



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

July 25, 2022

Heidi A. Teshner
Acting Commissioner
State of Alaska, Department of Education and Early Development
P.O. Box 110500
Juneau, AK 99811-0500

Re: Use of Correspondence School Allotments
AGO No. 2021200228

Dear Acting Commissioner Teshner:

You asked for a legal opinion addressing the ability of public correspondence school students to spend public funds in the form of allotment money on services offered by private vendors including classes presented either online or in-person to fulfill the students' public school education. You have also asked whether our analysis is affected by recent U.S. Supreme Court decisions on public funding for private religious education and whether those same decisions might invalidate Alaska's statute limiting the use of correspondence allotments to "nonsectarian services and materials."¹

I. Short Answer.

The legislature acted within its broad constitutional authority to create public correspondence schools and allotments as part of the public school system. Students enrolled in the program receive an education that is overseen by public school correspondence teachers and that meets state educational requirements. The allotment program supports students enrolled in public correspondence schools by permitting public money to be spent for certain materials and services from a private vendor to fulfill a student's individual learning plan. Such spending *does not*, on its face, violate the Alaska Constitution's prohibition against spending public funds for the direct benefit of a private educational institution. The nature of the private educational institution providing the materials or services does not impact this conclusion. Neither the Alaska Constitution

¹ *Carson ex rel. O.C. v. Makin*, __ U.S. __, 142 S.Ct. 1987 (2022); *Espinoza v. Montana Dep't of Revenue*, __ U.S. __, 140 S.Ct. 2246 (2020); AS 14.03.310(b).

nor the statutes make any distinction between religious or non-religious educational institutions and online or in-person education.

Although the constitutionality of the program as a whole is not in question, the Alaska Constitution does establish boundaries on how public money can be spent under the program. For example, the constitution does not permit supplanting public education with private school education by using public allotment funds to pay tuition for full-time enrollment in a private school. This opinion provides guidance on the types of spending that are clearly constitutional, clearly unconstitutional, and those that fall into a gray area. This opinion also clarifies that none of the recent U.S. Supreme Court cases related to this topic change the analysis.

II. Background: The Alaska Constitution mandates a public education system and tasks the legislature with designing it.

The Alaska Constitution addresses education at article VII, section 1:

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 Alaska Supreme Court has observed that in drafting this provision the framers “wished the constitution to support and protect a strong system of public schools.”² They sought to do so without incidentally preventing the state “from providing for the health and welfare of private school students, or from focusing on the special needs of individual residents.”³ Thus the framers designed the constitution “to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental indifference to any student choosing to be educated outside the public school system.”⁴ As stated by one of the framers during deliberations on the education section:

Many methods were sought out to provide and protect for the future of our public schools. We had to recognize that the public schools were our responsibility and that it was our duty to provide for all children of the state in matters of education. The Convention will note that in Section 1 that the Committee has kept a broad concept and has tried to keep our schools unshackled by constitutional road

² *Sheldon Jackson Coll. v. State*, 599 P.2d 127, 129 (Alaska 1979).

³ *Id.* (citations omitted).

⁴ *Id.*

blocks. May I draw to your attention further the fact that we have used the words to [“]establish and maintain by general law.” This is a clear directive to the legislature to set the machinery in motion in keeping with the constitution and whatever future needs may arise.⁵

In line with the Alaska Constitution’s directive, the legislature enacted statutes establishing a public school system.⁶ In the 1990s, school districts began developing public correspondence schools; under statute these were supervised by DEED.⁷ Correspondence schools were also referenced during the constitutional convention, with delegates discussing correspondence programs as being part of the public education system in territorial days.⁸ In today’s correspondence schools, students receive a public education oftentimes outside of the traditional neighborhood schools.⁹ Parents or guardians are primarily responsible for teaching material that they select from a list of vendors approved by the school district.¹⁰ Notwithstanding the homeschool environment and the heightened role of parents and guardians, correspondence schools are public schools.¹¹ Correspondence schools are publicly funded, they are subject to state regulatory oversight, and their students are held to state educational standards.¹² DEED or

⁵ 2 Proceedings of Alaska Constitutional Convention 1514 (Jan. 9, 1956).

⁶ AS 14.03.010 (“There is established in the state a system of public schools to be administered and maintained as provided in this title.”).

⁷ See 2005 Inf. Op. Att’y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *1; AS 14.07.020(9).

⁸ 2 Proceedings at 1525 (delegate Jack Coghill said he was “familiar with the Calvert course, that the Territorial Department of Education, that is one of their recognized correspondence courses for outlying areas, and if any family on a CAA remote station or someone on a remote part of the Yukon River, etc., would want to further the education of their children, write to the Commissioner of Education and they are referred to the Calvert course, and in higher institutions it would be the correspondence courses from the University of Nebraska”).

⁹ See 2005 Inf. Op. Att’y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *1.

¹⁰ See *id.*; 4 AAC 33.421(d).

