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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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EDWARD ALEXANDER; JOSH ANDREWS; SHELBY BECK ANDREWS; and CAREY CARPENTER,

Plaintiffs,

v.

ACTING COMMISSIONER HEIDI TESHNER, in her official capacity, State of Alaska, Department of Education and Early Development,

Defendant,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON.

Intervenors.

Case No. 3AN-23-04309CI

STATE'S REPLY, OPPOSITION, AND CROSS-MOTION FOR SUMMARY JUDGMENT

I. Introduction

The plaintiffs, four parents of school-age children attending Alaska public schools, (collectively, "Alexander"), challenge the constitutionality of AS 14.03.300–.310, statutes that govern the operation of correspondence school programs in Alaska. But their facial challenge fails because these statutes have a "plainly legitimate sweep," authorizing a range of spending that does not even implicate Article VII, Section 1 of the Alaska Constitution, including purchases of materials and services from public educational institutions and from private vendors that are not "educational institutions."

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Alexander's as-applied challenge also fails because the Department of Education and Early Development (DEED) is not the proper defendant for it—the current correspondence school programs are all administered by school districts and any as-applied challenge lies against the district responsible for the allegedly unconstitutional spending, not against DEED. Although DEED initially moved to dismiss the complaint under Alaska Civil Rule 12(b)(6), DEED now cross-moves for summary judgment so that this Court can consider additional facts not provided by Alexander.

II. Background

A. Alaska law assigns different functions and powers to the Department of Education and Early Development and to school districts.

The Alaska Constitution mandates that the legislature shall establish and maintain a system of public schools open to all.[1] To further this mandate the legislature created DEED[2] and empowered it to provide research and consultative services, establish standards and assessments, administer grants and endowments, and exercise general supervision of public schools.[3] The legislature also recognized that Alaska schools may need to "be adapted to meet the varying conditions of different localities."[4] To empower local control, the legislature delegated the task of school district operation

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[1] Alaska Const. art. VII, § 1.

[2] AS 44.27.020.

[3] AS 14.07.020; AS 14.07.145; *see Moore v. Alaska,* No. 3AN-04-09756CI, 2007 WL 8310251, at *5 (Alaska Super. June 21, 2007).

[4] *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

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to local school boards.[5] Each school district is a political subdivision of the State and not controlled by DEED.[6] The education of Alaska's youth is thus a responsibility shared by DEED and local districts, each with differing duties designed to meet the ultimate goal of providing every student with a "meaningful opportunity to achieve proficiency in reading, writing, math, and science."[7]

Among the learning options established by the legislature are correspondence school programs, which the legislature authorized either DEED[8] or local districts to operate.[9] Local districts have operated correspondence programs in the state for over 30

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[5] AS 14.12.020(b) ("[e]ach borough or city school district shall be operated on a district-wide basis under the management and control of a school board); AS 14.14.090 (duties of borough and municipal school boards); AS 14.08.021 (delegating authority to operate public schools in unorganized boroughs to regional attendance areas); AS 14.08.111 (duties of regional school boards); AS 14.08.101 (powers of a regional school board); *see Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67, 75 (Alaska 1980) ("[t]he Anchorage School Board was created by the authority of the state legislature, and is the delegated state authority to govern its school district and manage the operations of the schools within that district."); *see, e.g., Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 803 (Alaska 1975) (permitting the use of different education systems throughout the State); *see also Moore*, 2007 WL 8310251, at *75 (stating that "[c]ertainly, the Legislature has the authority to delegate its constitutional responsibility to maintain public schools to the Department of Education and Early Development as well as to local school districts.").

[6] *Kenai Peninsula Borough v. State*, 532 P.2d 1019, 1023 (Alaska 1975).

[7] *Moore*, 2007 WL 8310251, at *76.

[8] Currently, DEED does not operate any correspondence programs and repealed the regulations for a state-run correspondence school in 2004. The current correspondence school regulations only apply to "correspondence study programs offered by a school district." 4 AAC 33.405.

[9] AS 14.03.300–.310.

years.[10] Where a district operates a correspondence school program, the legislature has delegated certain duties to that district. The district is responsible for providing annual individual learning plans for each enrolled student,[11] which DEED has only limited authority to modify.[12] The district also determines graduation requirements and whether a student is awarded credit for a course.[13] Importantly, the district decides whether to provide an annual student allotment to the parents or guardians of students enrolled in a correspondence program.[14]

When a district decides to provide a family with an allotment, that family may then use the allotment to purchase educational materials and services.[15] It is the district—not DEED—that approves and owns those materials.[16] Thus, it is the district that must approve all expenditures and create written standards for those expenditures.[17]

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10 2005 Inf. Op. Att'y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *1.

11 AS 14.03.300(a); 4 AAC 33.421; *see, e.g.,* Anchorage School District BP 6182 (2021) (correspondence study programs).

12 AS 14.03.300(b).

13 *See, generally,* 4 AAC 06.075 (those requirements must meet or exceed DEED's minimum requirements).

