IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

EDWARD ALEXANDER; JOSH ANDREWS; SHELBY BECK ANDREWS; and CAREY CARPENTER,

Plaintiffs,

v.

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

Defendant,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON.

Intervenors.

Case Number: 3AN-23-04309CI

ORDER RE: STAY OF COURT'S APRIL 12, 2024 ORDER

On April 12, 2024, this Court issued its Order Denying Defendant's Motion to Dismiss and Granting Plaintiffs' Motion for Summary Judgment. In that order this Court found the statutes expanding the correspondence allotment program, AS 14.03.300-.310, unconstitutional.[1] Subsequently, Plaintiffs filed a Motion for Limited Stay on April 15, 2024 requesting a stay of the Order until the end of the current fiscal year on June 30, 2024 to allow "the Alaska Legislature to craft constitutional replacement language and/or for the

[1] Order Denying Defendant's Motion to Dismiss and Granting Plaintiffs' Motion for Summary Judgment at 32 (April 12, 2024) (hereinafter "Order").

Intervenors and Defendants to seek emergency relief from the Alaska Supreme Court."[2] On April 17, 2024, the Anchorage School District ("ASD") filed a Motion for Leave to File Amicus Brief supporting a stay of the effective date of the judgment until June 30, 2024.

The State filed its Response to Plaintiffs' Motion for Limited Stay and Cross-Motion for Stay Pending Appeal on April 22, 2024. In its Cross-Motion for Stay Pending Appeal, the State requested "a stay pending the outcome of an Alaska Supreme Court appeal."[3] On April 25, 2024, Plaintiffs filed their Opposition to Defendants' Cross-Motion for Stay Pending Appeal and Reply in Support of Plaintiffs' Motion for Limited Stay. Intervenors filed their Response to Cross Motions for Stay on April 26, 2024.[4] The Court agreed to an expedited briefing schedule on April 23, 2024.

For the reasons discussed below, the Plaintiffs' Motion for Limited Stay is **GRANTED**.

Legal Standard

Superior Courts have "discretion to grant a stay concerning a non-monetary judgment."[5] Under the Alaska Rules of Appellate Procedure, litigants must first seek a stay from the trial court before seeking a stay from the Alaska Supreme Court.[6] The court's

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[2] Plaintiffs' Motion for Limited Stay at 4 (April 15, 2024).
[3] State's Response to Plaintiffs' Motion for Limited Stay and Cross-Motion for Stay Pending Appeal at 1 (April 22, 2024) (hereinafter "State's Motion for Stay").
[4] Additionally, Intervenors requested oral argument on the cross motions for stay. As they acknowledge, oral argument is not mandatory in this instance and the Court therefore denies the request as oral argument is not needed.
[5] *Keane v. Local Boundary Comm'n,* 893 P.2d 1239, 1249 (Alaska 1995).
[6] Alaska R. App. P. 205.

discretion is "guided by 'the public interest,'"[7] and the standard for granting a stay resembles the standard for granting a preliminary injunction.[8] A stay pending appeal may be granted if the moving party meets "either the balance of hardships test or the probable success on the merits standard."[9] Where only the party seeking the stay faces irreparable harm, "it will ordinarily be enough that the [party] raised questions goin[g] to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."[10]

But if the party seeking a stay "does not stand to suffer irreparable harm, or where the party against whom the [stay] is sought will suffer injury if the [stay] is issued," the party seeking the stay must show "probable success on the merits."[11] For the "probable success on the merits" standard, courts are directed to apply "the heightened standard of a 'clear showing of probable success on the merits.'"[12]

Discussion

As the State notes, the parties are in agreement that a stay is appropriate in this case, only the length of such stay is at issue.[13] Plaintiffs request a stay until the end of the fiscal year (June 30, 2024), noting "[i]t is unconventional for prevailing parties to seek a stay of ruling in which they prevailed . . . [but] Plaintiffs do not wish to cause any undue

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[7] *Keane*, 893 P.2d at 1249.
[8] *See id.* (holding that the test presented in *A.J. Industries, Inc.* v. *Alaska Public Service Commission,* 470 P.2d 537 (Alaska 1970), applies).
[9] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).
[10] *A.J. Indus.*, 470 P.2d at 540.
[11] *Id.*
[12] *State v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).
[13] State's Motion for Stay at 1.

hardship or disruption resulting from the timing of the Order."[14] The State "requests a stay pending the outcome of an Alaska Supreme Court appeal" in order "[to] allow the Alaska Supreme Court to have the last word before Alaska's correspondence school programs are upended and the educations of thousands of Alaska students are irreparably disrupted."[15] Each argument is addressed in turn below.

