IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT, AND COMMISSIONER DEENA BISHOP IN HER OFFICIAL CAPACITY, Appellants, v. EDWARD ALEXANDER, JOSH ANDREWS, SHELBY BECK ANDREWS, AND CAREY CARPENTER, Appellees. ANDREA MORCERI, THERESA BROOKS, AND BRANDY PENNINGTON, Intervenor-Appellants,	)	**Supreme Court Case Nos.: S-19083 / S-19113** Trial Court Case No. 3AN-23-04309CI I certify that the typeface used in this document is 13 Point New Times Roman.

BRIEF OF *AMICUS CURIAE* CARLENE BODEN

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE JUDGE ADOLF ZEMAN

DATED at Anchorage, Alaska May 31, 2024

ASHBURN & MASON, P.C.
Counsel for *Amicus Curiae*
1227 West Ninth Avenue, Suite 200
Anchorage, Alaska 99501
(907) 276-4331; matt@anchorlaw.com

By:_____
Matthew T. Findley
Alaska Bar No. 0504009

Filed in the Supreme Court
for the State of Alaska
this_____ day of May 2024.

_____
Meredith Montgomery, Clerk

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Sec. 14.03.300. Correspondence study programs; individual learning plans.

(a) A district or the department that provides a correspondence study program shall annually provide an individual learning plan for each student enrolled in the program developed in collaboration with the student, the parent or guardian of the student, a certificated teacher assigned to the student, and other individuals involved in the student's learning plan. An individual learning plan must

(1) be developed with the assistance and approval of the certificated teacher assigned to the student by the district;

(2) provide for a course of study for the appropriate grade level consistent with state and district standards;

(3) provide for an ongoing assessment plan that includes statewide assessments required for public schools under AS 14.03.123(f);

(4) include a provision for modification of the individual learning plan if the student is below proficient on a standardized assessment in a core subject;

(5) provide for a signed agreement between the certificated teacher assigned to the student and at least one parent or the guardian of each student that verifies compliance with an individual learning plan;

(6) provide for monitoring of each student's work and progress by the certificated teacher assigned to the student.

(b) Notwithstanding another provision of law, the department may not impose additional requirements, other than the requirements specified under (a) of this section and under AS 14.03.310, on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f).

Sec. 14.03.310. Student allotments.

(a) Except as provided in (e) of this section, the department or a district that provides a correspondence study program may 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 enrolled in the program as provided in this section.

(b) A parent or guardian may purchase nonsectarian services and materials from a public, private, or religious organization with a student allotment provided under (a) of this section if

(1) the services and materials are required for the course of study in the individual learning plan developed for the student under AS 14.03.300;

(2) textbooks, services, and other curriculum materials and the course of study

(A) are approved by the school district;

(B) are appropriate for the student;

(C) are aligned to state standards; and

(D) comply with AS 14.03.090 and AS 14.18.060; and

(3) the services and materials otherwise support a public purpose.

(c) Except as provided in (d) of this section, an annual student allotment provided under this section is reserved and excluded from the unreserved portion of a district's year-end fund balance in the school operating fund under AS 14.17.505.

(d) The department or a district that provides for an annual student allotment under (a) of this section shall

(1) account for the balance of an unexpended annual student allotment during the period in which a student continues to be enrolled in the correspondence program for which the annual allotment was provided;

(2) return the unexpended balance of a student allotment to the budget of the department or district for a student who is no longer enrolled in the correspondence program for which the allotment was provided;

(3) maintain a record of expenditures and allotments; and

(4) implement a routine monitoring of audits and expenditures.

(e) A student allotment provided under (a) of this section may not be used to pay for services provided to a student by a member" means the student's spouse, gu stepsibling, grandparent, stepgrandparent, child, uncle, or aunt.

INTERESTS OF AMICUS CURIAE[1]

Carlene Boden respectfully submits this *amicus* both as a mother who has homeschooled her autistic daughter using the AS 14.03.310 allotments, and as a medical professional who works with the families of children with special needs who have homeschooled some, or all, of their children.

