anc.law.ecf@alaska.gov

EMERGENCY

IN THE SUPREME COURT OF THE STATE OF ALASKA

Commissioner Deena M. Bishop, in her official capacity, State of Alaska, Department of Education & Early Development, Appellant, v. Edward Alexander; Josh Andrews; Shelby Beck Andrews; and Carey Carpenter; Appellees. v. Andrea Moceri, Theresa Brooks, and Brandy Pennington; Intervenor-Appellants.	)	Supreme Court No.: **S-19083**

Trial Court Case No.: **3AN-23-04309 CI**

EMERGENCY MOTION FOR STAY PENDING APPEAL

Deena M. Bishop, in her official capacity as the Commissioner of the State of Alaska, Department of Education and Early Development ("the State") moves this Court to stay the trial court's decision pending appeal. **A decision on the motion for stay is requested as soon as possible, but no later than June 30**. This Court should have the opportunity to review and reverse the trial court's plainly incorrect decision—which struck down two ten-year-old statutes—before Alaska's public correspondence school programs are upended and the public education of thousands of Alaskan students are irreparably disrupted. The State previously requested a stay pending

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

appeal from the trial court, which instead issued a stay only through June 30.[1]

I. Contact information of counsel and efforts to notify counsel

As required by Appellate Rule 504(c) for emergency motions, the telephone numbers and office addresses of counsel are as follows:

Margaret Paton Walsh
Alaska Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5275
margaret.paton-walsh@alaska.gov
Counsel for Commissioner Deena M. Bishop, in her official capacity, State of Alaska, Department of Education & Early Development

Scott Kendall
Lauren Sherman
Cashion Gilmore & Lindemuth
510 L Street, Suite 601
Anchorage, AK 99501
(907) 222-7932
scott@cashiongilmore.com
lauren@cashiongilmore.com
Counsel for Edward Alexander, Josh Andrews, Shelby Beck Andrews, and Carey Carpenter

Craig Richards
Law Offices of Craig Richards
810 N. Street, Ste. 100
Anchorage, Alaska 99501
(907) 306-9878
crichards@alaskaprofessionalservices.com
Counsel for Andrea Moceri, Theresa Brooks, and Brandy Pennington

David Hodges
Kirby West
Institute For Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203

[1] Appx. A (Order Re: Stay of Court's April 12, 2024 Order).

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

(703) 682-9320
dhodges@ij.org
kwest@ij.org
Counsel for Andrea Moceri, Theresa Brooks, and Brandy Pennington

Counsel for the other parties were notified by email about this upcoming emergency motion on May 6, 2024.

II. Background

A. Public correspondence school programs have long been a public educational option in Alaska.

Correspondence schools have long been a fixture in Alaska, recognized by the framers as one of several ways to deliver public education to Alaska's children.[2] Local school districts have operated public correspondence schools in Alaska for over 30 years.[3] In them, students are educated outside of traditional brick-and-mortar public schools, generally instructed by their parents.[4] As part of the public school system, correspondence schools are publicly funded[5] and subject to DEED's general oversight,[6] and their students are held to state educational standards.[7]

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

2 *See Hootch v. Alaska State-Operated Sch. Sys*., 536 P.2d 793, 803 (Alaska 1975) (the framers of Alaska Constitution's education clause envisioned "different types of educational opportunities including boarding, correspondence and other programs…"); 2 Proceedings of the Alaska Constitutional Convention 1525 (January 9, 1956) (Delegate Coghill on correspondence schools in the Territory of Alaska).

3 2005 Inf. Op. Att'y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *1.

4 *See* 4 AAC 09.990(a)(3); 4 AAC 33.490(17).

5 AS 14.17.430.

6 AS 14.07.020(a)(9); 4 AAC 33.420; 4 AAC 33.460.

7 AS 14.03.300(a) (requiring an individual learning plan and monitoring by a certificated teacher); 4 AAC 33.421(b) (requiring strategies to help students meet statewide standards); 4 AAC 33.426 (requiring enrollment in core courses).