I. A limited stay through the end of the fiscal year protects all parties.

A court may, "in the exercise of its jurisdiction and as part of its traditional equipment for the administration of justice, stay the enforcement of a judgment pending the outcome of an appeal."[16] A stay effectively preserves the status quo while an appeal is decided. The heightened "probable success on the merits" standard applies here since as detailed above, Plaintiffs credibly argue that they will suffer injury if an indefinite stay pending appeal is granted.

a. Harms

When deciding whether or not to grant a stay, courts consider the harms the parties face.[17] In order to consider the harms presented to each party, the Court must assume that party will ultimately prevail on appeal. That is to say the Court will assume the plaintiff will prevail when assessing the harm to the plaintiff and likewise assume the defendant will prevail when assessing the harm to the defendant.[18]

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[14] Plaintiffs' Motion for Limited Stay at 2.
[15] State's Motion for Stay at 1-2.
[16] *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1975) (internal quotations omitted).
[17] *See id.*
[18] *See Alsworth*, 323 P.3d at 54 ("[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 ultimately will prevail when assessing the harm to the defendant from the injunction.").

Plaintiffs argue that "[t]he public cannot be adequately protected from an indefinite stay of this Court's decision."[19] Further, they contend "[t]here is no remedy—and Defendants offer no remedy—if such unlawful spending of limited public funds continues to occur . . . [and] [u]nder the Defendants' proposal, such spending would occur for at least the next school year, if not into the following school year."[20] The State argues that "the State and intervenor-defendants[21] (along with many non-parties) face clear irreparable harms absent a stay, whereas the plaintiffs' harms are 'relatively slight in comparison.'"[22] To that end, it contends that "[i]f correspondence programs suddenly evaporate, thousands of students will have to change their plans."[23] Additionally, the State maintains that [w]rongfully removing that educational option—even temporarily—irreparably harms both the State's education system and the children within it."[24]

As an initial matter, the State mischaracterizes and misreads this Court's April 12th Order. To reiterate, the only statutes at issue in this case are AS 14.03.300-.310, which expanded the allotment program for correspondence study students. As a result, this Court did not find that correspondence study programs were unconstitutional. Correspondence (homeschooling) programs existed before AS 14.03.300-.310 were enacted, and correspondence programs continue to exist after this Court's Order. The

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[19] Plaintiffs' Opposition to Defendants' Cross-Motion for Stay Pending Appeal and Reply in Support of Plaintiffs' Motion for Limited Stay at 5 (April 25, 2024) (hereinafter "Plaintiffs' Opposition and Reply").
[20] *Id.*
[21] "Intervenors agree with the State's analysis of the irreparable harm to families, school districts, and businesses that will occur absent a stay." Intervenors' Response to Cross Motions for Stay at 2 (April 26, 2024).
[22] State's Motion for Stay at 6.
[23] *Id.* at 7.
[24] *Id.*

legislative history of AS 14.03.300-.310[25] and prior statutes and regulations support this conclusion.[26]

Here, this Court agrees that "[m]any school districts, parents, and students have engaged in their educational plans in reliance on the availability of the allotment and correspondence system contained in AS 14.03.300-.310 . . . [and] upending that system with only a month left in the academic year could place a great hardship on districts and families."[27] Accordingly, this Court finds that a limited stay is the best solution to ensure that students, families, and school districts are protected from undue disruption and all parties are protected from unnecessary uncertainty and related harms. A limited stay until the end of the fiscal year will ensure that any correspondence allotments that were taken in reliance on AS 14.03.300-.310, will be honored, while minimizing the potential for future unconstitutional spending.

b. Merits

The State argues that it is able to make a "clear showing of probable success on the merits" and contends that "the Court struck down AS 14.03.300, the statute about individual learning plans, without any explanation of why individual learning plans (which need not entail allotments at all) are unconstitutional."[28] Further, the State argues "the Court's reasoning about allotments would invalidate a broad swath of public-school

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[25] *See* Order at 17-20 (discussing the legislative history of AS 14.03.300-.310).
[26] *See* Plaintiffs' Exhibit C at 3; *see e.g.*, AS 14.03.095(a); AS 14.07.050; AS 14.08.111(9); AS 14.14.090(7); 14.14.120; AS 14.17.410(b)(1)(D); AS 14.17.500(c); AS 14.30.010(b)(10); AS 14.30.186(a)(5); AS 14.30.365(c)(1); AS 14.45.150(c)(1); AS 14.56.365(a)(1); and AS 14.56.370(a); *see also* regulatory history for 4 AAC 33.405 – 4AAC 33.490.
[27] Plaintiffs' Motion for Stay at 2.
[28] State's Motion for Stay at 10.