¹¹ See AS 14.60.010(6) (defining “public schools” to “include elementary schools, high schools, citizenship night schools for adults, and *other public educational institutions that may be established*” (emphasis added)); 2005 Inf. Op. Att’y Gen. (Sept. 20; 663-05-0233), 2005 WL 2751244, at *3.

¹² AS 14.07.020(a)(9) (providing that DEED shall “exercise general supervision over elementary and secondary correspondence study programs offered by municipal school districts or regional educational attendance areas; the department may also offer and make available to any Alaskan through a centralized office a correspondence study

the school districts must provide correspondence students with individual learning plans that among other things, set out a course of study, provide for an assessment plan (that includes statewide assessments), and provide for monitoring by a certificated teacher assigned to the student.¹³

In 2014, the legislature enacted a statute authorizing districts to “provide an annual student allotment to a parent or guardian of a student enrolled in the correspondence study program for the purpose of meeting instructional expenses for the student.”¹⁴ These student allotments were created with significant strings attached. The statute provides that a student allotment may be used to “purchase nonsectarian services and materials from a public, private, or religious organization,” provided the purchase meets several criteria.¹⁵ Namely, the services and materials must be required for a course of study in the student’s individual learning plan; be district approved, appropriate, and aligned with state standards; comply with statutory prohibitions on advocating partisan, sectarian, or denominational doctrines; comply with standards on nondiscriminatory and unbiased textbooks and instructional materials; and “otherwise support a public purpose.”¹⁶ Although only “nonsectarian services and materials” are permitted, purchases can be made from a “public, private, or religious organization.”¹⁷ “Textbooks, equipment, and other curriculum materials . . . are property of the district,” and when a child leaves the correspondence program, non-consumable materials and unspent funds are returned.¹⁸

program”); 4 AAC 33.410 (explaining that the purpose of regulations is to ensure that the program standards are consistent with statewide curriculum, instruction, and student assessment standards, ensure that public money is spent in the public interest, and establish reporting requirements for districts enrolling out-of-district or part-time students); 4 AAC 33.420 (requiring department approval for correspondence programs); 4 AAC 33.421(b) (requiring strategies to help students meet statewide standards); 4 AAC 33.426 (requiring enrollment in core courses).

¹³ AS 14.03.300(a). AS 14.03.300(a) states that either a “district or the department that provides a correspondence study program” shall provide an individual learning plan. While DEED previously offered a statewide correspondence study program, that program no longer exists. All current correspondence study programs are district-provided.

¹⁴ AS 14.03.310(a).

¹⁵ AS 14.03.310(b).

¹⁶ *Id.*

¹⁷ AS 14.03.310(a).

¹⁸ 4 AAC 33.422(b); AS 14.03.310(d)(2).

III. Analysis.

A. The plain language of the Alaska Constitution grants broad authority to the legislature to establish a public school system—but with an important limitation that public funds are not used for the direct benefit of private educational institutions.

As set forth above, the Alaska Constitution provides that the legislature shall establish a system of public schools and that no public funds shall be paid “for the direct benefit” of “any religious or other private educational institution.”¹⁹ To construe this, I follow the Alaska Supreme Court’s roadmap for interpreting constitutional provisions:

[W]e first look to the plain meaning and purpose of the provision and the intent of the framers. Legislative history and the historical context assist in our task of defining constitutional terms as understood by the framers. While we have also said that we consider precedent, reason, and policy, policy judgments do not inform our decision-making when the text of the Alaska Constitution and the framers’ intent as evidenced through the proceedings of the Constitutional Convention are sufficiently clear.²⁰

Constitutional provisions are not interpreted “in a vacuum”; instead, “the document is meant to be read as a whole with each section in harmony with the others.”²¹ “Terms and phrases chosen by the framers are given their ordinary meaning as they were understood at the time”²²

The framers wanted to give the legislature broad authority to fulfill its obligation of establishing and maintaining a public school system.²³ In exercising this flexibility, the legislature has allowed public correspondence schools to be established as part of the public school system. As we have experienced during the COVID-19 pandemic, there are many ways to deliver a public education and to satisfy the constitution’s obligation. We have also seen technology and its use in our public education system change dramatically over the last 50 years. In many ways, the public education system today looks very different from the public education system when the framers wrote the constitution. Thankfully, the framers of the Alaska Constitution knew that this flexibility would be

¹⁹ Alaska Const. art. VII, § 1.

²⁰ *Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020) (citations and internal quotation marks omitted).

²¹ *Id.* at 585.

²² *Id.*

²³ *See Sheldon Jackson Coll.*, 599 P.2d at 129.

necessary so that the legislature could keep up with “whatever future needs may arise.”²⁴ Public correspondence school allotments are just one way in which the legislature has determined to meet the public education needs of Alaskans. As enacted in statute, the public correspondence allotments are facially constitutional.

