

MEMORANDUM

STATE OF ALASKA DEPARTMENT OF LAW

TO: The Honorable Fred Dyson
Chair, Senate Health, Education, and
Social Services Committee
Alaska State Senate

DATE: September 20, 2005

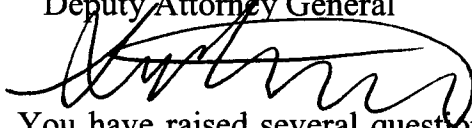
TEL. NO.: (907) 269-5187

FILE NO.: 663-05-0233

The Honorable Lyda Green
Co-Chair, Finance Committee
Alaska State Senate

FROM: Scott J. Nordstrand
Deputy Attorney General

SUBJECT: Statewide Correspondence
Programs and Religion



You have raised several questions regarding statewide correspondence programs, the associated instructional materials, and the permissibility of religious content. This memorandum responds to your questions and offers guidelines that will be useful in drafting legislation. Finally, we suggest a possible alternative educational approach for public support of home schooling.

I. EXECUTIVE SUMMARY

The Department of Education and Early Development ("DEED") conducted an audit of school districts operating statewide correspondence study programs. Following the audit, DEED informed the districts that they must require parents to use primary curriculum materials that are secular in nature, approved in advance by the school district.

The audit raised several questions among policymakers and those affected by the action related to selection of textbooks and materials, academic credit, and state funding under current law. This memorandum addresses those questions. In general, we conclude that the enforcement action and the current regulations do not infringe upon the rights of parents and are consistent with the underlying statutes. It also describes a set of legal guidelines to define the boundaries of religious involvement in public school curricula.

This memorandum goes on to suggest an alternative educational system to address parents' desire for greater freedom to use religious textbooks and materials in statewide correspondence programs. This new system would provide that freedom, while focusing state and school district involvement on secular student assessments independent of the religious content. Because this system would provide fewer educational services, it may be appropriate to fund it at a lower level than other educational programs that provide more services.

II. BACKGROUND ON STATEWIDE CORRESPONDENCE PROGRAMS AND STATE LAW

District-provided statewide correspondence programs were developed in Alaska during the 1990's. AS 14.07.020(9) provides for state supervision of correspondence programs.¹ The administrative details pertaining to the programs appear in 4 AAC 33.405 – 33.490. The programs allow children to receive their state education in a home environment. Currently, eleven school districts offer statewide correspondence programs and approximately 9,000 students participate. Generally, parents of a child enrolled in a correspondence program select textbooks and other educational materials from a list approved by the school district. Parents teach the material. A certificated teacher approves individual learning plans. Additionally, the teacher must have contact with either the parent or child at least monthly and review the student's work or progress at least quarterly. In most statewide correspondence programs the parents have a great deal of flexibility in educating their child. For instance, in addition to teaching the approved material, parents generally test and often grade their child's work or offer a suggested grade to the reviewing teacher.

In general, these statewide correspondence programs are distinct from traditional correspondence programs, where a student completes work at home and then mails it to a teacher for grading. They also differ from in-district correspondence programs, which are closely controlled by local school boards and subject to less state oversight.

The State of Alaska funds the statewide correspondence programs. For each program student, a district receives 80 percent of the funding normally allotted to a public school student.² The districts generally regulate the funds by establishing an account for each participating family. Families do not have direct access to the accounts. Parents typically submit their requests for specific textbooks and materials to the district. If the materials are on the list of approved materials, the district orders them for the parents and remits payment directly to the vendor. Occasionally, parents purchase texts and materials on their own, and receive reimbursement from the district as long as the items are approved by the reviewing teacher. 4 AAC 33.421(k) prohibits payment for religious textbooks or curriculum materials.

¹ Other statutes addressing correspondence programs include AS 14.07.050 (selection of textbooks), AS 14.08.111(9) (duties of regional school boards), AS 14.14.090(7) (duties of school boards), AS 14.17.430 (funding), and AS 14.30.010(10)(B) (attendance).

² AS 14.17.430.

In the 2004 legislative session, the Alaska Legislature appropriated funds to allow DEED to monitor statewide correspondence programs for compliance with regulations. To conduct the monitoring, auditor John Tongen examined the records of a representative sample of students from 10 districts operating statewide correspondence programs. Where the auditor found violations of statutes or regulations, DEED put the district on a plan of correction.

