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

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 & EARLY DEVELOPMENT,

Defendant,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON,

Intervenors.

Case No. 3AN-23-04309CI

STATE'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

I. Introduction.

The plaintiffs challenge the facial constitutionality of Alaska statutes governing correspondence school programs and providing for allotments to help cover the costs of materials and services needed by their students. But this facial challenge lacks merit because it ignores the wide range of constitutional spending authorized by the statute. Although the plaintiffs repeatedly mischaracterize both the legislative history and the State's arguments, they simply fail to engage with the fact that the statutory term

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"private organizations" is far broader than the constitutional term "private educational institutions" and thus that much of the spending that the statute authorizes—certainly more than enough to give the statute a "plainly legitimate sweep"—does not even implicate the constitutional prohibition on using public funds "for the direct benefit of any…private educational institution."[1]

Nor have they established any legal basis for holding the Department of Education and Early Development (DEED) responsible for decisions made by local school districts. Because the Alaska Legislature delegated to school districts—not DEED—the authority to manage their correspondence school programs and approve (or disapprove) allotment spending, the plaintiffs must sue the school districts if they want to make an as-applied challenge to that spending. DEED is entitled to summary judgment on any as-applied challenge because it is simply not the right defendant for the plaintiffs' claims.

II. The correspondence school statutes are facially constitutional.

"A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[2] When considering a facial challenge, "[a] statute is said to be facially unconstitutional if 'no set of circumstances exist under which the Act would be valid.'"[3] Although the "no set of circumstances" test

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1 Alaska Const. art. VII, § 1.

2 *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).

3 *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 405 (Alaska 2007).

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is not "a rigid requirement,"[4] "even under a relaxed standard of facial review," courts will not declare a statute "invalid on its face if it has a 'plainly legitimate sweep.'"[5]

Although the plaintiffs accuse DEED of "flipping the 'plainly legitimate sweep' standard on its head," [Pl.'s Reply & Opp. at 18 (hereafter "Reply"] it is they who appear to misunderstand this test. They recast it as requiring only that they show that the statute permits something unconstitutional. [Reply at 8, 14, 16-18, 21] But this is not the law. Rather, to succeed in their facial challenge they must establish that the law creates more than "occasional" constitutional problems.[6]

This they have not done. The statute's plainly legitimate sweep is reflected by the example of Mat-Su Central's curricula and vendor lists. Those lists include a range of constitutionally permissible allotment spending that the plaintiffs fail to grapple with.[7] The plaintiffs note that only a small subset of the approved curricula sources and vendors are "public" entities, [Reply at 21] as if that represented the full scope of constitutional spending. Not so. Public entities are not the only vendors who are not "private educational institutions" within the meaning of Article VII, § 1. As DEED has pointed out,[8] the vast majority of the approved vendors are private businesses—like the

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4 *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 35 (Alaska, 2001).

5 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 n.14 (Alaska 2004).

6 *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.'")

7 *See* Exhibits A and E to DEED's Cross Motion for Summary Judgment.

8 *See* DEED's Cross Motion for Summary Judgment at 11.

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Alaska Rock Gym and Alyeska Resort[9]—that could not reasonably be characterized as "educational institutions." Rather than address this hole in their argument, the plaintiffs rebut an argument DEED did not make about the difference between the words "organization" and "institution." [Reply at 18-19] They ignore the true key word, which is "*educational*." The concept of an "organization" (the term used in AS 14.03.310) is vastly broader than the concept of an "*educational* institution" (the term used in Article VII, § 1). Even if the words "organization" and "institution" were considered synonyms, not every "private organization" would be a "private *educational* institution."

The plaintiffs' implicit argument seems to be that any vendor of "services and materials" used by a correspondence school student must necessarily be an "educational institution" under Article VII, § 1, but this is obviously untenable for two reasons. First, it is absurd to characterize private businesses like Aurora's Cakery and Bakery or Jo-Ann Fabric and Crafts[10] as "educational institutions." Second, and more importantly, such a definition would expand the constitutional prohibition on use of public funds far beyond the private schools it was intended to reach, sweeping in businesses like textbook publishers and tutoring services. Such an expansive reading would affect not just correspondence school programs but all public schools, which also buy textbooks and curricula from private businesses.

The plaintiffs have failed to address the meaning of the constitutional term

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9 *See* Ex. E at 3.

10 *Id.* at 1, 7.

"educational institution," much less make a case for the expansive definition that their facial challenge requires. Because using allotment funds to purchase materials and services from public educational institutions and private businesses or non-profits that are not educational institutions does not even implicate Article VII, § 1, the statute has a "plainly legitimate sweep" and should be upheld against the plaintiffs' facial challenge.

