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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.

COMMISSIONER DEENA M. BISHOP, 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

#18 + #20

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STATE'S RESPONSE TO PLAINTIFFS' MOTION FOR LIMITED STAY AND CROSS-MOTION FOR STAY PENDING APPEAL

The plaintiffs request that the Court stay the effect of its decision ruling correspondence school statutes AS 14.03.300-.310 unconstitutional until the end of this fiscal year on June 30. The State does not oppose a stay—in fact, it affirmatively requests a stay as well—but it disagrees on the parameters. Instead of a stay just until the end of this fiscal year, the State requests a stay pending the outcome of an Alaska Supreme Court appeal which the State agrees should be resolved expeditiously. This will allow the Alaska Supreme Court to have the last word before Alaska's

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correspondence school programs are upended and the educations of thousands of Alaskan students are irreparably disrupted. Along with a stay pending appeal, the Court should enter final judgment so that the State may commence its appeal.[1]

I. The Court's decision causes an earthquake in the education system without explaining how to craft constitutional replacement statutes.

The Court struck down both AS 14.03.300 and AS 14.03.310 entirely, meaning that if the ruling goes into effect, correspondence school programs apparently cannot prepare any "individual learning plans" under AS 14.03.300 (even if those plans do not involve spending student allotments) and cannot provide any student allotments under AS 14.03.310 (even if the allotments are spent only on things like textbooks and laptops rather than on private school classes or tuition). The Court's ruling thus would seem to prevent the correspondence school program from operating at all.

The Court suggested that the legislature could save the program,[2] but the Court's sweeping decision leaves little room for such a fix. The plaintiffs' main concern was that student allotments are sometimes used to pay for classes or tuition at private schools, and it's true that the statutes could be amended to prohibit such spending. But this statutory tweak would not comply with the Court's ruling—on the contrary, the Court applied such a broad reading of the constitutional term "educational institution"

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[1] *See* Alaska R. App. P. 202 (allowing appeals from a final judgment). The plaintiffs suggest that the Court should delay entering final judgment until after their requested stay expires, but that would mean that the State could not appeal as of right in the meantime and would have to file a petition for review instead. The State is filing a motion for entry of final judgment concurrently with this response.

[2] Order at 33.

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used in Article VII, § 1 that the Court's ruling would render unconstitutional even basic purchases by brick-and-mortar public schools from private businesses like textbook publishers or equipment vendors.

The State had argued that spending at many private businesses (like a textbook publisher or a store like Best Buy or Jo-Ann Fabric and Crafts[3]) is constitutionally unproblematic because such businesses cannot reasonably be considered "educational institutions" under Article VII, § 1.[4] But the Court called this distinction "unreasonable" and refused to draw any line between private "organizations" and private "educational institutions."[5] The Court held that "purchasing educational services and materials from private organizations with public funds" is unconstitutional apparently no matter what type of entity the services and materials were purchased from.[6] However, even brick-and-mortar public schools make purchases from private entities with public funds. Alaska's public schools cannot simply produce their own textbooks or fabricate their own pencils and computers in-house—they buy what they need from private businesses just like correspondence school students do with their student allotments. The Court's order does not explain how such spending of public funds could be fine for brick-and-mortar public schools but unconstitutional in the context of correspondence schools.

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[3] *See* Affidavit of Kyle Emili and attachments (attached to State's Reply, Opp., and Cross-Motion for Summary Judgment).

[4] *See* State's Reply, Opp., and Cross-Motion for Summary Judgment at 10-12.

[5] Order at 19-20.

[6] Order at 14.

Because the Court's order does not define the term "educational institution" and instead declares all purchases from all private entities unconstitutional, the legislature could not fix the problem simply by de-authorizing allotment spending at private schools. And indeed, the Court's order calls into question much spending outside the correspondence school program as well. The Court's order thus does not give the legislature the guidance it would need to act quickly to prevent widespread harm.