The Alaska Constitution, however, does not only discuss what the legislature can do, but also includes a limiting sentence at the end of the education clause. The legislature cannot spend “public funds” “for the direct benefit” of a “private educational institution.”²⁵ Before going further, it is important to note that the constitution does not distinguish between religious and non-religious or online and in-person institutions. The constitution distinguishes between public and private “educational institutions.” The term “educational institution” should be given the ordinary meaning that the framers would have understood at the time. One common dictionary definition of the term is that it simply means “a school.”²⁶ Accordingly, it is not likely that the term was intended to include all private organizations, companies, or vendors.²⁷ Still, the framers understood the term “educational institution” to mean more than merely the equivalent of a traditional public school, including also, for example, programs meeting vocational, rehabilitative, or special education needs.²⁸ That is not to say that the framers intended “educational institution” to capture any and all entities that provide instruction of some form (such as those only providing tutoring or single-subject extracurriculars). Rather, the framers were focused on providing “all children . . . the opportunity of schools,”

²⁴ 2 Proceedings at 1514.

²⁵ Alaska Const. art. VII, § 1.

²⁶ See *Educational Institution*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “educational institution” as “[a] school, seminary, college, university, or other educational facility, though not necessarily a chartered institution”) This dictionary definition is not contemporaneous with the drafting of the constitution, but there is no reason to believe the term’s meaning has changed dramatically over the years. The Alaska Supreme Court has often referenced dictionary definitions when interpreting the constitution. See, e.g., *Dunleavy v. Alaska Legis. Council*, 498 P.3d 608, 614 n.23 (Alaska 2021) (citing Black’s Law Dictionary); *Forrer*, 471 P.3d at 586, 596 (citing dictionaries contemporaneous with constitution).

²⁷ See, e.g., 2 Proceedings at 1514 (“This was not intended and does not prohibit the contracting or giving of services to the individual child, for that child benefits as his part of society.”).

²⁸ See Alaska Const. art. VII, § 1 (requiring the creation of “a system of public schools,” but also allowing the legislature to establish “other public educational institutions”); 2 Proceedings at 1514.

while avoiding government aid to education outside of those public schools.²⁹ Applying this context to public correspondence school allotments, the primary area of potential concern is allotments (which are public funds) paying for classes, whether online or in-person, at private schools that provide educational experiences that could effectively stand in the place of those offered by public schools and educational programs.

This leads to the more difficult question—what does “for the direct benefit” mean? As lawyers often have to say, “it depends.”

The Alaska Supreme Court’s 1979 decision in *Sheldon Jackson College v. State* is the leading precedent interpreting the constitution’s direct benefit clause.³⁰ In *Sheldon Jackson*, the court held that state tuition grants to students at private colleges violated the Alaska Constitution.³¹ There, state statute established a program to provide grants designed to make private college in Alaska more affordable by paying the difference between state and private tuition.³² The court found that the grant program violated the constitution’s “direct benefit” prohibition because the tuition payments were substantial and directly benefitted the private colleges, with the students being “a conduit for the transmission of state funds.”³³

The court reviewed the minutes of the Alaska Constitutional Convention to assess the breadth of the direct benefit prohibition.³⁴ As the court explained, the framers’ rejection of two proposed amendments sheds light on their intent. First, the framers rejected an amendment that would have deleted the direct benefit prohibition entirely.³⁵ The proponent argued that the section was unnecessary because the establishment clause and the prohibition on expenditure of public funds for private purposes accomplished the same objective. In the court’s view, by rejecting that amendment it was “clear that [the

²⁹ See 2 Proceedings at 1514; *Sheldon Jackson Coll.*, 599 P.2d at 130 (identifying the “core of the concern” in the direct benefit prohibition).

³⁰ The court issued one previous case interpreting the constitutional provision in *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961) where it held that providing free public transportation to students attending private schools violated the constitution as a direct benefit to religious or other private schools. Later, the court in *Sheldon Jackson* called into question the “continuing vitality” of its reasoning in *Matthews*. *Sheldon Jackson Coll.*, 599 P.2d at 130 n.20.

³¹ *Sheldon Jackson Coll.*, 599 P.2d at 132.

³² *Id.* at 128.

³³ *Id.* at 130–31.

³⁴ *Id.* at 129.