DEED found that four of the monitored districts had determined certain course materials that parents had selected were religious in nature and not appropriate for state funding. In each case, the district informed the parents of its decision. None of the parents appealed. The districts then allowed students to be instructed primarily with those materials, despite the districts' determinations that they were "religious" in nature.³ DEED informed the districts that they would not receive state funding in the future for students primarily instructed with religious materials in violation of AS 14.03.090. State funding was not denied for the current year. DEED's audits did not instruct the districts as to whether they could count such courses toward graduation requirements.

III. ISSUES AND ANALYSIS

A. State Law Does Not Permit Correspondence School Parents To Purchase And Use Religious Materials Instead of A School District's Approved Textbooks And Materials.

You have questioned whether correspondence students may use religious materials in place of district-approved textbooks and materials. Current state statutes do not permit this.

In order to receive state funding for a student enrolled in a statewide correspondence program, a district must comply with state law. AS 14.07.070 provides that "[s]tate funds may not be paid to a school district or teacher that fails to comply with the school laws of the state or with the regulations adopted by the department." AS 14.07.050 requires that public schools, including statewide correspondence programs, use textbooks "selected by district boards." AS 14.08.111(9) and AS 14.14.090(7) make it clear that the requirement for board review and approval is not limited to textbooks but extends to all types of instructional materials. Hence it would appear that a correspondence program using materials not selected by the district board would be ineligible for state funds.

³ Generally, this memorandum refers to textbooks and materials from religious vendors as "religious materials." The religious content of these textbooks and materials varies substantially.

Because the second sentence of AS 14.07.050 also recognizes a parent's right to use privately purchased materials "not provided by the school district,"⁴ however, there has been some suggestion that correspondence school students may use religious materials in lieu of district approved textbooks and materials. The legislative history does not support this interpretation.

The legislative history of AS 14.07.050, AS 14.08.111(9), and AS 14.14.090(7), which were enacted together in 2002, reveals an intent to allow parents to purchase religious materials to supplement, but not replace, district-approved textbooks and materials. During committee hearings on these statutes, Representative Bunde, Chair of the House Special Committee on Education, explained:

there is an approved menu [of textbooks and materials] from which correspondence parents can choose materials. If they wish to *augment* that with privately purchased materials, that would be acceptable just as it is for the parents of students in public school.⁵

Representative Dyson, Chair of the House Health, Education, and Social Services Committee, expressed the same understanding:

Any program receiving [state] money is not precluded from purchasing materials from any publisher; the only restriction is that state law prohibits the use of state money for promulgating or advocating a particular religious perspective [A parent] is free to purchase materials *in addition* to state-funded material.⁶

⁴ The full text of AS 14.07.050 reads: "Textbooks for use in the public schools of the state, including a district offered statewide correspondence study program, shall be selected by district boards for district schools. Nothing in this section precludes a correspondence study student, or the parent or guardian of a correspondence study student, from privately obtaining or using textbooks or curriculum material not provided by the school district."

⁵ Minutes, House Education Committee Hearing on HB 464 (April 24, 2002) (emphasis added). House Bill 464 was later incorporated into SB 345, the vehicle for the three statutes cited.

⁶ Minutes, House Health, Education, and Social Services Committee (March 14, 2002) (emphasis added).

Based on this legislative history, we conclude AS 14.07.050, AS 14.08.111(9), and AS 14.14.090(7) do not allow replacement of district approved texts. Rather, correspondence program parents may privately supplement their child's educational material with religious materials.

B. AS 14.03.090 Restricts The Advocacy Of Religion By School Districts And Public School Teachers, But Not By Parents Who Homeschool.

Some of your questions concern application of AS 14.03.090 to the statewide correspondence programs. This statute provides that:

[p]artisan, sectarian, or denominational doctrines may not be advocated in a public school during the hours the school is in session. A teacher or school board violating this section may not receive public money.

The statute is consistent with constitutional prohibitions against government establishment of religion.⁷

On its face, the statute applies to public schools. This raises the question of whether a correspondence program is a "public school." The formal statutory definition of "public school," AS 14.60.010(6), includes "elementary schools, high schools, citizenship night schools for adults, and other public educational institutions which may be established"; it is not sufficiently specific to resolve the question. Nonetheless, although the actual education generally occurs in the home and parents provide most of the instruction, we conclude that statewide correspondence programs are public schools. This conclusion is based on the existence of public funding, the state's regulatory oversight, and the statutory requirement for students to meet state educational standards.⁸ Moreover, AS 14.07.050 refers to "public schools of the state, including a district offered statewide correspondence study program."

