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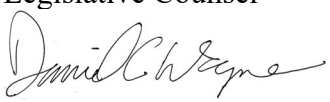
M E M O R A N D U M May 13, 2021

SUBJECT: Constitutionality of program that benefits a private religious school (HB 100; Work Order No. 32-LS0565\A)

TO: Senator Click Bishop

FROM: Daniel C. Wayne
Legislative Counsel



You have asked for a legal opinion about whether the required allocation of state money to the Amundsen Educational Center (AEC) proposed by HB 100 would be unconstitutional because AEC is a "faith-based program." As a preliminary matter, I note that I am not familiar enough with the facts to know for certain whether AEC or some of the other programs slated for allocation of money by HB 100 would be considered by a court to be public, private, or religious; however, for the sake of discussion this memo assumes AEC is a religious program.

Over 40 years ago, the Alaska Supreme Court struck down a grant program that sought to provide additional funding to students who selected private over public colleges.[1] In *Sheldon Jackson College v. State* the Alaska Supreme Court held that a tuition grant program for private colleges violated art. VII, sec. 1 of the Alaska Constitution.[2] That section 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 Court rejected assertions that the constitutional prohibition on the use of public funds did not apply to postsecondary institutions and that the tuition grant program was not a direct benefit, concluding that the payment of subsidies in the form of grants for the difference in the cost of private and public college tuition only to private college students

[1] *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

[2] *Id*, 132.

was unconstitutional.[3] The Court noted that "the [constitutional] convention made it clear that it wished the constitution to support and protect a strong system of public schools."[4]

When evaluating Sheldon Jackson College's arguments, the Court established a three part test for determining the constitutionality of public programs that provide economic benefit to private educational institutions.[5] *First*, the Court reviews the breadth of the class to which the economic benefits are directed, determining whether the program benefits both private and public institutions.[6] *Second*, the Court asks 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).[7] *Third*, the Court looks at the magnitude of the benefit to private education.[8] Finally, the Court recognizes that "merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies . . . the superficial form of a benefit will not suffice to define its substantive character."[9]

Applying the test to the tuition grant program, the *Sheldon Jackson* Court struck down the state's program, finding that it violated all three parts of the test.[10] The class that the 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.[11]

In *Sheldon Jackson,* the Court did not consider what makes a program a "private educational institution," articulate whether a program that survives one or more factors of the test is constitutional, or explicitly ascribe particular weight to any of the test parts. For

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[3] *Id.* at 130 – 32.

[4] *Id.* at 129.

[5] *Id.* at 130.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 130 – 31.

[10] *Id.* at 131.

[11] *Id.* at 131 – 32.

example, it is not clear whether a program that neutrally provides payments to private and public educational institutions but provides substantial benefits to private institutions for core education functions is constitutional. This lack of clarity is apparent in different attorney general opinions applying the *Sheldon Jackson* test. For example, a 1985 opinion treated neutrality as the dispositive or most heavily weighted factor, providing: "[t]he student loan program, on the other hand, is available on equal terms to students who enroll in public or private institutions; it is neutral. The direct benefits clause of article VII, section 1, thus is not implicated here."[12] The opinion also concluded "[t]he fact that student loans are available to students who attend a broad spectrum of public and private schools is therefore likely to be of greater constitutional significance than the existence of tangible benefits within particular religious institutions."[13] Despite the 1985 opinion's focus on neutrality, just two years later another attorney general opinion concluded that a seemingly neutral tax credit, which provided for "cash contributions accepted for direct instruction, research, and educational support services, including library and museum acquisitions, by an accredited, *nonprofit, public or private*, Alaska, two- or four year, college or university," was fatally flawed.[14] This later opinion did not discuss neutrality at all, let alone treat it as a dispositive or important factor.[15] After the attorney general opinion concluded that the Act with this tax credit was fatally flawed, Governor Cowper nonetheless signed the Act, and this tax credit is still in law.[16] I am not aware of any subsequent challenge to the credit.

Similarly, the grant allocation scheme amended by HB 100 has not, as far as I am aware, been evaluated under art. VII, sec. 1, by Alaska's courts or the attorney general. If challenged, a court may conclude that the scheme is neutral under the first part of the *Sheldon Jackson* test.[17] Additionally, the grant allocations would be administered by the Department of Labor and Workforce Development as opposed to the Department of Education and Early Development. This is significant, as it is conceivable that a court

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[12] 1985 Inf. Op. Att'y Gen. (Dec. 12; 366-189-84), 1985 WL 70231 at *3 n.6.

