Borough School District plans to construct a swimming pool using debt financing. The school district submitted an application for debt retirement assistance from the Department of Education and Early Development.¹ After reviewing the school district's application, the department determined that the school district was eligible for debt reimbursement for a project cost of \$5,865,000,² based on an allowable pool size of 2,100 square feet (sf). The district requested reconsideration of the department's determination and the department issued a decision affirming its prior action. The district appealed and following an administrative review the commissioner's designee approved the department's determination.³ The district requested an administrative hearing, and the matter was referred to the Office of Administrative Hearings.⁴

The assigned administrative law judge conducted a hearing on November 13, 2009. Three witnesses testified: Robert Hewitt, a veteran school district teacher and principal who is currently the principal at Schoenbar Middle School; Wendy C. Mackie, the borough's parks and recreation supervisor; and Sam Kito III, the department's official responsible for review and evaluation of requests for debt reimbursement.

Determination of the pool size eligible for debt reimbursement is governed by the Swimming Pool Guidelines, previously promulgated by the department. Substantial evidence supports the department's determination that a pool size of 2,100 sf (28' x 75') will accommodate the instructional program, applying the Guidelines. However, the Guidelines do

¹ AS 14.11.100.

² At the applicable reimbursement rate of 60%, the total amount reimbursed would be \$3,519,000 (60% of \$5,865,000)

³ 4 AAC 40.030.

⁴ 4 AAC 40.040. *See* AS 44.64.030(b).

not provide specific standards governing the determination of the size and cost of a pool facility for an approved pool size. The commissioner determines that a pool facility of 10,500 sf is commensurate with a pool size of 2,100 sf, in light of the instructional program, the amount of space requested, prior applications, and the conceptual design shown in the Guidelines. Debt reimbursement funding is approved for a project cost of \$7,372,977 (30% of the estimated total project cost).⁵

II. Facts

A. Planned Facility and Population to Be Served

The Ketchikan Gateway Borough School District operates four elementary schools, a middle school, a small junior-senior high school, Ketchikan High School, and a K-8 charter school, with a total student population of about 2,000.⁶ The school district's Mike Smithers Pool is located on the Ketchikan High School campus.⁷ The pool facility, constructed in 1972, consists of approximately 19,070 square feet on two levels and includes a rectangular 3,375 square foot pool with two one-meter diving boards, and a separate 1,800 square foot shallow warm water pool.⁸ The pool operates an average of 16 hours per day, 355 days per year.⁹ During the school year, approximately one-third of the operational hours are dedicated to educational uses.¹⁰ A variety of community uses occupy the remaining time.¹¹

The pool facility has exceeded its anticipated life span. The school district engaged an architectural firm to assess the condition of the facility. The firm determined that the facility was deficient and recommended its replacement.¹² The school district convened a committee including representatives from the community, borough and school district to evaluate alternatives for construction of a new facility.¹³ The committee presented two options for consideration by the district, both calling for construction of a new facility at a new location, and

⁵ At the applicable reimbursement rate of 60%, the total amount reimbursed would be \$4,423,786 (60% of \$7,372,977).

⁶ The district's application lists a student population of 1,974. R. 217. The district claimed a student population of 2,164 as of October, 2008. August 5, 2009 Letter of Appeal at 5 (hereinafter, "8/5/09").

⁷ R. 88.

⁸ R. 88, 123. Photographs of the existing facility are at R. 122-125. The district's application states that the pool has six lanes. However, assuming a standard length of 75', a 3,375 sf pool would have a width of 45', or at least eight lanes.

⁹ R. 88.

¹⁰ R. 88.

¹¹ R. 88. The various community users are described at R. 219-22.

¹² R. 89. The firm's report, dated March 27, 2008, is at R. 122-126.

¹³ R. 89.

both including a water slide.¹⁴ One option called for a new facility of about 28,850 sf on two floors with a rectangular lap pool (3,375 sf) and a separate, L-shaped leisure/therapeutic pool (2,470 sf);¹⁵ the other for a somewhat larger facility of about 35,000 sf on two floors,¹⁶ with an L-shaped lap pool including a separate diving area (total 6,100 sf) and an L-shaped leisure/therapeutic pool (3,150 sf).¹⁷ The natatorium, consisting of the pools and the adjacent decking (10,000 sf), for the larger option was 19,250 sf.¹⁸ Both options included ancillary space consisting of locker rooms with showers and restrooms, a sauna, a weight room, a classroom, and custodial, storage and office space on the first floor,¹⁹ with spectator seating and a mechanical room on the second floor.²⁰

The school district obtained base cost estimates of \$15,895,121 for the smaller facility and \$18,043,011 for the larger one.²¹ After conducting a public survey to gauge the level of community support, the school district decided to proceed with the larger facility.²² Based on the conceptual drawings and cost estimate, the school district submitted its application for debt reimbursement funding for a project whose total cost was estimated as \$24,576,591.²³

B. Instructional Program

The school district's instructional program for the pools will include a learn-to-swim program for grades two through four in the elementary schools²⁴ and water safety and survival instruction for grades seven and eight in the middle school.²⁵ For high school students, the instructional program will include swimming as part of the physical education program, and

¹⁴ R. 89. Conceptual drawings for the two options are at R. 132-133. Those drawings are dated December 4, 2007. *See* R. 140.

¹⁵ R. 108.

¹⁶ This is the area stated in the district's educational specifications. R. 243, 247. The conceptual drawings submitted with the application call for a facility of 34,813 sf. R. 141.

¹⁷ R. 224. *See also* R. 89 (lap pool, 6,752 sf; leisure/therapeutic pool 3,150 sf).

¹⁸ R. 224. Hearing Testimony of Sam Kito II, Digital Recording #1 at 0 hours, 17 minutes, 33 seconds [hearing testimony is hereinafter cited as: #NN (recording number, witness's initials) #:##:## (hours:minutes:seconds)]. *See also* R. 167 Item 062 (Floor Finishes; decking 8,273 sf).

¹⁹ R. 235-240.

²⁰ R. 134-136.

²¹ R. 139-201 (April 20, 2009). *See* R. 142 (Conceptual Cost Summary). The school district's application includes the mechanical upgrades. R. 91.

²² R. 89.

²³ R. 84-99. The total estimated includes design, construction management, overhead, contingencies, and other miscellaneous costs not included in the base cost estimates. *See* R. 105-106.

²⁴ R. 212

²⁵ R. 213.

maritime (boating) courses.²⁶ The instructional program will also include use of the pool by special needs students, and swimming and diving competition for high school students.²⁷

1. *Special Needs*

The special needs program will provide the same instruction as the other swimming instruction programs, adjusted as necessary to accommodate the students' needs.

2. *Elementary School*

The learn-to-swim program will be the standard Red Cross swimming program. The program will consist of 10 one-hour lessons, with students progressing at varying rates from Level 1 through as high as Level 6 (beginner, intermediate, advanced).²⁸ In addition to swimming, the program will include instruction in aquatic safety and lifejacket use.²⁹

3. *Middle School*

The middle school water safety and survival program will include basic swimming skills and water rescue, self rescue, and boating safety, including instruction in canoe safety.³⁰

4. *High School*

A. PHYSICAL EDUCATION

The high school physical education program will include basic and advanced swimming, as well as conditioning and water safety.³¹

B. MARITIME

The high school maritime program will provide training in maritime safety, seamanship and safety, using the school's 45' training vessel and its 16' open skiffs. The pool portion of the program will involve survival suit training, survival skills, and use of a 24' x 15' inflatable raft.³²

C. COMPETITIVE SWIMMING AND DIVING

The competitive high school swimming program includes a diving component. As part of the program, the swimming team will engage in interscholastic competition.

²⁶ R. 214.

²⁷ R. 215.

²⁸ See R. 246. The course description indicates that a standard "course" involves 8-10 sessions of 30-45 minutes at each level, that multiple levels should be offered at the same time, and that students will progress at varying rates. Presumably, the district's expectation is that in general students will complete two levels each year (given ten one-hour classes, this is consistent with the progression described in the course description), with the result that they will achieve Level 6 by the time they complete the program in the fourth grade.

²⁹ R. 212.

³⁰ R. 213.

³¹ R. 214.

³² R. 214.