14 AS 14.03.310(a); 4 AAC 33.422.

15 AS 14.03.310(b).

16 *Id.* at (b)(2)(A) (allotments may be used to purchase education material approved by the district); AS 14.08.111(9) (regional school boards review and select education materials); AS 14.14.090(7) (borough and municipal school boards review and select education materials); 4 AAC 33.421(d) & (h) (correspondence programs must use education materials approved by the district); 4 AAC 33.422(b) (purchased educational material belong to the district); *see* 2005 Inf. Op. Att'y Gen., 2005 WL 2751244, at *1 (noting that the district must approve correspondence learning materials in advance).

17 4 AAC 33.422(f).

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Moreover, the district must ensure that allotment funds are kept separate from other funds,[18] account for the balance of unexpended allotments,[19] return the balance of unexpended allotments to the district's budget if the student unenrolls,[20] maintain records of expenditures and allotments,[21] and implement a routine monitoring of audits and expenditures.[22] The district must also ensure that correspondence students are receiving at least half of their core coursework through the program, unless the district decides to waive that requirement under limited circumstances.[23]

While the individual districts are tasked with ensuring that their correspondence programs comport with state law, DEED is tasked with the general supervision of the programs.[24] To ensure that districts operating a correspondence program comply with state law, they must provide DEED with a statement of assurances.[25] Once DEED receives this statement, it will approve the program.[26] Despite the regulatory mandate to approve the program, DEED may, in its discretion, monitor the programs for compliance.[27] If a district has violated the correspondence study regulations, DEED has

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18 AS 14.03.310(c).

19 *Id.* at (d)(1).

20 *Id.* at (d)(2).

21 *Id.* at (d)(3).

22 *Id.* at (d)(4).

23 4 AAC 33.426(a) & (c).

24 AS 14.07.020(a)(9).

25 4 AAC 33.420.

26 *Id.*

27 4 AAC 33.460(a).

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the authority to implement a plan of correction; and, if the violation was made knowingly DEED may, in its discretion, withdraw approval for the district to operate the program.[28] Regardless of fault, DEED will also require that the district repay any money that was spent in violation of the regulations.[29]

Alaska law does not provide an affirmative obligation on DEED to seek out alleged violations of law by correspondence school programs. Instead, DEED relies on the districts' statements of assurances that each program will follow the law. However, the legislature may occasionally appropriate money to DEED for the sole purpose of conducting statewide audits if the legislature deems this action necessary.[30]

Thus, the legislature, through DEED, monitors and approves district correspondence programs. But it is the districts that are responsible for all correspondence program operations, including ensuring that allotments are approved and spent in accordance with state law.

B. Correspondence school programs in Alaska allow student allotment spending on a wide range of services and materials.

There are currently more than 30 district-operated correspondence school programs in Alaska, 18 of which are statewide.[31] Some enroll just a handful of

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28 4 AAC 33.460(c).

29 *Id.*

30 For example, this occurred in 2004. *See* 2005 Inf. Op. Att'y Gen, 2005 WL 2751244, at *2.

31 *See* Alaska Department of Education and Early Development Correspondence School Directory available online at https://education.alaska.gov/Alaskan_Schools/corres

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students,[32] others hundreds[33] or even thousands.[34] Because the programs vary significantly, this memorandum cannot give the Court a complete view of what different correspondence schools offer to Alaskan students, so it instead uses one of the larger programs as an instructive example.

Mat-Su Central is a correspondence school affiliated with the Matanuska-Susitna Borough School District that enrolls over 2000 students.[35] Its website provides a list of approved curricula from more than 200 different sources.[36] Among these curricula sources are organizations as diverse as GO Math, a program operated by textbook publisher Houghton Mifflin Harcourt; the North Dakota Center for Distance Education, a public agency offering K-12 online classes and other educational programs; and Razzle Dazzle Creative Writing, a business created by a teacher in Texas to sell creative writing lessons.[37]

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[32] *See e.g.*, AK-Trails Correspondence School with 6 students, according to DEED's school profile website: https://education.alaska.gov/compass/ParentPortal/SchoolProfile?SchoolID=448010

[33] *See e.g.*, FOCUS Homeschool with 558 students, according to DEED's school profile website: https://education.alaska.gov/compass/ParentPortal/SchoolProfile?SchoolID=108010

[34] *See e.g.*, Interior Distance Education of Alaska (IDEA), with 7352 students, according to DEED's school profile website: https://education.alaska.gov/compass/ParentPortal/SchoolProfile?SchoolID=178010

[35] *See* https://education.alaska.gov/compass/ParentPortal/SchoolProfile?SchoolID=338010

[36] *See* https://www.matsucentral.org/resources/curricula; *see also*, Affidavit of Kyle Emili at ¶ 2, Ex. A.

[37] Affidavit of Kyle Emili at ¶ 4-6, Ex. B-D.

