IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

EDWARD ALEXANDER, JOSH ANDREWS, SHELBY BECK ANDREWS, & CAREY CARPENTER,

Plaintiffs,

vs.

ACTING COMMISSIONER HEIDI TESHNER, in her official capacity, STATE OF ALASKA, DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT,

Defendant,

vs.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON.

Intervenors.

Case No. 3AN-23-04309CI

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR STAY PENDING APPEAL AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LIMITED STAY

I. Introduction

Alaska Statutes 14.03.300-.310 had the intended purpose, and actual effect, of authorizing spending of public funds to reimburse payments to private schools. Such

spending is clearly unconstitutional. Alaska Statute 14.03.300(b) further prevented the Department of Education & Early Development ("DEED") from imposing any restrictions on these expenditures. Accordingly, this Court issued an order correctly invalidating the two statutes as facially in conflict with Article VII, Section 1 of the Alaska Constitution (the "Order").

Because it is late in the current school year, many students, families, and school districts have undertaken plans in reliance on the existence of AS 14.03.300-.310 for reimbursement of expenses from their student allotments. To avoid undue disruption, the Plaintiffs asked this Court to issue a limited stay of the Order through June 30, 2024, to allow the current school year and fiscal year to conclude without interruption. Even though some amount of unconstitutional spending might occur in that two-month window, having the Order take effect at the end of the fiscal year will provide needed certainty to school districts and parents, while also properly motivating the parties to seek a timely final resolution of this dispute.

In response to Plaintiffs' proposal for a limited stay to allow for a smooth transition, the Defendants have asked for an indefinite stay. Their request is predicated on Defendants' vastly overbroad interpretation of the Order, as well as the false binary they present between being granted an unlimited stay versus what they present as the apocalyptic end of all homeschooling in Alaska. For the reasons herein, this Court should reject Defendants' absurd request and grant Plaintiffs' reasonable and pragmatic request for a stay of limited duration.

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II. The Defendants' request is based on a mischaracterization of the Order.

Defendants argue that, without an indefinite stay, correspondence school programs have become completely impossible to implement, even *with* a statutory fix. As this Court noted, the legislative history and the very text of AS 14.03.300-.310 demonstrate that they were passed for the specific purpose of approving reimbursement of facially unconstitutional spending, such as tuition at private schools.[1] Indeed, the Intervenors "explicitly acknowledge[d] that they are using public funds to finance their children's private educations."[2] Accordingly, it is the unconstitutional *spending* of public funds which is now prohibited, not the act of homeschooling through the correspondence school program. There was a correspondence (homeschooling) program before AS 14.03.300-.310 was enacted, and there can continue to be one after this Court's Order. Moreover, not only does the Order *not* block a legislative fix as the Defendants claim, but this Court also explicitly invited a legislative fix should the legislature believe that some modified form of this correspondence program allotment spending that complies with the Alaska Constitution is necessary.[3]

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[1] Order at 15 (stating "…the plain statutory text, [then-Senator Dunleavy's] statements, and legislative history…" all indicate the statutes were passed for the unconstitutional purpose of "'funds going to private or religious *educational service providers.*'") (emphasis in original); *see also id.* at 19 ("This Court agrees with Plaintiffs' arguments and finds that the legislative history… clearly demonstrates that the statutes were drafted with the express purpose of allowing purchases of private educational services with the public correspondence school allotments.").
[2] *Id.* at 30.
[3] *Id.* at 33 (noting "[i]f the legislature believes these expenditures are necessary—then it is up to them to craft constitutional legislative to serve that purpose—that is not this Court's role.").

Defendants further claim that a legislative fix is impossible because the Order somehow prohibits spending at any private businesses like "Best Buy or Jo-Ann Fabric and Crafts."[4] This is an absurd misreading of the Order. The Order clearly lays out that the purpose and effect of AS 14.03.310 was to allow unconstitutional spending. Further, AS 14.03.300(b) specifically prohibits DEED from employing any narrowing construction. Taken together, *that* overbreadth of authorized expenditures and the ban on narrowing is what invalidated both statutes. The Court acknowledged that the legislature could fix this, and indeed they can, by drafting a new .300 that *prohibits* spending with private schools and a new .300(b) that *does not* bar DEED from implementing regulations allowing it to narrow eligible expenditures to comply with the Alaska Constitution.

