

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 8, 2013

SUBJECT: Additional education funding questions
(Work Order No. 28-LS0605)

TO: Senator Mike Dunleavy
Attn: Bethany Marcum

FROM: Jean M. Mischel
Legislative Counsel

You have posed three additional questions in the form of hypotheticals that again pertain to public education funding and ask about the constitutionality of the spending. This memorandum must be brief under the time constraints you provided. Your questions describe a single child¹ entering into three private contracts (one each with, Sylvan Learning Center, religious postsecondary schools located outside the state, and an in-state sectarian school for enrollment in a Latin course) as part of the child's public school program, which in itself poses no particular problem if the funding is private. If, however, you are asking whether a public school district or the state may pay for the contracts in each of the hypotheticals you pose, the details of the program allowing for the funding is relevant. If challenged, a court would scrutinize for consistency with Art. I, Art. VII, and Art. IX of the Constitution of the State of Alaska the use of public funds to pay for the contracts described as previously explained in the March 4th memorandum.

Although you have stated that there is a goal of a "public purpose," that statement alone is not evidence of the existence of a public purpose under Art. IX. If, for example, the contract is funded as part of a public correspondence program or for a student with a learning disability for which a local school has determined the services are necessary, the public purpose appears to be met.² That does not, however, address the other constitutional constraints on public spending.

¹ Since you use the term "child" it is assumed for purposes of this memorandum that all contracts involve a primary or secondary school student.

² As previously stated, students have successfully sought private secular tuition aid using public money under federal disabilities law, 20 U.S.C. 1401. See, *J.P. and L.P. v. Anchorage School District*, 260 P.3d 285 (Alaska 2011). The Alaska Supreme Court has not had occasion to review the issue in the context of a private or religious educational institution under Art. VII, sec. 1 of the Constitution of the State of Alaska.

The Sylvan Learning Center contract does not appear to involve Art. I, sec. 1 questions of government entanglement in a religious program as do the other two contracts. With regard to the two sectarian school contracts, the type of course taken from the three religious programs described is relevant under both the state and federal constitutions although the Alaska Supreme Court has not yet dealt with the specific issues presented.

With respect to all three contracts, a single child's tuition expense may not provide a "direct benefit" under Art. VII, sec. 1 as construed by the Alaska Supreme Court. Cumulatively, however, if the three contracts are part of an overall program to encourage or provide incentives to attend private or religious educational institutions, both Art. VII, sec. 1 and Art. I, sec. 1 are implicated. All three contracts combined call into question the availability of "genuine" public school options required by the United States Supreme Court analysis under the First Amendment to the federal constitution. In addition, if the contracts are not available to all similarly situated students, the contracts could be challenged under the equal protection clause of Art. I, sec. 4.

These are complex considerations not lending themselves to simple yes or no answers. Until further guidance is provided by the Alaska Supreme Court, persuasive arguments may be made on either side of each of the issues raised, depending upon the precise parameters of the program allowing for the funding and the reasons for the private contracts. Keep in mind, however, that the inclusion of private education contracts in a public education plan using public funds is not necessarily evidence of its constitutionality.

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