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Mat-Su Central's website also has a list of over 300 community instructional partners and vendors covering the subjects of art, health, language arts, math, music, science, social studies, technology, and more. Sixteen vendors are public entities, and the rest are private businesses and organizations.[38] These private businesses include the Alaska Center for the Martial Arts, the Alaska Nautical School, Aurora's Cakery and Bakery, Frontier Tutoring, and Sonja's Studio of Performing Arts.[39] Each offers classes or tutors for use as part of an individual learning plan.

III. Procedurally, DEED initially filed a motion to dismiss but now cross-moves for summary judgment.

DEED initially filed a motion to dismiss Alexander's facial challenge to the correspondence school statutes. In response, Alexander emphasizes that motions to dismiss are "disfavored," but simultaneously acknowledges—by cross-moving for summary judgment—that the Court can decide the facial challenge now as a matter of law. [Opp. at 18-19] Although a motion to dismiss is a proper procedural vehicle here,[40] DEED now cross-moves for summary judgment on both Alexander's facial and as-applied challenges to remove any possible "disfavor" and to allow the Court to consider the attached materials outside the pleadings, which provide a more comprehensive picture of correspondence school programs in Alaska than Alexander has provided.

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[38] Affidavit of Kyle Emili at ¶ 7, Ex. E, also available online at https://www.matsucentral.org/learning/cip.

[39] Affidavit of Kyle Emili at ¶ 8-12, Ex. F-J.

[40] *Cf. Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020) (explaining why the trial court was not required to convert a motion to dismiss into a motion for summary judgment when the issue presented was purely legal).

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IV. Argument

A. Alexander's facial challenge fails as a matter of law because the student allotment statutes have a plainly legitimate sweep.

The Court should reject Alexander's facial challenge to AS 14.03.300–.310 and decline the request to strike those statutes down entirely. [Complaint ¶ 57, 70 & p. 22] The statutes are capable of a wide range of legitimate applications for such uncontroversial things as textbook purchases from private publishing companies, tutoring services, athletic activities, and more. DEED is entitled to judgment on this claim because the statutes have a "plainly legitimate sweep."[41]

1. This case is not a referendum on the 2022 AG opinion.

Alexander asserts that DEED relies "solely" and "heavily" on the 2022 AG opinion as if it were legal precedent. [Opp. at 3-4, 18, 34] Alexander criticizes that opinion as "nonsensical" and "circular," and spends several pages attacking its reasoning. [Opp. at 3-4, 18, 34-38] But DEED does not rely on the AG opinion as legal precedent—DEED discussed the opinion only in the "background" section of its motion. [MTD at 5-7] Nor does this case turn on whether the Court adopts or rejects the opinion's reasoning. The Court could disagree with the AG opinion on where to draw the line between constitutional and unconstitutional spending and still reject Alexander's facial challenge to AS 14.03.300–.310. Indeed, it must do so, because those statutes are capable of many constitutional applications. Alexander's criticisms of the AG opinion and of DEED's letter about the opinion are thus mere distractions from the

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41 *See Treacy v. Municipality of Anchorage*, 91 P.3d 252, 268 (Alaska 2004).

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task before the Court, which is to decide whether Alexander has made a viable facial challenge to the statutes, not to grade the AG opinion.

2. The statutes are capable of a range of constitutional applications and therefore have a plainly legitimate sweep.

As explained in DEED's motion, a school district could administer student allotments without even approaching constitutional lines. [MTD at 11-13] Article VII, Section 1 prohibits only uses of funds "for the direct benefit of" a "religious or other private educational institution." But allotments are spent on a range of things not encompassed by this language, and school districts need not approve improper uses.

Alexander suggests that most spending under the student allotment statute is unconstitutional by conflating the statute's wording with the constitution's. Alaska Statute 14.03.310 says that a parent may spend allotment funds on services and materials from a "public, private, or religious organization" if they are appropriate and approved by the school district. Alexander assumes that any purchase from a "private or religious *organization*" under AS 14.03.310 would necessarily come from a "religious or other private *educational institution*" under Article VII, Section 1. [Opp. at 38-43]

But these phrases are meaningfully different—of course, not every "organization" is an "educational institution." A textbook publisher, for example, is not an "educational institution." If it were, Article VII, Section 1 might be violated whenever a school district buys textbooks from Houghton Mifflin Harcourt. Nor are companies like Staples or Best Buy that sell notebooks and laptops, or tutoring services like Turning Leaf Literacy, "educational institutions." "Educational institutions" like

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schools and universities are only a *subset* of possible vendors of services and materials. Plus, AS 14.03.310 also authorizes purchases from "public" organizations—for example, the University of Alaska—which are not "religious" or "private" even if they are "educational institutions." Allotment funds thus can be, and are, used on a wide range of purchases that do not even need to be assessed under *Sheldon Jackson* because spending that does not involve a "religious or other private educational institution" surely cannot confer a "direct benefit" on one.