Ms. Boden is a psychiatric medical provider who is deeply involved with the special needs community, both professionally and as a parent. She was born and raised in Alaska and returned home in 2014 and is raising her family here.[2] She completed her Master of Health Science in Physician Assistant Studies in 2004 from Chatham University.[3] Ms. Boden has prior experience in primary care and oncology and completed her certification as a Board-Certified Behavior Analyst in 2017. She develops collaborative and comprehensive treatment plans centered on achieving patient/family goals, which incorporate behavior support strategies and education.[4]

Ms. Boden has three children. She has twin girls who are currently seventeen years old and who were born three months prematurely.[5] One has level three autism

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[1] *Amicus* submits this brief in support of neither party because the analysis and outcome advocated here has not to date been argued by any party. Because this brief is in support of none of parties, and Appellant and Intervenor-Appellants reply briefs are due to allow all parties a chance to respond.

[2] Affidavit of Carlene Boden at ¶ 3.

[3] *Id.* at ¶ 4.

[4] *Id.*

[5] *Id.* at ¶ 5.

and an intellectual disability and is currently attending the Whaley School in Anchorage.[6] The other has cerebral palsy and is currently attending South Anchorage High School with some limited special education support through an Individualized Education Plan (IEP).[7] Finally, she has a son with ADHD who is twelve years old and attends Rabbit Creek Elementary school, and he has special education resource support for math and social skills.[8]

There is a longstanding practice of homeschooling in the special needs community. Parents choose this option for a myriad of reasons, but a common theme is that school districts, while doing the best they can in good faith, often struggle to meet the unique needs and challenges posed by special needs children. This was the case with Ms. Boden's f

Ms. Boden homeschooled all three of her children for the 2020-2021 school year.[9] She continued to homeschool her daughter with cerebral palsy for the 2021-2022 and 2022-2023 school years.[10] She made this decision because she felt that she could meet her children's needs in a way the school district was

[6] The mission of Whaley School is to align with the Anchorage School District while advancing the social-emotional development of students within an intensive and supportive learning environment. Whaley's staff is committed behavioral interventions and support to guide students successfully in transitioning back to their neighborhood school. https://www.asdk12.org/domain/3598

[7] Affidavit of Carlene Boden at ¶ 5.

[8] *Id.*

[9] *Id.* at ¶ 6.

[10] *Id.* During both of these school years she attended two classes at her local high school as part of her homeschooling. The Anchorage School District charges students from their allotment to attend neighborhood school classes.

unable to.[11] This is never an easy decision because homeschooling is a significant undertaking in terms of time and resources, and for families without significant financial resources, it is incredibly difficult. The allotments authorized by AS 14.03.310 are a lifeline to these families and were significant to Ms. Boden.[12]

When Ms. Boden was homeschooling, her family used the allotments for:

> Piano lessons
> Voice lessons
> Online math and history lessons
> Specialized autism curriculum
> Martial arts classes
> Private swim lessons
> The hotdoggers ski program at Hilltop Ski Area
> Challenge Alaska ski lessons at Alyeska Report in Girdwood
> Internet reimbursement; and
> Technology purchase (a computer).[13]

The educational benefits of these uses are self-apparent. Nonetheless, it is worth highlighting the impact of some of these programs. For example, the piano and voice lessons were not only therapeutic they increased her self-confidence and ability to perform, which in turn has allowed her to now be meaningfully involved with choir at her current neighborhood school and participate in programs with the Alaska Theatre of Youth.[14] Similarly, participation in ski and karate lessons are not only a form of physical therapy, but

[11] *Id.*

[12] *Id.*

[13] *Id.* at ¶ 7.

[14] *Id.* at ¶ 7.

also provide for important socialization and building skills for working within groups of people. These are important benefits that should not be taken away from hundreds of families simply because others may be using allotment funds in an unconstitutional manner.