Since correspondence schools are public schools, AS 14.03.090 requires that religious doctrines not be advocated while the school is in session. Advocacy of religious doctrines through the public schools is also proscribed by the federal and state constitutions, as interpreted in the cases cited below.

⁷ See Alaska Const. art. I, § 4; U.S. Const. amend. I.

⁸ See AS 14.07.020(a)(9) (mandatory departmental supervision); 4 AAC 33.421(b) (requiring programs to conform with statewide goals and performance standards).

To advocate is “[t]o speak, plead, or argue in favor of.”⁹ When publicly employed teachers are educating a child within a correspondence program, they should not use religious texts, materials, or courses of study *in favor of* a religious belief. However, a writing of historical, literary, or scientific value may be taught in the school, even if the writing also contains a religious point of view. The teacher must be careful to avoid religious advocacy, however, and must present the material for its non-religious value. Thus, a teacher could teach a child about various religions, the role of religion in history, or the Bible as literature only as objective study.¹⁰

It is clear that because the correspondence programs are public schools, a public school teacher overseeing such a program is subject to AS 14.03.090. The teacher must therefore strive to avoid religious advocacy “during the hours the school is in session.” As a practical matter, a correspondence school is certainly “in session” whenever the teacher is interacting with the correspondence student.

A different issue is presented by the role of parents in the correspondence school program. As seen from DEED’s 2004 monitoring, some correspondence school parents discuss religion and include religious materials in teaching their child within the context of correspondence study courses. This practice might seem to raise questions under the “establishment” clauses of the state and federal constitutions and under AS 14.03.090. However, a parent’s interest in providing a religious education to his or her children at home is protected under the free exercise clauses of the Alaska and United States constitutions.¹¹ Accordingly, the issue of using religious materials in teaching public school courses at home involves a sensitive balancing of the right to practice religion freely¹² and the prohibition against the state’s establishment of religion.¹³ Moreover, when a parent is presenting material not provided or approved by the school district, it is problematic to contend that the public school program is “in session.”

⁹ *The American Heritage College Dictionary* 20 (3rd ed. 1993).

¹⁰ *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (the “objective study” of religion may occur in public schools); *see also* 1988 Inf. Op. Att’y Gen. (Sept. 15; 663-88-0573) (analyzing AS 14.03.090 and concluding that public school teachers may teach about various religions as part of the public school curriculum, but may not advocate a particular religious view or teach that a particular religious view is true or false).

¹¹ Alaska Const. art. I, § 4; U.S. Const. amend. I.

¹² Alaska Const. art. I, § 4; U.S. Const. amend. I.

¹³ Alaska Const. art. I, § 4; U.S. Const. amend. I.

Because (1) there is a tension between the constitutional provisions, (2) correspondence programs do not have regular school hours and (3) the education occurs in the home, we conclude AS 14.03.090 applies to school districts and publicly employed teachers, but not to parents. Parents who include religious instruction, including the use of privately obtained religious materials,¹⁴ in their home during their child's correspondence course studies, may do so without violating the law.

C. Instructional Materials May Not Advocate Religion.

Senator Dyson's undated memorandum to Attorney General David Márquez asked whether the prohibition against religious advocacy in AS 14.03.090 applies only to the actions of teachers, as opposed to the content textbooks and other education materials itself. In short, can textbooks advocate? Senator Dyson posed the question this way:

It is my understanding that it is unjustified and problematic to interpret AS 14.03.090 as a standard by which textbooks, instructional aids, and curriculum materials are selected and purchased. The law prohibits public schools advocating doctrine which is not necessarily violated by teachers making use of materials that may advocate or reveal the world view of the author, publisher, or a person studied. While it is possible for a teacher to violate 14.03.090, it is not lawful to try to determine whether instructional materials violate 14.03.090.

Please comment on, or correct, my perception of the application of AS 14.03.090.