Ten years ago, in 2014, the legislature enacted AS 14.03.300-.310, the statutes at issue here, to codify and amend public correspondence school practices that previously existed on the ground and in regulation, but with few governing statutes. Before 2014, statutes referred to correspondence schools either in passing, for example by recognizing the existence of correspondence school students,[8] or only in very general terms, for example by providing that DEED shall "exercise general supervision over elementary and secondary correspondence programs."[9] The only reference to correspondence school funding was found in AS 14.17.430, which funded each correspondence program at 80 percent of the funding for brick-and-mortar public schools.[10] This funding went to school districts. No statute explicitly authorized school districts to distribute correspondence school allotments to students or their parents.

Instead, public correspondence students received funding under a regulation, 4 AAC 33.422, which authorized programs to "provide a fund account to the student's parents for the purpose of meeting instructional expenses for the student enrolled in the program."[11] A separate regulation—4 AAC 33.421—provided for individual

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

[8] *See e.g.*, AS 14.03.095(a) (allowing "a child, including a child who…is a correspondence school student…to enroll as a part time student in the district.");

[9] AS 14.07.020(9).

[10] AS 14.17.430 stated: "Except as provided in AS 14.17.400(b), funding for the state centralized correspondence study program or a district correspondence program, including a district that offers a statewide correspondence study program, includes an allocation from the public education fund in an amount calculated by multiplying the ADM of the correspondence program by 80 percent." (2013 version). The statute was amended in 2014 to increase the multiplier to 90 percent. § 25 ch. 15 SLA 2014.

[11] 4 AAC 33.422 (2013 version).

learning plans for correspondence school students, and also imposed restrictions on the use of funds by correspondence school programs and parents.[12] In addition to a list of prohibited items—for example, family travel, clothing, furniture, services provided by family members, and the like—4 AAC 33.421(h) provided that:

> A correspondence study program, or a parent through a fund account under 4 AAC 33.422, may contract with a private individual to provide tutoring to a student in a subject described in 4 AAC 04.140, fine arts, music, or physical education, if
>
> (1) the instruction is not provided by a private or sectarian educational institution;
>
> (2) the instruction is part of the student's individual learning plan under (d) of this section; and
>
> (3) a certificated teacher who is highly qualified under 4 AAC 04.210 to teach the subject or the grade level, if applicable, and who is employed by the program, has the primary responsibility to plan, instruct, and evaluate the learning of the student in the subject.

In 2014, the legislature amended the regulatory scheme governing correspondence schools and enshrined it in statute, providing explicit statutory authorization for correspondence student allotments, broadening the range of educational services and materials that could be purchased with those allotments, and limiting DEED's ability to impose additional extra-statutory conditions on students who were succeeding in a correspondence program.[13] These statutes have governed the public correspondence school program for the last decade. In 2022, the Department

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

12 *See* 4 AAC 33.421(d) (2013 version).

13 *See* AS 14.03.300 and .310.

of Law issued an attorney general opinion examining correspondence student allotments, concluding that using allotments to purchase materials or services from a private vendor is not facially unconstitutional.[14]

B. School districts allow public correspondence student allotment spending on a wide range of educational services and materials.

The current statutes authorize either DEED[15] or local districts to operate public correspondence schools,[16] but all currently existing programs are run by local school districts.[17] Where a district operates a correspondence school program, the district is responsible for providing annual individual learning plans for each enrolled student,[18] which DEED has only limited authority to modify.[19] The district also determines graduation requirements[20] and whether to provide student allotments.[21]

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

14 State of Alaska, Dep't of Law, Op. Att'y Gen. No. 2021200228 (July 25, 2022), *available at* https://law.alaska.gov/pdf/opinions/opinions_2022/22-002_2021200228.pdf.

15 AS 14.07.020(a)(9).

16 AS 14.03.300–.310.

17 Currently, DEED does not operate any correspondence programs and repealed the regulations for a state-run correspondence school in 2004. The current correspondence school regulations only apply to "correspondence study programs offered by a school district." 4 AAC 33.405.

18 AS 14.03.300(a); 4 AAC 33.421; *see, e.g.,* Anchorage School District BP 6182 (2021) (correspondence study programs).

19 AS 14.03.300(b).

20 *See, generally,* 4 AAC 06.075 (those requirements must meet or exceed DEED's minimum requirements).