The Defendants' illogical argument boils down to a claim that the terms in .300 and .310 were so overly broad (and could encompass almost any expenditure) that when the Court struck them down it necessarily struck down *all* possible conduct and spending. That is an argument almost too nonsensical to respond to, especially given the Court's explicit invitation for the legislature to pass new legislation complying with the Alaska Constitution by narrowing eligibility for reimbursement.

Finally, it is noteworthy that Defendants generally complain that this Court did not employ a narrowing construction of AS 14.03.300-.310 and instead invalidated the statutes in their entirety. This complaint is without basis—especially where, as here, the

[4] State's Response to Plaintiffs' Motion for Stay and Cross-Motion for Stay Pending Appeal (the "Defendants' Motion") at 3.

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Defendants *rejected* Plaintiffs' alternative arguments which made the case for such a narrowing.[5] Defendants cannot take the position of objecting to a narrowing interpretation or severance of unconstitutional provisions and then later complain that their objections to such narrowing were honored by this Court.

III. The public will suffer significant, and irreparable, harm if the Defendants' request for an indefinite stay is granted.

To begin with, Plaintiffs have agreed that any current correspondence allotments that were taken in reliance on the then-existing statutes should be honored. Hence, Plaintiffs' request for a stay through the end of the fiscal year. That, however, is where the parties' agreement ends.

For purposes of assessing what harms the public could face from the indefinite stay requested by the Defendants, this Court must assume that Plaintiffs will prevail on appeal.[6] Plaintiffs are public interest litigants. The public cannot be adequately protected from an indefinite stay of this Court's decision. Plaintiffs' and the public's interest in this case is clear—that the Alaska Constitution be obeyed, and that public education funds are not diverted to private educational institutions. If such spending of funds continues to be permitted, there will accordingly be less public funding going to public schools and

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[5] Order at 32 (recognizing that Defendants "[do] not ask the Court to craft a narrowing construction or sever any provisions.' Rather … [they ask] this Court to reject Plaintiffs' facial challenge as a matter of law…").

[6] *See Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) ("[A] court is to assume the plaintiff will ultimately prevail when assessing the irreparable harm to the plaintiff absent an injunction, and to assume the defendant will ultimately prevail when assessing the harm to the defendant from the injunction.").

Article VII, Section 1 will continue to be violated. There is no remedy—and Defendants offer no remedy—if such unlawful spending of limited public funds continues to occur. Under the Defendants' proposal, such spending would occur for at least the next school year, if not into the following school year.

The Defendants claim, without explanation or attribution, that the Plaintiffs', and presumably the entire public's, harms are "relatively slight" in comparison to the harm to Defendants and Intervenors. For starters, any purported harm to the Intervenors is premised upon a rickety house of cards that assumes they are *entitled* to receive public funds to pay for their children's private school tuition. Given this Court's well-founded ruling, they clearly have no such right and accordingly suffer no harm.

The Defendants' purported harm is premised, again, upon the false choice that the Order completely obliterates their ability to run any correspondence program under any circumstances. This is not reality; homeschooling may continue. The only thing that the Order directly disrupts is the allotment program and, as discussed below, Defendants have many possible remedies if they are willing to accept only *constitutional* spending during the pendency of their appeal.

Defendants' speculation that a flood of students will, absent allotments, purportedly rejoin brick and mortar schools is just that—speculation. They have no way of knowing who or how many families might choose that option, since they could choose to do so regardless of this Court's action.

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Defendants also fail to consider the other side of that coin and acknowledge a potentially disruptive outcome if this Court *does* grant their indefinite stay. All indications are that the use of allotments to repay tuition at private schools was a large and rapidly growing trend. Given the increased public awareness the issue has gained via coverage of the Order, it seems quite likely that—should an indefinite stay be granted—there could actually be a flood of families wishing to take advantage of the stay by moving their children out of public schools and into a private school while they can still obtain the unconstitutional tuition subsidy. In short, if this Court grants a stay of indefinite length, the universe of families aware of the temporary option to get private school tuition paid back will be much larger, and presumably participation could increase to a level that would actually increase the harm to public schools and their funding levels overall.

Finally, Defendants also ignore the potential harm to those families that may rely on the continued existence of unconstitutional allotments to support their educational plans when the Alaska Supreme Court affirms the Order. The sooner their reliance on unconstitutional expenditures ends, the less harm to them and to the public at large.