The application of AS 14.03.090 to educational material selection has not been previously addressed by this office or the Alaska courts. The prohibition against religious advocacy by district teachers and the school districts in AS 14.03.090 (or under the establishment clauses) is not limited to oral advocacy. A book may not be approved for use in publicly provided education if it advocates a partisan, sectarian, or denominational doctrine.¹⁵ To allow otherwise would permit a school board to advocate partisan, sectarian, and denominational doctrines in a public classroom through textbooks. Clearly, the school districts have the authority—in fact, the obligation—to

¹⁴ See AS 14.07.050.

¹⁵ Textbooks for use in public schools must be approved by the local school district boards. AS 14.07.050.

determine whether its textbooks advocate religion in violation of the statute, the Alaska Constitution, or the United States Constitution.¹⁶

Furthermore, exercising the authority to determine whether a textbook advocates religion is not unconstitutional censorship.¹⁷ State statutes and regulations allowing local school boards to review and approve textbooks do not, on their face, violate the right of parents or students to freely exercise their religion.¹⁸ As discussed above, parents are free to augment their children's education with religious materials.

A local school board decision regarding textbook selection would not violate the constitution unless it was based on improper, non-educational reasons, such as the intention to establish a religion by including or excluding certain materials from a curriculum.¹⁹ Since state laws allowing school boards to approve textbooks are constitutionally permissible, it follows that enforcing those laws for the purpose of ensuring children receive an adequate education would not violate the constitution.

D. Local School Districts Are Responsible For Determining Which Homeschool Courses May Be Used To Meet Graduation Requirements.

Senator Green asked whether DEED's audit instructed that districts could not allow academic credit toward graduation for religious correspondence courses. As noted above, DEED did not give any instructions regarding whether these courses could be considered in meeting graduation requirements. DEED refrained from instructing districts in this regard because school districts have discretion in deciding whether to award academic credit.

¹⁶ DEED retains general oversight authority, but does not set any standard to determine whether a textbook advocates religion. *See* AS 14.07.020(a)(9).

¹⁷ *See* Alaska State Legislature, News from the House & Senate Majority, "Legislators Work Together to Improve School Curriculum" (May 23, 2005) (raising question of unconstitutional censorship).

¹⁸ *Epperson*, 393 U.S. at 107 (referring to "State's undoubted right to prescribe the curriculum for its public schools" but noting that their choice may not violate the Establishment Clause); *see also Fraser v. Bethel Sch. Dist.*, No. 403, 478 U.S. 675, 683 (1986) (holding right to free speech did not prevent school district from disciplining student for lewd speech at an assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (students do not have a free speech right in the choice of curricular materials).

¹⁹ *Epperson*, 393 U.S. at 107-09.

DEED is required to prescribe by regulation “a minimum course of study for the public schools.”²⁰ Accordingly, DEED regulations require a high school student to have earned at least 21 units of credit before being eligible for graduation.²¹ DEED also requires that these credits include courses in language arts, social studies, mathematics, science, and health/physical education.²² However, local school boards have the authority to establish the district's high school graduation requirements beyond the minimum established by DEED.²³ Further, the local school board sets the standards that each course must meet in order to qualify for academic credit.²⁴ The teachers within the local school districts determine when these course requirements are fulfilled.

Therefore, while DEED informed school districts that state funding would not be available in the future for students within the correspondence program using primarily religious materials, its audits did not discuss whether such correspondence courses could be considered in meeting graduation requirements. Districts have discretion with regard to academic credit. A district must follow its own rules and procedures in determining when, for example, a student enrolled in the district who has taken high school courses outside of the district has met a local requirement for a course of study.

E. DEED's Role Is Not Restricted By AS 14.07.050.

Senator Dyson also asked whether AS 14.07.050 is a restriction on the powers and duties of DEED, such that DEED would not have authority to set standards for selection and review of texts.

²⁰ AS 14.07.020(a)(4).

²¹ See 4 AAC 06.075(a).

²² See 4 AAC 06.075(b).

²³ See 4 AAC 06.075(b) (12 credits in required subject areas); 4 AAC 06.075(a) (21 credits for graduation).

²⁴ See 4 AAC 06.075(f) (defining “unit of credit” as credit awarded by achieving a passing grade in a course of study that meets “the performance standards for a course of study as prescribed by a local school board”); *see also* 4 AAC 06.075(d) (districts have discretion in determining whether transfer student meets district subject area credit requirements).