21 AS 14.03.310(a); 4 AAC 33.422.

Alaska Statute 14.03.310 authorizes a district with a public correspondence program to "provide an annual student allotment to a parent or guardian of a student enrolled in the correspondence study program for the purpose of meeting instructional expenses for the student." The family may use the allotment to "purchase nonsectarian services and materials from a public, private, or religious organization," provided the purchase meets certain criteria, including being approved by the district, aligned with state standards, and not partisan or sectarian.[22] When a child leaves the program, non-consumable materials or unspent funds must be returned.[23]

Below, the State used one of the larger correspondence programs—Mat-Su Central—as an example to show the wide range of things student allotments can be spent on.[24] Mat-Su Central's website lists approved curricula from more than 200 different sources, including organizations as diverse as GO Math, operated by publisher Houghton Mifflin Harcourt, and Razzle Dazzle Creative Writing, a teacher's business selling creative writing lessons.[25] The website also lists over 300 community instructional partners and vendors covering the subjects of art, health, language arts, math, music, science, social studies, technology, and more.[26] Sixteen vendors are

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

22 AS 14.03.310(b).

23 4 AAC 33.422(b); AS 14.03.310(d)(2).

24 Appx. B (Affidavit of Kyle Emili and attachments).

25 *Id*. at ¶ 2-6, Ex. A-D; https://www.matsucentral.org/resources/curricula.

26 *See id*.

public entities, and the rest are private organizations.[27] These private organizations include businesses like the Alaska Center for the Martial Arts, Aurora's Cakery and Bakery, Frontier Tutoring, and Sonja's Studio of Performing Arts.[28] Each offers classes or tutors for use as part of an individual learning plan.

C. Alexander sued DEED and the superior court struck down AS 14.03.300-.310 as facially unconstitutional.

In January 2023, four parents (collectively, "Alexander") sued DEED's acting commissioner, claiming that "Alaska Statute 14.03.300-.310, which allows for the payment of educational materials and services provided by private institutions using public funds, is unconstitutional"[29] under Article VII, Section 1 of the Alaska Constitution, which says:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

As relief, the complaint requested "[a]n order declaring AS 14.03.300-.310 is unconstitutional" and "[a]n order enjoining any current or future use of public funds to reimburse payments to private educational institutions pursuant to AS 14.03.300-.310." Three other parents intervened in defense of the challenged laws.

DEED initially filed a motion to dismiss the facial constitutional challenge. To

---

27 *Id.* at ¶ 7, Ex. E, also available at https://www.matsucentral.org/learning/cip.

28 *Id.* at ¶ 8-12, Ex. F-J.

29 Appx. C (Complaint) at ¶ 57.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

support its position that AS 14.03.300-.310 have a "plainly legitimate sweep" and are thus facially constitutional, DEED pointed to the many private vendors selling materials and services to correspondence students who could not reasonably be called "educational institutions" triggering the restrictions of Article VII, Section 1. DEED noted in particular that the constitutional provision references "religious or other private educational institution[s]," whereas AS 14.03.310 more broadly references "public, private, or religious organization[s]." Alexander opposed dismissal and cross-moved for summary judgment, and DEED cross-moved for summary judgment.[30]

On Friday, April 12, 2024, the trial court issued an order granting summary judgment to Alexander.[31] Alexander moved the trial court to stay the effect of the judgment in their favor until the end of the state fiscal year on June 30, 2024. The State responded with a cross-motion asking the trial court instead to stay the effect of its ruling until this Court decides its appeal. The trial court granted only Alexander's requested stay through June 30, declining to issue a stay pending appeal.[32]

III. Argument

When considering whether to grant a stay pending appeal, a court applies an analysis similar to that for a preliminary injunction,[33] which considers the harms the

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

30 Appx. D (DEED's Reply, Opposition, and Cross-Motion for Summary Judgment).

31 Appx. E (Order Denying Defendant's Motion to Dismiss and Granting Plaintiffs' Motion for Summary Judgment).

32 Appx. A.

33 *See Powell*, 536 P.2d at 1229.