³⁵ *Id.*

framers] wished the constitution to support and protect a strong system of public schools.”³⁶ But the framers also rejected a second proposed amendment that would have taken the prohibition further—barring the use of public funds for even an “indirect” benefit to religious or other private schools.³⁷ As the court explained, by rejecting the “indirect” language, “the delegates to Alaska’s Constitutional Convention made it abundantly clear that they did not wish to prevent the state from providing for the health and welfare of private school students, or from focusing on the special needs of individual residents.”³⁸ In fact, the framers also discussed the concept of contracting with private institutions and that eliminating the ability to contract for public services would take the prohibition too far.³⁹ In the end, “Article VII, section 1 was thus designed to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental indifference to any student choosing to be educated outside the public school system.”⁴⁰

The court identified three criteria to weigh in determining whether a state program directly benefits a religious or other private school in violation of the Alaska Constitution. First, there appears to be a requirement of “neutrality rather than hostility from the state” toward private schools, and “thus the breadth of the class to which statutory benefits are directed is a critical area of judicial inquiry.”⁴¹ On this point, providing police and fire protection to all schools regardless of affiliation has been considered constitutional, but “a benefit flowing only to private institutions, or to those served by them, does not reflect the same neutrality and non-selectivity.”⁴² Second, “the nature of the use to which the public funds are to be put” is a major consideration. Here, the court identified “the core of the concern expressed in the direct benefit prohibition

³⁶ *Id.*; see 2 Proceedings at 1513–25 (discussing whether to add “or indirect” after “direct” in art. VII, sec. 1). The option of adding “or indirect” was rejected because it “would reach out to infinity and that such a provision would deprive certain students of some benefits which should be available through State aid.” 1966 Op. Att’y Gen. No. 3 at 2 (Apr. 22).

³⁷ *Sheldon Jackson Coll.*, 599 P.2d at 129.

³⁸ *Id.*

³⁹ 2 Proceedings at 1515 (“Now when you get into the wording ‘or indirect’, then you are getting into an argument as to whether you can even contract with a private institution for the rendering of certain public services because they might say they might make a profit.”); see also *id.* at 1519 (even the proponent of the amendment to add “indirect” recognized the need to potentially contract with private institutions).

⁴⁰ *Sheldon Jackson Coll.*, 599 P.2d at 129.

⁴¹ *Id.* at 130.

⁴² *Id.*

involves government aid to Education conducted outside the public schools.”⁴³ This is distinguished from incidental public support for the health and welfare of private school students.⁴⁴ The court noted that “analogous distinction” was drawn in establishment clause cases at that time, where the question was whether a statute impacts secular educational functions that are separate from religious instruction.⁴⁵ Third, courts must consider “the magnitude of the benefit conferred.”⁴⁶ In this consideration, a “trivial, though direct, benefit may not arise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may.”⁴⁷ Finally, the court emphasized that although a direct transfer of money from the state to a private school would make a program “constitutionally suspect,” simply moving funds through an “intermediary” would not make an “otherwise improper expenditure of public monies” constitutional.⁴⁸

In applying these principles to the private college tuition program, the court in *Sheldon Jackson* found that the program unconstitutionally provided a direct benefit to private schools. First, the beneficiaries of the program were comprised “only of private colleges and their students” with the primary beneficiaries being the private colleges. “Unlike a statute that provides comparable dollar subsidies to all students” the only incentive created by the tuition program was to go to a private college.⁴⁹ Second, the tuition program was essentially a subsidy for education provided by a private college which raised “fully the core concern of the direct benefit provision.”⁵⁰ The “mandate” of article VII is “that Alaska pursue its educational objectives through public educational institutions.”⁵¹ Third, the magnitude of the benefits provided by the tuition program was substantial—without the grants the private colleges experienced a drop in enrollment, faculty, income, and curriculum offerings.⁵² Finally, the court explained that the tuition

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 130, 132.

⁴⁹ *Id.* at 131.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 131–32.

program's direct benefit violation was not avoided merely because the grants were given to students rather than directly to the private colleges.⁵³

B. Since the *Sheldon Jackson* decision, the Department of Law has interpreted the direct benefit clause in several legal opinions.

The Department of Law has considered the Alaska Constitution's direct benefit prohibition on several occasions. Predictably, the department's conclusion on any particular question is driven by facts related to who would benefit from the payments and by how much.

For example, the department has provided advice on a spectrum of issues related to state assistance to private educational institutions. The department advised that grants or loans made directly to named private institutions would violate the constitutional prohibition.⁵⁴ But other forms of assistance required a more nuanced analysis. The department advised that research grants likely could be made to private educational institutions so long as public funds were not used to directly aid educational programs and the research grant programs were neutral in that both public and private schools could competitively bid for them. General scholarship or tuition grant programs likely would be permitted for students attending an Alaska public or private postsecondary institution if they are based on a fixed sum or actual tuition costs, whichever was less, the maximum grant does not have a direct relationship to tuition charged by private schools, and the grant is meaningfully less than tuition. And a tax credit program that applied to contributions to Alaska educational institutions "would undoubtedly be struck down" if it were structured as a full, one-for-one credit; but it may be permissible if the amount were limited to a few thousand dollars and the benefit could be applied to a broad class of organizations.⁵⁵

The department has emphasized the distinction between funds that support a private institution's educational activities compared to supporting other operations. For example, the department concluded that a grant to a private college to operate a television translator station as part of a television training program would likely be unconstitutional

⁵³ *Id.* at 132 (quoting *Wolman v. Essex*, 342 F. Supp. 399, 415 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808 (1972)).

