

LEGAL SERVICES

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MEMORANDUM

December 1, 2010

SUBJECT: Education Vouchers as Scholarships
(Work Order No. 27-LS0223\A)

TO: Representative Wes Keller
Attn: Jim Pound

FROM: Jean M. Mischel
Legislative Counsel

I have enclosed a draft version of an education voucher system based generally on the material provided, accommodating your desire to avoid a significant rewrite of the current funding system for public education and to base the draft on the "mission statement" rather than the model legislation provided. I tried to condense the proposal to that end but received no specific staff direction in doing so. The time allotted in your request does not allow for rewrites.

Although this proposal is unlike your previous education voucher request this session in that this draft attempts to provide vouchers as scholarships for use at both public and private schools, it is my opinion that the draft will not survive Alaska's express constitutional prohibition against providing public funds for the benefit of a private school under article VII, section 1. That section provides, in part:

No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The Alaska Supreme Court has interpreted that section to mean that a tuition assistance program awarding students attending private colleges an amount equal to the difference between public and private college tuition is unconstitutional. Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979).

Sheldon Jackson is directly relevant to the proposed scholarship system. In that case, the Court established a three part test for determining the validity of public programs that provide economic benefit to private schools. First, the Court looks at the breadth of the class to which the economic benefits are directed. Second, the Court looks at how the public money is to be used; i.e., whether the benefit to the private school is incidental to education (as with fire and police protection) or whether it amounts to direct aid to education (as with tuition and books). Third, the Court looks at the magnitude of the benefit to private education. Significantly, the Court noted that channeling funds to a

private school through an intermediary (such as the student or parent) will not save an otherwise unconstitutional program providing aid to private schools.

In the Sheldon Jackson case, the Court struck down the state's tuition assistance program as violative of all three parts of the test. The class which the tuition assistance program benefitted consisted almost entirely of private schools, the funds were to be used directly for educational purposes (tuition), the benefit conferred on these schools was quite substantial, and the fact that the money was actually paid directly to the students, not the schools, did not mitigate the fact that the students were required to turn the money directly over to the private schools.

The proposed "scholarship" system (which appears to be a voucher system) suffers some of the same infirmities as the tuition assistance program did despite the inclusion of public schools. The money would go to private schools or public schools for the cost of education and facilities. A large part of the class benefitted would be private schools since the public schools currently receive public funding.

The second part of the test would also be violated because the vouchers would be used as a direct benefit to private education rather than an incidental benefit.

The third part of the test, the magnitude of the benefit, also presents a problem. The vouchers are to cover the entire cost of tuition or the cost of tuition plus the facilities spending. Obviously, the benefit to private schools would be substantial and, consequently, unconstitutional.

The proposed scholarship system is also potentially in violation of the "establishment" and "freedom of religion" clauses of article I, section 4 of the Constitution of the State of Alaska. I am aware that voucher systems in Wisconsin and Ohio have survived constitutional challenge under the U.S. First Amendment. See Zelman v. Simmon - Harris 536 U.S. 639 (2002). However, that does not mean scholarships would be upheld under art. I, section 4 of the state constitution. In addition, the Court in Sheldon Jackson noted that First Amendment cases upholding limited forms of assistance to religious schools have no relevance to the preceding analysis of article VII, section 1 of the state constitution. The prohibition against state aid to any private school is much broader than the prohibition under the First Amendment which relates only to religious schools. For example, the United States Supreme Court case upholding a Minnesota program of tax credits for public and private school expenses against a First Amendment challenge (Mueller v. Allen, 463 U.S. 388 (1983)) is not relevant to the analysis of the proposed voucher system in Alaska. Not only did that case involve a tax credit system rather than a voucher system, but it was challenged under the First Amendment. The case did not consider the kind of prohibition against direct aid to private schools found in the Alaska constitution. In other words, even if the scholarship system could survive scrutiny under the First Amendment, it would still violate article VII, section 1 of the state constitution.

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In order to survive constitutional scrutiny under the state constitution, a voucher system, such as the proposed parental choice scholarship system, would have to satisfy all three parts of the Sheldon Jackson test and scrutiny under the First Amendment. It is difficult to imagine a voucher system, as I understand the voucher system to work, that would not violate the constitution. The system would have to benefit students in public as well as private schools without giving any substantial direct benefit to education in the private schools. By its nature, the voucher system seems to work against this.

The problem could be circumvented by amending article VII, section 1 of the state constitution as you have proposed in a separate draft resolution.

In addition to constitutional considerations, this draft leaves many unanswered and potentially very expensive questions. For example, do you really intend to make a home district pay transportation costs? How is the student count and scholarship funding affected if a student transfers midyear? How does a public school district which is paid under the existing formula (AS 14.17) account for direct scholarship payments to schools? The material provides no direction on these and other questions that arise under Alaska law.

If I may be of further assistance, please feel free to contact me.

JMM:ljw

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Enclosure