C. Program Space Requirements

The district's instructional programs (including competitive swimming practice) will occupy the pool during the competitive swimming season for seven hours (four hours during school hours) a day during the week and three hours on the weekend, which is approximately 40% of the hours it will be open.³³ In the remainder of the school year, the instructional program will occupy the pool four hours a day (all during school hours),³⁴ which is approximately 21% of the hours it will be open.³⁵ The instructional program will occupy the pool 67% of the instructional period (four of six hours) each school day.³⁶

1. *Special Needs*

The special needs program will serve approximately 50 students, 43 in the elementary grades and seven in the high school. The high school special needs students will share pool time with other high school swimming classes.³⁷ The elementary special needs students will be provided swimming instruction separately from other elementary students, one hour per month.³⁸ Both the elementary and the high school special needs programs can be accommodated in the same pool that will be used for the basic swimming program.³⁹

2. *Elementary School*

All of the district's elementary students in grades two through four, plus all students at the charter school, will participate in the basic learn-to-swim program.⁴⁰ In order to progress satisfactorily in the learn-to-swim program, students must attend on consecutive days. The program will be conducted for students in grades two through four over a two-week period, rotating through the various schools. At each school, due to class and bus schedules, all of the students in a classroom will take lessons at the same time. Elementary school classes in the

³³ See Ex. 9 (38 of 94 hours).

³⁴ R. 217; Ex. 9.

³⁵ See Ex. 9 (20 of 94 hours).

³⁶ The school instructional period is from 8 a.m. to 3 p.m., excluding a one hour lunch period. The department's standards indicate that six hours per day of instructional program use is the maximum possible. Department of Education, *Swimming Pool Guidelines* (1997 ed.), p. 15 (R. 283) [hereinafter, "Guidelines"] (noting that for a "normal school day of six hours, at least three must be mandatory swimming courses" but that to accommodate additional programs beyond a basic swimming program, a district can consider "increasing usage to 6 periods per day to gain greatly expanded offerings with the same facility.").

³⁷ R. 215.

³⁸ R. 215.

³⁹ The district's proposed lap pool will be accessible to disabled persons. R. 90.

⁴⁰ R. 114, 212.

district are no greater than 30 students.⁴¹ A total of about 573 students will participate in the basic learn-to-swim program.⁴² The program will use the facility for more than one hour but less than two hours each school day for 165 days each school year.⁴³

An introductory swimming program (Level 1) may be provided in a pool area with a flat bottom with a maximum depth of no more than three feet, six inches, and with a minimum dimension of 22' x 25'.⁴⁴ A beginning swimming program (Level 2) may be provided in a pool area with a flat or minimally sloped bottom with a minimum depth of three feet and a minimum dimension of 22' x 60'.⁴⁵ Similarly, intermediate and advanced swim programs (Levels 3-6) may be provided in a pool with a minimum dimension of 22' x 60'.⁴⁶

Students in Levels 3-5 will swim in lanes, allowing three to four body lengths per swimmer (around 20-25 feet per swimmer), one pool length at a time.⁴⁷ Thus, at any time, in Levels 3-5 there will be three or four swimmers in a 75' lane at a time (75-100 sf per student).⁴⁸ In Level 6, swimmers can circle swim, doubling the effective student use to six to eight students at a time (37.5-50 sf per student).⁴⁹ Instructors will be assigned six to ten students.⁵⁰ With one instructor per 75' lane, using six lanes, including one for Level 6, there may be up to 28 students in the pool at a time.⁵¹ Using eight lanes, including one for Level Six, there may be up to 36 students in the pool at a time.⁵² A pool size of 28' x 75' (six lanes) will accommodate one class of no more than 30 students, and a pool size of 36' x 75' (eight lanes) will accommodate one or

⁴¹ The district did not provide specific information regarding classroom size. Assuming that the total student population is evenly divided among teachers, the enrollment numbers suggest that classrooms in the second through fourth grade are about 26 students at Fawn Elementary School (four classrooms), 25 at Houghtaling (six classrooms), 30 at Point Higgins School (three classrooms), and 27 at Tongass School of Arts and Sciences (two classrooms). R. 90, 217.

⁴² There are 399 students in grades two through four in the elementary schools and 174 students at the charter school. R. 217.

⁴³ 573 students will each take a ten hour course. Thus, the pool will be needed for 5,173 instructional hours for this program. Assuming an average elementary school class size of 25, the program would use the pool 207 hours per school year ($5,173 \div 25 = 206.92$), or about 1.25 hours per day ($207 \div 165 = 1.254$).

⁴⁴ Guidelines, pp. 8-9 (R. 276-277). The Guidelines do not separately identify a minimum dimension for the introductory component of the program. However, in light of the description of that component of the program, it appears that the area required is no more than a standard pool width, in that portion of the pool that in a standard configuration is flat and has a depth of no more than three feet six inches, corresponding to the "Beginner" dimension shown at R. 277.

⁴⁵ R. 276-277.

⁴⁶ R. 276-277.

⁴⁷ 3WM 1:11:00-1:17:00.

⁴⁸ In a 28', six-lane pool, lanes are four feet and eight inches wide. Each lane is thus approximately 350 sf.

⁴⁹ 3WM 1:11:00-1:17:00.

⁵⁰ *Id.*; R. 246.

⁵¹ Five lanes with four students per lane; one lane (advanced) with eight students.

⁵² Seven lanes with four students per lane; one lane (advanced) with eight students.

more classes totaling no more than 50 students.⁵³ Based upon Ketchikan's stated maximum class size of 50 students, a pool size of 36' x 75' would be required to accommodate the learn-to-swim program. However, with reasonable adjustments to the instructional schedule, class size can be limited to no more than 30 students.⁵⁴ Therefore, a pool size of 28' x 75' will accommodate the learn-to-swim program.

3. Middle School

The middle school water safety and survival program will be provided to 276 students.⁵⁵ The program will include basic swimming skills and water rescue, self rescue, and boating safety, including instruction in canoe safety.⁵⁶ Physical education classes at the middle school range from 21 to 57 students, with an average of around 35-40.⁵⁷ However, the district anticipates limiting classes to 25 students.⁵⁸ The program will occupy the pool one hour per day, 165 days per school year.⁵⁹

Assuming space needs substantially equivalent to the learn-to-swim program for the swimming and rescue components, a pool size of 28' x 75' will accommodate this program if classes are limited to no more than 30 students. However, if class sizes exceed 30 students, a pool size of at least 36' x 75' would be required.⁶⁰ The boating safety component will be equally accommodated in a pool size of 28' x 75' as in a pool size of 36' x 75'.⁶¹

⁵³ Guidelines Chart 2 (R. 287). Assuming up to ten students per instructor, with one instructor per lane, the theoretical maximum class size for a six lane pool is 60 students, and for an eight lane pool it is 80 students.

⁵⁴ See *infra* at 18-20.

⁵⁵ R. 217.

⁵⁶ R. 213.

⁵⁷ Mr. Hewitt testified that the average class size is 35 and that there are seven physical education periods per day. 3RH 0:57:30-0:58:30. Based on the number of students, the average class size is about 39.4 (276 students ÷ 7 class periods).

⁵⁸ The district's application states that classes for the middle school program will consist of 25 students. R. 114. Mr. Hewitt testified that the program would be delivered to each physical education class as a whole, and that the maximum class size is 57 students. 3RH 0:57:30-0:58:30. He added that if classes were under 30 students, he would not be able to send all of his students at the same time. 3RH 1:05:30.

⁵⁹ 276 students will each take a fifteen hour course. Thus the pool will be needed for 4,140 instructional hours for this program (276 x 15 = 4,140). R. 217. Assuming a consistent class size of 25 students, the program would use the pool 165 hours per school year (4,140 ÷ 25 = 165), or one hour per day, which is the usage reflected in the district's application. If the middle school program is delivered to an entire class at once, then the pool would be used one hour per day for 105 days (7 classes x 15 days/class = 105 class days; 4,140 instructional hours ÷ 39.4 average class size = 105 class days).

⁶⁰ A pool size of 36' x 75' would be required for the average class size (35-40 students) and a pool size of 45' x 75' would be required for the maximum class size (57 students). Guidelines, Chart 2 at 14 (R. 287).

⁶¹ Because the boating safety program requires a minimum pool width of 28', increasing pool width to 36' would not increase capacity.