For example, consider Mat-Su Central School District's correspondence school program, which identifies dozens of approved "instructional partners (vendors)," ranging from the Alaska Center for the Martial Arts and Aurora's Cakery and Bakery through Gail Moses Art Studio and Blue River Aviation to the Bristol Bay Campus of UAF and Prince William Sound Community College.[42] Some of these vendors are public educational institutions; others are small, private businesses that couldn't conceivably qualify as "educational institutions." Spending public funds with these vendors plainly poses no constitutional problem.

For purchases that *do* involve religious or other private educational institutions, like private school classes, *Sheldon Jackson* provides the test for assessing whether a particular expenditure confers a "direct benefit."[43] Such spending of student allotments would need to be evaluated on its facts, taking into account the "magnitude" of the

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42 *See* Affidavit of Kyle Emili at ¶ 7, Ex. E.

43 *See Sheldon Jackson Coll. v. State*, 599 P.2d 127, 130-32 (Alaska 1979).

benefit to the private educational institution.[44] But even if the Court were to consider all of this "gray area" spending to violate Article VII, Section 1, that still would not justify striking down the student allotment statutes as facially unconstitutional. Given all the clearly unproblematic applications discussed above—like buying textbooks, taking a baking class offered at a local bakery, or working with a tutor—Alexander has failed to establish that the statutes lack a "plainly legitimate sweep."[45]

True, a school district *could* violate Article VII, Section 1 by allowing a parent to spend student allotment funds on full-time private school tuition, but this would be contrary to statute as well as the constitution. The statutes authorize only spending of allotment funds to support an individual learning plan followed by a student in the district's "correspondence school program," "developed with the assistance and approval of the certificated teacher assigned to the student by the district," that among other things "provide[s] for an ongoing assessment plan that includes statewide assessments required for public schools," "include[s] a provision for modification of the individual learning plan if the student is below proficient on a standardized assessment," and "provide[s] for monitoring of each student's work and progress by the certificated

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[44] *See id.* at 130 ("[A] court must consider, though not in isolation, the magnitude of the benefit conferred. A trivial, though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may."). Notably, this part of the *Sheldon Jackson* test focuses on the benefit *to the educational institution*, not to the individual students, as Alexander suggests. [Opp. at 32]

[45] *See e.g.*, *Planned Parenthood of the Great Northwest v. State*, 375 P.3d 1122, 133 (Alaska 2016) (" When a statute's constitutionality is facially challenged, we will uphold the statute even if it might occasionally create constitutional problems in its application, as long as it 'has a plainly legitimate sweep.'")

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teacher assigned to the student."[46] Although conceivably an individual learning plan with these characteristics could be layered over a full-time private school education, this is clearly not the intent of the statute, which plainly contemplates an *individualized* plan for a student educated primarily through correspondence courses. Nor, contrary to Alexander's contention, was this the intent of the statute's sponsor, then-Senator Michael Dunleavy, who expressly disavowed the idea that correspondence school allotments could be used to "send[] kids to private school."[47]

But even if paying full-time private school tuition were consistent with the statutes, all uses of allotment funds require school district approval, and the statutes do not require districts to approve any unconstitutional uses.[48] A statute is not facially unconstitutional merely because it is capable of unconstitutional applications. A school district must comply with the Alaska Constitution, not just the statutes, and it can be held to account if it does not. A statute need not repeat the constitution's independent limitations in its text to be facially constitutional. For example, the allotment statutes also do not specify that a school district cannot discriminate by approving purchases of science kits for boys but not girls—the statute allows this by not explicitly prohibiting it and giving the district discretion. Of course, the equal protection clause prohibits such discrimination, which would justify a court finding that such a district is violating the

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[46] *See* AS 14.03.300(a)(1), (3), (4), and (6).

[47] Sen. Educ. Comm., 28th Leg., Mar. 3, 2014, Statement of Sen. Dunleavy at 8:29:05-10.

[48] *See* AS 14.03.310.

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constitution. But the *statute's* failure to prohibit discrimination would not render the *statute* facially unconstitutional.

Thus, even though a school district could violate Article VII, Section 1 when administering student allotments, that does not justify striking the allotment statutes down entirely because the statutes also have many constitutional applications.[49]

3. Nothing in the legislative history undercuts DEED's position.

Alexander argues that the sponsors of the legislation behind the student allotment statutes wanted to authorize unconstitutional spending on private school classes, and that this supposed intent means that the statutes they passed lack a plainly legitimate sweep. [Opp. at 3-17, 22-23] But although legislative history can aid in interpreting disputed statutory language, the parties' dispute is not over what the statute says. Alexander cites no authority for the theory that legislative (as opposed to constitutional) history aids in assessing a statute's *constitutionality*. A legislator's (or legislative attorney's) opinion about what the constitution requires is of no matter—the Court must determine this for itself. Nor does it matter whether legislators wanted to authorize both constitutional and unconstitutional spending or thought they were doing so. Courts do not defer to legislative interpretations of the constitution.

