

# LEGAL SERVICES

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## MEMORANDUM

March 4, 2013

**SUBJECT:** Questions about public funding of various private or religious programs or contracts (Work Order No. 28-LS0605)

**TO:** Senator Mike Dunleavy  
Attn: Bethany Marcum

**FROM:** Jean M. Mischel  
Legislative Counsel

You have asked nine questions about the constitutionality of various expenditures of public funds for programs or contracts pertaining to preschool and primary, secondary, postsecondary, pre-military, and vocational education or training.<sup>1</sup> The Alaska Supreme Court must ultimately interpret and apply the Constitution of the State of Alaska. The expenditures you describe have not been challenged on constitutional grounds. In each instance, if challenged, a court would review the factual details of the expenditure to determine whether:

(1) the money provided a "direct benefit" to a "religious or other private educational institution" or established a school under sectarian control to the extent prohibited under art. VII, sec. 1;

(2) the expenditure constituted excessive entanglement by the government in religion prohibited under art. 1, sec. 4;

(3) the expenditure resulted in disparate treatment of similarly situated individuals prohibited under art. 1, sec. 1; or

(4) the expenditure served a public purpose under art. IX, sec. 6.

Because of the breadth of your questions, I am unable to provide a full analysis of each of these issues at this point in the session. The following is a general overview of the constitutional protections in the context of public funding of education. Rather than repeat those concepts to answer each of the nine questions, an overview of constitutional funding prohibitions and restrictions will be provided and will be followed by the questions and a short answer for each.

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<sup>1</sup> It is likely that a court's review will consider all relevant factors and a comparison of expenditures based solely on age will lead to an oversimplified understanding of complex constitutional considerations.

Funding prohibition under art. VII, sec. I

Art. VII, sec. 1 of the Constitution of the State of Alaska provides:

*Public Education.* 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.

The Alaska Supreme Court, in *Sheldon Jackson v. State of Alaska*, 599 P.2d 127 (Alaska 1979), found tuition grants for private colleges to be a violation of art. VII, sec. 1 of the Constitution of the State of Alaska. The state tuition assistance program under review in the *Sheldon Jackson* case provided money to a student for the difference in the cost of private and public college tuition under an agreement to pay the money to a private college for tuition. Rejecting the proposition that the constitutional prohibition on the use of public funds did not apply to postsecondary institutions and that the tuition grant program then under scrutiny was not a direct benefit, the Supreme Court found that the payment of subsidies in the form of grants to only private college students was unconstitutional.

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 looked at the breadth of the class to which the economic benefits are directed. Second, the Court looked 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 looked at the magnitude of the benefit to private education.

The Court struck down the state's tuition assistance program as violative of all three parts of the test. The class that 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 Alaska Supreme Court left open the question of the constitutionality of a tuition scholarship or grant that did not provide for direct incentives to attend a private school as in *Sheldon Jackson*. The Court then stated:

First, the class primarily benefitted by the tuition grant program consists only of private colleges and their students. Though the appellants characterize the statute as merely equalizing the positions of private and public university students, effectively the chief beneficiaries are the private colleges themselves. Unlike a statute that provides comparable

dollar subsidies to all students, Alaska's tuition grant program is not neutral, inasmuch as the only incentive it creates is the incentive to enroll in a private college.

*Id.* at 131.

### Equal Protection

Art. 1, sec. 1 of the Constitution of the State of Alaska states:

*Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

This provision has been interpreted to require equal treatment for those who are "similarly situated" and evaluates equal protection claims using a three-step sliding scale test that "places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake." *Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003). The Court determines the weight of the individual interest impaired by the classification, examines the importance of the purposes underlying the government's action, and evaluates the means employed to further those goals to determine the closeness of the means-to-end fit. *Id.* The greater the weight of the individual interest, the greater showing that must be made demonstrating that the classification achieves a legitimate governmental objective.

A more recent Alaska Supreme Court decision described the test for analyzing whether a law violates the constitutional right to equal protection as follows:

Under the Alaska Constitution, the "legitimate reason test" is "the standard level of scrutiny . . . in equal protection cases," and we apply it to laws that do not employ classifications based on suspect factors or infringe on fundamental rights. Under this test, a law "will survive as long as a 'legitimate reason for the disparate treatment exists' and the law creating the classification 'bears a fair and substantial relationship to that reason.'"

*Griswold v. City of Homer*, 252 P.2d 1020 (Alaska 2011), 2011 Alas. LEXIS 43, 25-26 (Alaska June 10, 2011) (internal cites omitted).