4. *High School*

A. PHYSICAL EDUCATION

The high school physical education program will be provided to two classes of 30 students each, during separate one hour classes each school day for the entire school year. The program can be accommodated in a pool size of 28' x 75', if the maximum class size, including special needs students, is no more than 30 students.⁶²

B. MARITIME

The pool portion of the maritime program will involve survival suit training, survival skills, and use of a 24' x 15' inflatable raft.⁶³ The high school maritime program will have 60 students enrolled in two 30-student classes. Each class will be offered two to three times per semester and will use the pool for approximately 15 days per class, about 2.5 hours each day. The survival suit and skills portion of the program may be accommodated in a pool size of 28' x 75', with all students using the pool at the same time, based on the number of students per class. Limited use of a 24' x 14' raft is possible in a pool size of 28' x 75', although a minimum dimension of 48' (2x the length of the raft) is recommended for a raft of that size.⁶⁴

C. COMPETITIVE SWIMMING AND DIVING

The high school competitive swimming program will have 85 participants.⁶⁵ The program will not use the pool during school hours. However, the program will occupy the pool for four non-school hours each school day during the swim season (2.5 months).⁶⁶ This program requires a minimum pool size of 28' x 75'.⁶⁷ Although an L-shaped pool with a separate diving area is preferable for a competitive swimming program, it is not required in order to operate a competitive swimming program with a diving component. Due to space constraints, absent an L-shaped pool, diving will increase the time allocated to the competitive swimming program's use

⁶² Guidelines Chart 2 (R. 287).

⁶³ R. 214.

⁶⁴ R. 276.

⁶⁵ R. 222, R. 217. In addition to the high school team, two non-school affiliated swimming teams use the pool: the Ketchikan Killer Whales, and the Masters Swim Club. R. 222. Students participate in the former, but it is not a part of the district's instructional program.

⁶⁶ Exhibit 9 (Monday through Friday, 6:30 a.m.-7:30 a.m.; 3:00 p.m.-6:00 p.m.).

⁶⁷ The Guidelines state that a 28' x 75' pool is the "Minimum Competitive" size pool. Guidelines, Chart 2 (R. 287). Elsewhere, the Guidelines state that a 30' x 75' pool "would meet minimum requirements for some interscholastic competition." Guidelines at 12 (R. 280).

The class sizes shown on Chart 2 are for a basic swimming program; they do not mean that a competitive swimming program conducted in a 28' x 75' pool may have no more than 30 participants.

of the pool. Provision for spectator accommodation is required for a successful interscholastic competitive swimming program.

D. Swimming Pool Debt Reimbursement Determinations

The department has no records of any swimming pools having been evaluated under the debt reimbursement program prior to 2004.⁶⁸ From 2004 through the date of Ketchikan's application, the department considered and approved three applications for debt reimbursement for swimming pool construction. In 2004, the department approved construction of a 39' x 75' (2,925 sf) swimming pool by the Petersburg School District (638 students)⁶⁹ and provided debt reimbursement funding for a project cost of \$5,874,000, based on a pool facility of 14,858 sf.⁷⁰ In Petersburg, the maximum class size is 20 students, and the pool is used for instructional purposes three hours and twenty minutes per school day.⁷¹ In 2007, the department approved construction of a 45' x 75' (3,375 sf) lap pool and contiguous 800 sf shallow pool by the Kodiak Island Borough School District (2,618 students)⁷² and provided debt reimbursement funding for a project cost of \$14,210,000, based on a pool facility of 20,950 sf.⁷³ Also in 2007, the department approved construction of a 36' x 75' (2,700 sf) swimming pool by the Juneau School District (2,500-3,500 students served)⁷⁴ and provided debt reimbursement funding for a project cost of \$8,650,853, based on a pool facility of 14,855 sf.⁷⁵

⁶⁸ 1SK 0:39:30; 0:49:10.

⁶⁹ 8/5/09 pp. 2, 5.

⁷⁰ Exhibit 2, p. 5; Exhibit H; Exhibit 1, p. 5. The approved pool facility size was 66% of the total proposed pool facility of 22,512 sf, and debt reimbursement funding was approved for 66% of the estimated total project cost of \$8,800,000. At a reimbursement rate of 60%, the amount reimbursed would be \$3,524,400 (\$5,874,000 x .60). The actual as built size was 22,649 sf. 3WM 1:29:20.

⁷¹ 3WM 1:17:00-1:23:00.

⁷² 8/5/2009, p. 6.

⁷³ Exhibit I; Exhibit J (R. 289-291); Ex. 4, p. 7; Ex. 6, p. 1. The approved pool facility size was 100% of the total proposed pool facility of 20,950 sf, and debt reimbursement funding was approved for 100% of the estimated total project cost of \$14,210,000. At a reimbursement rate of 60%, the amount reimbursed would be \$8,526,000 (\$14,210,000 x .60).

The Kodiak pool facility was originally planned at 18,249 sf, at a cost of \$6,210,000. *Id.* See Exhibit 4, p. 11. There is no apparent explanation for the increase in the projected cost from \$6,210,000 in the grant application as submitted, to \$14,210,000 in the final approval letter, other than a slight increase in space and the two year delay in the date of construction. See Exhibit 6, p. 2.

⁷⁴ Mr. Kito testified that the total student population in Juneau is about 5,000 students. The pool will serve only a portion of the total student population in Juneau, because Juneau has a separate pool facility at another location. The department based its determination on a total student population of 3,500. Ex. A, p. 3.

⁷⁵ Exhibit A, pp. 3-4. The approved pool facility size was 44% of the total proposed pool facility of 34,000 sf. Debt reimbursement funding was approved for 44% of the estimated total project cost of \$19,661,029. At a reimbursement rate of 60%, the amount reimbursed would be \$5,190,512 (\$8,650,853 x .60).

Sam Kito III is the department's school facilities engineer. Since 2007 he has administered the school construction grant and debt reimbursement programs. Debt reimbursement applications are infrequent, averaging two to six per year. Mr. Kito reviews those applications independently. The Juneau School District application, in 2007, was the first debt reimbursement application for a swimming pool that he reviewed.⁷⁶ Before reviewing that application, Mr. Kito reviewed the department's records regarding the Petersburg and Kodiak applications. He was unable to discern the methodology or other basis for the determinations that had been made respecting those applications and he did not receive any policy guidance from the commissioner regarding debt reimbursement for swimming pools. Accordingly, Mr. Kito made his determinations regarding the Juneau and Ketchikan debt reimbursement applications based on his understanding of applicable statutes and regulations and the Swimming Pool Guidelines (Guidelines) promulgated by the department.⁷⁷

For the Juneau pool, Mr. Kito determined that the proposed instructional program could be accommodated by a pool size of 36' x 75' (2,700 sf), based on a total student population to be served of 3,500, and an average class size of 45 students.⁷⁸ To determine the proportion of the proposed project (34,000 sf) that was eligible for debt reimbursement, Mr. Kito determined the reasonable size of the natatorium and ancillary space appropriate to a pool of the approved size. He determined that for a pool of 2,700 sf, additional natatorium and ancillary space of approximately 12,155 sf was reasonable, resulting in a reasonably-sized pool facility of approximately 14,855 sf. He approved debt reimbursement funding based on the proportion of a reasonably-sized pool facility to the proposed pool facility, or 44% (14,855 sf ÷ 34,000) of the overall project cost.⁷⁹

For the Ketchikan pool, Mr. Kito determined that the proposed instructional program could be accommodated by a pool size of 28' x 75' (2,100 sf), based on a total student

The total facility cost is derived from the amount funded ($\$8,650,853 \times 100/44 = \$19,661,029$). The proposed Juneau facility included two pools, a 6,100 sf eight lane competition pool, and a 5,000 sf recreational pool. ISK 0:37:50; 3WM 1:28:25.

⁷⁶ ISK: 0:25:43. The final Kodiak project agreement in 2007 was executed after Mr. Kito took his current position, but he did not review the application or any supplemental information.

⁷⁷ Swimming Pool Guidelines (1997 ed.). See 4 AAC 31.020(a)(7).

⁷⁸ Ex. A, p. 3.