II. Even the plaintiffs acknowledge the need for a stay.

Although it is, as the plaintiffs put it, "unconventional for prevailing parties to seek a stay of ruling in which they prevailed,"[7] the plaintiffs nonetheless do so, recognizing the untenable situation that the ruling they requested creates for over 22,000 Alaskan students. As the plaintiffs correctly observe, "[m]any school districts, parents, and students have engaged in their educational plans in reliance on the availability of the allotment and correspondence system contained in AS 14.03.300-.310," the two statutes the Court has ruled facially unconstitutional.[8] And "upending that system with only a month left in the academic year could place a great hardship on those districts and families."[9] Thus, the plaintiffs themselves recognize that the Court's decision cannot be allowed to take immediate effect. The State agrees.

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7 P's Motion for Limited Stay at 2.

8 *Id.*

9 *Id.*

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III. The legal standard for a stay is met.

Although the plaintiffs request a stay, they do not apply the legal standard for a stay, so the State does so here. A court may, "in the exercise of its jurisdiction and as part of its traditional equipment for the administration of justice, stay the enforcement of a judgment pending the outcome of an appeal."[10] A stay "suspends judicial alteration of the status quo" while the appeal is decided.[11] A stay must normally be sought first in the trial court before being sought from the Alaska Supreme Court.[12]

When considering whether to grant a stay pending appeal, a court applies an analysis similar to that for a preliminary injunction,[13] which considers the harms the parties face.[14] For purposes of assessing a party's harm the Court must assume that party will ultimately prevail—i.e., assume the plaintiff will prevail when assessing the harm to the plaintiff, and assume the defendant will prevail when assessing the converse.[15] If the moving party faces "irreparable harm" and the non-moving party can be adequately protected, the moving party "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or

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10 *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1975) (internal quotations omitted).

11 *Nken v. Holder*, 556 U.S. 418, 429 (2009) (cleaned up).

12 Alaska R. App. P. 205.

13 *See Powell*, 536 P.2d at 1229.

14 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

15 *See Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) ("[A] court is to assume the plaintiff ultimately will prevail when assessing the irreparable harm to the plaintiff absent an injunction, and to assume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction.").

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obviously without merit.'"[16] Adequate protection exists where the injury that results from the stay "is relatively slight in comparison to the injury which the person seeking the [stay] will suffer if the [stay] is not granted."[17] If the moving party's threatened harm is not irreparable or the opposing party cannot be adequately protected, the Court requires the heightened showing of a "clear showing of probable success on the merits."[18] The Court may also consider the public interest in its analysis.[19]

A. Harms

Here, the State and intervenor-defendants (along with many non-parties) face clear irreparable harms absent a stay, whereas the plaintiffs' harms are "relatively slight in comparison."[20] For decades, the State has offered correspondence schools as one of the options for Alaskan students in furtherance of its constitutional duty to provide for

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16 *Metcalfe*, 110 P.3d at 978.

17 *Id.* at 978–79.

18 *Id.*

19 *State v. Galvin*, 491 P.3d 325, 339 (Alaska 2021) (discussing how the public interest is implicitly considered in the preliminary injunction analysis).

20 *See Metcalfe*, 110 P.3d at 979.

education.[21] Wrongfully removing that educational option—even temporarily—irreparably harms both the State's education system and the children within it.[22]

Over 22,000 Alaskan children are currently enrolled in correspondence school programs.[23] Their families have incurred (and continue to incur) educational expenses for this school year that have not yet been reimbursed under the statutes that the Court invalidated.[24] Allowing the Court's decision to take immediate effect would put those reimbursements in jeopardy.[25] On top of the specter of unreimbursed expenses for the current school year (and resulting financial insecurity), the students face the irreparable harm of disrupted educational plans for the upcoming school year. Students and families typically make their educational decisions many months ahead.[26] If correspondence programs suddenly evaporate, thousands of students will have to change their plans.[27] Assuming this Court's decision was incorrect (as one must in this context),[28] these

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[21] *See* Alaska Const., art. VII, § 1; *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 803 (Alaska 1975) (noting that the framers of Alaska Constitution's education clause did not "require uniformity in the school system" and instead envisioned "different types of educational opportunities including boarding, correspondence and other programs...").