parties face.[34] For purposes of assessing a party's harm the Court must assume that party will ultimately prevail—i.e., assume the plaintiff will prevail when assessing the harm to the plaintiff, and assume the defendant will prevail when assessing the converse.[35] If the moving party faces "irreparable harm" and the non-moving party can be adequately protected, the moving party "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'"[36] Adequate protection exists where the injury that results from the stay "is relatively slight in comparison to the injury which the person seeking the [stay] will suffer if the [stay] is not granted."[37] If the moving party's threatened harm is not irreparable or the opposing party cannot be adequately protected, the Court requires the heightened showing of a "clear showing of probable success on the merits."[38] The Court may also consider the public interest in its analysis.[39]

Under these standards, a stay pending appeal is clearly warranted here. As discussed below, DEED and Alaska public correspondence school students face

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

34 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

35 *See Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) ("[A] court is to assume the plaintiff ultimately will 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.").

36 *Metcalfe*, 110 P.3d at 978.

37 *Id.* at 978–79.

38 *Id.*

39 *State v. Galvin*, 491 P.3d 325, 339 (Alaska 2021) (discussing how the public interest is implicitly considered in the preliminary injunction analysis).

substantial irreparable harm, while the harm to Alexander is comparatively slight. DEED therefore must show only serious and substantial questions on the merits, a standard which is far surpassed here. Indeed, DEED plainly satisfies even the heightened merits standard, as the lower court's order fundamentally misunderstood the difference between facial and as-applied constitutional challenges to statutes and threatens to drastically alter how courts approach such constitutional cases.

A. The State and tens of thousands of students face irreparable harm if the trial court's decision erroneously goes into effect.

Here, the State and intervenors (along with many non-parties) face clear irreparable harms if the trial court's decision (which must be assumed erroneous for this purpose)[40] is allowed to take effect before this Court rules on appeal.

The trial court struck down AS 14.03.300-.310 as facially unconstitutional, leaving no laws in place to govern public correspondence school programs if the order goes into effect. In denying a longer stay, the trial court said that the State misreads its order; it declared that correspondence programs "existed before AS 14.03.300-.310 were enacted" and "continue to exist after" the court's order. But although other statutes refer to correspondence programs,[41] AS 14.03.300-.310 are the only statutes actually governing their operation. With them invalidated, the State and school districts are left with no statutes that expressly govern correspondence programs. The court did not just enjoin certain types of student allotment spending—it struck the two

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

40 *See Alsworth*, 323 P.3d at 54.

41 *See, e.g.*, AS 14.17.430.

statutes from the books entirely. The State is irreparably harmed if prevented from having these statutes govern Alaska's correspondence programs.[42]

Alexander has suggested that the State could avoid harm by allowing correspondence programs to continue under emergency DEED regulations or last-minute legislation that could be crafted to enshrine the practices that predated the 2014 enactment of AS 14.03.300-.310—practices the trial court apparently considers constitutionally unproblematic.[43] But although the State will surely pursue such alternatives if necessary to try to limit the harm to Alaskan students and families, those are not ways to *avoid* irreparable harm—only ways to contain the scope of the harm. The harm of unnecessarily scrambling to get new legislation or emergency regulations passed to try to comply with an erroneous (and confusing) trial court decision is irreparable. And the harm of unnecessarily changing the rules governing correspondence programs only to have them change back again after an appellate decision is similarly irreparable.

The trial court order likewise imposes additional irreparable harms on public correspondence school children and their families. Over 22,000 Alaskan children are currently enrolled in public correspondence school programs,[44] and students and

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

42 *Cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977)).

43 Appx. A at 5-8.

44 Appx. F (Goyette Aff.) at ¶ 3.

families typically make educational decisions many months ahead.[45] If correspondence programs cease to operate, change substantially, or are held in limbo as political actors rework them to try to comply with the trial court order, the plans of thousands of students will be up in the air.[46] Assuming the trial court's decision was incorrect (as one must in this context),[47] these students will be wrongfully deprived of educational options that may not be available at a later date.[48]

Viable alternatives may be difficult to find for students in remote areas, especially those with particular needs or specific course requirements for graduation.[49] This Court has recognized the unique needs of children living in remote regions of our large state and the importance of diverse options such as correspondence schools.[50] Because correspondence school classes can count towards graduation requirements, some students' plans to meet their graduation requirements and get their diplomas will be disrupted.[51] Eliminating the correspondence option would disproportionally impact

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

45 *Id*. at ¶ 9.