⁵⁴ 2008 Inf. Op. Att'y Gen. (May 13; 883-08-0119), 2008 WL 4277529, at *5-6 (grant of \$300,000 to a private college); 2007 Inf. Op. Att'y Gen. (June 13; 883-07-0071), 2007 WL 2333368, at *1-3 (grant of \$50,000 to a private religious school); 2000 Inf. Op. Att'y Gen. (Jan. 12; 661-97-0624); 2000 WL 34246955, at *8-9 (Alaska Industrial Development and Export Authority loan for expanding private religious school; also noting establishment clause concerns).

⁵⁵ 1981 Inf. Op. Att'y Gen. (Mar. 9; 663-81-0379), 1981 WL 38896, at *1-2.

because the purpose of the grant was to support an educational training program.⁵⁶ But grant funds likely could be provided to a private college for the sole purpose of producing programs for broadcast and distribution and not to support educational activities.⁵⁷

And the department has noted the importance of identifying the class primarily benefited by the public funds, with programs that can benefit both public and private institutions less likely to implicate direct benefit concerns. In 1985, for example, the department noted that the state's student loan program that broadly applied on equal terms to students attending either public or private colleges raised no direct benefit issue.⁵⁸ Still, in 1987 the department recommended vetoing a bill that would have allowed tax credits (in some instances up to \$100,000) for contributions to either public or private colleges because it would have the effect of using public funds to support private schools.⁵⁹

The department has also addressed the direct benefit implications of allowing private school students to take public correspondence classes.⁶⁰ The department advised that the state correspondence school could allow private school students to take public correspondence classes as long as the state did not subsidize the cost of the services provided to private schools.⁶¹ The department explained that private students needed to meet public correspondence admission requirements, including minimum enrollment status.⁶² Moreover, if the state suspected that a private school was encouraging widespread enrollment by its students in the state correspondence program to meet its education responsibilities, the department advised that the enrollment guidelines be reviewed to avoid constitutional issues.⁶³ Ultimately, if a private school began eliminating classes and directing students to enroll in public correspondence schools, the "appearance and substantive effect would be that [the correspondence school], with state

⁵⁶ 1981 Inf. Op. Att'y Gen. (Sept. 9; 883-96-0063), 1981 WL 38755, at *1.

⁵⁷ 1981 Inf. Op. Att'y Gen. (Oct. 20; J-66-114-82), 1981 WL 38821, at *1.

⁵⁸ 1985 Inf. Op. Att'y Gen. (Dec. 12; 366-189-84), 1985 WL 70231, at *3 n.6.

⁵⁹ 1987 Inf. Op. Att'y Gen. (May 29; 883-87-0033), 1987 WL 121123, at *1. Given the fairly light analysis in this 1987 informal opinion, it is difficult to tell whether the department would come to the same conclusion today. The bill at issue appeared to have a neutral application between public and private institutions, but it also would have allowed private school contributions to be used for substantial credits against taxes owed to the state (up to \$10,000 or \$100,000 depending on the form of tax). *Id.* at *1 & n.2.

⁶⁰ 1993 Inf. Op. Att'y Gen. (Mar. 18; 663-93-0179), 1993 WL 595773, at *1.

⁶¹ *Id.* at *5–6.

⁶² *Id.*

⁶³ *Id.*

dollars, was providing the curriculum and teaching for a private school” contrary to the “core of the prohibition against payment of public funds directly benefitting private educational institutions.”⁶⁴

C. Using public correspondence school allotments to purchase discrete services or materials is likely constitutional.

There is a spectrum of expenditures that carry a low risk of violating the Alaska Constitution. For example, there is a reasonable legal basis to conclude that allotments could be used to pay for high school correspondence students to attend college classes at *public or private* postsecondary institutions. That is because both public and private colleges charge for tuition, making public funds operate neutrally between the two forms of institutions. And supplementing a public correspondence education with college classes supports a student’s public education by providing an advanced curriculum not otherwise available at public schools. Moreover, using allotments to fund private tutoring as authorized by existing state regulation,⁶⁵ or extracurricular activities such as swimming lessons, attendance at music or drama performances, or participation in academic or athletic competitions likewise carry a lower risk of violating the direct benefit prohibition. These activities support and supplement rather than supplant a student’s public correspondence education.

There is also a reasonable legal basis to permit the expenditure of a portion of a correspondence student’s allotment on certain materials obtained from a private educational institution subject to the limitations on the nature of the materials set out in the correspondence allotment statute.⁶⁶ The statute restricts the use of allotments to services and materials that are required for a course of study under an individualized learning plan, and it requires that textbooks, services, and other curriculum materials be approved by the district, be appropriate to the student, align with state standards, comply with state law restrictions on discrimination and partisan, sectarian, and denominational advocacy, and otherwise support a public purpose.⁶⁷

While the purchase of these services or materials may incidentally benefit the private institutions, the expenditures are likely to be relatively insubstantial and they

⁶⁴ *Id.* at *5. The department has also advised that part-time enrollment by private school students in public schools probably did not violate article VII, sec. 1, although that conclusion might be different if the private school’s very existence depended on students enrolling part-time in public schools. 1993 Inf. Op. Att’y Gen. (June 24; 663-93-0394), 1993 WL 593219, at *2.