In her professional practice and personal life, Ms. Boden also regularly interacts with other parents who care for children with special needs who have homeschooled. This includes families with children with autism, ADHD, auditory or sensory processing disorders, down syndrome, dyslexia, and apraxia of speech. Ms. Boden has and has direct personal knowledge of how these families use some of their allotment funds.[15] Often, these families use their allotments for:

> Dyslexia tutoring.
> Learning therapy programs.
> Specialized educational curriculum
> disability.
> Purchasing assisted learning devices and specialized learning software.
> Field trips and outings to museums and artistic performances; and
> Purchasing supplies for therapeutic learning and art.[16]

Ms. Boden personally knows several families who have experienced very positive outcomes from these services.[17] What is also important to keep in mind is that many of the specialized tutoring and therapy programs would not exist but for the critical

[15] *Id.* at ¶ 8.

[16] *Id.*

[17] *Id.* at ¶ 9.

mass of homeschool students enabled by the allotments.[18]

Notably, the uses of the homeschool allotments described in the above paragraphs do not in any way trigger the constitutional concerns at issue in this case. To conclude otherwise would require concluding that all private tutors and therapists and all vendors who sell adaptive learning equipment qualify as "educational institutions," a conclusion

The above-listed use of allotment funds cannot be reasonably characterized as money "from public funds for the dire

educational Yeitn sitfi t uhe oCn" ourt adopts one approaches currently being advocated by the parties, these families will lose access to these allotment funds through no fault of their own and they will experience significant hardship as a result. There is no sound reason to eliminate the allotment program in its entirety simply because certain uses of the funds may be unconstitutional. Numerous families statewide use these allotment funds in clearly constitutional ways. Equity and justice require that their voices be heard in these proceedings.

Given these interests, and for the reasons discussed below, Ms. Boden respectfully requests that the Court consider severability in its analysis of the issues presented on appeal. She advocates for a ruling that finds that any unconstitutional portions of the statute may be severed (thus preserving the existence of the

[18] *Id.*

allotments), and that remands the case for the creation of a record on how allotment funds are currently being used. This will allow the courts, in conjunction with the legislature, to thoughtfully evaluate and determine the constitutional boundaries for how these allotment funds can be used. To invoke a timeless idiom, this is a case where the Court should take great care to ensure it does not throw out the baby with the bathwater.

FACTUAL BACKGROUND

There is no meaningful factual record in this case, which is part of the problem. The only record to date is the existence of AS 14.03.310 and the fact that it is possible to use these statutory allotments in ways that violate the Alaska Constitution's ban on using public funds for the direct benefit of religious or other private educational institutions.

The record, such as it is, is silent on the diverse array of current allotment fund uses that trigger no constitutional concerns. In addition to those discussed above, these include:

> Purchasing curricula for use in the home
> Private tutoring.
> Field trips.
> Purchasing art materials, Chromebooks, software, and basic school supplies like paper, pencils, pens and calculators.
> Enrolling students in music, theater, or sports programs.
> Paying for private lessons in music, dance, and foreign languages.[19]

[19] The State of Alaska's Cross-Motion for Summary Judgment below included an exhibit from the Mat-Su School District that included numerous examples of constitutionally permissible uses of allotment funds. *See* Exhibits A and E to the State's Motion For Summary Judgment.

Building this record and allowing the trial court to consider it in crafting a ruling, is essential.

This is equally true when it comes to identifying and assessing use of allotment funds that do trigger constitutional problems. For example, many correspondence programs have partnerships with private schools.[20] This use of funds may not be unconstitutional *per se* (unless one is using the allotments to reimburse private school tuition for students who are in reality enrolled full time at the private school), but it does warrant scrutiny. It is critical to understand the array of uses for these funds in order to craft a set of rules and guideposts that would govern use of allotment funds, prohibit unconstitutional uses, and allow the program to otherwise continue and help the hundreds of Alaskan families who rely on it.

