

# LEGAL SERVICES

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## MEMORANDUM

April 28, 2024

**SUBJECT:** Correspondence study programs  
(Work Order No. 33-LS1590)

**TO:** Representative Tom McKay  
Attn: Trevor Jepsen

**FROM:** Marie Marx   
Legislative Counsel

You asked several questions related to the recent Anchorage superior court case *Alexander v. State*.<sup>1</sup> Given the limited time available at this point in session, I have set out brief answers to your questions below.

Background. The legislature passed AS 14.03.300 and 14.03.310 in 2014.<sup>2</sup> On April 12, 2024, the Anchorage superior court in *Alexander* struck down these two statutes as unconstitutional under art. VII, sec. 1, of the Alaska Constitution,<sup>3</sup> which provides, "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."

AS 14.03.300(a) requires an individual learning plan for each student enrolled in a correspondence study program, and lists what an individual learning plan must include.<sup>4</sup> AS 14.03.300(b) provides: "Notwithstanding another provision of law, the department may not impose additional requirements, other than the requirements specified under (a) of this section and under AS 14.03.310, on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f)." AS 14.03.310(a) permits the

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<sup>1</sup> Case No. 3AN-23-04309 CI (Alaska Super. Ct. April 12, 2024).

<sup>2</sup> Sec. 15, ch. 15, SLA 2014.

<sup>3</sup> Case No. 3AN-23-04309 CI, Order Denying Defendant's Mot. to Dismiss and Granting Plaintiffs' Mot. for Summ. J. at pp. 31 - 33 (Alaska Super. Ct. April 12, 2024).

<sup>4</sup> Note that, while the court struck down AS 14.03.300, which includes provisions relating to individual learning plans for students enrolled in public correspondence study programs, the court did not find these individual learning plans unconstitutional. The issue addressed in *Alexander* was the constitutionality of using public funds to purchase services and materials from private or religious educational institutions.

payment of some public money for private education. Specifically, it allows payment of "an annual student allotment to a parent or guardian of a student enrolled in" a correspondence study program provided by the Department of Education and Early Development (department) or a district "for the purpose of meeting instructional expenses for the student enrolled in the program." AS 14.03.310(b) sets requirements for the use of the student allotment, providing:

(b) A parent or guardian may purchase nonsectarian services and materials from a public, private, or religious organization with a student allotment provided under (a) of this section if

(1) the services and materials are required for the course of study in the individual learning plan developed for the student under AS 14.03.300;

(2) textbooks, services, and other curriculum materials and the course of study

- (A) are approved by the school district;
- (B) are appropriate for the student;
- (C) are aligned to state standards; and
- (D) comply with AS 14.03.090 and AS 14.18.060;

and

(3) the services and materials otherwise support a public purpose.

1. What is the current status of correspondence study program operations?

AS 14.07.020(a)(9) provides: "The department shall . . . exercise general supervision over elementary and secondary correspondence study programs offered by municipal school districts or regional educational attendance areas; the department may also offer and make available to any Alaskan through a centralized office a correspondence study program[.]" AS 14.17.430 provides: "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 90 percent."

The version of AS 14.07.020(a)(9) currently in statute was enacted in 2003.<sup>5</sup> AS 14.17.430 was first enacted in 1998, and provided that the allocation for a correspondence study program was 80 percent of the ADM of the correspondence program.<sup>6</sup> In 2014, the statute was amended to raise this to 90 percent.<sup>7</sup> As evident from the statutes in effect prior to and after enactment of AS 14.03.300 and 14.03.310,

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<sup>5</sup> See sec. 2, ch. 114, SLA 2003.

<sup>6</sup> Sec. 2, ch. 83, SLA 1998.

<sup>7</sup> Sec. 25, ch. 15, SLA 2014.

correspondence study programs existed before enactment of AS 14.03.300 and 14.03.310, and continue to exist even after the superior court struck down AS 14.03.300 and 14.03.310. Notably, the superior court did not strike down AS 14.07.020(a)(9), AS 14.17.430, or any of the numerous provisions of Alaska law that involve correspondence study programs offered by school districts, and these statutes remain in effect.<sup>8</sup> Additionally, the department and the state Board of Education and Early Development (state board) regulated correspondence study programs prior to enactment of AS 14.03.300 and 14.03.310, and continue to regulate them now.<sup>9</sup>

However, four regulations in the Alaska Administrative Code rely, at least in part, on AS 14.03.300 and 14.03.310<sup>10</sup> as the statutory authority for adoption: 4 AAC 09.160, 4 AAC 33.421, 4 AAC 33.422, and 4 AAC 33.426. It is likely the state board will need to update these four regulations in light of *Alexander*, just as the state board did in 2015 after AS 14.03.300 and 14.03.310 became law.<sup>11</sup>

2. May the correspondence study program allotment issue raised in *Alexander* be remedied by statute or regulation? The short answer is yes. The issue addressed in *Alexander* was the constitutionality of using public funds to purchase services and materials from private or religious educational institutions.<sup>12</sup> AS 14.03.310(a) permits the payment of some public money for private education. AS 14.03.300(b) provides: "Notwithstanding another provision of law, the department may not impose additional requirements, other than the requirements specified under (a) of this section and under AS 14.03.310, on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f)." One of the effects of the language in AS 14.03.300(b) is that it prohibits the department from placing any restrictions on, or other requirements for, the use of the student allotments authorized under AS 14.03.310.