⁶⁵ 4 AAC 33.421(i).

⁶⁶ AS 14.03.310.

⁶⁷ AS 14.03.310(b).

primarily support district-supervised public correspondence instruction and thus do not implicate the core constitutional concern of using public funds to aid private education.

D. Using public correspondence school allotments to pay most or all of a private educational institution’s tuition is almost certainly unconstitutional.

In contrast to paying for discrete course materials and services, using the student allotments to pay for the tuition of a student being educated full-time at a private institution would be highly unlikely to survive constitutional scrutiny. Spending public funds in this manner would appear to violate the plain language of the constitutional prohibition against using public funds to pay for a direct benefit to a private school. It would also be contrary to the purpose of the constitutional provision, which was to commit the state to a strong system of public education. Likewise, simply placing the public money in another person’s hands—such as a parent or guardian in a correspondence school program—so that the person can deliver the money to a private educational institution to pay tuition is irrelevant to the analysis. As the Alaska Supreme Court noted in *Sheldon Jackson*, “merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies.”⁶⁸ This is also why the Department of Law has consistently advised legislators and agencies that school voucher programs allowing parents to pay for public or private schools are not permitted under the Alaska Constitution—the framers were clearly concerned about where the money ultimately ended up, not the means by which it got there.

E. The space in between: there is likely room under the constitution for the correspondence school program to permit expenditure of allotments on individual classes provided by private institutions where the educational experience supports rather than supplants the child’s home-based public education.

Public correspondence school allotments may, under certain circumstances, be used consistently with the Alaska Constitution to pay for the costs of the materials and services for a student to attend certain classes at a private school as part of fulfilling their public school correspondence program. The relevant circumstances must be responsive to the constitution’s plain language prohibition on using public money for the direct benefit of a private institution as well as the constitution’s requirement that public schools “be free from sectarian control” and “open to all children of the State.”⁶⁹

The constitution granted the legislature broad authority and flexibility in establishing a public education system. Categorically rejecting the ability of the

⁶⁸ *Sheldon Jackson Coll.*, 599 P.2d at 130.

⁶⁹ Alaska Const. art. VII, § 1.

legislature to permit, in some circumstances, spending on a class offered by a private school as part of an established public school program would fail to respect the legislature's broad authority. Indeed, the Alaska Supreme Court has noted "[t]he need for flexibility in providing educational services," and it has "approved a legislative enactment designed to ensure that 'Alaska schools might be adapted to meet the varying conditions of different localities.'" ⁷⁰ Additionally, taking an approach that too strictly limits the legislature's authority could have disparate impacts geographically in a state with vast rural areas. If, for example, a community was unable to get qualified teachers to come out to the public school, the framers provided space for the legislature to come up with creative solutions for ensuring all children in Alaska have access to a public education.

In assessing the likely constitutionality of any particular scenario, it is helpful to look carefully at the purpose for spending a portion of an allotment on a class offered by a private educational institution as well as the requirements in the statute that the payment go towards "materials and services." If the purpose is to enhance or support the home-based correspondence school education guided by a parent or guardian with oversight from a public correspondence teacher,⁷¹ there is a strong argument that spending for this purpose is permissible. It supports the legislatively created correspondence program's objectives and it is not intended to supplant the student's public education or to provide a direct benefit to a private educational institution. But if attendance in private school classes is, for example, in response to a private school encouraging parents to enroll in a public correspondence school and then use public allotments to offset the cost of private tuition, there would be a significant likelihood that the use of allotments would be found unconstitutional. Similarly, consideration of the magnitude of the spending is important. Using allotment money for one or two classes to support a public correspondence school program is likely constitutional, whereas using public school allotment money to pay for most or all of a private school's tuition would not be.

F. Developments in the interpretation of the U.S. Constitution's Free Exercise Clause do not alter Alaska's direct benefit prohibition or correspondence allotment statutes.