46 *See id*. at ¶ 6.

47 *See Alsworth*, 323 P.3d at 54.

48 As one example, currently enrolled correspondence students may wish to attend alternative educational programs, like the Alaska Middle College School (AMCS) through the Anchorage School District. AMCS provides high school students the opportunity to take college courses for high school and college credit. For a standard schedule, which includes up to four college courses, the application deadline is April 30. *See* Alaska Middle College School, Application Process, https://www.asdk12.org/Page/14923 (last visited May 6, 2024).

49 Appx. F at ¶ 9.

50 *See Hootch*, 536 P.2d at 803.

51 Appx. F at ¶ 10.

students living in rural Alaska who would lose access to robust course offerings not available locally.[52] Such harms cannot be undone or indemnified by a bond.

The irreparable harms absent a stay would extend not only to correspondence students and their families, but also to school districts, teachers, private businesses, and even brick-and-mortar public schools. Private businesses that sell products and services to correspondence school students would lose a source of income. School districts with correspondence schools would be faced with financial and programming uncertainty.[53] The 261 teachers tasked with creating individual education plans for correspondence students under AS 14.03.300—one of the statutes invalidated—would need to be re-assigned if possible.[54] Many correspondence students may choose to switch to brick-and-mortar public schools that have not anticipated rising enrollment in their planning and staffing decisions and may struggle to employ enough teachers to meet increased demand given the current teacher shortage.[55] This would also create budgeting challenges for school districts because under state law, state funding is sent out monthly and is based on the district's prior school year pupil counts for the first

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

52 *Id*. at ¶ 9.

53 Student count information submitted during the 2023-2024 school year is used to estimate state aid for the 2024-2025 school year. AS 14.17.500; AS 14.17.610. If the State lacks authority to distribute funding during the 2024-2025 school year to account for correspondence students enrolled during the 2023-2024 school year, affected school districts would experience a loss in expected funding.

54 Appx. F at ¶ 7. Laying off teachers at a late date could put districts in breach of statutory requirements about teacher retention. *See* AS 14.20.140.

55 *Id*. at ¶ 8.

nine months of the fiscal year.[56] Thus, not until the final three months of the fiscal year (April, May, June 2025) would districts begin to receive funding based on their increased costs of providing in-person education. Then, if the trial court is ultimately reversed, all these disruptions to the education system would occur in reverse.

B. The harm to Alexander of maintaining the status quo pending appeal is relatively slight in comparison.

By contrast, the harms Alexander faces from maintaining the status quo (by extending the stay through this appeal) are abstract and "relatively slight in comparison."[57] These statutes operated for nearly a decade before Alexander sued and any harm to Alexander will not appreciably increase if they remain in effect for the additional time this Court takes to rule on an expedited appeal.

This case is not about any direct impact of the challenged statutes on the Alexander plaintiffs or their children—instead, they sued to vindicate their interpretation of the Alaska Constitution. Their position has been that the constitution prohibits using public funds to pay for private school classes and tuition and that AS 14.03.300-.310 are unconstitutional because they allow this to happen. But even assuming Alexander is correct (as one must, for this purpose) that any student allotment spending at private schools is unconstitutional, such unlawful spending is only a *subset* of the spending authorized by AS 14.03.300-.310, as explained further below. The harm to Alexander of continuing that fraction of unconstitutional spending

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

56 *See* AS 14.17.610(a).

57 *See Metcalfe*, 110 P.3d at 979.

until this Court rules on an expedited appeal is abstract and "relatively slight in comparison"[58] to the concrete, real-world harms on the other side of the ledger.

C. The State is likely to succeed on the merits of its appeal because the trial court badly misunderstood the standard for a facial challenge.

The State's appeal will at least raise "serious and substantial questions going to the merits,"[59] which is sufficient here given the stark difference in relative harms discussed above, but even if the Court believes that a "clear showing of probable success on the merits"[60] is necessary, the State can make that showing too because the trial court's decision is fundamentally flawed in at least two major ways.

