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CHERI C. JACOBUS
ATTORNEY AT LAW
1348 CRESCENT AVENUE
ANCHORAGE, ALASKA 99504

19 May 1983

Representative Sam Pestinger
State House of Representatives
Pouch V
Juneau, Alaska 99811

Re: HB 357 -- Regulation of Religious Schools

Dear Representative Pestinger:

Thank-you for your support and for the excellent help provided to Burt Carney and to me by Ed Essa during our recent trip to Juneau to work for the passage of HB 357. As we discussed, this legislation is extremely important if the state is to avoid the church-state conflicts that have occurred in other states. While the results are generally pleasing, in reviewing the final Health, Education and Social Services committee substitute, one problem is apparent in the language added to Section 1. The section as amended reads as follows:

(8) in cooperation with the Department of Health and Social Services, exercise general supervision over public and private pre-elementary schools and over the educational component of nurseries as defined in AS 47.35.080(4) excluding the educational component of pre-elementary schools and nurseries operated by a church or other nonprofit religious organization that is exempt from federal taxation and does not receive state or federal funding; pre-elementary schools in this paragraph means schools for children ages three through five years when the school's primary function is educational; (the added language is in bold type)

While the phrase "the educational component" may seem innocuous, it really defeats the purpose of this legislation. The change in the language is improper on three grounds. First, it violates the Equal Protection clause of the U. S. Constitution by apparently delegating to the Department of Education more supervision over church schools than it has over public schools. Second, it is unclear what non-educational general supervisory powers the legislature intends to grant to the Department of Education over church schools and, therefore, this broad grant is an unconstitutional delegation of legislative power to the executive branch of government. Third, if by this grant of power, the department through regulation can unduly burden religious exercise, it is unconstitutional as a violation

of the First Amendment.

If the legislation excludes only "the educational component" of church schools, there is a clear implication that the church school may be regulated in other ways under the "general supervision" language. Not even the public schools are subject to "general supervision," but the department's duties regarding them are specifically set forth. The existing statute includes: providing consulting and advisory services to the public schools, prescribing a minimum course of study for the public schools, establishing educational programs for children in detention, accrediting public schools, prescribing standards to assure healthful and safe conditions in public and private schools, providing correspondence courses, accrediting private schools that request accreditation, reviewing construction plans of public schools, and providing vocational education to those persons older than sixteen. These specific powers are generally not relevant or applicable to church schools.

Unless church schools are totally exempt from "general supervision," and not exempt only with respect to the educational component, there would be a denial of equal protection under the Constitution, because the department would have more authority over religious schools than it has over public schools.

Because the words, "general supervision," are not defined it is not clear what the legislature intends by them. By leaving it up to the department to decide what is meant by these words, the legislature would be violating a basic principle of our form of government. The legislature writes the laws and sets policy and the executive branch implements that policy. The separation of power is essential to effective government and where a delegation is too vague, the courts generally strike the law down.

Finally, the state cannot do indirectly what it is prohibited from doing directly. As we have discussed, the state's right to impose minimum requirements on private religious schools is very limited, because those religious activities are protected by the First Amendment of the U. S. Constitution and its identical counterpart in the Alaska State Constitution, Art. I, sec. 4. Any legislation that directly or indirectly burdens parents', childrens', or a church's free exercise of religious beliefs is unconstitutional unless, the state can demonstrate that it has a compelling state interest in the regulation and that it has chosen the least burdensome method for protecting that interest.

In this case, since the legislature has not even identified the compelling state interest in granting to the department "general supervision" of church pre-elementary and nursery programs and has left the definition of the term, as well as the method, up to the department, this would clearly violate the First Amendment.

Again, I appreciate the time and the support you and your staff have provided to me. Please delete the phrase "the educational component of" added by the HESS Committee to HB 357.