Under AS 14.07.050, district school boards are responsible for selecting textbooks for public schools, including correspondence study programs.²⁵ However, nothing in the statute excuses DEED from its general oversight responsibility and authority.²⁶ DEED's authority reasonably includes ensuring that public schools comply with state law, including the requirement that texts do not advocate a religious doctrine. Further, DEED has the responsibility to determine the amount of state aid due each school district.²⁷ A school board violating the prohibition against textbooks advocating a religious doctrine may not receive public money.²⁸ Accordingly, DEED has the statutory authority to ensure that school districts do not select textbooks for public schools (including correspondence schools) that advocate partisan, sectarian or denominational doctrines.

We conclude that AS 14.07.050 does not restrict the powers and duties of DEED, but rather only clarifies the school board's responsibilities with respect to textbook selection.

F. Restrictions On Religious Advocacy Apply To All Public Schools.

You also asked whether the standards for selection and review of texts set by AS 14.03.090 must be applied equally to all public school instruction materials and public school programs. We believe that this question arises from the fact that 4 AAC 33.421(c), which requires textbooks to comply with AS 14.03.090, applies to statewide correspondence programs but not to in-district correspondence programs.

DEED relies on the local school districts to regulate the in-district correspondence programs. This reliance is consistent with the concept of local control of education, which is deeply embedded in our educational system.²⁹ However, a district's education

²⁵ AS 14.07.050 ("Textbooks for use in the public schools of the state, including a district offered statewide correspondence study program, shall be selected by district boards for district schools.").

²⁶ AS 14.07.020(a)(1) (establishing mandatory supervision over public schools).

²⁷ AS 14.17.610; AS 14.17.400; AS 14.17.410.

²⁸ AS 14.03.090; *see also* Alaska Const. art. I, § 4 ("No law shall be made respecting an establishment of religion . . ."); *cf.* Alaska Const. art VII, § 1 ("schools and institutions so established shall be free from sectarian control").

²⁹ *See Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67, 75 n.17 (Alaska 1980) ("although state legislatures possess plenary power over the educational system, local initiative with respect to education is so highly regarded that most states

of an out-of-district student through a statewide correspondence program is not local control of education. Accordingly, DEED exercises its statewide regulatory authority over the statewide correspondence programs to ensure that the education offered to out-of-district students (over which the local school districts have less of a vested interest) is of equally high quality as the in-district programs. To further this purpose, 4 AAC 33.421(c) interprets and makes specific the underlying statutory and constitutional provisions, AS 14.03.090 and the establishment clauses, as they apply to the statewide correspondence programs. However, the statute and constitutions apply with equal force to in-district correspondence programs.

We conclude that DEED's decision to apply 4 AAC 33.421 only to statewide programs is a valid policy choice. Additionally, the analysis of AS 14.03.090 above applies with equal force to prohibit the advocacy of religion through textbooks used in in-district schools and programs and in statewide correspondence programs.

IV. EIGHT LEGISLATIVE GUIDELINES

In addition to these questions, we understand that you would like some legal guidelines regarding the use of religious materials in correspondence programs. Religion and public education is a problematic and confusing area of the law. From 1947 through 2004, the United States Supreme Court issued 17 decisions analyzing public school aid and religion. These cases show that the Court has shifted from a stance close to pure separation of church and state to one allowing some state aid to private religious schools.

None of these cases are analogous to the current situation.³⁰ We have also reviewed the handful of Alaska Supreme Court decisions concerning these matters.³¹

have delegated extensive authority over the actual administration of the schools to local institutions") (quoting Project, Education and the Law: State Interests and Individual Rights, 74 Mich. L. Rev. 1373, 1380 (1976)): *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

³⁰ The Court's Establishment Clause school aid decisions discuss public funding of private religious education. Our situation involves public funding of public education in a private home. The Court's other Establishment Clause decisions focus primarily on prayer in public schools. In those cases, the Court has held that state sponsored prayer is not appropriate in public education. See *Abington Township*, 374 U.S. at 205, 223; *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

None is dispositive of the issue presented here: the constitutionality of parents using religious textbooks, either to supplement or supplant an approved text, in a home-school environment under a statewide correspondence public education program.³²

However, a number of general guidelines can be gleaned from cases concerning the prohibition on state-established religion:

1. The law should be facially neutral.³³ In other words, the language of the statute should not favor or disfavor religion.