Freedom of Religion

Art. 1, sec. 4 of the Constitution of the State of Alaska states:

*Freedom of Religion.* No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

The postsecondary performance scholarship program and other payments to private educational institutions also share the potential of violating the "establishment" and "freedom of religion" clauses of art. I, sec. 4 of the Constitution of the State of Alaska. We don't know the precise reach of the establishment clause on public school funding because art. VII, sec. 1 has expressly prohibited funding of a religious educational institution and the Alaska Supreme Court has found it unnecessary to address the art. I, sec. 4 issue directly.<sup>2</sup>

The United States Supreme Court in *Zelman v. Harris*, 563 U.S. 639 (2002), found by a five to four decision that a Cleveland, Ohio pilot scholarship program did not violate the establishment clause of the First Amendment of the United States Constitution for various reasons pertaining to the specifics of the program. The Ohio program provided students who met financial need criteria and who were enrolled in a failing public school in a district that was under federal court order to be operated by the state, with tuition aid to attend another public or private school, tutorial aid to stay in a failing public school, or the option to transfer to a magnet school. The *Zelman* court found that the program's purpose, to provide educational choices to parents who reside in a failing district, was neutral with respect to religion and that the choice of school was an independent, not governmental, decision.<sup>3</sup> A private school could receive public funding under the Ohio

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<sup>2</sup> The Alaska Supreme Court in the *Sheldon Jackson* case raised the questions of whether private school tuition payments violated the establishment of religion under art. I, sec. 4, and whether a valid public purpose was served under art. IX, sec. 6, but found it unnecessary to go beyond the art. VII, sec. 1 analysis to invalidate the payments.

<sup>3</sup> In Justice O'Connor's tie-breaking concurring opinion in *Zelman*, the three part test of an establishment clause violation from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) was clarified as follows:

Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause.

pilot program only if the school agreed (1) to meet statewide educational standards; (2) not to discriminate on the basis of race, religion, or ethnic background; and (3) not to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." *Id.* at 645.

### Public Purpose

Art. IX, sec. 6 of the Constitution of the State of Alaska states:

*Public Purpose.* No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

Any expenditure of public funds must be for a public purpose. A philanthropic or charitable purpose is not necessarily a public purpose. Addressing the public purpose issue, the Alaska Supreme Court has held that where the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or the use of the public credit, this Court will not set aside the finding of the legislature unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact. *DeArmond v. Alaska Development Corp.*, 376 P.2d 717, 721 (Alaska 1962).

In addition, the determination of whether a public purpose is being served does not depend on the public or private nature of the entity that will use public funds, but upon the character of the use of the funds by the entity. *Weber v. Kenai Peninsula Borough*, 990 P.2d 611 (Alaska 1999). The attorney general's office expressed the view that as a general rule, the public purpose clause cannot be met by a mere authorization to provide for the public welfare. Alaska's Supreme Court has taken a fairly strict view of the legislature's appropriation power. For example, The Court has noted that the reason for prohibiting appropriation by voters is "to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." *McAlpine v. University of Alaska*, 762 P.2d 81, 88 (Alaska 1988).

### Your questions

1. Does the Constitution of the State of Alaska prohibit K-12 school districts or the Alaska Department of Education from purchasing educational services directly from private or religious entities for services such as tutorials?

I don't know whether "educational services," in the context of your question, includes things such as transportation, building construction and maintenance, or other commonly contracted for services with private entities as authorized by statute. If, however, the phrase is intended to include the provision of education to public school students, some constitutional and statutory constraints apply.

As a constitutional matter, the authority for expenditure of public funds excludes "direct benefits to private or religious educational institutions," may not be under sectarian control, requires a public purpose, and prohibits government entanglement in religion. If the private contractor is not an "educational institution" or the funding is not a "direct benefit," the funding serves a public purpose, and the funding does not result in an establishment of religion or interfere with the free exercise of religion, as discussed above, then the department's authority is a matter of legislative control.

The powers and duties of the department are found in AS 14.07.020 and 14.07.030, some of which may involve contracting for services.

AS 14.14.110(a) authorizes, when necessary for more efficient or economical educational services, a district to cooperate among districts, with the department, state-operated schools, or with the Bureau of Indian Affairs.

With regard to regional educational attendance area school boards, AS 14.08.011(2) authorizes a contract with any other agency, among others, for the provision of services, facilities, supplies, or utilities. The term "agency" is undefined but its common meaning would be relevant.