Although the legislative history is thus irrelevant here, it is actually much more nuanced than Alexander reports. Granted, a handful of statements by SB 100's sponsor,

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[49] *Cf. Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) ("Since [the statute] can be applied constitutionally in many circumstances, it is not facially unconstitutional.").

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then-Senator Dunleavy, suggest he believed that public funding for even a single private school class would violate the constitution,[50] but other parts of the legislative history show that he—and other legislators—understood that the constitutionality of different kinds of correspondence school spending was an undecided question of Alaska law. For example, Senator Dunleavy prepared a PowerPoint presentation as part of his introduction of Senate Joint Resolution 9, which would have amended Article VII, Section 1 of the Alaska Constitution to remove the prohibition on the use of public money for the direct benefit of educational institutions.[51] In this presentation, Senator Dunleavy explained that various "public/private partnerships" that were already part of correspondence school programs "*could be* construed to be unconstitutional," noting that the "[i]ssue of constitutionality can only be determined by the courts or we can change our constitutional language to align with our practices."[52]

Senator Dunleavy also expressly disavowed the goal that the plaintiffs attribute to SB 100—i.e. to allow for private school tuition to be covered by public funds through

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50 *See* Opp. at 8, quoting Sen. Educ. Comm., 28th Leg., Apr. 10, 2013, Statement of Sen. Dunleavy at 8:33:10-22.

51 This PowerPoint slideshow is attached as defendant's Exhibit K, and is available online at https://www.akleg.gov/basis/get_documents.asp?session=28&docid=3356

52 *See id.* at 2; *see also, id.* at 19, noting that one possible "solution" to uncertainty about the constitutionality of "public/private partnerships using public educational funding" was to "[d]o nothing and continue practices and *hope such practices are constitutional* and do not get challenged in court."

the correspondence school program.[53] In fact, he noted that a different bill—SB 89, which would have provided tax credits for donations to private schools for scholarships—was intended to expand school choice to include private schools.[54] SB 100, by contrast, contemplated only the more limited option of an occasional private school class as part of a public school correspondence program developed in cooperation with a public school district and monitored by a public school teacher and district officials. Moreover, the legal advice available to legislators did not state that this goal was clearly unconstitutional—because, of course, no Alaska precedent considers this question.[55] To the contrary, legislative attorney Jean Mischel advised Senator Berta Gardner that the constitutionality of using public funds to purchase a correspondence course from Brigham Young University[56] was uncertain.[57]

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[53] *See* Sen. Educ. Comm., 28th Leg., Mar. 3, 2014, Statement of Sen. Dunleavy at 8:27:48-53 ("This has nothing to do with going to private school"); 8:29:05-11 ("This has nothing to do with sending kids to private school.")

[54] Sen. Educ. Comm., 28th Leg., Apr. 10, 2013, Statement of Sen. Dunleavy at 8:30:00-10 ("The tax credit bill that we just heard is a voucher bill…").

[55] *See e.g.*, Ex. L, Legislative Counsel Jean M. Mischel to Senator Berta Gardner, March 18, 2014.

[56] Brigham Young University—a private educational institution—provides a wide variety of online courses through BYU Independent Study. *See* https://is.byu.edu/

[57] *See* Ex. M, Legislative Counsel Jean M. Mischel to Senator Berta Gardner, February 6, 2014.

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4. The legislature's choice to delegate control to local school districts rather than DEED does not render the statutes unconstitutional.

Alexander repeatedly asserts that AS 14.03.300(b) prohibits DEED from imposing any additional limitations on student allotment funds. [Opp. at 2, 21, 23, 38] Although this specific provision's wording is convoluted, DEED agrees with the basic point that the statutes put school districts and parents—not DEED—in charge of student allotments. In other words, the legislature favored local control over DEED control. But this is a valid legislative choice that does not render the statutes unconstitutional.

The Alaska Constitution requires the legislature to "establish and maintain a system of public schools."[58] It "vest[s] the legislature with pervasive control over public education."[59] But it does not require the legislature to delegate its pervasive control of the school system, or any specific piece of it, to *DEED*. Indeed, the constitution does not require DEED to exist at all. The legislature could "establish and maintain" a school system entirely through local districts. And, in fact, the legislature has delegated many functions to school districts.[60] As the Alaska Supreme Court has recognized, "[t]he very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle

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58 Alaska Const. Article VII, Section 1.

59 *Jefferson v. State*, 527 P.2d 37, 44 (Alaska 1974) (emphasis added).

60 *See Municipality of Anchorage v. Repasky*, 34 P.3d 302, 306 (Alaska 2001) ("The legislature delegated the state's authority to manage the operations of the schools to local school districts.").

the problems' should be entitled to respect."[61] The fact that the legislature has chosen to put correspondence student allotments—like many other aspects of Alaska's public schools—in the control of districts rather than DEED is no constitutional problem.