Sincerely,

Cheri C. Jacobus

Cheri C. Jacobus

cc: Rep. Mae Tischer
Rep. Milo Fritz, M.D.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 18, 1983

SUBJECT: Regulation of religious schools
(CSHB 357 (HESS))

TO: Representative Mae Tischer
Chairman, House Health, Education and
Social Services Committee

FROM: Keith B. Levy *KBL*
Legislative Counsel

You have asked for an opinion as to the effect of the amendment made to sec. 1 of CSHB 357 (HESS) at the Health, Education and Social Services Committee meeting of May 17, 1983. Before the committee amendment, sec. 1 amended AS 14.07.020(8) to provide that certain religious schools are excluded from the general supervision of the Department of Education and the Department of Health and Social Services. The committee amendment makes it clear that only the educational component of those schools is exempt from departmental supervision.

More specifically, before the committee amendment, sec. 1 provided that the departments would exercise general supervision over public and private pre-elementary schools and over the educational component of nurseries, excluding pre-elementary schools and nurseries run by religious organizations. In other words, religious pre-elementary schools would be exempt from any supervision whereas religious nurseries would only be exempt from supervision of their educational component. This would leave the religious nurseries open to regulation as to such matters as health and safety, but not curriculum. The amendment made in the committee meeting added the words "educational component" to the exemption from departmental supervision. The effect of the amendment is to make it clear that the departments can regulate both religious pre-elementary schools and nurseries only in regard to matters other than education, e.g., health and safety.

KBL:ljb
20/024

CHERI C. JACOBUS
ATTORNEY AT LAW
1348 CRESCENT AVENUE
ANCHORAGE, ALASKA 99504

Representative Milo Fritz, M.D.
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Re: Draft Letter of Intent for CSHB 357 -- Regulation of
Religious Schools

Dear Dr. Fritz:

Attached is a draft Letter of Intent to accompany CSHB 357. I have attempted to cover all the issues which might arise in the state's later interpretation of this legislation. If you or your staff have any questions or think that it can be clarified, please feel free to call me. I especially enjoyed our short meeting together.

In carefully reviewing the draft CSHB 357 a few minor problems came to my attention. The Legislative Affairs Assistant Counsel added some language and left out other language which would have made the committee substitute more clear, without changing its meaning.

Pursuant to discussions with the representative of the Department of Education, Steve Hole, the following sentence should be added to page 2, line 21 to make it clear that religious schools are treated in the sub-sections that follow:

This sub-section does not apply to religious schools as defined in AS 14.45.040 which comply with this chapter.

Since it is clearly not practical for the parents to provide daily attendance records, that requirement should be deleted from the committee substitute. Section 5 found on page 2, beginning on line 23, would then read:

(b) The parent or guardian of a child enrolled in a religious school that complies with this chapter shall file annual enrollment [and attendance records] for the child with the public school superintendent for the area in which the child resides on a form provided by the public school superintendent. . .
(bracketed part is deleted.)

As I testified in the teleconference, the last sentence of that section should also read differently to protect the state's interest in assuring compliance with the state's compulsory education law. Since this is more practical, the change would require the church school to notify authorities if a child leaves the church school. Line 29 on page 2 and lines 1 and 2 on page 3 should read as follows:

The religious school [parent] shall notify

the public school superintendent immediately if the child is no longer in or attending the religious school.

As I was leaving Juneau, it came to my attention that the Administration was considering lengthening the school year. Therefore, with that in mind, the following language change is suggested to ensure that religious schools operate for similar lengths of time. Line 6 on page 3 should read:

. . . [during at least nine calendar months of the year] for at least the same number of days that the public schools operate.

Finally, to avoid an interpretation that would require intrusive regulations, it is suggested that the following language be added to Section 6, beginning at line 19. That subsection would then read:

(c) A religious school shall maintain records of the results of the nationally standardized tests and the records shall be made available to the parent or guardian of the student and to authorized representatives of the state in the school office.

Thank-you for all your help on this important issue. If Alaska can avoid all the problems that have occurred in the lower 48 states, it will be worth the effort. I look forward to working with you again.

Sincerely yours,

Cheri C. Jacobus
Cheri C. Jacobus

attachment

LETTER OF INTENT
HB 357

The House Health, Education and Social Services Committee recognizes that operating a church school is an integral part of the free expression of religion and that schools operated by religious bodies are quite different from other private schools. Therefore, the Committee's purpose in referring HB 357 to the floor and in urging its passage is to prevent possible church-state constitutional conflicts by protecting the fundamental rights of religious freedom of parents, children, and church schools in Alaska and, at the same time, to balance the state's interest in assuring that each child receives a good education. The Committee specifically intends to exempt pre-elementary and nursery programs operated by religious organizations from the general supervision of the Departments of Education and of Health and Social Services.