ARGUMENT

I. THE COURT MAY SEVER THE UNCONSTITUTIONAL PROVISIONS OF AS 14.03.310 AND IN DOING SO AVOID THE HARM CAUSED BY ELIMINATING THE ALLOTMENTS IN THEIR ENTIRETY

The statutory scheme at issue here consists of AS 14.03.300, which establishes homeschool correspondence programs and addresses the contents of individual learning programs,[21] and AS 14.03.310, which provides for the allotment

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[20] *E.g.* https://alaskapolicyforum.org/csap/ (listing correspondence programs with private school partnerships).

[21] This provision provides in full:

> (a) A district or the department that provides a correspondence study program shall annually provide an individual learning plan for each

payments to those enrolled in the correspondence programs. It is worth quoting subsection .310 in its entirety to demonstrate its detail and breadth:

> (a) Except as provided in (e) of this section, the department or a district that provides a correspondence study program may 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 enrolled in the program as provided in this section.
>
> (b) A parent or guardian may purchase nonsectarian services and materials from a public, private, or religious organization with a student allotment provided under (a) of this section if

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> student enrolled in the program developed in collaboration with the student, the parent or guardian of the student, a certificated teacher assigned to the student, and other individuals involved in the student's learning plan. An individual learning plan must
>
> > (1) be developed with the assistance and approval of the certificated teacher assigned to the student by the district;
> >
> > (2) provide for a course of study for the appropriate grade level consistent with state and district standards;
> >
> > (3) provide for an ongoing assessment plan that includes statewide assessments required for public schools under AS 14.03.123(f);
> >
> > (4) include a provision for modification of the individual learning plan if the student is below proficient on a standardized assessment in a core subject;
> >
> > (5) provide for a signed agreement between the certificated teacher assigned to the student and at least one parent or the guardian of each student that verifies compliance with an individual learning plan;
> >
> > (6) provide for monitoring of each student's work and progress by the certificated teacher assigned to the student.
>
> (b) Notwithstanding another provision of law, the department may not impose additional requirements, other than the requirements specified under (a) of this section and under AS 14.03.310, on a student who is proficient or advanced on statewide assessments required under AS 14.03.123(f).

(1) the services and materials are required for the course of study in the individual learning plan developed for the student under AS 14.03.300;
(2) textbooks, services, and other curriculum materials and the course of study
(A) are approved by the school district;
(B) are appropriate for the student;
(C) are aligned to state standards; and
(D) comply with AS 14.03.090 and AS 14.18.060; and
(3) the services and materials otherwise support a public purpose.

(c) Except as provided in (d) of this section, an annual student allotment provided under this section is reserved and excluded from the unreserved portion of a district's year-end fund balance in the school operating fund under AS 14.17.505.

(d) The department or a district that provides for an annual student allotment under (a) of this section shall

(1) account for the balance of an unexpended annual student allotment during the period in which a student continues to be enrolled in the correspondence program for which the annual allotment was provided;
(2) return the unexpended balance of a student allotment to the budget of the department or district for a student who is no longer enrolled in the correspondence program for which the allotment was provided;
(3) maintain a record of expenditures and allotments; and
(4) implement a routine monitoring of audits and expenditures.

(e) A student allotment provided under (a) of this section may not be used to pay for services provided to a student by a family member. In this subsection, "family member" means guardian, parent, stepparent, sibling, stepsibling, grandparent, stepgrandparent, child, uncle, or aunt.