[22] *Cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)).

[23] Goyette Aff. ¶ 3.

[24] *Id.* at ¶ 5.

[25] *Id.*

[26] *Id.* at ¶ 9.

[27] *Id.* at ¶ 6.

[28] *See Alsworth*, 323 P.3d at 54.

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students will be wrongfully deprived of their preferred education and forced to scramble to find other options at a relatively late date.

Viable alternatives may be difficult to find for some students in remote areas, especially those with particular needs or specific course requirements for graduation.[29] Because correspondence school classes can count towards graduation requirements, some students' plans to meet their graduation requirements and get their diplomas will be disrupted.[30] Eliminating access to the correspondence option would disproportionally impact students living in rural Alaska who would lose access to robust course offerings not available locally.[31] Such harms cannot be undone or indemnified by a bond.

The irreparable harms absent a stay would extend not only to correspondence students and their families, but also to school districts, teachers, private businesses, and even brick-and-mortar public schools. Private businesses that sell products and services to correspondence school students would lose a source of income. School districts with correspondence schools would be faced with financial and programming uncertainty.[32] The 261 teachers tasked with creating individual education plans for correspondence school students under AS 14.03.300—which this Court invalidated—would need to be

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[29] Goyette Aff. ¶ 9.

[30] *Id.* at ¶ 10.

[31] *Id.* at ¶ 9.

[32] Student count information submitted during the 2023-2024 school year is used to estimate state aid for the 2024-2025 school year. AS 14.17.500; AS 14.17.610. If the State lacks authority to distribute funding during the 2024-2025 school year to account for correspondence students enrolled during the 2023-2024 school year, affected school districts would experience a loss in expected funding.

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re-assigned if possible.[33] Many correspondence students may choose to switch to brick-and-mortar public schools that have not anticipated rising enrollment in their planning and staffing decisions and may struggle to employ enough teachers to meet increased demand given the current teacher shortage.[34] This would also create budgeting challenges for school districts because under state law, state funding is sent out monthly and is based on the district's prior school year pupil counts for the first nine months of the fiscal year.[35] Thus, not until the final three months of the fiscal year (April, May, June 2025) would districts begin to receive funding based on their increased costs of providing in-person education. Then, if this Court's decision is ultimately reversed, all these disruptions to the education system would occur in reverse.

The harms the plaintiffs face without a stay are, by contrast, abstract and "relatively slight in comparison."[36] Indeed, this is apparent from the plaintiffs' choice to request a temporary stay themselves. The plaintiffs are parents of children attending brick-and-mortar public schools, but this case is not about any direct impact of the challenged laws on their children or families—instead, they sued to vindicate their interpretation of the Alaska Constitution. Although the State acknowledges the importance of complying with the Alaska Constitution, the generalized harm the

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[33] Goyette Aff. at ¶ 7. Laying off teachers at a late date could put districts in breach of statutory requirements about teacher retention. *See* AS 14.20.140.

[34] *Id.* at ¶ 8.

[35] *See* AS 14.17.610(a).

[36] *See Metcalfe*, 110 P.3d at 979.

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plaintiffs face from the subset of unconstitutional spending that occurs under these statutes (assuming the plaintiffs are correct that all spending at private schools is unlawful) is abstract and "relatively slight in comparison"[37] to the concrete, real-world harms faced on the other side of the ledger. These laws operated for many years before the plaintiffs sued and the plaintiffs' harm will not appreciably increase if they remain in effect for the additional time it takes for the Alaska Supreme Court to rule on appeal.

B. Merits

The Court may not agree that it is likely to be overruled on appeal, but the State's appeal will at least raise "serious and substantial questions going to the merits,"[38] which is sufficient here given the stark difference in relative harms discussed above.