⁷⁹ 3SK 0:25:00-0:40:00; Ex. A, p. 3. Interestingly, the approved pool size is also 44% of the size of the proposed main pool ($2,700 \div 6,100 = .44$). However, only 24% of the total proposed pool size was approved ($2,700\text{sf} \div 11,100 \text{ sf} = .24$).

population to be served of less than 2,880, and an average class size of 27 students.⁸⁰ However, to determine the proportion of the proposed project (35,000 sf) that was eligible for debt reimbursement, Mr. Kito did not use the same methodology that he had used for the Juneau application. Instead, he approved debt reimbursement based on the proportion of the approved pool size to the proposed pool size, or 23.9% (2,100 ÷ 8,800) of the overall project cost, equivalent to a pool facility of 8,365 sf based on a proposed facility of about 35,000 sf.⁸¹

III. Discussion

A. Applicable Legal Standards

1. *Debt Reimbursement Swimming Pool Guidelines*

A municipality that is a school district is entitled to an allocation of state funds for reimbursement of payments made by the municipality for the retirement of school construction bonds, in varying proportions.⁸² The bonds at issue in this case will be reimbursed at the rate of 60%, to the extent that the bonds are for “school construction” or “education-related facilities.”⁸³ However, bond reimbursement funding must be reduced “by the difference between the amount of money used to construct a swimming pool that exceeds the standards adopted by the department and the amount of money that would have been used to construct a small swimming pool, ...as determined by the commissioner.”⁸⁴

The “standards adopted by the department” for swimming pool construction are set forth in the Swimming Pool Guidelines (Guidelines), promulgated by the department.⁸⁵ The department may approve an application for debt reimbursement to the extent a facility is planned in accordance the Guidelines.⁸⁶ The Guidelines include two charts providing parameters relevant to the determination of the minimum pool size appropriate to a swimming program, and a worksheet that provides a matrix for assessing the appropriate pool size.⁸⁷

The school district, in planning a facility, is encouraged to consider community needs beyond the instructional program.⁸⁸ The three primary factors to be considered in determining

⁸⁰ R. 252-253. *See* Guidelines Chart 2, p. 14 (R. 282).

⁸¹ R. 252-253. The proposed size of the facility as shown in the cost estimate was 34,813 sf, and thus the actual area authorized for reimbursement was 8,320 sf (23.9% x 34,813 = 8,320 sf).

⁸² AS 14.11.100(a).

⁸³ AS 14.11.100(a)(17).

⁸⁴ AS 14.11.100(h).

⁸⁵ Department of Education, Swimming Pool Guidelines (1997 ed.). *See* 4 AAC 31.020(a)(7).

⁸⁶ 4 AAC 31.060(b)(1).

⁸⁷ Guidelines at 8, 14, 17 (R. 276, 282, 285).

⁸⁸ *See* Guidelines at 5 (R. 273).

the pool size eligible for debt reimbursement are the student population, the instructional program, and the program space requirements.⁸⁹ The governing principle of the Guidelines is that the eligible pool size is the smallest standard pool size that would meet the instructional program goals for the student population.⁹⁰ The standard pool sizes are: 22' x 60' (1,320 sf); 30' x 60' (1,800 sf); 28' x 75' (2,100 sf); 36' x 75' (2,700 sf); and 45' x 75' (3,375 sf).⁹¹

2. *Standard of Review*

The initial decision by the department was based on the district's application and supporting materials. Pursuant to 4 AAC 40.040(e)(1)-(3), the administrative law judge conducted an evidentiary hearing at which witnesses testified and were cross-examined, and new evidence was introduced. 4 AAC 40.040(e)(4) provides that the administrative law judge must determine "whether the department had a reasonable basis for its decision, based upon substantial evidence in the record." 4 AAC 40.040(f) provides that following the evidentiary hearing, the administrative law judge issues a recommended decision that must identify the relevant legal and factual issues, make findings of fact with respect to the former, and render conclusions of law on the latter. Finally, 4 AAC 40.040(g) provides that the commissioner will issue the final decision, with findings of fact and conclusions of law.

These provisions establish a three stage review process, which, to the extent not inconsistent with AS 44.64.060, the administrative law judge will adhere to.⁹² First, the administrative law judge reviews the department's initial decision. Second, the administrative law judge makes factual findings and issues a recommended decision. Third, the commissioner issues a final decision.

In the first stage, 4 AAC 40.040(e)(4) states the standard of review: the administrative law judge must determine whether the department had a reasonable basis for its decision, based upon substantial evidence in the record. This formulation reflects the standard of review that courts use to review a final agency decision: an administrative decision has a reasonable basis "when the agency's decision is supported by the facts and has a reasonable basis in law,"⁹³ and

⁸⁹ Guidelines at 4 (R. 272).

⁹⁰ See Guidelines at 12 (R. 280).

⁹¹ Guidelines Chart 2 at 14 (R. 282).

⁹² The Prehearing Order states: "The administrative law judge will adhere to 4 AAC 40.040, except as otherwise ordered to conform to AS 44.64.060 or by agreement of the parties."

⁹³ Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co., 746 P.2d 896, 903 (Alaska 1987).

the agency's factual findings must be supported by substantial evidence.⁹⁴ Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a finding of fact in light of the whole record.⁹⁵ In determining whether a factual finding is supported by substantial evidence, the administrative law judge may not reweigh the evidence, that is, may not choose between competing inferences from the same evidence.⁹⁶

4 AAC 40.040(e)(4) does not state whether, in reviewing the department's initial decision, the administrative law judge should consider the factual findings stated in the department's initial decision and the evidence in the agency record at the time that decision was made, or rather the factual findings made by the administrative law judge and the evidence developed at the hearing. However, because subsection (e)(4) is worded in the past tense and the standard of review it articulates is essentially appellate, the more reasonable interpretation is that the administrative law judge is to review the department's initial decision in light of the factual findings stated in the decision and the evidence in the agency record at that time.

In the second stage, the burden of proof is on the district to establish the facts by a preponderance of the evidence.⁹⁷ Because the evidence at the hearing is materially different from the evidence considered by the department when it made its initial decision, the administrative law judge necessarily determines the facts *de novo*, based on the evidence at the hearing. Similarly, because it is based upon the facts established at the hearing, the administrative law judge's recommended decision necessarily reflects the administrative law judge's judgment, informed by the commissioner's designee's review of the initial decision and by the parties' arguments at the hearing.

In the third stage, the commissioner issues a final decision as provided in AS 44.64.060(e) and 4 AAC 40.040(g).⁹⁸ AS 44.64.060(e)(1)-(4) apply to the commissioner's final

⁹⁴ See, e.g., Estate of Basargin v. State, Commercial Fisheries Entry Commission, 31 P.3d 796, 799 (Alaska 2003); Schikora v. State, Department of Revenue, 7 P.3d 938, 941 (Alaska 2000). For cases adjudicated under the Administrative Procedures Act, the same standard applies by law. AS 44.62.570(c)(2).

⁹⁵ See, e.g., Hidden Heights Assisted Living, Inc. v. State, Department of Health and Social Services, Division of Health Care Services, ___ P.3d ___, 2009 WL 5154261 (Alaska 2009); Cassel v. State, Department of Administration, 14 P.3d 278, 282 (Alaska 2000); Stalnak v. M.L.D., 939 P.2d 407, 411 (Alaska 1997). This formulation dates back at least to Keiner v. City of Anchorage, 378 P.2d 406, 411 (Alaska 1963), citing federal precedents.

⁹⁶ See, e.g., Anderson v. Department of Revenue, 26 P.3d 1106, 1109 (Alaska 2001); Handley v. State, Department of Revenue, 838 P.2d 1231, 1233 (Alaska 1992).

⁹⁷ See 2 AAC 64.290(e); 4 AAC 40.040(e)(4).

⁹⁸ As stated in the Prehearing Order, AS 44.64.060 and 2 AAC 64.100-.990 apply to this proceeding. See AS 44.64.060(a); 2 AAC 64.100(b).

decision.⁹⁹ The commissioner considers the entire record, including the department's initial decision, the commissioner's designee's review of that decision, and the administrative law judge's recommended decision based on the expanded record from the administrative hearing. The commissioner may, but is not required to, defer to the reasonable judgments of those who have previously considered the matter.¹⁰⁰ The commissioner's final decision must adequately explain the commissioner's reasoning¹⁰¹ and show that all of the significant factors have been considered.¹⁰² The decision must be consistent with prior decisions in similar cases or provide a reasonable explanation for departing from past practice in similar cases.¹⁰³

B. The Department's Determination Has a Reasonable Legal Basis

1. *Prior Determinations Are Not Conclusive*

The district argues that the department's decision is arbitrary and capricious, and therefore lacks a reasonable basis, because it is irreconcilable with the department's action with respect to applications filed by Petersburg, Kodiak and Juneau. The department responds that the prior decisions are irrelevant, because it is the Ketchikan application, not the others, that is at issue in this case.