The Committee only intends to exclude from the purview of this bill those church schools that receive direct federal or state funds. This would not affect those schools that receive incidental benefits from government, such as fire or police protection, health care or other benefits to which all citizens are entitled.

Any church school that satisfies all the requirements of AS 14.45 would be exempt from any additional provision of law relating to education except those requirements of law relating to fire, health, and safety. While each church school would be subject to reasonable fire, health, and safety regulation, the House Health, Education and Social Services Committee intends to specifically limit health regulation to that regulation that is reasonably related to the state's interest in preventing and curing physical diseases. For example, the Committee does not intend for the state to regulate minimum space requirements (except as it directly relates to the fire code), hours of attendance, or reasonable methods of discipline.

In summary, the House Health, Education and Social Services Committee Substitute for HB 357 balances the state's interest in ensuring that each child receives a good education with the constitutional right to religious freedom.

Respectfully submitted,
/s/

OFFERED IN THE HOUSE:

BY: Koponen and Phillips

To: CS HOUSE BILL No. 357 (RULES)

SENATE BILL No. _____

PAGE: _____

LINE: _____

PAGE 1, LINE 6

Delete: "religious"

Insert: "private"

PAGE 1, LINE 14, following "by a"

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 2, LINE 6, following "by a "

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 2, LINE 10, following "A"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 23, following "in a"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 25, following "in the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 2, LINE 29, before "school"

delete: "religious"

insert: "private nonprofit"

Failed
13 - 23

A M E N D M E N T #1 (continued)

OFFERED IN THE HOUSE: By: _____
 To: _____ HOUSE BILL No. _____
 SENATE BILL No. _____
 PAGE: _____ LINE: _____

PAGE 3, LINE 1, following "The"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 3, following "the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 4, following "a"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 12, before "school"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 14, following "the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 18, following "A"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 22, following "A"

Delete: "religious"

Insert: "private nonprofit"

OFFERED IN THE HOUSE:

By: _____

To: _____ HOUSE BILL No. _____

SENATE BILL No. _____

PAGE: _____

LINE: _____

PAGE 3, LINE 25, following "the"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 26, following "chapter"

Delete: "religious"

Insert: "private nonprofit"

PAGE 3, LINE 27, following "by a "

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

PAGE 4, LINE 8, following "by a"

Delete: "church or other nonprofit religious"

Insert: "private nonprofit"

AMENDMENT #2

OFFERED IN THE HOUSE:

By: KOPONEN AND PHILLIPS

To: CS HOUSE BILL No. 357 (RULES)

SENATE BILL No. _____

PAGE: _____

LINE: _____

PAGE 1, LINE 15

Delete: "direct"

PAGE 2, LINE 8

Delete: "direct"

PAGE 3, LINE 29

Delete: "direct"

PAGE 4, LINE 10

Delete: "direct"

Failed 23-14

Levy
5/20/83

Original sponsors: Fritz, Tischer,
Pestinger, et al

1 IN THE HOUSE

BY THE RULES COMMITTEE

2 CS FOR HOUSE BILL NO. 357 (Rules)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the regulation of religious
7 schools."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 14.07.020(8) is amended to read:

10 (8) in cooperation with the Department of Health and Social
11 Services, exercise general supervision over public and private pre-
12 elementary schc ls and over the educational component of nurseries as
13 defined in AS 47.35.080(4) excluding pre-elementary schools and nur-
14 series operated by a church or other nonprofit religious organization
15 that is exempt from federal taxation and does not receive direct state
16 or federal funding; pre-elementary schools in this paragraph means
17 schools for children ages three through five years when the schools'
18 primary function is educational;

*CS deletes
"the educational
component of"*

19 * Sec. 2. AS 14.30.010(b)(1) is amended to read:

20 (1) is provided an academic education comparable to that
21 offered by the public schools in the area, either by