2. Is it constitutional for the State of Alaska to give public funds to a 19-year-old Alaskan resident for the purpose of attending APU for educational services?

The Alaska Scholarship Program under AS 14.43.810 - 14.43.849, postsecondary scholarships recently approved and funded by the legislature, has not been tested under the state constitution but raises issues under art. VII, sec. 1, art. 1, sec. 1, and art. 1, sec. 4, (if the program is not available to all students), and, possibly art. IX, sec. 6. The express purpose of the scholarships is to provide incentives to all high school graduates in the state to compete for funding payable to a "qualified postsecondary institution" by meeting increasingly rigorous secondary school curriculum and testing criteria. The private tuition assistance grants invalidated in the *Sheldon Jackson* case are somewhat different from the postsecondary scholarships. Unlike in *Sheldon Jackson*, the program is neutral as it provides no incentive to select a religious or private postsecondary institution over a public postsecondary institution.<sup>4</sup> A student qualifies for the same amount for either institution and is not required to agree to pay state money directly to a private college but is free to select any school or program that is "qualified" to receive the funds. The *Sheldon Jackson* case involved a tuition grant program that was not neutral inasmuch as the only incentive it created, as noted by the Alaska Supreme Court, was the incentive to enroll in a private college.

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<sup>4</sup> The 2011-2102 numbers of scholarship recipients are consistent with the lack of incentives. So far, a total of 10 students have selected APU in the first two years of the program, as compared to several hundred who have selected public postsecondary institutions.

The postsecondary institutions selected by a scholarship student may be public or private and are described in neutral terms as follows:

**Sec. 14.43.830. Qualified postsecondary institutions.** (a) The following institutions are qualified postsecondary institutions for purposes of awarding an Alaska performance scholarship:

- (1) a university or college physically located in the state that is
  - (A) authorized to operate in the state under AS 14.48.020, or is exempt from authorization under AS 14.48.030(b)(1); and
  - (B) accredited by a regional accreditation association;

- (2) a career and technical school program physically located in the state that has been included on a list of certified career and technical school programs received from the Department of Labor and Workforce Development; the commission shall publish the list on or before June 30 of the year preceding enrollment.

Under the second prong of the *Sheldon Jackson* test, the benefit from the scholarships is likely to be construed as an educational, not an incidental benefit since they are used for tuition.<sup>5</sup>

Under the third prong, a court would also look at the magnitude of the state money to a private educational institution and determine whether the scholarship payments confer a "benefit" that is of constitutional significance. Here, a court may consider the amount of money flowing to a particular private institution from the program, the size of the program, and other relevant factors. The rate of selection by the scholarship and grant recipients of private schools over public may also be considered. Since this is only the second year of the performance scholarship program, the real magnitude of the benefit may not be readily discernible.

I cannot predict with any certainty the outcome of a constitutional challenge brought against the scholarships provided under AS 14.43.810 - 14.43.849 for attendance at qualified postsecondary institutions. However, the neutrality and apparently equal availability of the scholarship for use at all qualified public and private postsecondary institutions, the option being left to the individual student, along with the stated public purpose for the program, may support a court finding that the program is a constitutionally appropriate use of public funds.

The United States Supreme Court has upheld the concept of providing public funds for attendance at religious schools but not for a religious curriculum under the First Amendment of the federal constitution. The Alaska Supreme Court has not yet had occasion to analyze the issue under our constitutional parameters.

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<sup>5</sup> An advocate for the scholarship program might argue that the career and technical programs are distinguishable since they are not all part of an "educational institution" and therefore should be exempt from the art. VII constitutional prohibition altogether.

Finally, an equal protection challenge may be brought by students who attend a public school that fails to offer courses required for the performance scholarship. The phased in requirements were intended to avoid any disparity in availability.

3. Is it constitutional for the State of Alaska to give public funds to a 12-year-old Alaskan resident for the purpose of attending Monroe Catholic School in Fairbanks?

Currently, there is no state law that would provide for that. I also do not find on these basic facts a public purpose required under art. IX, sec. 6. Without more information, this appears to be prohibited under art. VII sec. 1 of the Constitution of the State of Alaska and to implicate art. 1, sec. 1 and art. 1, sec. 4, although a court is the final interpreter of constitutional principles. I am not aware of any court case asserting that right. I believe, however, there are some cases in which a student with a severe disability has sued the state for funding to attend a private and nonsectarian specialized school under federal disabilities law when the state could not otherwise provide a "free and appropriate" education.