2. The law should have a secular purpose.³⁴ For example, educating poor children is a secular purpose, as is the state's desire to have a well-educated populace.³⁵ Instructing a child regarding the positive benefits of religion is not a secular purpose.

3. The law should extend to a broad spectrum of people and be defined by an appropriate state objective such as to assist parents in meeting the rising cost of education,³⁶ or to tailor education to individual student's needs.

4. The educational aid provided by the law (including textbooks and educational materials) should not provide financial benefits to religious schools or institutions.³⁷

³¹ *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979); *State v. Frank*, 604 P.2d 1068 (Alaska 1979).

³² Also, of some relevance to this question, the Alaska Constitution has language that prohibits public funds from being paid "for the direct benefit of any religious or other private educational institution." Alaska Const. art. VII, § 1; *see also Sheldon Jackson Coll. v. State*, 599 P.2d 127 (Alaska 1979) (holding that state's tuition grant program, which awarded state residents attending private colleges the difference between the tuition costs of private and public colleges, violated the constitutional prohibition against direct benefits to private schools).

³³ *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-55, 661-63 (2002).

³⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

³⁵ *Agostini v. Felton*, 521 U.S. 203, 209 (1997); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

³⁶ *Mueller*, 463 U.S. at 395, 397-99.

5. The law should be structured so that any involvement of religion in the government program is the result of the parents' independent and genuine choices. For example, the U.S. Supreme Court found acceptable a federal program allowing sign-language interpreters to assist deaf children at a private, religious school since any benefit to the religious school was the result of the parents' independent choice of that school as the best learning environment for their handicapped child.³⁸ Similarly, the Court found acceptable a state tax deduction for educational expenses, including private school tuition costs, since public funds end up with religious schools only as a result of numerous private choices of the parent.³⁹

6. The law should permit guidelines to ensure compliance with the constitutional limitations on educational aid.⁴⁰

7. The law may not be motivated by a goal to promote religion, and this fact should be clear from the legislative history. Courts will closely scrutinize the legislative history for statements or actions indicating a religious intent. If a religious purpose is apparent from the legislative record--for example in statements by members of the enacting body or by the public supporting the action--a court may conclude that the law violates the establishment clauses and is unconstitutional.⁴¹

8. The law should not permit money to be paid from public funds for the direct benefit of any religious or other private educational institution.⁴²

Again, this area of the law is complex and evolving. We recommend that you consider each of these guidelines in any legislation pertaining to the correspondence programs and religious materials.

³⁷ *Zelman*, 536 U.S. at 653-54; *see also* Alaska Const. art VII, § 1 ("No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.").

³⁸ *Zobrest v. Catalina Foothills Dist.*, 509 U.S. 1, 10, 13-14 (1993).

³⁹ *Mueller*, 463 U.S. at 399.

⁴⁰ *Mitchell v. Helms*, 530 U.S. 793, 861-67 (2000) (O'Connor, J., concurring).

⁴¹ *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, ___ U.S. ___, 125 S. Ct. 2722, 2733-36 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 592-97 (1987).

⁴² Alaska Const. art. VII, § 1.

V. A POSSIBLE ALTERNATIVE APPROACH TO STATEWIDE CORRESPONDENCE PROGRAMS

One aspect of the statewide correspondence programs that makes them attractive to many parents is that the programs increase parental autonomy in their children's education. Some parents prefer to control the values, principles, skills, and knowledge that their children learn. The state and the school districts, however, have an interest in ensuring that any child who receives a public education has an opportunity to participate in an education on a par with that received by other children in the district. The issues that we have addressed here are largely a result of the tension between a parent's desire for autonomy and the state's desire to assure that each student has an opportunity for a quality, secular education. In broad summary, we have concluded that the current regulations governing statewide correspondence programs do not infringe parents' constitutional rights. In addition, we conclude that the current regulations are consistent with the underlying statutes.

We now turn to a different question: How would the State design a system of public education that maximizes parental autonomy, maintains high quality, and is consistent with constitutional requirements? To put this another way, can the State design a publicly-funded program that would allow parents to select and deliver their own choice of curriculum—without regard to religious content—and still be consistent with the State's goal of providing a quality secular public education? Although a complete answer to this question would involve educational policy matters beyond our expertise, we can offer the following guidelines.