[13] *Id.* at *3.

[14] 1987 Inf. Op. Att'y Gen. (May 29; 883-87-0033), 1987 WL 121123 at *1–2 (emphasis added).

[15] *Id.*

[16] *See* AS 43.56.018.

[17] *See* AS 14.43.820 (defining qualified postsecondary institution in neutral terms); AS 23.15.641(a)(3) (STEP program benefits available to private and public programs); AS 23.15.835 (providing TVEP funds directly to both public and private programs); AS 23.15.840 (limiting TVEP grants to programs that do not compete with existing public and private programs); AS 23.15.080 (providing for vocational education through a public or private instrumentality).

might distinguish between job training or vocational programs and educational programs, concluding that the former are not "private educational institutions." [18] Under part two of the *Sheldon Jackson* test, whether the benefit provided is incidental, the state money provided for each program is directed toward tuition or fees for the core program and is probably not incidental. Finally, under part three, whether the benefit provided is substantial, with the limited guidance from the *Sheldon Jackson* opinion I do not know the amount of money provided under a program that a court will consider substantial.

A court could conclude, however, that a program or a specific implementation of a program violates the state constitution.[19] Ultimately, I cannot predict with certainty whether a court would uphold the allocation to AEC proposed in HB 100, or find that it violates art. VII, sec. 1, of the state constitution. If a court were to find that the grant violates the state constitution, I do not know whether the court would invalidate the entire allocation scheme or just the allocation to AEC.

In 2020 the U.S. Supreme Court considered a similar question regarding a program established by the Montana Legislature to grant tax credits to those who donate to organizations that award scholarships for private school tuition. In holding that the program had been administered in a manner that discriminated against religious schools in violation of the Free Exercise Clause of the Federal Constitution, the Court advised: "[A] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[20] Based on

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[18] I do not know how a court would review a job training or vocational program within a private college. For example, HB 100 proposes extending the grant allocations under AS 23.15.835, providing money to several institutions in addition to AEC, including Ilisagvik College. I do not know whether Ilisgavik college is a private educational institution, but an attorney general opinion questioned a proposed 2008 grant to Ilisagvik college and concluded that the grant provided a direct benefit to a private educational institution. 2008 Inf. Op. Att'y Gen. (May 13; 883-08-0119), 2008 WL 4277529 at *5–6.

[19] For example, a 1983 attorney general opinion concluded that provision of a state employment training program grant to Sheldon Jackson College would be unconstitutional. 1983 Inf. Op. Att'y Gen. (April 8; 366-540-83), 1983 WL 42511 at *1. The state employment training program predates the current state training and employment program. Despite finding a specific application of the program unconstitutional, the opinion did not evaluate whether the state employment training program was unconstitutional.

[20] *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2261 (2020). The Court found unconstitutional a related regulation prohibiting families from using the scholarships at religious schools. The regulation, known as "Rule 1," was promulgated by the Montana Department of Revenue to reconcile the tax credit program with art. X, § 6(1) of the Montana Constitution, which bars government aid to schools "controlled in whole or in part by any church, sect, or denomination." Three parents alleged that Rule 1

this, if the grant allocation scheme in HB 100 provides funding to non-religious private institutions, withholding of the grant to AEC because it is faith-based would be unconstitutional discrimination and violate the Free Exercise Clause of the Federal Constitution. Under those facts, even if the bill's proposed grant to AEC might otherwise be in violation of the Alaska Constitution, the Supremacy Clause would require that the state follow the holding in *Espinoza* and allow the grant. As explained in that case:

> The Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. This Clause creates a rule of decision directing state courts that they must not give effect to state laws that conflict with federal law.[21]

If there are no private non-religious institutions on the list with AEC in HB 100, then a state court would probably not be required to follow the rule from *Espinoza,* and would follow the state constitution and past court opinions to interpret whether the allocation is constitutional.

Please call with any questions or concerns.

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unconstitutionally discriminated against them based on their religious views and the religious nature of the school they had chosen for their children to attend. The Court further held that the violation required invalidating the entire program. *Id*. at 2246.

[21] *Espinoza*, 140 S. Ct at 2262 (2020) (Internal quotes and citations omitted).