IV. The Defendants' inevitable appeal will lack merit.

The plain text of AS 14.03.300 and .310—as well as all relevant legislative history—drove this case towards its inevitable conclusion. Those statutes had an

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unconstitutional aim and effect, and they fall squarely within the Alaska Supreme Court's ruling in *Sheldon Jackson College v. State*.[7]

Despite the Defendants' claims of ignorance about why AS 14.03.300 was invalidated, this Court told them very clearly: Subsection (b) of AS 14.03.300 explicitly blocks any narrowing construction of AS 14.03.310 or any substantive oversight of allotment spending, making it impossible for the Department of Education and Early Development to halt unconstitutional spending even if it wished to. That very clear reasoning is in the Order.[8]

Defendants have not shown a likelihood of prevailing on the merits on appeal, and instead appear to be taking issue with the Alaska Constitution itself—specifically, the direct benefit prohibition in Article VII, Section 1. However, it is not the parties' role, nor this Court's, to debate the wisdom of the Founders when they drafted the language in our Constitution. Rather our role is to interpret whether laws are compliant with the Constitution, which in this case the contested statutes clearly were not.

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[7] 599 P.2d 127 (1979).

[8] *See, e.g.,* Order at 19 ("Plaintiffs argue that 'read in total [the statutes] clearly authorize[] the expenditure of public funds for educational purposes at private institutions, and prohibit[] DEED from imposing limitation on this expenditure of public funds regardless of constitutional requirements.' This Court agree with Plaintiffs' arguments…"); *see also id.* at 32 (citing Plaintiffs' argument that "… severing the provision in AS 14.03.300(b) which expressly precludes DEED from 'placing any limits on the allotment funds being paid to private entities' would be necessary" to cure unconstitutionality).

V. The Defendants have numerous options to keep the Correspondence Program and (Constitutional) Allotments functioning during the pendency of any appeal.

The Defendants present this Court with a false choice—a choice between allowing blatantly unconstitutional spending to continue indefinitely or ending homeschooling in Alaska. In reality, the Defendants hold the keys to their own prison. If their goal is to preserve the Correspondence Program and *only* allotment spending that the parties agree is constitutional, then this Court, the Legislature, and the Plaintiffs have offered them several paths to accomplish that end:

1. A legislative solution

As noted by this Court, the Alaska Legislature can pass legislation which cures the allotment program's defects by excluding unconstitutional spending. It could be as simple as passing a version of section .300 without subsection (b), which would allow DEED to implement regulations, and rewriting .310 to state that "all allotments must be for a bona fide educational purpose and under no circumstances can payments be made for expenses incurred with any religious or other private educational institutions." Facially, such a revised statute should comply with the Order in full.

The Alaska Legislature is currently in session, and individual legislators have indicated a willingness to draft, introduce, and work to pass such legislation.[9]

[9] *See* Senator Bill Wielechowski, stating that, "a narrow statutory change and new regulations" could "fix" the correspondence program, and from Senator Löki Tobin, the Chair of the Senate Education Committee, stating that, "the Senate Education Committee was drafting legislation intended to provide certainty…" to those in the correspondence program. Source: Anchorage Daily News, *State of Alaska requests pause in homeschool ruling blocking public funds at private*

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Nevertheless, Defendants have not proposed any such legislation and have actually denounced a legislative fix. Instead, they want to maintain the broad authorization of expenditures at private educational institutions under AS 14.03.300-.310.

2. <u>Expedited appeal to the Alaska Supreme Court</u>

In addition to offering to agree to a stay of the Order through the end of the current fiscal year, undersigned counsel also offered to participate in an expedited appeal to the Alaska Supreme Court such that, if the Court agreed, the parties would receive at least a summary order indicating whether the Alaska Supreme Court would be affirming the conclusion that AS 14.03.300-.310 are unconstitutional.[10] Plaintiffs' counsel has personally participated in at least three appeals to the Alaska Supreme Court that were briefed, argued, and decided on timelines shorter than the one the parties face here.[11]

Nevertheless, that offer was rejected.[12]

3. <u>Negotiated emergency regulations</u>

Finally, Plaintiffs offered a solution to Defendants where the Board of Education could pass emergency regulations preserving the parts of the correspondence and allotment program that the parties agree are not in dispute as unconstitutional. In short, Plaintiffs offered to agree to stipulated regulations in order define the "gray area" and only prohibit allotments that are clearly unconstitutional spending with private

schools (dated April 22, 2024), https://www.adn.com/politics/2024/04/22/state-of-alaska-requests-pause-in-homeschool-ruling-blocking-public-funds-at-private-schools/.

[10] Affidavit of Scott Kendall at ¶ 6.