1. Individual learning plans are completely unrelated to the direct benefit prohibition in Art. VII, Section 1.

The trial court's first major error was striking down AS 14.03.300, the statute about individual learning plans, without any explanation of why individual learning plans (which need not entail student allotments at all) are unconstitutional.[61] That statute requires a school district[62] to provide "individual learning plans" for its correspondence students that meet a list of criteria, such as providing "a course of study for the appropriate grade level consistent with state and district standards." The statute does not even mention student allotments, much less spending them at private

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

58 *See id*.

59 *See id*. at 978.

60 *See id*.

61 Appx. E at 31, 32-33.

62 Or DEED, if DEED operated a correspondence study program.

schools. Because the statute is not about allotments, it simply does not trigger Alexander's concerns about improper uses of allotments. The trial court erred in lumping it together with AS 14.03.310 and striking it down unnecessarily.

2. The student allotment statute is not facially unconstitutional.

The trial court's second major error was striking down AS 14.03.310, the statute about student allotments, as *facially* unconstitutional despite the wide range of allotment spending that does not even implicate Article VII, Section 1.[63] This error stems from a failure to properly implement the standard for a *facial* (as opposed to *as-applied*) constitutional challenge, which is a particularly high bar: "A statute is facially unconstitutional if 'no set of circumstances exists under which the Act would be valid.'"[64] Although this "no set of circumstances" test is not "a rigid requirement,"[65] the Court has instructed that "even under a relaxed standard of facial review it would be improper" to declare a statute "invalid on its face if it has a 'plainly legitimate sweep.'"[66] Thus, "plaintiffs seeking facial invalidation of a law must establish at least that the law does not have a 'plainly legitimate sweep.'"[67] Put differently, if some applications of a statute are permissible while others are unconstitutional, the statute is

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

63 Appx. E at 31.

64 *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

65 *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 35 (Alaska, 2001).

66 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 n.14 (Alaska 2004).

67 *Id.* at 268; *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 104 (Alaska 2015) (quoting *Planned Parenthood of Alaska*, 171 P.3d at 581).

not *facially* unconstitutional—instead, it may be unconstitutional as applied in some circumstances[68] but should not be stricken from the books entirely.[69]

Alaska Statute 14.03.310 has a "plainly legitimate sweep"—and is thus not facially unconstitutional—because it authorizes a wide range of constitutionally unproblematic student allotment spending even assuming (for the sake of argument) that Alexander is correct that Article VII, Section 1 prohibits paying for even a single private school class with public funds. For example, Mat-Su Central's curricula and vendor lists identify dozens of approved vendors ranging from the Alaska Center for the Martial Arts and Aurora's Cakery and Bakery through Gail Moses Art Studio and

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

---

[68] *Cf. State, Dep't of Revenue, Child Support Enf't Div. v. Beans*, 965 P.2d 725, 728 (Alaska 1998) (rejecting a facial challenge to a statute permitting the State to suspend the driver's licenses of child support obligors who were delinquent—explaining that suspension would be constitutional in cases of parents who could pay child support but unconstitutional as applied to parents who were unable to pay support—and imposing this constitutional limit on the child support enforcement agency's discretion under the statute); *State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009) ("A holding of facial unconstitutionality generally means that there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution. A holding that a statute is unconstitutional as applied simply means that under the facts of the case application of the statute is unconstitutional. Under other facts, however, the same statute may be applied without violating the constitution.").

[69] *See Beans*, 965 P.2d at 728 (concluding that because "the statute need not be applied in [an unconstitutional] manner; it is not unconstitutional on its face"); *see also Treacy*, 91 P.3d at 268 ("[A]lthough the ordinance could be enforced in ways that bear no rational connection to the municipality's goals, or in ways that unduly restrict the underlying substantive rights of movement, privacy, and speech, we need not deal with such possibilities on this facial review."); *see also* AS 01.10.030 (requiring that any statute without a severability clause be construed to contain one that states "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.").

Blue River Aviation to the Bristol Bay Campus of UAF and Prince William Sound Community College.[70] None of these are "religious or other private educational institution[s]" that implicate Article VII, Section 1. Indeed, most of the vendors are private businesses—like the Alaska Rock Gym and Alyeska Resort—that cannot reasonably be considered "educational institutions" of any kind. Purchases from such vendors don't even need to be assessed under this Court's decision in *Sheldon Jackson College v. State*[71] because something that does not involve a "religious or other private educational institution" surely cannot confer a "direct benefit" on one.