Because the prior decisions were issued by staff, rather than by the commissioner, they do not necessarily reflect or incorporate the commissioner's considered judgment regarding any policy issues or the proper interpretation of a statute or a regulation. Thus, in this case the commissioner may exercise independent judgment with respect to matters of policy and the interpretation of applicable law.

⁹⁹ See 2 AAC 64.340(b). To the extent that 4 AAC 40.040(g) is inconsistent with AS 44.64.060(e)(1)-(4), it is superseded. See 2 AAC 64.100(c).

¹⁰⁰ See, e.g., In Re. C.J.B., OAH No. 06-0515 at 12 (Department of Revenue 2008); In Re Martin Ferrell, OAH No. 06-0582 at 8, note 26 (Department of Commerce, Community and Economic Development 2007); Quality Sales Foodservice v. Department of Corrections, OAH No. 06-0400-PRO at 11-12 (Department of Administration 2006).

¹⁰¹ See, e.g., Crittell v. Bingo, 36 P.3d 634, 639 (Alaska 2001) (judicial decision); Alvarez v. Ketchikan Gateway Borough, 28 P.3d 935, 940-41 (Alaska 2001) (discussing prior cases involving administrative decisions). The court has distinguished between the application of this rule in the context of administrative adjudicative and non-adjudicative decisions, as well as in the context of administrative rule-making. See Messerli v. State, Department of Natural Resources, 768 P.2d 1112, 1118 (Alaska 1989); Johns v. Commercial Fisheries Entry Commission, 758 P.2d 1256, 1260 (Alaska 1988).

¹⁰² See, e.g., Ninilchik Traditional Council v. Noah, 928 P.2d 1206, 1217 (Alaska 1996); Southeast Alaska Conservation Council, Inc. v. State, 665 P.2d 544, 549 (Alaska 1983).

¹⁰³ See generally, May v. State, Commercial Fisheries Entry Commission, 168 P.3d 873, 882-884 (Alaska 2007).

2. *The Department's Decision Has a Reasonable Basis in Law*

The department's determination of the funding level for the Ketchikan pool incorporated two quite different factual inquiries. First, the department determined the minimum pool size, based on the Guidelines. Second, the department determined the degree to which the cost of the proposed pool facility exceeded the cost of a pool facility for a pool of the approved size.

A. POOL SIZE

The Guidelines articulate standards that may be applied in determining the size of a pool that is eligible for debt reimbursement funding. The district does not dispute that to the extent that the department's determination was based upon the three factors identified in the Guidelines (student population, instructional program, and program space requirements), the decision had a reasonable legal basis. The issue to be decided with respect to pool size is primarily factual: whether, in light of the three factors, the department had, at the time of its decision, substantial evidence that a pool size of 28' x 75' would accommodate the instructional program, and whether the preponderance of the evidence at the hearing is to the same effect.

B. POOL FACILITY SIZE AND COST

Debt reimbursement funding is limited to the cost of a pool facility for a pool of the size approved by the department, "as determined by the commissioner."¹⁰⁴ The Guidelines do not contain specific standards governing the determination of the size or cost of a pool facility, and no prior determination has been adjudicated.

In this particular case, the department approved funding for a pool facility based on the proportion of the approved pool size to the proposed pool size. The district does not argue that this methodology lacks a reasonable basis in law. However, it is not the methodology that the department applied to prior applications. The district argues that this methodology led to a result that is inconsistent with the department's prior funding determinations, and that the commissioner should adopt a different approach than was used in this instance. With respect to the amount of funding, the applicable standards must be determined by the commissioner. The

¹⁰⁴

AS 14.11.100(h) states:

[A]n allocation [for debt reimbursement] shall be reduced by difference between the amount of money used to construct a swimming pool that exceeds the standards adopted by the department and the amount of money that would have been used to construct a small swimming pool..., as determined by the commissioner.

Neither party has suggested that the cost of a "small swimming pool" in subsection (h) means anything other than the cost of a pool facility accommodating a pool of the size approved by the department.

amount of debt reimbursement funding must be consistent with those standards and the facts as determined based on the preponderance of the evidence at the hearing.

C. The Finding of Minimum Pool Size Was Supported by Substantial Evidence

1. *Student Population*

Neither party has identified any dispute regarding the student population. In the basic swim program the student population is 573 students, including grades two through four, special needs students and charter school students. The middle school program will serve 276 students, and the high school program will serve about 222 students (two classes of 30 each for both physical education and maritime; 85 in the competitive swim program; 7 special needs). The district's total student population is about 2,000. The swimming instructional program, including the basic learn-to-swim program for the elementary school, charter school and special needs students, plus the high school physical education classes, will be provided to about 909 students per year.¹⁰⁵ The entire instructional program will need to accommodate a total of about 1,054 students each year.¹⁰⁶

2. *Instructional Program*

The parties have identified two issues regarding the components of the instructional program for purposes of determining the minimum pool size: the competitive swimming program, and the use of a 24' inflatable raft in the maritime course.

A. COMPETITIVE SWIMMING

The district's application includes a competitive swimming and diving program as part of its instructional program. The department's initial decision excluded the program from consideration in determining the appropriate pool size, on the ground that a competitive swimming program is not part of a school's instructional program.

Mr. Kito testified that he did not consider the Ketchikan competitive swimming program to be a part of the instructional program because it does not utilize the pool during school hours. However, the Guidelines specifically identify a competitive swimming program as part of a well-rounded pool instructional program.¹⁰⁷ In addition, undisputed testimony at the hearing

¹⁰⁵ 573 (elementary school, charter school, and special needs students) + 276 (middle school students) + 60 (high school physical education students) = 909.

¹⁰⁶ 909 + 85 (competitive swimming) + 60 (maritime program) = 1,054.

¹⁰⁷ Guidelines at 4 (R. 272) ("In addition to basic swimming instruction, courses that may be included in a well rounded program are...: Competitive Swimming to foster elements of teamwork, character and skills among students.").

established that a competitive swimming program is part of the instructional program. Finally, on review of Mr. Kito's decision, the commissioner's designee implicitly determined that the competitive swimming program is part of the instructional program.¹⁰⁸ That the pool is not used for the competitive swimming program during regular school hours means that that more time during regular school hours is available for other elements of the instructional program. However, whether the pool is used for a competitive swimming program during school hours or not, both the Guidelines and the testimony indicate that a competitive swimming program is part of the instructional program.

B. 24' INFLATABLE RAFT

The district's maritime program includes training in the use of a 24' inflatable raft. Ketchikan is a key port for the Alaska Marine Highway System. Testimony at the hearing indicated that ferries and the passenger cruise ships frequenting the port during the summer use a 24' inflatable life raft as a standard piece of equipment, and that the maritime course offered by the district will include training in the use of that piece of equipment in order to prepare students for work in these industries.

The Guidelines do not include maritime training as a part of a comprehensive instructional program. By offering such a program, the district no doubt helps prepare its students for a logical and locally-available career path, but it does so largely by classroom instruction and use of the district's marine vessels in marine waters. The only portion of the program that uses the pool is the training in the use of the 24' life raft. Even the largest pool size available for funding (45' x 75') would not meet the recommended width for training in the use of a 24' life raft (48', or twice the vessel's length).¹⁰⁹ The department reasonably excluded the use of the raft, for purposes of determining the minimum pool size for the instructional program.

3. *Space Requirements*

The Guidelines include two charts that relate to program space requirements. Chart 1, attached as Appendix A, is entitled "Minimum Instructional Requirements." It states the lane size, water space per student, and water depths for various basic, intermediate and advanced

¹⁰⁸ Because the commissioner's designee included the competitive swimmers for purposes of calculating the average class size, he implicitly agreed with the district's argument that competitive swimmers should be considered part of the instructional program. Letter, Deputy Director P. Prussing to R. Boyle, September 4, 2009 at p. 4 [hereinafter, "9/4/09"]. However, because the competitive swimming program is not a swimming class, the participants in that program should not be included in the calculation of average class size for purposes of Chart 2.

¹⁰⁹ See Guidelines Cart 1, p. 8 (R. 276).

swimming courses, along with water depth and lane size. Chart 2, attached as Appendix B, is entitled “Summary of Standard Pool Sizes and Population Served.” It states the pool size for a basic swim program in terms of the number of students per class, the number of students taking courses, and the total population served.