III. The plaintiffs' arguments about the 2022 Attorney General Opinion are both incorrect and irrelevant.

The plaintiffs' reply brief persists in their mischaracterization of both the 2022 Attorney General Opinion and DEED's treatment of it. Contrary to the plaintiffs' apparent belief, recognizing that an attorney general opinion is not legal precedent that this Court is bound to follow does not constitute "walk[ing] away from" or "disown[ing]" the opinion. [Reply at 15, 17, n.61]

DEED has not disavowed any part of the opinion. The opinion concluded that using correspondence school program allotments to pay for full-time private school tuition is "almost certainly unconstitutional;"[11] that using allotments for "discrete services or materials"—like college classes, private tutoring, or extracurriculars—is "likely constitutional;"[12] and that for "the space in between"—for example, a single class taken at a private school—the constitutional line might depend on the role or

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[11] State of Alaska, Dep't of Law, Op. Att'y Gen. No. 2021200228 at 13 (July 25, 2022), *available at* https://law.alaska.gov/pdf/opinions/opinions_2022/22-002_2021200228.pdf.

[12] *Id.* at 12-13.

"purpose" that the class plays in the student's educational experience as a whole.[13]

DEED's position at this summary judgment stage is fully consistent with this opinion. DEED argues that the plaintiffs' facial challenge to the allotment statutes fails because the statute does not authorize the use of allotments for full-time private school tuition (the use the opinion considered "almost certainly unconstitutional"),[14] and because most of the private vendors selling services and materials to correspondence school students are not "educational institutions" under Article VII, § 1. Thus, the statute has a plainly legitimate sweep—it authorizes a range of uses that do not implicate constitutional concerns—and is not facially unconstitutional.

As for "the space in between" discussed in the opinion, that is a question for an as-applied challenge examining particular allotment spending that the plaintiffs believe violates the constitution. And that challenge lies not against DEED, but against a school district that approved the spending. The attorney general opinion—which is not what this Court is tasked with reviewing here—says nothing to the contrary.

IV. DEED is entitled to summary judgment on the as-applied challenge because DEED is not responsible for school districts' allotment spending.

DEED cross-moved for summary judgment on the plaintiffs' as-applied challenge because DEED does not control school district approval of allotment spending. The plaintiffs characterize this as a "pass-the-buck argument" that "ignores the role of the executive branch in ensuring that public funds are lawfully spent." [Reply

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13 *Id.* at 13-14.

14 *See* DEED's Cross Motion for Summary Judgment at 12-13.

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at 24] But they cite no authority suggesting that the executive branch has a freestanding obligation—i.e. one not found in statute—to ensure that public funds are lawfully spent.

The plaintiffs also complain that DEED "ignores that [they] are seeking declaratory and injunctive relief, and instead suggests [they] are seeking damages," [Reply at 24] but this baffling characterization is not supported by a citation to DEED's pleadings.[15] After rejecting this strawman, the plaintiffs assert that, "[i]n reality, [they] are seeking to hold the legislature accountable for passing unconstitutional statutes and DEED accountable for its responsibility to provide oversight to the correspondence program and oversight of education funding." [Reply at 25] But a party "hold[s] the legislature accountable for passing unconstitutional statutes" by suing the entity tasked by the legislature with implementing those statutes, i.e. the school districts, not DEED.

The plaintiffs have failed to cite any statute that gives DEED "responsibility" for the districts' correspondence program spending. To the contrary, they repeatedly point out that AS 14.03.300 expressly prohibits DEED from imposing any restrictions on the school district other than those in the statute. Indeed, they assert that "all parties agree that the legislature has now *prohibited DEED from regulating future expenditures under this program.*" [Reply at 27] Thus, the plaintiffs acknowledge that DEED lacks any authority over the school districts' spending decisions where correspondence program

[15] The next sentence of the plaintiffs' reply criticizes DEED for suggesting that they are "seeking to hold DEED 'liable for the school district's actions,'" with a citation for the quotation, but DEED doubts that the plaintiffs can really believe that holding a party liable is synonymous only with damages. [Reply at 24] Nor is citation to tort cases appropriate only when a party is seeking damages. [*Id.* at 24-25]

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allotments are concerned. They cannot simultaneously argue that DEED must answer for those decisions in an as-applied challenge to the statute.