Here, the constitutional issue in this long and multi-faceted statutory provision is only triggered by subsection (b), which provides the allotments may be used to "purchase nonsectarian services

religious organization." While there is "private education" is not always the same thing as a "pr institution, the fact that this language triggers potential constitutional concerns is not entirely surprising.[22] But this is no reason to throw the statute out in its entirety, particularly where there is no record delineating the constitutional and nonconstitutional uses of these funds. Rather, the Court should sever subsection (b) from the statute, or in the alternative, invoke a narrowing interpretation to harmonize the statute with Alaska's Cons

When addressing Constitutional issues, this Court first applies a rule that statutes should be interpreted to avoid constitutional issues where possible.[23] Where this is not possible, the Court must consider whether it is possible to sever the unconstitutional provisions from the rest of the statute and in undertaking this analysis, the same principle applies that the Court should first try and sever the statute to avoid constitutional issues.[24] Indeed, as the trial cour

[22] For example, the Attorney General opinio to Dismiss below concluded that using correspondence school program student allotments to purchase materials or services from a private vendor, on its face, violate the Alaska Constitution's p the direct benefit of a private educational institution," but that "the A Constitution does establish boundaries on how public money can be spent under the program," and would bar some uses of all full-time enrollment in a private school." March 8, 2023 at 5 (emphasis in original). *does not*

[23] *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 633 (Alaska 1999).

[24] *Id.; see also Forrer v. State*, 471 P.3d 569, 584 (Alaska 2020) ("Laws duly enacted by the legislature are endowed with a presumption of constitutionality, and

than strike a statute down, [courts] will employ a narrowing construction if one is reasonably possible."[25]

The test for determining severability is twofold: (1) can the statute stand-alone without its unconstitutional elements; and (2) did the legislature intend that the statute remain in place should any unconstitutional portion of it be struck down.[26] Here, one can either sever subsection (b) in its entirety, or conclude that subsection (b) should be construed as only permitting constitutional uses of allotment funding, and either way the allotment program can still function as a coherent whole. And given that the facial intent of the statute is to provide support to homeschool families, there is no indication that the legislature intended to remove this support *in its entirety* should some unconstitutional uses of this funding arise.

A. The Allotment Provisions of AS 14.03.310 Function as a Coherent Whole Whether Subsection (b) Is Severed or Narrowly Construed.

There are two ways to interpret subsection .310(b). The less favorable way is to see the language as an attempt to circumvent the Constitutional prohibition on spending "public funds for the direct benefi

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even if one or more sections of a law are constitutionally infirm, AS 01.10.030 directs us to excise those portions to save the remainder if this is possible.")).

[25] Order at 31 (citing *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 633 (Alaska 1999).

[26] *State v. ACLU*, 978 P.2d at 633 ("Unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.")).

educational alternative is to presume good faith on the part of the legislature and view this language as an effort to delineate how these allotment funds can be used in a way that does not violate the Constitution. Either way, this language is not necessary in any way for the statutory allotment statute to function. The Constitution already places sideboards on how these funds may be used and the statute itself need not weigh in on the issue. Similarly, if the Court chooses to parse the language of subsection .310(b) and only strike down any portion of it that mistakenly authorizes unconstitutional uses of the funds, the result is the same – the statute continues to function and provide for the receipt of allotment funds and the only change going forward is there will be a decision from this Court providing guidance on what constitutes unconstitutional uses of the allotment funds.

B. There Is No Indication the Legislature Intended the Entire Allotment Program to Disappear Should the Courts Conclude the Funds May Only Be Used in a Constitutional Manner.

While the parties below and the superior court all parsed the legislative history of these provisions, including the questionable exercise of assessing the intent of the whole legislature through the statements of individual lawmakers, there should be no doubt that fundamentally, the legislature enacted the allotment provisions to support homeschool families. After either severing or narrowing subsection (b), the statute remains in place to provide this support. To presume that the legislature would find this result undesirable, and that instead the statute should simply be eliminated because it cannot be used in an unconstitutional manner, requires a troubling assumption that the legislature enacted this statute with the sole

purpose of trying to funnel public money to private and religious schools and that the legislature would prefer the program disappear in its entirety if any Constitutionally infirm use of funding is prohibited. This assumption is unwarranted here.