[11] *Id.*

[12] *Id.*

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educational institutions. Since the Board of Education next meets June 4-6, it could pass such emergency regulations with time to spare before Plaintiffs' proposed stay would expire.[13]

It is important to note that the solution of emergency regulations is not simply some idea floated solely by Plaintiffs, the Anchorage School Board—representing the largest district in the state—passed a rare *unanimous* resolution imploring the Board of Education to "meet as soon as possible and . . . promulgate regulations that provide for *constitutional* correspondence study programs for the 2024-2025 school year and beyond."[14]

Plaintiffs' counsel went so far as to draft proposed emergency regulations[15] that accomplish exactly this—they allow allotment spending for proper educational purposes to continue while prohibiting spending with "private and religious educational institutions" as required by the Alaska Constitution and the holding in *Sheldon Jackson*.[16] Plaintiffs' counsel researched and confirmed that valid statutes exist to support and authorize the Board to adopt such regulations.[17] Plaintiffs' counsel transmitted these draft compromise regulations to counsel for Defendants and offered to agree not to dispute their passage, or the passage of similar regulations.[18] That offer, too, was rejected.

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[13] *See* Board Meeting Schedule and Information Packets, 2024 Schedule, https://education.alaska.gov/State_Board (last visited April 25, 2024).
[14] *See* Exhibit D to Scott Kendall Affidavit (emphasis added).
[15] Scott Kendall Affidavit at ¶¶ 7-9; Exhibit B to same.
[16] 599 P.2d 127.
[17] Scott Kendall Affidavit at ¶ 8; Exhibit B to same.
[18] Scott Kendall Affidavit at ¶¶ 8-9; Exhibits A and B to same.

Unfortunately, Defendants have disingenuously rejected all three available options to resolve the issues justifying their request for an indefinite stay. Defendants seem bound and determined to manufacture a crisis, by ignoring all other viable solutions, to justify the relief they seek. It is noteworthy that the only substantive difference between their preferred course—an indefinite stay—and these other solutions, is that the other remedies will not allow the clearly unconstitutional spending at the core of this case: the brazen and illegal payment of public funds to private schools.

This Court should not reward the Defendants' bad faith arguments.

VI. THE LEGISLATURE'S OWN COUNSEL AGREES THAT DEFENDANTS' INTERPRETATION IS INCORRECT, AND THAT BOTH REGULATORY AND LEGISLATIVE FIXES ARE AVAILABLE.

On April 23, 2024, Legislative Counsel issued a memorandum of law regarding the status of correspondence study programs following the Order.[19] This well-reasoned memorandum made three primary conclusions, all of which demonstrate the falsity of Defendants' flawed interpretation:

- The memo concludes that "the ruling only struck down student allotments, the correspondence study program continues to exist following the ruling."[20]

- The memo concludes that the State Board of Education could solve the issues through emergency regulations exactly like those offered by Plaintiffs: "Nothing currently precludes the state board from enacting regulations governing correspondence study programs, including … regulations that require an individual learning plan for each student enrolled

[19] Scott Kendall Affidavit at ¶ 10; Exhibit C to same.
[20] Exhibit C at 3.

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in a correspondence study program and that allow for allotments. **The regulations, however, may not permit use of public funds for the direct benefit of private or religious education institutions**."[21]

- Finally, the memo concludes that such regulations could be implemented by the Board of Education via an emergency order under AS 44.62.250-.260.[22]

The fact that the legislative counsel, who have had less than two weeks to review the issues could come up with these solutions, and yet Defendants somehow could not, demonstrates the disingenuousness of their position. The only consistency to Defendants' position is that they will oppose any solution that halts the most clearly unconstitutional result of the stricken statutes—the unlawful reimbursement of private school tuition with public education funds.

VII. CONCLUSION

There is no remedy for the public or Plaintiffs if this Court grants Defendants' request for an indefinite stay. Unconstitutional spending will continue to occur, it will harm Plaintiffs and the public at large, and there exists no remedy to reclaim those misspent funds in the likely event the Alaska Supreme Court affirms this Court's well-reasoned Order. This Court should protect *all* the parties by denying the Defendants' Motion for an Indefinite Stay and granting Plaintiffs' Motion for a Limited Stay through the end of the fiscal year. This is the only remedy that will both protect students, families, and school districts from undue disruption while also preventing the broad, and

[21] Exhibit C at 3 (emphasis added).
[22] *Id.* at 3-4.

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irreparable, harm of continued unconstitutional spending. This remedy also provides Defendants with ample time to pursue any of the solutions discussed herein in advance of the next school year.

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DATED: April 25, 2024

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CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing was served via email on April 25, 2024, on the following:

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