Nor can DEED's general role in education funding be transformed into a responsibility for every school district spending decision. Indeed, the statute plaintiffs cite to establish DEED's alleged "oversight of education funding" is AS 14.17.610, [Reply at 25, n.88] which states only that DEED "shall determine state aid for each school district," not that it must supervise and determine the legality of how that aid is spent. And the plaintiffs ignore AS 14.17.910(b) which provides that "[a]ll district money, including state aid, shall be received, held, allocated and expended *by the district* under applicable local law and state and federal constitutional provisions, statutes, and regulations…" This statute expressly places responsibility for complying with all applicable law—including constitutional law—with the school districts.[16]

Similarly, DEED's "general supervision" of correspondence schools does not translate into specific responsibility for allotment spending decisions, because—as noted above—AS 14.03.300 expressly limits DEED's authority to control, and therefore its responsibility for, school district spending decisions. "If one statutory 'section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict,

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[16] DEED's discretionary authority to audit school district financial records does not create an *obligation* to do so. *See* AS 14.17.910(a) (making records "subject to audit by the department at a time and place designated by the department"). And even if it did, that could only conceivably create a claim against DEED for failing to conduct the audit; it would not make DEED answerable for school districts' violations of the law.

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the specific section will control over the general.'"[17] Thus, even if "general supervision" could reasonably be read to include day-to-day oversight of every implementing decision required to run a correspondence school program (which it cannot), the specific limitations of AS 14.03.300 would still trump the general terms of AS 14.07.020.

The plaintiffs insist that "DEED (and its legal counsel, the Attorney General) still has an obligation to ensure that a school district's expenditure of public funds complies with state law, including the Alaska Constitution." [Reply at 25] But they fail to identify any *source* for that alleged obligation. DEED—and the Department of Law—are creatures of statute and their roles and authority are prescribed by statute. And no statute they cite gives DEED the power to control school district spending under correspondence school programs; nor imposes upon it an obligation to ensure that school district spending under the program complies with the constitution.

The plaintiffs cite *Sagoonick v. State* for the proposition that "[t]o satisfy its obligation to provide a system of public education, 'the legislature has established numerous interrelated statutory policies and delegated implementation authority to the executive branch."[18] But *Sagoonick* is not about public education at all; it involved claims that the State's resource development policies were contributing to climate change.[19] And the language quoted by the plaintiffs refers to the "obligation" created by

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17 *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011) (quoting *In re Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978).

18 503 P.3d 777, 785 (Alaska 2022).

19 *Id.* at 782.

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Article VIII, § 2's command that the legislature "provide for the utilization, development, and conservation of all natural resources belonging to the State."[20] It has nothing to do with how the legislature has effectuated its duty under Article VII, § 1 to "establish and maintain a system of public schools open to all children of the State ..."

Similarly, the statutes governing the Department of Law provide that "[t]he attorney general is the legal advisor *of the governor and other state officers.*"[21] The Attorney General neither represents school districts nor advises them as to their legal obligations; they have their own attorneys for that.[22] And that is how "school districts are supposed to know whether the myriad possible private expenditures [allowed by the allotment statutes] would pass constitutional muster" [Reply at 27]—by consulting their own legal counsel, not the Attorney General.

Neither DEED nor the Attorney General has a general obligation "to ensure that a school district's expenditure of public funds complies with state law." [Reply at 25] Much less do they have the sort of obligation necessary to make DEED answerable to the plaintiffs in court for the conduct of the school districts.[23]

V. Civil Rule 56(f) is inapplicable here.

DEED has moved for summary judgment on the plaintiffs' as-applied claim

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20 *Id.* at 785.

21 *See* AS 44.23.020.

22 *See e.g., Classified Employee Ass'n v. Matanuska-Susitna Borough School District*, 204 P.3d 347, 349 (Alaska 2009) (wherein the school district was represented by David Freeman and Scott Kendall of Holmes Weddle & Barcott, P.C.)

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

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arguing that it is not the proper defendant to that claim. This argument is a purely legal one, based on DEED's lack of statutory authority or responsibility for local school district decision-making. No additional discovery is necessary for this Court to decide that legal question. And any discovery relevant to determining the merits of the plaintiffs' as-applied claims against the districts would come from those districts, not from DEED, because they are the proper defendants. There is neither any purpose, nor any legal basis, to keep DEED in this lawsuit while that discovery is undertaken.

VI. Conclusion.

Because the allotment statute authorizes a wide range of spending, most of which is constitutionally unproblematic, the plaintiffs have failed to show that the statute is facially unconstitutional, and the Court should grant DEED summary judgment on that claim. And because DEED is not responsible for the school districts' allotment spending, it is also entitled to summary judgment on the as-applied claim. To pursue an as-applied challenge to the districts' correspondence school spending, the plaintiffs must refile their lawsuit naming one or more school districts as defendants.

DATED: August 9, 2023.

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