22 (A) attendance at a private school in which the teach-
23 ers are certificated according to AS 14.20.020;

24 (B) tutoring by personnel certificated according to
25 AS 14.20.020; [OR]

26 (C) except as provided in (D) of this paragraph,
27 attendance at a private school in which the average student
28 proficiency is not less than the average proficiency found in the
29 public schools in the area as measured by national achievement

1 tests; the board of education [DEPARTMENT] with assistance from
2 representatives of the private schools shall adopt [PROMULGATE]
3 regulations defining the subject areas to be tested and the
4 minimum average scores to be achieved; or

5 (D) attendance in an educational program operated in
6 compliance with AS 14.45 by a church or other nonprofit religious
7 organization that is exempt from federal taxation and does not
8 receive direct state or federal funding;

9 * Sec. 3. AS 14.45 is amended by adding a new section to read:

10 Sec. 14.45.025. EXEMPTION FROM EDUCATION LAWS. A religious
11 school that complies with this chapter is exempt from other provisions
12 of state law and regulations relating to education except laws and
13 regulations relating to health, fire safety, sanitation, immunization,
14 and physical examinations.

15 * Sec. 4. AS 14.45.030 is amended to read:

16 Sec. 14.45.030. ATTENDANCE AND ANNUAL REPORTS REQUIRED. (a)
17 Except as provided in (b) and (c) of this section, teachers [TEACHERS]
18 and others in charge of private or denominational schools shall make
19 regular monthly attendance reports and annual reports to the commis-
20 sioner in the same manner as teachers and superintendents in the
21 public schools.

22 * Sec. 5. AS 14.45.030 is amended by adding new subsections to read:

23 (b) The parent or guardian of a child enrolled in a religious
24 school that complies with this chapter shall file an annual notice of
25 enrollment in the religious school for the child with the public
26 school superintendent for the area in which the child resides on a
27 form provided by the public school superintendent. The form shall be
28 signed by the parent and the chief administrative officer of the
29 religious school and returned to the public school superintendent by

1 the parent. The religious school shall notify the public school
2 superintendent immediately if the child is no longer enrolled in or
3 attending the religious school.

4 (c) A religious school that elects to comply with this chapter
5 shall maintain monthly attendance records for each student enrolled in
6 the school, shall operate on a regular schedule, excluding reasonable
7 holidays and vacations, during at least 180 days of the year, and
8 shall make an annual report to the commissioner of the number of
9 students in each grade and the school calendar.

10 * Sec. 6. AS 14.45 is amended by adding new sections to read:

11 Sec. 14.45.035. STANDARDIZED TESTING REQUIREMENTS. (a) A
12 religious school that elects to comply with this chapter shall admin-
13 ister a nationally standardized test selected by the chief administra-
14 tive officer of the religious school to all students enrolled in
15 grades one, three, six, and nine at least once each school year.

16 (b) The nationally standardized test must measure achievement in
17 English grammar, reading, spelling, and mathematics.

18 (c) A religious school that elects to comply with this chapter
19 shall maintain records of the results of the nationally standardized
20 tests and the records shall be made available to the parent or guar-
21 dian of the student and to authorized representatives of the state.

22 Sec. 14.45.040. RECORDS. A religious school that elects to
23 comply with this chapter shall maintain adequate student records,
24 including records of immunizations, physical examinations, testing,
25 and courses taken at the religious school.

26 Sec. 14.45.045. DEFINITION. In this chapter, "religious school"
27 means a school operated by a church or other nonprofit religious
28 organization that is exempt from federal taxation and does not receive
29 direct state or federal funding.

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* Sec. 7. AS 44.27.020(1) is amended to read:

(1) administer the state's program of education at the elementary, secondary, and adult levels, including, but not limited to, programs of vocational education and training, vocational rehabilitation, library services, correspondence courses, adult basic education, and fire-service training, but not including degree programs of postsecondary education or an educational program operated in compliance with AS 14.45 by a church or other nonprofit religious organization that is exempt from federal taxation and does not receive direct state or federal funding;

* Sec. 8. AS 14.45.020 is repealed.