Even if the Court believes that a "clear showing of probable success on the merits"[39] is necessary for a stay here, the State can make that showing too. The Court struck down AS 14.03.300, the statute about individual learning plans, without any explanation of why individual learning plans (which need not entail allotments at all) are unconstitutional. And as explained above, the Court's reasoning about allotments would invalidate a broad swath of public-school spending on things like textbooks and computers that must be purchased from private entities. Even if the Supreme Court does not reverse this Court entirely, it will surely answer crucial questions that are necessary

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37 *See id.*

38 *See id.* at 978.

39 *See id.*

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to allow the legislature to fix the correspondence school program and to ensure that public schools can continue to purchase from private businesses.

C. Public interest

Finally, the public interest strongly favors a stay pending appeal given the harms involved. A generation of Alaskan students have already had their educations interrupted by the COVID-19 pandemic. The more than 22,000 students in correspondence schools should not be further boomeranged back and forth by litigation. The public interest favors not disrupting their educations unless and until the Alaska Supreme Court has held that such disruption is constitutionally required.

IV. The stay should last until the Alaska Supreme Court rules on appeal rather than only until the end of the fiscal year.

The plaintiffs suggest that the short stay they propose will allow the legislature to save the correspondence school program and avoid the harms discussed above,[40] but they are wrong about this for three reasons. First, any legislative action before the end of this fiscal year is far from certain. The legislature's regular session ends in 23 days, the legislature has not yet accomplished its primary responsibility of passing a budget, and lawmakers have been sharply divided over educational reform questions during this session. Second, as explained above, the Court's order does not give the legislature the constitutional guidance it would need to enact new correspondence school statutes. Third, even if the legislature does manage to act, it would have to revisit

[40] P.'s Motion for Limited Stay at 4.

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correspondence school issues yet again if the Alaska Supreme Court ultimately rules differently from this Court, leading to further uncertainty and whiplash.

The only way to avoid unnecessarily inflicting the widespread irreparable harms discussed above is to stay the Court's ruling pending a full decision from the Alaska Supreme Court. Alaska's highest court should weigh in on the weighty constitutional questions at issue here *before*—not after—those harms occur.[41] The State agrees with the plaintiffs that its appeal should be resolved expeditiously to minimize this period of uncertainty about the correspondence school program. To that end, the State intends to file its appeal as soon as this Court enters its final judgment and to ask the Alaska Supreme Court to hear and decide it on an expedited schedule.

V. Conclusion

For these reasons, the Court should stay the effect of its ruling pending the Alaska Supreme Court's decision on appeal. The Court should also enter final judgment so that the State and intervenor-defendants can initiate that appeal.[42]

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[41] In the event the Alaska Supreme Court's decision requires a change to the program, the State will ask that court to stay entry of judgment on remand until after the next legislative session. This will provide the legislature the opportunity to act with the full benefit of the Alaska Supreme Court's reasoning. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 795 (Alaska 2005) (citing with approval a Massachusetts state court decision where the court "stayed entry of judgment on remand for 180 days to permit the legislature to take such action as it may deem appropriate in light of th[e] opinion" (internal quotation marks omitted)).

[42] The State is simultaneously filing a motion for entry of final judgment and a proposed final judgment.

DATED: April 22, 2024.

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Subject:	Alexander v. DEED, Case no. 3AN-23-04309CI
Attachments:	3AN-23-04309CI States Response, Affidavit and Proposed Order.pdf; COS DEED.pdf; 3AN-23-04309CI Unopposed Motion and Proposed Order.pdf

Good afternoon,

Please find the attached for filing in Alexander v. DEED, Case no. 3AN-23-04309CI:

- **State's Response to Motion for Stay And Cross-Motion,**
- **Affidavit of Monica Goyette,**
- **{Proposed} Order Granting Stay Pending Appeal,**
- **Unopposed Motion for Expedited Consideration,**
- **{Proposed} Order Granting Expedited Consideration ;and**
- **Certificate of Service.**

Please let me know if you have any difficulty with the attachments.

Thank you,

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