The trial court misinterpreted this argument as the State "relying on an occasional constitutional use to save a plainly unconstitutional statute."[72] But that is wrong for two reasons. First, even accepting that the State had only identified "an occasional" constitutional use, the question of "plainly legitimate sweep" is not a counting exercise. That makes sense, because it would not be practicable, or consistent with judicial review or the presumption of constitutionality, for courts to have to tally up hypothetical applications to decide a *facial* challenge. "[F]acial challenges are disfavored" because they "often rest on speculation," risk interpretation "on the basis of factually barebones records," and run contrary to principles of judicial restraint.[73]

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

70 *See generally* Appx. B.

71 599 P.2d 127 (Alaska 1979).

72 Appx. E at 14.

Second, it is simply not true that the State's examples of using student allotment funds are just the "occasional constitutional use" and that most of what AS 14.03.310 authorizes is paying for private school classes. Most of the vendors on Mat-Su Central's lists are private *businesses*, not "educational institutions" (though the trial court resisted this distinction and failed to define the term "educational institution"). Just as brick-and-mortar public schools must purchase goods and services from private businesses (because they cannot simply produce their own textbooks or fabricate their own pencils and computers), so too must public correspondence school families. Such run-of-the-mill educational spending is the "plainly legitimate sweep" of AS 14.03.310 even assuming Alexander is correct that any spending of allotment funds on private school classes is unconstitutional.

The trial court appeared to underappreciate the breadth of this sweep because of another error. The constitution prohibits spending public funds only for the direct benefit of any "religious or other private educational institution," but AS 14.03.310 permits the use of funds at the much broader category of ""public, private, or religious organization[s]." The trial court held that the words "institution" and "organization" are synonymous.[74] But that misses the point. The contrast is between an "*educational* institution" and an "organization." The Constitution's language plainly refers more narrowly to entities that are akin to schools, while the statute sweeps in all manner of businesses and non-profits that may not have any "educational" purpose.

[74] Appx. E at 19-20 & fn. 95.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

Perhaps recognizing these fundamental mistakes, Alexander and the trial court attempted to rewrite the trial court's merits order in the stay proceedings below. They seem to contend that striking down AS 14.03.310 does not invalidate the wide range of uncontroversial spending permitted under the statute (which they appear to acknowledge as legitimate), but rather simply invalidates any *additional* spending that the statute allowed beyond what occurred under the regulations that predated it, slotting the earlier system back into place.[75] But that is what an as-applied challenge targeting only certain applications of AS 14.03.310 (like spending at private schools) might have done. Here, by ruling the statute *facially invalid*, the trial court held that every kind of allotment spending authorized by its statutory language—"may purchase…services and materials from a…private…organization"—violates the constitution. That includes the allotment spending with private vendors that happened before 2014 under the old regulation. The trial court's back-pedaling only highlights its misunderstanding of how facial challenges work. Striking down AS 14.03.310 entirely is improper under the standard for a facial constitutional challenge and does not have the limited, targeted effect that Alexander and the trial court seem to assume.

For these reasons and others, the State has a clear likelihood of success on the merits of its appeal of the trial court's erroneous order.

D. The public interest favors a stay pending appeal.

Finally, the public interest strongly favors a stay pending appeal given the

---

[75] Appx. A at 5.

harms involved. The superior court's limited stay until June 30 does nothing to resolve the uncertainty hanging over correspondence schools as a result of the court's order, because the limited stay will almost certainly expire before the legislature can act. And any legislative action that does occur may be rendered obsolete when this Court later rules on this appeal. A generation of Alaskan students has already had their educations interrupted by the COVID-19 pandemic. The more than 22,000 students in correspondence schools should not be further boomeranged back and forth by litigation. The public interest favors not disrupting their educational plans unless and until this Court has held that such disruption is constitutionally required.

IV. Conclusion

For these reasons, the Court should grant a stay pending appeal.

Dated: May 6, 2024.

TREG R. TAYLOR
ATTORNEY GENERAL

By: */s/ Margaret Paton Walsh*
Margaret Paton Walsh
Assistant Attorney General
Alaska Bar No. 0411074

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100