February 21, 2013

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The Honorable Lynn Gattis, Chair
The Honorable Lora Reinbold, Vice-Chair
House Education Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Rep.Lynn.Gattis@akleg.gov
Rep.Lora.Reinbold@akleg.gov

Re: HJR 1: Constitutional Amendment for Educational Funding
ACLU Review of Legal Issues

Dear Chair Gattis and Vice-Chair Reinbold:

Thank you for the opportunity to provide written testimony regarding House Joint Resolution 1.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions.

We write to advise the Education Committee of at least two serious problems with HJR 1. First, were HJR 1 to pass the Legislature and be adopted by the people, the federal and Alaska constitutions prohibit the payment of public money to private religious schools. Second, the public funding of private schools (both religious and secular), may expose private-schooled students and families to increased discrimination, which they would not have suffered had they remained in public schools.

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HJR 1 Will Not Change the Federal or Alaska Establishment Clauses

HJR 1, were it to be passed and adopted, would amend the Public Education section (Alaska Const. art. VII, § 1) and Public Purpose section (Alaska Const. art. IX, § 6) of the Alaska Constitution. The stated purpose of these amendments is to permit the State to fund both private secular ***and*** religious schools. While HJR 1 would allow Alaska to fund private secular education, it would ***not*** change the federal or Alaska Establishment Clauses, which substantially limit the State from funding religious schools. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion . . ."); Alaska Const. art. I, § 4 ("No law shall be made respecting an establishment of religion . . .").

Though the U.S. Supreme Court interpreted the federal Establishment Clause to permit an Ohio secular and religious school voucher program, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Ohio was not directly paying the religious schools: a salient difference from what HJR 1 seeks to allow. And, no matter the details of the religious voucher scheme, even if it were to pass federal constitutional muster, public funding of religious schools would still violate the Alaska Establishment Clause. *Lien v. City of Ketchikan*, 383 P.2d 721, 724 (Alaska 1963) (noting that the Alaska Establishment Clause prohibits the teaching of religion).

If the Legislature seeks to publicly subsidize private **secular** schools, HJR 1 would appear to achieve that end. It would not, however, lower the federal and Alaska Establishment Clauses' high constitutional bars against funding religious schools.

Private Schools Lack Public Schools' Nondiscrimination Protections

An asserted impetus behind HJR 1 is to increase the ability of families to send their children to private secular and religious schools. While the ACLU of Alaska takes no position on this as a policy matter – and ***we would defend a family's right to choose to send their child to a secular or religious school***, *see Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) – the Committee should note that **private school pupils fall outside the protective umbrella of federal and state nondiscrimination laws.**

Private schools, be they secular or religious, may exempt themselves from nearly all of Alaska's "laws and regulations relating to education," Alaska Stat. § 14.45.100, including the sexual and racial nondiscrimination laws of Alaska Stat. §§ 14.18.010 to 14.18.110.[1] Students at religious schools risk extra discrimination: they may be sexually discriminated against without recourse to Title IX,[2] 20 U.S.C. § 1681(a)(3), and students with otherwise-

[1] Private schools must still comply with "law and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations." Alaska Stat. § 14.45.100.

[2] Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681–1688.

protected physical and mental disabilities may lack the protections of the Americans with Disabilities Act, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. ___, 132 S. Ct. 694 (2012).

These disabled students are further exposed: whether they attend a secular or religious school, they may lack the protections of the federal Individuals with Disabilities Education Act ("IDEA"). *See* 20 U.S.C. § 1412(a)(10)(A)(i)(III). While Alaska Stat. § 14.30.340 currently requires school districts to provide IDEA services to students at secular and religious schools, those benefits are conditioned on the State's legislative grace, not a federal right. If the State were to divert educational funds to private schools – as HJR seeks to allow – there could be pressure on the Legislature to eliminate a potentially expensive private school benefit in order to offset the diminished public school funds.

It would be unfortunate if the same Legislature that, on the one hand, is considering eliminating official slurs against disabled Alaskans[3] were to, on the other hand, strip the protections of important nondiscrimination laws from these same individuals.

We Should Not Reject Our Framers' Wisdom and Needlessly Amend the Constitution

Alaska's Framers sought to ensure that the Alaska Constitution would not be easily amended. To be adopted, proposed amendments must first receive a two-thirds vote from both legislative houses and then a majority vote from the citizens at the next general election. Alaska Const. art. XIII, § 1.

Since the Nation's founding, "there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Locke v. Davey*, 540 U.S. 712, 722 (2004). The Founders enacted the federal Establishment Clause because "they fervently wished to stamp out" the centuries long "turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 8–9 (1947). The Founders designed the Establishment Clause "to preserve liberty for themselves and their posterity." *Id*. at 8.

Alaska's Framers knew this history when they proposed – and the citizens adopted – the Alaska Establishment Clause. Our state constitutional delegates considered and rejected a "motion . . . to delete entirely the direct benefit prohibition of article VII, section 1." *Sheldon Jackson College v. State*, 599 P.2d 127, 129 (Alaska 1979). The Framers decided to keep this section – one of the two that HJR 1 now seeks to erase – because they "clear[ly] . . . wished the constitution to support and protect a strong system of public schools." *Id.* Delegate Coghill was particularly concerned "that the amount of tax dollars available for the support of public schools might be lessened if public funds were used to support a great many private schools." *Id.* at n.6.

[3] House Bill 88 and Senate Bill 39.

We should not reject our Framers' wisdom by amending the Constitution and exposing the State to needless, costly litigation and Alaskan students and families to avoidable, harmful discrimination.

Conclusion

We hope that the Education Committee will recognize that these are just some of the problems with House Joint Resolution 1, in that it exposes Alaska's students and families to numerous forms of discrimination, it rejects the accumulated wisdom of our Framers, and it opens the State to protracted, expensive litigation.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey A. Mittman
Executive Director
ACLU of Alaska

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