4. How do the two scenarios differ with regard to the constitutionality of giving public funds to Alaskans to receive educational services from private or religious educational entities such as APU and Monroe Catholic School?

As we discussed at length recently and as described above, art. VII, sec. 1 as well as the art. 1, sec. 1, art. 1, sec. 4, and art. IX, sec. 6 issues are unresolved for either scenario. Both the United States Supreme Court and the Alaska Supreme Court considered the incentives to attend a private religious school over a public school. While you have provided no detail in your scenarios, the following significant differences are apparent: (1) the state is constitutionally obligated to provide a *free* system of public education open to all children - not to adults; if public money is spent to pay for the tuition and fees for a 12-year-old to attend a religious school, there is no incentive to use a similar tuition voucher at a public school that already is free to the student; (2) the state is not constitutionally obligated to provide a *free* education at the postsecondary level so that a tuition scholarship based on academic performance is valuable at both private and public postsecondary institutions; and (3) Alaska's options for "school choice" are limited by its topography, transportation, infrastructures, and diverse population distribution. There may be ways, as in *Zelman*, to structure a tuition voucher program that provides other incentives for a student to stay in a public school. In *Zelman*, the public school options included tutorial aid, magnet school admission, and transfer to an adjacent public school. Since Alaska's topography creates natural obstacles that do not exist in the Cleveland urban school district, I don't know whether those options would work here so as to avoid an equal protection, religious freedom, or other constitutional protection problem even if HJR 1 passed and was adopted by the voters to allow public money to be used at private and public school.

5. If it's legal to give the funds to a 19-year-old, does it matter that the state of Alaska already funds and claims the University of Alaska as its public university system?  
<Article 7, Section 2>



I don't think so. Art. 7, sec. 2 establishes the University of Alaska but does not require free tuition. In fact, it is my understanding that the performance scholarship amounts were set using UAA tuition costs as a guide at the time of the legislation's passage. The tuition scholarships available now do not appear to provide incentives to afford a private or religious school.

6. Is it constitutional for the State of Alaska to give public education dollars to Alaskans under the age of 5 for the purpose of receiving educational services from public, private and religious educational entities?

Again, the question under art. VII, sec. 1 is whether the public money is for the "direct benefit" of a "private or religious educational institution." For the most part, as I understand it, the preschool age funding is used for nonsectarian programs, not educational institutions, that are conducted at the child's home, on public school grounds, or at a day care center. More specific facts may help in an analysis under the above described constitutional principles.

7. Is Alaska Military Youth Academy considered a public school in the same vein as any other public school in Alaska? It educates 16 to 18-year-old Alaskans with public dollars for a public purpose. If not, please explain why.

The Alaska Military Youth Academy was authorized by the state legislature in AS 14.30.740. Although it is not operated by a public school district, the academy is considered to be an alternative public secondary school. *See, e.g., AS 14.30.365(c).*

8. Is it constitutional to provide labor and workforce training from public dollars to private, for-profit training/educational entities?

As stated above, I don't know whether a court would construe workforce development as providing a "direct benefit to a private or religious educational institution" in violation of art. VII, sec. 1. The fact that those programs are reviewed and certified not by the Department of Education and Early Development but by the Department of Labor and Workforce Development may be persuasive of a distinction for art. VII purposes. The Department of Education and Early Development is also required to provide vocational training opportunities for students over the age of 16 who no longer attend school, under AS 14.07.020(a)(12). I don't believe a court would find the programs to fail to serve a public purpose required under art. IX, sec. 6.

9. Can the Department of Education and Early Development give public dollars to individuals that are private contractors for educational services?

As explained in the answer to question 1, I don't know whether "educational services" (as your question uses the phrase) includes things such as transportation, building construction and maintenance, or other commonly contracted for services as authorized

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by statute. If, however, the phrase is intended to include the provision of education to public school students, some constitutional and statutory constraints apply.

As a constitutional matter, the authority for expenditure of public funds excludes "direct benefits to private or religious educational institutions," requires a public purpose, and prohibits government entanglement in religion. If the private contractor is not an "educational institution" or the funding is not a "direct benefit," the funding serves a public purpose, and the funding does not result in an establishment of religion or interfere with the free exercise of religion, as discussed above, then the department's authority is a matter of legislative control.

The powers and duties of the department are found in AS 14.07.020 and 14.07.030, some of which may involve contracting for services.

If I may be of further assistance, please advise.

JMM:med

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