At points Alexander seems to suggest that the student allotment statutes give *parents* complete control over the funds, leaving both DEED *and* school districts powerless to stop unconstitutional uses. [Opp. at 23, 38] But this is not accurate. Parents may use the funds to purchase only services and materials "approved by the school district" and "required for the course of study in the individual learning plan" that is "developed with the assistance and approval of" a district-assigned teacher.[62] Moreover, the districts are directed to "maintain a record of expenditures and allotments," and "implement a routine monitoring of audits and expenditures."[63] Thus, school districts have the explicit authority to approve or reject parent proposals, including proposals for spending that crosses constitutional lines. The districts have the power and the duty to comply with Article VII, Section 1 in administering student allotment funds just as they must comply with all parts of the constitution in all their actions.

5. DEED does not ask the Court to craft a narrowing construction or sever any provisions—only to reject the facial challenge.

Alexander recharacterizes DEED's position as a request for a narrowing construction or severance of unconstitutional language. [Opp. at 39-43] But that is not

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61 *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 803–04 (Alaska 1975).

62 AS 14.03.310(b), AS 14.03.300(a)(1).

63 AS 14.03.310(d)(3) and (4).

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what DEED seeks here, nor is DEED doing "contortions to advance a constitutionally permissible interpretation" of the statutes. [Opp. at 42] Instead, DEED is pointing out that striking down the statutes entirely is unjustified given the range of constitutional applications. DEED just asks the Court to reject Alexander's facial challenge as a matter of law because the statutes have a plainly legitimate sweep, thereby leaving Alexander to pursue an as-applied challenge.[64] In that as-applied challenge, the parties can litigate the boundaries of permissible spending under the statutes with the benefit of actual examples to evaluate.[65] "[F]acial challenges are disfavored" because they "often rest on speculation," risk interpretation "on the basis of factually barebones records," and run contrary to principles of judicial restraint.[66] The proper vehicle to resolve Alexander's objections to the school districts' application of the statutes is an as-applied challenge.

None of the language in the challenged statutes is facially unconstitutional such that the Court should sever it. Alexander suggests severing the words "private, or

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[64] *Cf. Treacy v. Municipality of Anchorage*, 91 P.3d 252, 268 (Alaska 2004) ("[P]laintiffs seeking facial invalidation of a law must establish at least that the law does not have a 'plainly legitimate sweep.' The failure to meet this burden in this case does not preclude the possibility that the ordinance as applied in other situations might be unconstitutional. And although the ordinance could be enforced in ways [that are unconstitutional], we need not deal with such possibilities on this facial review.").

[65] *Cf. State v. ACLU of Alaska*, 204 P.3d 364, 373 (Alaska 2009) (rejecting a facial challenge as unripe, observing that "[t]his case is necessarily about a narrowing construction of some sort since the amended statute is not unconstitutional in all its applications. The question is what narrowing constructions are appropriate. *Allowing the normal processes of adjudication to take place may be of assistance in providing the answer*.") (emphasis added).

[66] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).

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religious" from AS 14.03.310 such that it would only allow purchases from a "public" organization. [Opp. at 41] But as explained above, not every "private" or "religious" organization is an "educational institution," so many purchases from such organizations would not even implicate Article VII, Section 1.[67] And even some purchases from private or religious "educational institutions" might pass muster depending on how the facts shake out under the *Sheldon Jackson* test.[68] There is thus no justification for severing words and no need to consider Alexander's arguments about the severance test.

Alexander quotes language about severance from *Forrer v. State* as if it is relevant to the distinction between a facial and an as-applied challenge, but it is not. [Opp. at 38] Nowhere in the lengthy *Forrer* opinion do the words "facial" or "as-applied" appear—which makes sense, because no party suggested that the challenged statutes there (which created a new bonding scheme) could be applied in any way that would not trigger the plaintiff's constitutional concerns.[69] Thus, contrary to Alexander's suggestion, there is no "central pillar" test for determining whether a statute is facially unconstitutional. [Opp. at 38] Instead, a plaintiff can succeed on a facial challenge only by showing that "no set of circumstances exists under which the Act would be valid"[70]

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[67] DEED is thus not "advanc[ing]" a "limitation that funds only be used at public institutions such as the University of Alaska," as Alexander asserts. [Opp. at 41]

[68] *See* 599 P.2d at 130-32.

[69] *See Forrer v. State*, 471 P.3d 569, 569-99 (Alaska 2020).

[70] *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

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or at least that the statute "does not have a 'plainly legitimate sweep.'"[71] Because Alexander has not met that burden here, the Court should reject the facial challenge.

B. Alexander's as-applied challenge lies against the school districts, not DEED.

The Court should also reject Alexander's as-applied challenge against DEED because it properly lies against the school districts. Alexander's position contains an inherent contradiction: Alexander asserts that the statutes explicitly prohibit DEED from controlling how districts and parents spend student allotment funds, [Opp. at 21, 23, 40], while simultaneously asking the Court to hold DEED responsible for how districts and parents spend student allotment funds. [Opp. at 45-46] But Alexander cannot have it both ways. While it is true that the statutes favor local control by delegating allotment fund oversight to school districts rather than DEED, this means that Alexander's as-applied claim properly lies against the school districts rather than DEED. Whether because the school districts are indispensable parties or because the as-applied claim simply fails against DEED on the merits, the Court should reject the as-applied claim.