The U.S. Supreme Court has interpreted the federal Free Exercise Clause as requiring strict scrutiny of state laws that provide public assistance to private secular

⁷⁰ *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 803 (Alaska 1975) (citing *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971)). In *Hootch*, the Court noted that the Alaska Constitution's education clause "appears to contemplate different types of educational opportunities including boarding, correspondence and other programs." *Id.*

⁷¹ See 4 AAC 33.421(a), (c).

schools but deny assistance to otherwise eligible private religious schools.⁷² In the 2020 decision *Espinoza v. Montana Department of Revenue*, the Court held that a Montana state law that provided tuition assistance for children to attend private secular schools, and not religious schools, failed to survive a strict scrutiny analysis and violated the Free Exercise Clause.⁷³ Likewise, this year the Court held in *Carson ex rel. O.C. v. Makin* that a Maine law violated the Free Exercise Clause because it permitted public funds to be spent for tuition assistance at private nonsectarian schools but not at private religious schools.⁷⁴ Both decisions emphasized, however, that a “State need not subsidize private education.”⁷⁵ Their interpretations of the Free Exercise Clause do not alter the Alaska Constitution’s direct benefit prohibition, which applies equally to religious and non-religious schools. Moreover, because correspondence allotments are used to purchase services and materials for a student’s public, not private, education, it is unlikely that the Free Exercise Clause invalidates the correspondence allotment statutes’ requirement that purchases be “nonsectarian.”⁷⁶

1. The recent cases do not overrule the Alaska Constitution’s direct benefit prohibition.

The federal constitution’s Free Exercise Clause “ ‘protects religious observers against unequal treatment’ and against ‘laws that impose special disabilities on the basis of religious status.’ ”⁷⁷ It does not require that a state use its funds to support private education.

The Alaska Constitution’s direct benefit prohibition applies equally to secular and religious private schools.⁷⁸ It is therefore very likely that the direct benefit prohibition would survive a facial challenge under *Carson* and *Espinoza*. In addition, Alaska’s correspondence allotment statutes and regulations allow purchases from “a public, private, or religious organization,”⁷⁹ guarding against discrimination against otherwise eligible vendors merely because of their religious affiliation.

⁷² See *Espinoza*, 140 S.Ct. at 2254–57; *Carson ex rel. O.C.*, 142 S.Ct. at 1997–98.

⁷³ *Espinoza*, 140 S.Ct. at 2262.

⁷⁴ *Carson ex rel. O.C.*, 142 S.Ct. at 1997–2002.

⁷⁵ *Id.* at 2000 (quoting *Espinoza*, 140 S.Ct. at 2261).

⁷⁶ AS 14.03.310(b).

⁷⁷ *Espinoza*, 140 S.Ct. at 2254 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, 137 S.Ct. 2012, 2021 (2017)).

⁷⁸ Alaska Const. art. VII, § 1.

⁷⁹ See, e.g., AS 14.03.310; 4 AAC 33.421, .422.

Moreover, you asked specifically if the Court’s recent reaffirmation of its holding in *Zelman v. Simmons-Harris*⁸⁰ undermines the Alaska Supreme Court’s interpretation of the Alaska Constitution’s direct benefit prohibition in *Sheldon Jackson*. In *Zelman*, the U.S. Supreme Court held that an Ohio school voucher program that provided tuition aid for students to attend participating public or private schools of their parent’s choosing did not violate the Establishment Clause.⁸¹ Both religious and nonreligious schools in the district could participate, as well as public schools in adjacent districts.⁸² In holding that the voucher program did not violate the Establishment Clause, the Court reasoned that the program provided benefits to a wide spectrum of individual recipients without regard to religion and permitted “individuals to exercise genuine choice among options public and private, secular and religious.”⁸³ The program was one “of true private choice.”⁸⁴ Citing *Zelman*, the Court in *Carson* noted that “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.”⁸⁵

Zelman is unlikely to move the needle on the Alaska Supreme Court’s interpretation of the state constitution. For one, the Alaska Supreme Court’s ruling in *Sheldon Jackson* turned on the interpretation and application of the Alaska Constitution’s public education clause; it was not a federal Establishment Clause case.⁸⁶ And while the Alaska Supreme Court discussed then-current Establishment Clause cases, it did so by way of analogy and to draw “generalizations.”⁸⁷ Ultimately, the court’s analysis centered on Alaska’s “apparently unique” constitutional prohibition on using public funds for the direct benefit of any private school, religious or not.⁸⁸

⁸⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁸¹ *Id.* at 662–63.

⁸² *Id.* at 654.

⁸³ *See id.* at 662.

⁸⁴ *Id.*

⁸⁵ *Carson ex rel. O.C.*, 142 S.Ct. at 1997; *see also Espinoza*, 140 S.Ct. at 2254 (citing *Zelman* and noting that an Establishment Clause challenge to Montana’s scholarship program would be unavailing “because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools”).

⁸⁶ *Sheldon Jackson Coll.*, 599 P.2d at 129–32.

⁸⁷ *See id.* at 129–30.

⁸⁸ *See id.*

Moreover, Alaska, like many other states, does not have a school voucher program similar to that in *Zelman*. Nor would it be likely that such a program could be established without violating the Alaska Constitution's direct benefit prohibition. Public correspondence schools with student allotments are not analogous to the vouchers in *Zelman*. And even still, the parent or guardian role in spending public correspondence allotments does not rise to the level of "true private choice" that appeared in *Zelman*'s Establishment Clause analysis. In spending correspondence allotments, parents and guardians purchase services and materials to support a student's public correspondence education. The purchases must align with a student's individual learning plan developed with a certificated public teacher; the services and materials must be approved by districts and comply with state law and curriculum standards; and even after allotments are disbursed, unspent funds and unconsumable materials can be recovered by the districts.⁸⁹ It is not likely that *Zelman* or the U.S. Supreme Court's recent citations to it would alter the Alaska Supreme Court's interpretation of the state constitution in *Sheldon Jackson*.