A. CHART 1: SPACE PER STUDENT

Chart 1 lists the size of the instructional lane and the number of square feet per student. The district argues that the department failed to provide the space per student listed in Chart 1 (100 sf for beginners, 120 sf for intermediates, and up to 300 sf for advanced).¹¹⁰ The department rejected the idea that the minimum pool size can be determined based on Chart 1; it concluded that minimum pool size is a function of class size and is based on Chart 2.¹¹¹

The district’s argument reads Chart 1 as listing the minimum amount of square footage required in a pool per student, with the implication that a class of 30 students requires a minimum pool size of 3,000, 3,600, or 9,000 sf (depending on the type of class). In fact, Chart 1 is described as showing the “maximum amount of water square footage per student,”¹¹² and the department concluded that the space stated reflects the maximum amount of space required for a single student at any one time, rather than the amount of space required for each student at all times. If the district’s interpretation were adopted, the number of students using an instructional lane at the same time would decrease as the students became more expert, but in fact the number of students using a lane increases as the students become more expert.¹¹³ More fundamentally, the district’s reading of Chart 1 is completely incompatible with Chart 2: the space per student shown in Chart 1 is substantially greater than the amount of space available per student based on the allowable class sizes as shown on Chart 2. The district’s argument is therefore rejected; Chart 1 does not establish the minimum pool size.¹¹⁴

B. CHART 2: MINIMUM POOL SIZE

Chart 2 lists the number of students in a basic instructional program per class period and per year for various pool sizes, including 30 students per class and 720 students per year for a 28’ x 75’ pool, and 50 students per class and 1,200 students per year for a 36’ x 75’ pool. Chart

¹¹⁰ 8/5/2009, p. 11. See Guidelines Chart 1, p. 8 (R. 276).

¹¹¹ Email, S. Kito to D. Hiley, 6/11/2009 (R. 256).

¹¹² Guidelines, p. 5 (R. 283) (emphasis added).

¹¹³ See note 49, *supra*.

¹¹⁴ Alaska law requires that pools include a minimum of 35 sf per occupant. See 18 AAC 30.560.

2 also states that the “Total Population Served” for a “100% Basic Swim Program” is 2,880 students in a 28’ x 75’ pool, and 4,800 in a 36’ x 75’ pool.

i. Class Size

The department initially approved a 28’ x 75’ pool based on an average of 27 students per class (excluding competitive swimmers in the calculation of the average class size), based on the number of students per class shown for a pool of that size.¹¹⁵ In response, the district argued that the department should have calculated pool size based on an average class size of 38 students, rather than on an average class size of 27 students.¹¹⁶ More fundamentally, it argued that rather than the average class size, the department should have used the largest class size to determine the appropriate pool size, and that because the basic swim program will include classes of up to 50 students, the appropriate pool size is 36’ x 75’.¹¹⁷

As the district points out, in terms of class size the limiting factor in determining the minimum pool size is the maximum number of students in a class, not the average class size. But both the maximum and average number of students in a class will vary, depending on how many classes are scheduled and how the program structured. For this reason, looking solely at the average class size or the maximum class size is not enough: to determine the minimum pool size that will accommodate the instructional program, it is important to consider whether the program has been structured, to the extent practicable, in a manner that minimizes class size (average and maximum).

The district plans to use the pool for instructional purposes for four periods each school day of which it appears generally two hours per day will be for the basic swimming program, including the elementary (one hour per day) and middle (one hour per day) school programs.¹¹⁸ The district’s application states that elementary school swimming classes will consist of up to 50 students. However, the application neither states nor implies that any elementary classroom exceeds 30 students,¹¹⁹ and it offered no information to establish that smaller swimming classes were impracticable. Limiting swimming classes to one elementary classroom at a time would mean that the entire elementary swim program could be accommodated in classes of no more than 30 students each, by increasing the number of pool hours devoted to the elementary

¹¹⁵ R. 252-253. *See* Guidelines, Chart 2.

¹¹⁶ Email, D. Hile to S. Kito, 6/1/09 (R. 254).

¹¹⁷ 8/5/2009, p. 11. *See* R. 114 (Program Determination Worksheet).

¹¹⁸ *See* Exhibit 9; notes 43, 59, *supra*.

¹¹⁹ *See* note 41, *supra*.

program.¹²⁰ Notably, even though the average physical education class size in the middle school program is about 40 students, and the largest class has 57 students, the district's application states that it will provide the course to students in groups of no more than 25.¹²¹

With respect to the high school programs, the application states that the physical education classes, which in content are comparable to a basic swimming program, will consist of 30 students and can be accommodated in a 28' x 75' pool, except for classes with special needs students.¹²² While the competitive swimming program is a part of the instructional program, there is no evidence that the minimum pool size necessary to support a competitive swimming program with 85 participants is greater than 28' x 75'.¹²³

Based on the total number of students in the program and the number of hours the pool is available for the program, the department had substantial evidence that the basic swimming classes could be provided to groups of no more than 30 students.¹²⁴ The application states that the middle school program and the high school physical education program can be provided to groups of no more than 30 students, except for high school special needs students. Given the small number of high school special needs students, the department could reasonably limit the high school class size to 30 students, including special needs students. There is no evidence that a 28' x 75' pool will not accommodate a competitive swimming program with 85 participants. Thus, the department had substantial evidence that the entire instructional program could be accommodated in a 28' x 75' pool.

The testimony and evidence at the hearing provided additional information regarding the manner in which the basic swimming program is structured. The testimony established that class and bus schedules will limit the district's flexibility in transporting elementary students to the pool, but it did not establish that those constraints mean that the basic swimming program must be provided to groups in excess of 30 students. With respect to the middle school program,

¹²⁰ Limiting class size could also reduce potential conflicts resulting from simultaneous use of the pool by swimmers at different skill levels. The district did not argue or present evidence that usage conflicts necessitate the construction of two separate pools, nor did argue that the department should have provided debt reimbursement funding for more than one pool tank in a single facility (as it did in Kodiak).

¹²¹ R. 114.

¹²² R. 114.

¹²³ It is not implausible that a pool of that size would accommodate a competitive swimming program with 85 participants. Assuming that, like the advanced swimmers in the basic instructional program, competitive swimmers circle swim, up to 48 swimmers (eight in each of six lanes) could be accommodated in a six-lane pool at the same time. Dry-land exercises or weight training may be part of the program, reducing actual pool usage, and it may be that practices could be scheduled at different times for different groups.

¹²⁴ See notes 36, 43, *supra*.

testimony at the hearing as to the size of classes was in direct conflict with the district's application.¹²⁵ However, based on the application and the number of hours of pool time available, the preponderance of the evidence is that the middle school program can be accommodated in a 28' x 75' pool.¹²⁶ There is no evidence that it would be unreasonable to limit the size of the high school physical education classes to 30 students, including special needs students. Thus, the preponderance of the evidence at the hearing is that the entire instructional program can be accommodated in a minimum pool size of 28' x 75'.

ii. Student Population Served

The district requested approval of a pool size of 45' x 75' (3,375 sf) based on 889 students per year in the swimming program, using the figures provided in Chart 2 for "Enrollees per year in all 3 classes"¹²⁷ and "Students Per Year Able to Receive Mandatory Classes" in a 28' x 75' pool.¹²⁸ On review, the commissioner's designee determined that a pool of 28' x 75' is sufficient, based on the figure provided in Chart 2 for "Total Population Served", which is greater than the Ketchikan total student population.¹²⁹

In terms of the total population served, the limiting factor in determining pool size is the total number of students who can be enrolled in the program at one time. However, just as class size depends on the manner in which the program is structured, the total number of students that can be enrolled in a program also depends on the manner in which the program is structured.

Because the total population served is a variable that depends on the program structure, the total population figures stated in Chart 2 are illustrative rather than prescriptive. For example, Chart 2 does not state the content of a "Basic Swim Program,"¹³⁰ nor does it state the number of instructional periods per day upon which the calculations are based (which quite obviously directly affects the number of students who can be instructed). Furthermore, Chart 2 on its face reflects only the basic swim program, and does not account for the space requirements of any programs other than a basic swim program. For all these reasons, Chart 2 is of limited

¹²⁵ See note 58, *supra*.

¹²⁶ See note 59, *supra*.

¹²⁷ R. 114. See Guidelines, Chart 2 ("Enrollees Per year in all 3 classes"). The district's application requested an L-shaped pool to accommodate the diving program and the use of the 24' life raft. However, the district no longer seeks funding for an L-shaped pool, recognizing that funding is capped at 45' x 75' under the Guidelines.