1. If Alexander wants to pursue an as-applied challenge, the school districts must be joined as parties under Civil Rule 19.

Under the first prong of Civil Rule 19(a), a party must be joined if "in the person's absence complete relief cannot be accorded among those already parties." Alexander points out that the Court could grant complete relief on Alexander's *facial* challenge without joining the school districts by simply striking down the challenged

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[71] *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 268 (Alaska 2004).

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statutes as facially unconstitutional and thereby eliminating correspondence program student allotments altogether. [Opp. at 44-45] But DEED does not invoke Civil Rule 19 for Alexander's *facial* challenge—it asks the Court to reject that claim because it fails as a matter of law as explained above and in its motion to dismiss. [MTD at 8-15] DEED invokes Civil Rule 19 only for Alexander's *as-applied* challenge, if Alexander intends to pursue one. While a facial challenge means "there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution"[72]—justifying striking it down altogether—an as-applied challenge "alleges that although the law may be constitutional in some circumstances, it is unconstitutional under the particular facts of the case"[73]—justifying only more limited relief.

If the Court rejects Alexander's facial challenge, as it should, (and thus declines to strike down the statutes entirely), Alexander fails to explain how the Court could grant complete relief on an *as-applied* challenge without joining the school districts that are allegedly applying the statutes in unconstitutional ways. [Opp. at 44-46] Alexander just asserts that such relief would be possible without telling the Court what the relief would be. [Opp. at 46] The Court should reject this unexplained position. Complete as-applied relief against DEED is difficult to imagine. For example, enjoining DEED from approving specified types of student allotment spending (like payment of private school tuition) would be ineffective because DEED does not approve student allotment

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72 *Ass'n of Vill. Council Presidents Reg'l Hous. Auth. v. Mael*, 507 P.3d 963, 982 (Alaska 2022).

73 *Id.* at 981 n.64.

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spending, the school districts do. Even if the Court could imagine a way to channel as-applied relief against the districts through DEED as an intermediary, such relief would be much more straightforward and effective if ordered against the districts themselves. Because complete relief cannot be afforded on an as-applied challenge without joining the school districts, they must be joined under Civil Rule 19(a).

In the alternative, under the second (independent) prong of Civil Rule 19(a), a party must also be joined if "the person claims an interest relating to the subject of the action" and disposition in their absence may impede their ability to protect that interest or leave other parties subject to a substantial risk of incurring multiple or inconsistent obligations. Alexander argues that this prong does not apply here because the school districts have not yet actively "claimed" an interest in this litigation. [Opp. at 47] While the first prong of Civil Rule 19(a) may be a better fit here for this reason, DEED's basic point remains: any as-applied challenge would be about the school districts' actions, not DEED's actions, so it is difficult to imagine litigating it without their participation. Not only would the litigation implicate their interests in defending themselves and receiving state funding, but it would also subject DEED to a risk of incurring inconsistent obligations if, for example, the Court were to order DEED not to give the districts a portion of the state funding to which the districts could claim statutory entitlement.

In sum, joinder of the implicated school districts is required at least under Civil Rule 19(a)(1), if not both prongs. Because joinder is feasible here, the Court need not consider Civil Rule 19(b), which is about what to do when a party cannot feasibly

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be joined. Instead, the Court should order the school districts joined if Alexander wishes to proceed with an as-applied challenge rather than purely a facial challenge.

2. Regardless of whether the school districts are indispensable parties, an as-applied challenge cannot succeed against DEED.

Civil Rule 19 aside, an as-applied challenge cannot succeed against DEED on the merits because DEED does not apply the challenged statutes—the school districts do—and DEED is not liable for the school districts' actions. DEED is thus entitled to summary judgment on Alexander's as-applied challenge regardless of whether the Court considers the school districts to be indispensable parties under Civil Rule 19.

First, DEED does not apply the student allotment statutes. DEED does not administer, approve, or give out any student allotments to any parents for any use, let alone an unconstitutional use. As Alexander acknowledges, "all current correspondence programs are district-provided." [Complaint ¶ 18] DEED does not provide a statewide correspondence program at this time. [*Id.*] All of Alexander's allegations of purportedly improper uses of student allotment funds concern student allotments given to parents by the Matanuska-Susitna Borough and Anchorage school districts, not by DEED. [Complaint ¶¶ 24-28] Thus, to have a viable as-applied claim against DEED, Alexander must explain why DEED is liable for the school districts' actions.