2. The free exercise ruling in *Carson* does not invalidate the requirement that correspondence allotments be used only for "nonsectarian" services and materials.

Alaska's correspondence allotment statute provides in part that a "parent or guardian may purchase *nonsectarian* services and materials from a public, private, or religious organization with a student allotment."⁹⁰ Textbooks, services, and other curriculum materials, as well as the course of study, must also comply with a separate statutory prohibition against partisan, sectarian, or denominational doctrines advocated in a public school during the hours the school is in session.⁹¹ You asked if the correspondence allotment statute's "nonsectarian" requirement violates the Free Exercise Clause as recently applied in *Carson*.

In *Carson*, the Court held that Maine's "'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause."⁹² The Court explained that "[r]egardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise."⁹³ But *Carson* did not address constraints on

⁸⁹ AS 14.03.310(b), (d); 4 AAC 33.422(b).

⁹⁰ AS 14.03.310(b) (emphasis added).

⁹¹ AS 14.03.090 ("Partisan, sectarian, or denominational doctrines may not be advocated in a public school during the hours the school in session. A teacher or school board violating this section may not receive public money.")

⁹² *Carson ex rel. O.C.*, 142 S.Ct. at 2002.

⁹³ *Id.*

expenditures made solely for public education. Indeed, the Court was unpersuaded by the argument that Maine was providing the “rough equivalent of the public school education that Maine may permissibly require to be secular.”⁹⁴ The Court explained that the Maine statute “does not say anything like that”; there was “no suggestion that the ‘private school’ [recipients] must somehow provide a ‘public’ education”; and there were “numerous and important” differences between the private schools eligible to receive tuition assistance and Maine public schools, including open admissions, a “comprehensive, statewide system of learning results,” “parameters for essential instruction,” and “annual state assessments in English, language arts, mathematics, and science.”⁹⁵

In contrast, Alaska’s correspondence program is part of the public school system. This conclusion is supported by the existence of public funding, the state’s regulatory oversight, and the statutory requirements for students to meet state educational standards.⁹⁶ Correspondence allotments are thus public funds used for public education, falling outside of the ruling in *Carson*. And as public school materials and services, purchases made with correspondence allotments must still comply with state law prohibiting advocacy of “[p]artisan, sectarian, or denominational doctrines.”⁹⁷ The Department of Law has advised in the past that state correspondence laws restrict advocacy of religion by public correspondence schools.⁹⁸ Of course, parents and guardians may still “privately supplement” their child’s education through “religious instruction, including the use of privately obtained religious materials, in their home during their child’s correspondence course studies.”⁹⁹

⁹⁴ *Id.* at 1998 (quoting *Carson ex rel. O.C. v. Makin*, 979 F.3d 21, 44 (1st Cir. 2020)).

⁹⁵ *Id.* at 1998–99.

⁹⁶ 2005 Inf. Op. Att’y Gen. (Sept. 20; 663-05-0233); 2005 WL 2751244, at *3.

⁹⁷ AS 14.03.090.

⁹⁸ 2005 Inf. Op. Att’y Gen. (Sept. 20; 663-05-0233); 2005 WL 2751244, at *3–4.

⁹⁹ *Id.* (citing AS 14.07.050 (“Nothing in this section precludes a correspondence study student, or the parent or guardian of a correspondence study student, from privately obtaining or using textbooks or curriculum material not provided by the school district.”)).

IV. Conclusion.

The Alaska Constitution's prohibition on using public funds for the direct benefit of private educational institutions does not wholly constrain the use of public correspondence allotments to acquire services or materials from private vendors or to pay for classes offered by private educational institutions. In this opinion, I have identified some possible examples that lie within a spectrum of low-risk scenarios as well as some examples of high-risk scenarios. There will also be fact-specific situations that fall into a gray area; when those situations arise, DEED and school districts should consult with legal counsel. The way education is delivered and the way the public education system functions continue to change and evolve over time, and this opinion attempts to give guidance that still allows for the necessary flexibility for the legislature and school districts to meet the future needs of Alaska's children. This conclusion is not changed by the U.S. Supreme Court's recent decisions interpreting the federal Free Exercise Clause; nor are those decisions likely to invalidate Alaska's restriction on using public correspondence allotments only for nonsectarian services and materials.

Sincerely,

Cori M. Mills
Deputy Attorney General¹⁰⁰

¹⁰⁰ Acting under the Attorney General's May 21, 2022 Delegation of Authority.