II. THE COURT SHOULD CAREFULLY CONSIDER WHETHER A REMAND IS NECESSARY TO BUILD A PROPER FACTUAL RECORD ON HOW ALLOTMENTS ARE USED IN ORDER TO ASSESS THE PROPER CONSTITUTIONAL BOUNDARIES FOR ALLOTMENT EXPENDITURES

One of the biggest issues in this case is that there is no factual record on how allotment funds are being used. All the superior court had to go on in granting summary judgment on the facial constitutional challenge was that an unknown number of allotment recipients likely were using the funds in a way that is impermissible under the Alaska Constitution. What is missing from this analysis is how the funding is also being used in a constitutional manner. Once these facts enter the record, it is difficult to sustain a broad facial challenge to the statue, and near impossible to maintain an argument that there is no possible way to either sever or narrowly construe the statue to avoid constitutional prohibitions while allowing those who are using the funds appropriately to continue receiving them.

Moreover, taking the time and effort to build a record in this matter would avoid the significant chaos and disruption that hundreds of Alaskan families will otherwise experience if the Court continues down the current path and issues a definitive decision on the allotment program *less than two months before the beginning of the next school year*. While A*micus* here is not a party and has not

weighed in on the stay issue, it is worth emphasizing here that two months is not remotely enough time for families who are homeschooling special needs children to make the necessary adjustments to enroll their children in public schools and ensure their children receive all the support they need. Nor is it enough time to make the financial and logistical adjustments necessary to find an alternate way to make homeschooling work. There is simply no reason to act with haste regarding a statutory program that has been in place for almost ten years.

CONCLUSION

The principle of "first do no harm" has profession and emphatically applies here. While it is the responsibility of the courts to dispassionately uphold the State Constitution, when remedying constitutional violations, they should take great care to avoid collateral damage. Here, this means not taking away critical support for homeschool families who are using allotment funds in a manner that does not implicate the constitution, and it means not causing significant disruption to all families who have been relying on an allotment program that has been in place for almost ten years. The Court can achieve these ends by concluding the statute is severable and then remanding to the superior court for the creation of a factual record. Doing so will not only help provide guidance on how these funds may be used in a constitutional manner, it will also avoid the untenable result of a judicial decision that radically alters the status quo less than two months before the next school year is about to begin.

In sum, leaving the statute in place while taking great care to only eliminate

unconstitutional uses of the allotments allows numerous Alaskan families to continue to benefit from these funds while they engage in the significant undertaking that is homeschooling. A thriving homeschool program is not mutually exclusive with supporting and encouraging the robust and healthy public school system the State is Constitutionally obligated to provide. Rather, these goals are complementary, as demonstrated by Ms. Boden's both homeschooled and sent their children to public school. Alaskan families should have the opportunity to send their children to a first-rate public school, or in the alternative choose to homeschool if the public schools do not fit their needs. The allotment program was designed to provide support to these homeschool families and it would be a mistake to presume that the legislature would support eliminating this program in its entirety simply because the funds could be used by some in an unconstitutional manner.

CERTIFICATE OF SERVICE

I certify that on this 31st day of May 2024, a true and correct copy of the foregoing was served upon the following by e-mail or U.S. Mail:

Scott M. Kendall
Lauren Sherman
CASHION GILMORE & LINDEMUTH
scott@cashiongilmore.com
lauren@cashiongilmore.com
todd@cashiongilmore.com

Margaret Paton-Walsh
STATE OF ALASKA, EDUCATION AND EARLY Development
margaret.paton-walsh@alaska.gov

Jeff Rowes
INSTITUTE FOR JUSTICE
jrowes@ij.org

Craig Richards
LAW OFFICES OF CRAIG RICHARDS
crichards@alaskaprofessionalservices.com

David Hodges
Kirby Thomas West
INSTITUTE FOR JUSTICE
kwest@ij.org
dhodges@ij.org

Lea E. Patterson
Justin E. Butterfield
Hiram S. Sasser
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075

Elbert Lin
HUNTON ANDREWS KURTH, LLP
951 E. Byrd Street
Richmond, VA 23219

ASHBURN & MASON

By: s/*Maarit Cain*
Maarit Cain