But DEED is not liable for the school districts' actions. Local school districts are independent governmental entities, not subordinate divisions within DEED or agents acting on DEED's behalf. Both the Anchorage and Matanuska-Susitna Borough school

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districts are governed by local school boards elected by local voters.[74] "The legislature delegated the state's authority to manage the operations of the schools to local school districts."[75] Just as the State of Alaska is not liable when the Municipality of Anchorage transgresses statutory or constitutional boundaries in exercising its delegated authority, DEED is not liable when the Anchorage School District does so. "[A]uthorized activities of such subdivisions as municipalities and school districts are almost universally considered to be independent actions not subjecting the state to liability."[76]

In *Kenai Peninsula Borough v. State*, the Alaska Supreme Court rejected the position that a borough was acting as an agent of the State when it provided school transportation, even though the borough did so in accordance with statutory direction pursuant to the legislature's constitutional duty to establish and maintain public schools.[77] The Court explained that "[i]f a political subdivision acts with a substantial degree of independence under authority delegated by the state, liability may not be

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74 *See Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67, 75 (Alaska 1980) ("The Anchorage School Board was created by the authority of the state legislature, and is the delegated state authority to govern its school district and manage the operations of the schools within that district. . . . While the school board is elected by the same voters as is the municipal assembly, and is also a part of the Municipality of Anchorage, it is a legislative body with legal responsibilities which in important respects are distinct from those exercised by the assembly. Nowhere is the independent status of the Anchorage School Board more apparent than in school system budgetary matters.").

75 *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 306 (Alaska 2001).

76 *Kenai Peninsula Borough v. State*, 532 P.2d 1019, 1022–23 (Alaska 1975).

77 *Id.* at 1021–27.

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imposed on the state as a result of such activity."[78] Only if "an executive department specifically makes a political subdivision its agent to act on its behalf and subject to its control" would liability extend to the State.[79] Because political subdivisions usually act independently rather than as state agents, the Court applies "a much stricter test . . . as to the type of control required to create liability on the part of the state."[80] In *Kenai Peninsula Borough*, although the State "did supervise the transportation service insofar as it related to [state] funding" and "also had certain regulations in effect" about safety, the Court concluded that the borough was ultimately in control of the transportation services and was not the State's agent.[81] By contrast, in *Alaska State-Operated School System v. Mueller*, the Court held that the Alaska State-Operated School System (ASOS)—which provided education for the children of the unorganized borough—was an instrumentality of the State, distinguishing *Kenai Peninsula Borough* because "unlike local public school systems, ASOS operates directly on behalf of and under the auspices of the state."[82]

Here, just as in *Kenai Peninsula Borough*, although DEED has general oversight and passes regulations that districts must follow, the local school districts "act[] with a

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78 *Id.* at 1022.

79 *Id.*

80 *Id.* at 1023.

81 *Id.* at 1024.

82 536 P.2d 99, 102 (Alaska 1975).

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substantial degree of independence under authority delegated by the state"[83] when they run their schools, including when they administer their correspondence program student allotments. They are not acting as agents of DEED, and DEED is therefore not liable for their actions. Alexander criticizes DEED for not intervening to micromanage the districts' use of student allotment funds and instead telling districts to "consult with legal counsel" in gray areas. [Opp. at 45-49] But the legislature has not given DEED the role of micromanager. Instead, as Alexander recognizes (and criticizes), the statutes actually "prohibit[] the Department from imposing restrictions on [allotment fund] expenditures" beyond those already in statute. [Opp. at 21] The legislature has chosen to make this a matter of local control, not DEED control. Thus, as in *Kenai Peninsula Borough*, "there is no authority for making claim against the State, but the agency exercising the delegated authority must respond for its own actionable conduct."[84]

The failure of Alexander's claims against DEED does not somehow leave Alexander with inadequate recourse. The proper recourse is straightforward: to challenge the allegedly unconstitutional actions of the Anchorage and Matanuska-Susitna Borough school districts detailed in the complaint, Alexander can sue those school districts. That litigation, if pursued through an appeal, would result in a precedential ruling explaining whether, and to what extent, those uses of allotment funds are constitutional. Such a ruling would provide guidance to those districts and

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83 *Kenai Peninsula Borough*, 532 P.2d at 1024.

84 *Id.* at 1022.

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others going forward. This is not an "impossible, unnecessary burden," [Opp. at 48], it is normal litigation: plaintiffs sue those they believe are acting unlawfully and prove their actions are unlawful. There is simply no reason why litigation over the constitutionality of the school districts' actions should proceed against DEED without the school districts' participation.

The Court should therefore grant summary judgment to DEED on Alexander's as-applied challenge regardless of its ruling on Civil Rule 19 joinder.

V. Conclusion

The Court should grant summary judgment to DEED on the facial challenge to AS 14.03.300–.310 because Alexander has failed to show that the statutes lack a plainly legitimate sweep. The Court should also grant summary judgment to DEED on the as-applied challenge because Alexander has not sued the school districts who implement and manage correspondence school programs and DEED is not the proper defendant for any as-applied challenge. The Court should therefore reject all claims in the complaint.

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