spending on things like textbooks and computers that must be purchased from private entities."[29] As a result, the State maintains that "[e]ven if the Supreme Court does not reverse this Court entirely, it will surely answer crucial questions that are necessary to allow the legislature to fix the correspondence school program and to ensure that public schools can continue to purchase from private businesses."[30]

Once again, the State mischaracterizes this Court's previous Order. The only statutes at issue in this case concern the correspondence allotment program; as a result, this Court's Order finding those statutes unconstitutional only affects those statutes—AS 14.03.300-.310. As the Plaintiffs note, "[t]he Order clearly lays out that the purpose and effect of AS 14.03.310 was to allow unconstitutional spending . . . [and] AS 14.03.300(b) specifically prohibits DEED from employing any narrowing construction."[31] As a result, "together, that overbreadth of authorized expenditures and the ban on narrowing is what invalidated both statutes."[32] To reiterate, it is not the Court's role to draft legislation and determine policy for the state through impermissibly revising otherwise unconstitutional statutes.[33] Since this Court found no indication that the legislature intended AS 14.03.300, which contains the provision concerning individual learning plans, to stand alone without the other related provisions of AS 14.03.310, it found AS 14.03.300-.310 to be

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[29] *Id.*
[30] *Id.* at 10-11.
[31] Plaintiffs' Opposition and Reply at 4
[32] *Id.*
[33] *See* Order at 32-33 ("Severing the portions of AS 14.03.310 dealing with private and religious organizations coupled with severing the provision preventing DEED from setting any limits on allotment spending would not be enough to save the remainder of AS 14.03.300-.310. This Court echoes the State's concerns regarding how organizations are characterized and the "gray area spending," and finds that it is not possible to sever certain provisions to create a reasonable narrowing construction.").

unconstitutional in their entirety.[34]

Plaintiffs argue that "[t]he plain text of AS 14.03.300 and .310-as well as all relevant legislative history—drove this case to its inevitable conclusion."[35] Additionally, Plaintiffs contend that "[t]hose statutes had an unconstitutional aim and effect, and they fall squarely within the Alaska Supreme Court's ruling in *Sheldon Jackson College v. State*."[36] This Court agrees. Put plainly, the State has not shown a likelihood of prevailing on the merits on appeal.

c. Public Interest

As all parties agree, it is in the interest of students, parents, and school districts to ensure that any current correspondence allotments that were taken in reliance on the correspondence allotment program should be honored.[37] Accordingly, this Court finds that a limited stay is the best solution to ensure that students, families, and school districts are protected from undue disruption and all parties are protected from unnecessary uncertainty and related harms. A limited stay until the end of the fiscal year will ensure that any correspondence allotments that were taken in reliance on AS 14.03.300-.310, will be honored, while minimizing the potential for continued unfettered unconstitutional

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[34] A similar severability issue was addressed by the Alaska Supreme Court in *Forrer v. State*, 471 P.3d 569, 598 (2020). In that case, the Supreme Court determined that the legislative history of the statute at issue contained "no indication. . . that either the [bill sponsor] or the legislature ever intended the other portions of [the statute] to be stand-alone provisions." *Id.* That fact coupled with the fact that the State did not argue for severability, was central to the Court's reasoning that the statute at issue should be found unconstitutional in its entirety. *Id.*

[35] Plaintiffs' Opposition and Reply at 7.

[36] *Id.* at 7-8.

[37] Amicus Brief of Anchorage School District in Support of Stay of Effective Date of Judgment at 3 (April 17, 2024) ("ASD should not have to risk making unlawful payments, and families should not be left shouldering the costs for educational expenses they incurred in good faith under the status quo before this Court's ruling.").

spending.

Conclusion

For the foregoing reasons, Plaintiffs' Motion for Limited Stay is **GRANTED.** The effect of this Court's Order Denying Defendant's Motion to Dismiss and Granting Plaintiffs' Motion for Summary Judgment dated April 12, 2024 is stayed until the end of the State of Alaska's current fiscal year on June 30, 2024 at midnight.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 2nd day of May, 2024.

ADOLF V. ZEMAN
Superior Court Judge

I certify that on the 2nd of May 2024, a copy was mailed/emailed to:

L. Sherman; S. Kendall; M. Paton-Walsh; K. West; C. Richards; J. Rowes; D. Hodges

Caroline Randive, Law Clerk