¹²⁸ 8/5/2009, p. 5.

¹²⁹ R. 4. See Guidelines, Chart 2 ("Total Population Served 100% Basic Swim Program").

¹³⁰ Presumably, the "50% Basic Swim Program" reflects an elective program, in which 50% of the total student population participates. The "Total Population Served" for a "50% Basic Swim Program" would thus be the number of students who will receive instruction, not the number of students attending school.

persuasiveness. However, the chart does indicate that it is possible, depending on the program structure and class schedules, to provide a basic swimming program to up to 240 students in each of three elementary grades, or up to a total of 720 elementary students per year in a 28' x 75' pool. The district's basic swimming program will serve 573 elementary students per year, which is significantly less than the number of students per year that Chart 2 indicates can be served. Similarly, the district's total student population is significantly less than the total population that Chart 2 indicates can be served in a 28' x 75' pool. Thus, the department had substantial evidence that the district's basic swimming program could reasonably be accommodated in a pool size of 28' x 75'.¹³¹ The preponderance of the evidence at the hearing supports the same finding.

D. The Department's Past Practice In Determining Pool Facility Size Is Inconsistent

Determining the pool size is only the first step in determining the amount of debt reimbursement. The size and cost of the pool facility containing the pool must also be determined. The Guidelines do not provide any specific standards on those issues, although they do include a conceptual layout that provides information regarding the nature and amount of ancillary space that "would be anticipated" for a pool size of 22' x 60' with a diving instruction area.¹³² For the two most recent applications, from Juneau and Ketchikan, the department has determined pool facility size in light of three different methodologies. The department has consistently provided funding for a project cost proportionate to the approved pool facility size, and the district does not object to using the same formula in this case.¹³³

I. *Facility Size Based on Approved Natatorium and Ancillary Space*

One methodology for determining the pool facility size that will be approved is to quantify the reasonable size of a facility for a given pool size. This is the approach that Mr. Kito used in determining the amount of reimbursement for the Juneau pool. Mr. Kito quantified the

¹³¹ The district will have 573 students in the program. At an average class size of 25 students, it can accommodate that number of students in no more than 24 classes (24 x 25 = 600). 24 two-week classes, each consisting of ten hours of instruction (one hour per school day), would require that the pool be available for a total of 240 hours during the school year, or approximately 1.5 hours per day (240 pool hours ÷ 165 school days = 1.45 pool hours per day).

¹³² Guidelines Figure 3, p. 19 (R. 287).

¹³³ The district did not submit any evidence regarding the cost of constructing a pool facility other than the two options it had considered. However, the estimates for those facilities suggest that pool facility size and project cost do not increase in direct proportion to increases in pool size or project size: the larger option had a pool 58% larger than the smaller one, but the pool facility increased in size only 25% and project cost increased only 13.5%. To that extent, the record suggests that the department's approach understates project costs for a smaller facility.

space appropriate for various ancillary uses (natatorium, lobby, circulation, mechanical, *etc.*) based on the district's request and prior projects, and calculated the total size of the pool facility to be reimbursed. He determined that the reasonable size of a pool facility for the approved pool size of 2,700 sf was 14,855 sf, and the department approved debt reimbursement for 14,855 sf of the proposed pool facility.

The Guidelines include minimum and recommended pool deck dimensions.¹³⁴ In addition, the Guidelines recognize that ancillary space will be needed, including mechanical, storage, maintenance, office, circulation, locker rooms, showers and toilets. Overall, the Guidelines indicate that the total pool facility related to a basic swimming instruction program can reasonably be anticipated to be about five times the pool size,¹³⁵ without considering any additional space that might be related to other aspects of the instructional program, such as a classroom for use in connection with boating safety or maritime instruction, or spectator space for a competitive high school swimming program.

The Guideline's overall space allocation is consistent with all of the department's determinations, except for Ketchikan. In each other prior case, the department authorized debt reimbursement for pool facility at least five times greater than the approved pool size: In Petersburg, the department approved a pool size of 2,925 sf (39' x 75') and approved debt reimbursement for a facility of 14,858 sf (2,925 x 5.08).¹³⁶ In Kodiak, the department approved a pool size of 4,175 sf (45' x 75' and contiguous 800 sf shallow area) and approved debt reimbursement for a facility of 20,950 sf (4,175 x 5.02).¹³⁷ In Juneau, the department approved a pool size of 2,700 sf (36' x 75') and approved debt reimbursement for a facility of 14,855 sf (2,700 x 5.50). In Ketchikan, by contrast, the department approved a facility size less than four times the size of the approved pool size: the department approved a pool size of 2,100 and approved debt reimbursement for a facility of only 8,320 sf (2,100 x 3.96).

Based on the information submitted with the district's application, and on a comparison with the space estimates in the Guidelines and the space approved for the Petersburg, Kodiak and

¹³⁴ Guidelines p. 10 and Figure 3, p. 19 (R. 287) (eight feet on each length; 12 feet at one end and 14 feet at diving board end). *See also id.* at 18 (minimum of six feet of deck space on all sides; minimum of 12 feet for instruction).

¹³⁵ Guidelines p. 19, Figure 3 (R. 287).

¹³⁶ Exhibit H.

¹³⁷ Ex. 6, p. 1. As initially proposed, the pool was 4,198 sf. Exhibit 4, pp. 4, 5, 11; Exhibit 5, p. 13. As initially approved in 2005, the pool was 4,050 sf (45' x 75' lap pool plus 675 sf contiguous shallow pool). Ex. 6, p. 7.

Juneau facilities, the reasonable size of a pool facility for a 2,100 sf pool used to provide a comprehensive instructional program including competitive swimming is a minimum of approximately 10,500 sf, including the natatorium (4,444 sf),¹³⁸ two locker rooms (1,110 sf),¹³⁹ an office (300 sf),¹⁴⁰ walls, lobby and circulation space (2,000 sf),¹⁴¹ mechanical (1000 sf),¹⁴² storage (500 sf),¹⁴³ public restrooms (250 sf),¹⁴⁴ custodial space (100 sf),¹⁴⁵ and spectator space (1,000 sf).¹⁴⁶

2. Facility Size Based on Proportion of Proposed Pool Size Approved

A second methodology to determine pool facility size is to calculate the approved facility size in the same proportion to the proposed facility size that the approved pool size has to the proposed pool size. This is the approach Mr. Kito used in determining the amount of reimbursement for the Ketchikan pool. In Ketchikan, the approved pool size was 23.9% of the proposed pool size (2,100 sf ÷ 8,800 sf = .239), and therefore a pool facility of 23.9% of the proposed facility size was approved. In Juneau, the approved pool size was 2,700 sf, and the

¹³⁸ Allowing the minimum deck dimensions, the natatorium space for a 28' x 75' pool is 44' (28' + 8' + 8') x 101' (75' + 12' + 14') = 4444 sf.

¹³⁹ Ketchikan proposed locker rooms of 1,350 sf each. R. 224. Juneau and Kodiak were allowed about 800 sf for each locker room. Ex. A, p. 3. The Guidelines allow 740 sf for locker rooms. Guidelines at Figure 3, p. 19. However, the pool size depicted in the Guidelines is the minimum instructional size, in which classes are limited to 20 students. Guidelines Chart 2, p. 14. Locker room space for the Ketchikan pool should be increased to reflect classes of up to 30, that is, by 50% (740 sf x 1.5 = 1,110).

¹⁴⁰ Ketchikan proposed a 425 sf office. R. 224. Juneau was allowed an office of 375 sf. Ex. A, p. 3. Kodiak's proposal includes a lifeguard office of 250 sf. Ex. 4, p.11. The Guidelines suggest a space for "control" of 120 sf. Guidelines at 19, Figure 3 (R. 287). The average of these is 292.5 sf.

¹⁴¹ Ketchikan proposed 2,500 sf for circulation and a lobby, as compared with Juneau's allowance of more than 4,000 sf. R. 224; Exhibit A, p. 3. Kodiak was approved for 2,580 in circulation space. Ex. 4, p. 11. The Guidelines include only 630 in total for circulation, entry and exit, but provide 1,245 for that plus interior walls and a "planning factor". Guidelines Figure 3, p. 19 (R. 287). Given that the instructional program in Ketchikan includes competitive swimming, with spectator space (and the Guidelines do not), 2,000 sf for this category is reasonable.