We believe that three legal principles govern any public education program directly funded by the state:

- ***The program must be a public school.***⁴³
- ***The program must have a public purpose.***⁴⁴
- ***The program must be secular.***⁴⁵

To put these legal principles into practice:

⁴³ Alaska Const. art. VII, § 1.

⁴⁴ Alaska Const. art. IX, § 6.

⁴⁵ Alaska Const. art. I, § 4; Alaska Const. art. VII, § 1.

- *The state or school district must be meaningfully involved in the education.*
- *The funding of the program should not be diverted to private purposes.*
- *State or local government personnel should not review, approve, or deliver educational materials or programs that have the purpose of religious advocacy.*

Therefore, we conclude that if a school district wishes to increase parental autonomy, it could decrease the involvement of school personnel in the selection and delivery of the education. In order to do this, however, the school district would have to take other measures to ensure that the education met the standards for a public education.⁴⁶ However, at a minimum, we believe that when the school district does not significantly participate in the selection and delivery of the curriculum, qualified school district personnel must thoroughly assess and evaluate the achievement of the student in each class in which the student enrolls in a public school.

A district would have to assess a student in a manner that does not advocate religion. The assessment would have to reflect district and state standards for the content and grade level of the course. If no secular assessment is readily available, the state, district, or publisher may have to prepare a standards-based secular assessment for the course. The most likely “instrument” would be a comprehensive written test administered and graded by a certificated teacher employed by the school district. Other forms of assessment may be possible.

We recognize that having the state require a comprehensive assessment for each class would be a novel approach. Although teachers frequently use tests in the classroom, the state does not *require* them in other programs. Yet, the alternative system we are suggesting is unique. Here, the parents would select and deliver the curriculum without input from the school district. This program could not be considered a public school unless the school district meaningfully participates in the education. Therefore, a

⁴⁶ In weighing whether the new education system described above qualifies as a “public school,” note that the system requires substantially more involvement by school districts and the state than currently required under Alaska statutes for “private schools.” Under AS 14.45.100 - 120, private schools need only account for student attendance, certify that they operate 180 days a year, and administer nationally standardized tests in grades four, six, and eight at least once each school year.

district that offers an outcome-based program must assess and evaluate the achievement of the students in that program.

In addition to the requirement that the school district evaluate achievement, even a minimal public school program should likely include additional involvement by the school district to ensure its status as a public education. We defer to the policymakers on the precise mix of requirements, but to maintain the quality of education while only minimally intruding into parental autonomy, we suggest that a district should:

1. define the level of knowledge required for each offered course, based, where appropriate, on state standards and grade-level expectations;
2. approve a secular course outline or content requirement for each offered course;
3. provide academic and technical support for the home education;
4. meet with parents and students regarding the content that must be covered in a course before the student will be provided credit; and
5. assist parents in learning teaching skills.⁴⁷

Turning to the question of funding, a program based solely on outcomes may be significantly less expensive than a program in which the district participates in the selection and delivery of the curriculum. In designing this program, policymakers must ensure that the money for the program does not serve a private benefit instead of a public purpose. Moreover, to avoid providing a windfall to districts or parents, good public policy would dictate that funding should be commensurate with the program design: A program that provides fewer services should receive less funding than a program that provides more services.⁴⁸

In sum, an outcome-based program could be designed to maximize parental autonomy while still providing a public education. In our view, a court would not consider an outcome-based program to be a public school unless qualified personnel were directly involved in assessment of achievement for each course. Additional involvement

⁴⁷ In addition, a school district must continue to perform all statutory and regulatory requirements for a public school program. These include setting graduation requirements, participating in statewide assessments, and providing special education.

⁴⁸ We are not implying that foundation funding for a district should be dedicated to a particular program or spent on a per-pupil basis.

by the district should be included even in a minimal program. All involvement by the district should be secular. Funding of a minimal program should not be diverted to a private purpose and should be commensurate with the services provided by the district.

VI. CONCLUSION

We hope we have answered your questions and provided you with helpful guidance. Because this is an unsettled area of the law, you may want to consider consulting your legislative legal staff. We also recommend that you consult the administration regarding standards-based education. If you have additional concerns, please do not hesitate to contact this office.

cc: Roger Sampson, Commissioner, Department of Education and Early Development

David Márquez, Attorney General, Department of Law