The court found that the legislative history of AS 14.03.300 and 14.03.310 "clearly demonstrates that the statutes were drafted with the express purpose of allowing

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<sup>8</sup> See, e.g., AS 14.03.095(a); AS 14.07.050; AS 14.08.111(9); AS 14.14.090(7); 14.14.120; AS 14.17.410(b)(1)(D); 14.17.500(c); AS 14.30.010(b)(10); 14.30.186(a)(5); 14.30.365(c)(1); AS 14.45.150(c)(1); AS 14.56.365(a)(1); and 14.56.370(a).

<sup>9</sup> See regulatory history for 4 AAC 33.405 - 4 AAC 33.490.

<sup>10</sup> AS 14.03.310 was originally enacted as AS 14.03.320, but was subsequently renumbered.

<sup>11</sup> See Order Certifying the Changes to Regulations of the State Board of Education & Early Development, filed Feb. 4, 2015, <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=98453>.

<sup>12</sup> See generally Case No. 3AN-23-04309 CI, Order Denying Defendant's Mot. to Dismiss and Granting Plaintiffs' Mot. for Summ. J. (Alaska Super. Ct. April 12, 2024).

purchases of private educational services with the public correspondence student allotments,"<sup>13</sup> and that the plain language of art. VII, sec. 1, of the Alaska Constitution prohibits the use of public funds for educational materials and services from private educational institutions.<sup>14</sup> While the court expressed concerns about "how organizations are characterized and the 'gray area spending,'"<sup>15</sup> the court found that there was "no workable way to construe the statutes to allow only constitutional spending and AS 14.03.300-.310 must be struck down as unconstitutional in their entirety."<sup>16</sup> The court explained that it is the legislature's role, and not that of the courts, to craft legislation that is constitutional, stating:

If the legislature believes these expenditures are necessary - then it is up to them to craft constitutional legislation to serve that purpose - that is not this Court's role.<sup>17</sup>

In other words, although the court did not find all student allotments unconstitutional, the court declined to strike only certain provisions of AS 14.03.300 and 14.03.310, because rewriting statutes to make them constitutional "is not [the] Court's role."<sup>18</sup> It is up to the legislature or the executive branch to craft a constitutional student allotment program.

The state board has broad authority under AS 14.07.060 to adopt regulations that are necessary to carry out the provisions of AS 14. Many of the correspondence study program regulations in effect today were first adopted in some form in the late 1990s or early 2000s.<sup>19</sup> Nothing currently precludes the state board from enacting regulations governing correspondence study programs, including regulations that are similar in substance to 4 AAC 33.421 and 4 AAC 33.422; i.e. regulations that require an individual learning plan for each student enrolled in a correspondence study program and that allow for student allotments. The regulations, however, may not permit use of public funds for the direct benefit of private or religious educational institutions.

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<sup>13</sup> *Id.* at p. 19.

<sup>14</sup> *Id.* at p. 31.

<sup>15</sup> *Id.* at p. 32.

<sup>16</sup> *Id.* at pp. 32 - 33.

<sup>17</sup> *Id.* at p. 33.

<sup>18</sup> *Id.*

<sup>19</sup> See regulatory history for 4 AAC 33.405 - 4 AAC 33.490.

The state board also has the power to issue emergency regulations under AS 44.62.250.<sup>20</sup> An emergency regulation requires a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the "public peace, health, safety, or general welfare."<sup>21</sup> The normal public notice is not required for an emergency regulation, but once the regulation is adopted, the state board must give notice of the adoption in the same manner as notice would be given for a non-emergency regulation. If the required notice is not given within 10 days, the regulation is automatically repealed. An emergency regulation is only in effect for 120 days unless the state board complies with the usual procedures for a non-emergency regulation during the 120-day period.<sup>22</sup>

As discussed above, the legislature may pass legislation and the executive branch may adopt regulations to cure what the superior court held were constitutional defects in the student allotment program. However, the Governor has indicated that the executive branch will appeal the superior court's decision. On appeal, the Alaska Supreme Court could uphold the superior court's ruling, narrow the scope of the ruling, or overturn the ruling and find that AS 14.03.300 and 14.03.310 are constitutional. This ruling may affect any statutes or regulations adopted in response to the *Alexander* decision.

Please let me know if I may be of further assistance.

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<sup>20</sup> See, e.g. Notice of Adoption of Emergency Regulation Regarding Increased Internet Access for Schools by State Board of Education and Early Development, dated June 23, 2020, <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=198645>.

<sup>21</sup> AS 44.62.250.

<sup>22</sup> AS 44.62.260.