¹⁴² Ketchikan proposed 5,000 sf for mechanical use. R. 224. Juneau was allocated 820 sf for that purpose. Ex. A, p. 3. Kodiak's proposed pool had 1,465 sf for pool and building mechanical space. Ex. 4, p. 11. The Guidelines provide a total of 1,070 sf for mechanical/HVAC, filtration, chlorine, chemical storage and electric. Guidelines p. 19, Figure 3 (R. 287).

¹⁴³ Ketchikan proposed 1,600 sf for storage. R. 224. Juneau was allowed 1,200 sf for pool equipment and general storage. Ex. A, p. 3. Kodiak was allowed 476 sf for storage. Ex. 4, p. 11. The Guidelines do not include any equipment storage. Guidelines at 19, Figure 3 (R. 287). Because the instructional program in Ketchikan includes components requiring substantially more equipment storage than a basic swimming program would require, storage at least equivalent to the smallest of the other approved facilities is reasonable.

¹⁴⁴ Ketchikan proposed 250 sf for public restrooms. R. 224. The Guidelines include 240 sf for restrooms. Guidelines at 19, Figure 3 (R. 287).

¹⁴⁵ Ketchikan proposed 100 sf for custodial space. R. 224. Kodiak's proposed pool included 202 sf in janitorial space. Ex. 4, p. 11. The Guidelines include 100 sf for janitorial space. Guidelines at 19, Figure 3 (R. 287).

¹⁴⁶ Ketchikan's proposed spectator area consists of a 350 person capacity tiered bleacher, occupying 1,400 sf. R. 191, 224, 235. The Kodiak pool included a 900 sf spectator area. Ex. 4, p. 13.

proposed pool size was 11,100 sf. Applying this methodology to the Juneau application, the approved facility size would have been only 24.3% of the proposed facility size, as compared with the actual approved proportion of 44%. Thus, use of this methodology to determine the size of the pool facility for the Ketchikan application was inconsistent with the department's decision regarding the Juneau application.

3. *Facility Size Based on Proportion of Time Used for Instruction*

A third methodology for determining the approved pool facility size would be to approve reimbursement for a pool facility based on the proportion of time that the pool facility will be used for instructional purposes. The department considered this approach in reviewing the Ketchikan application. The district argues that any use of this particular methodology is improper, because it is not identified in the Guidelines as a factor in determining the appropriate pool size, and because it would reduce funding as public use of the facility increases, even though the school district's use remains constant.

The latter argument highlights substantial defects in this particular methodology, depending on how it is applied. Mr. Kito compared the number of hours the Ketchikan facility was used for the instructional program to the number of hours it was used for other purposes.¹⁴⁷ This approach is problematic. First, it would diminish funding for the reasonable cost of a pool facility appropriate to the instructional program based on an unrelated factor: the amount of community use. Second, the Guidelines encourage districts to plan facilities with broader community needs in mind, and to reduce funding based on the degree of community use would inhibit such planning. Third, school use is by definition limited to the instructional program, while community uses are unrestricted. For all these reasons, a district's proportional use of the pool, in terms of the number of hours used for instructional purposes as compared with the number of hours it is used for community purposes, is not a useful criterion by which to assess the degree to which a project should be funded.¹⁴⁸

¹⁴⁷ R. 116, 253. *See* notes 33-36, *supra*.

¹⁴⁸ The proportional use methodology could be applied in other ways. For example, it could be based on the operating agreement between the district and the borough. However, the operating agreements for Petersburg and Kodiak simply provide the school districts in those municipalities with scheduling priority; neither reflects the actual use of the pool. Actual use could be measured by user hours. *See, e.g.*, 9/4/09, p. 2; Ex. 4, p. 17. But characterizing user hours as school use or community is problematic. As the district points out, Kodiak counts its youth competitive swimming group as school use, but Ketchikan does not, although both programs are essentially identical.

Actual use can also be measured, as Mr. Kito did, by considering the number of hours a pool is used for instructional purposes as compared with the number of hours it is used for community purposes. In Kodiak, non-

Nonetheless, the department did not rely on this criterion to determine the appropriate level of funding, but rather used it only as means of testing the result it had reached using the other methodologies described previously. The department did not err in doing so.

E. Recommended Decision

Because the department has not promulgated specific standards governing the determination of the size of a pool facility that will support the instructional program, or regarding the determination of the cost of such a facility, the commissioner may exercise independent judgment regarding the standards to be applied. The administrative law judge makes a recommended decision based on the record as a whole; the commissioner may adopt all, none or part of the recommended decision, as provided in 4 AAC 40.040(g) and AS 44.64.060(e)(1)-(4).

With respect to determining the size of the pool facility, the single factor considered by the department with respect to the Ketchikan application (approved pool size in relation to proposed pool size) is inconsistent with the factors it considered with respect to the Juneau application. The factors considered by the department in connection with the Juneau application (approved pool size, ancillary space requested, prior similar applications), supplemented by consideration of the standard space allocations stated in the Guidelines, yield results consistent with prior decisions. Using those factors, a pool facility of 10,500 sf is commensurate to a pool size of 28' x 75' offering a complete instructional program including competitive swimming. The administrative law judge recommends that the commissioner approve funding for a pool facility of that size.

With respect to determining the cost of the pool facility, the department has consistently authorized debt reimbursement funding in proportion to the size of the approved pool facility in relation to the size of the proposed pool facility. Under that standard, 30% of the proposed Ketchikan project is eligible for debt reimbursement funding. The administrative law judge recommends that the commissioner approve debt reimbursement funding for 30% of the estimated cost of the proposed Ketchikan project.

school pool use is 62.5 hours per week. Ex. 8. Assuming that school use is approximately the same as in Ketchikan (38 hours per week during the swimming season), the Kodiak pool is used by the district about 38% of the time during the season, which is about the same as in Ketchikan (40%). *See* note 33, *supra*. The Petersburg pool is used for instructional purposes during the competitive swimming season for about 32 hours per week, and the pool is open a total of about 62 hours (52%). *See* Ex. 7. Outside of the competitive swimming season, district usage is 17 hours per week (28%). *Id.* These are not significantly different from the Ketchikan usage percentages (40% and 21%, respectively). *See* notes 33-35, *supra*.

IV. Conclusion

The department's finding that a pool size of 28' x 75' will accommodate the instructional program was based on the standards promulgated by the department, was supported by substantial evidence and is consistent with the factual findings, and is therefore **AFFIRMED**.

The commissioner **FINDS** that under the facts of this case a pool facility of 10,500 sf is commensurate to a pool size of 28' x 75' for a complete instructional program, including competitive swimming, based upon the ancillary space requested, comparison to prior applications and decisions by the department, and the space allocations described in the Guidelines. Pursuant to AS 14.11.100(h), the commissioner **DETERMINES** that the proposed project of approximately 35,000 sf is eligible for debt reimbursement financing (at the applicable rate of 60%) for a project cost of \$7,372,977, or 30% of the estimated total project cost.

DATED February 24, 2010.

By: _____
Andrew M. Hemenway
Administrative Law Judge

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF EDUCATION AND EARLY DEVELOPMENT**

In the Matter of:)
)
KETCHIKAN GATEWAY BOROUGH)
SCHOOL DISTRICT,)
)
Appellant.) OAH No. 09-0517-EED

ORDER AMENDING and ADOPTING PROPOSED DECISION

Under the authority of AS 44.64.060(e)(3) and (5), the Commissioner of Education and Early Development amends the administrative law judge’s proposed decision as follows:

(1) The Commissioner revises the determination of the amount of debt financing reimbursement for the proposed project, based on the parties’ stipulation as to the total bonded cost of the project. The last sentence of the Conclusion at page 26 is **amended** to read: “Pursuant to AS 14.11.100(h), the commissioner determines that the proposed project of approximately 35,000 sf is eligible for debt financing reimbursement (at the applicable rate of 60%) for a bonded project cost of \$7,050,000, or 30% of the total bonded project cost.”

(2) The Commissioner modifies the interpretation or application in the proposed decision of 4 AAC 40.040 by not adopting the discussion of that regulation, for the reason that the discussion is unnecessary for purposes of the final decision. The proposed decision is **amended** by deleting Section A, Part 2, “Standard of Review”, at pages 12-14 of the proposed decision.

The proposed decision, attached, is **ADOPTED AS AMENDED** as the final decision in this matter.

Judicial review of this final decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 14.11.016(d), AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5th day of April, 2010.

By: *Signed* _____
Larry LeDoux
Commissioner