

IN THE SUPREME COURT OF ALASKA

MOLLY HOOTCH, minor, by her father and
next friend JAMES HOOTCH; FRANK KAMER-
OFF, JR., CAMMY KAMEROFF, LORENE KAMER-
OFF, and ELLEN KAMEROFF, minors, by their
father and next friend FRANK KAMEROFF; A-
GATHA KEYES; VIRGINIA OKTOYAK, minor, by
her father and next friend BERNARD OKTO-
YAK; THERESA HORN, minor, by her mother
and next friend PERTETUA HORN; URSALA TRA-
DER; IDA TRADER and LINDCY TRADER, minors,
by their father and next friend ALEX TRA-
DER; MARTINA TRADER and PATRICK TRADER,
minors, by their father and next friend
WILLIAM TRADER; LUCILLE EVON and ERNEST
EVON, minors, by their father and next
friend and next friend HARRY EVON; MARY
ANN ANDREW; HERBERT PETER, minor, by his
father and next friend DAVID PETER; CHRIS-
TINE ATTI and JAMES ATTI, minors, by their
father and next friend PETER ATTI; ENOCH
BEAVER, minor, by his father and next
friend ALBERT BEAVER; STEPHANIE PHILLIP
and DORIS PHILLIP, minors, by their father
and next friend ROLAND PHILLIP; WILLIAM
JOHN and ELSIE JOHN, minors, by their fa-
ther and next friend PETER JOHN; ELIZA-
BETH FRIEND, minor, by her father and next
friend OTTO FRIEND; LORRAINE BEAVER, minor,
by her father and next friend OWEN BEAVER;
ELSIE BLACK, minor, by her mother and next
friend MARY BLACK; and ELSIE AGNES MUTE,
minor, by her father and next friend FRANK
MUTE; on behalf of themselves and all o-
thers similarly situated,

Petitioners,

vs.

ALASKA STATE-OPERATED SCHOOL SYSTEM, a
State Corporation; KATHRINE T. HURLEY,
JAMES N. WANAMAKER, JOHN BORBRIDGE, JR.,
MARIE L. McDOWELL, BETTY J. CUDDY, FRANK-
LING M. KING, JR., RUTH McLEAN, as members
of the State Board of Education of the
State of Alaska; MARSHALL L. LIND, as Com-
missioner of Education; NATHANIAL H. COLE,
as Director of Administrative Services,
Department of Education; JAMES M. HARPER,
as Director of Regional Schools and Board-
ing Home Program, Department of Education;
STANLEY FRIESE, as Superintendent, Alaska
State-Operated School System,


Respondents.

File No. _____

Superior Court No.
72-2450

PETITION FOR REVIEW

ALASKA LEGAL SERVICES CORPORATION
Box 73
Bethel, Alaska 99559


CHRISTOPHER R. COOKE
Attorney for Petitioners

Filed October 11, 1973 in the
SUPREME COURT for the State of
Alaska,

JOSEPHINE M. McPHETRES,

By: _____

STATEMENT OF FACT

Petitioners seek review of the Superior Court's Order Denying Motion for Summary Judgment, entered October 2, 1973, and attached hereto as Appendix A.

Petitioners are more than 3,000 high school age children who are Alaska Natives, Citizens of Alaska and the United States, and reside in 145 Alaskan Communities which lack public secondary educational opportunities.¹ Most, but not all, of these Communities are within the State-Operated School District.

Defendants are the Alaska State-Operated School System, the members of the State Board of Education, the Commissioner of Education, and other education officials.

The defendants admit they do not provide secondary educational opportunities in 112 of plaintiff's Communities and they have no plans to offer it in the future. In the remaining 33 Communities there are, or defendants plan to initiate, "secondary programs;" however, none of these programs provide complete secondary education and all fall below the state's minimum standards for offering secondary education.² 4AAC 06. 025(2)

Because local secondary educational opportunities are not provided, plaintiffs are not required to attend school.³

1. Plaintiffs' Memorandum in Support of Motion for Summary Judgment [hereafter, Mem. in Support], 4-5; Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss this Suit as to the Class, 5.

2. Mem. in Support, 12-14, Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment [hereafter Reply Mem.], 2.

3. Mem. in Support, 14-18

Hundreds of them are not attending school.⁴ To attend school plaintiffs must live away from home in one of a variety of public and non-public boarding schools elsewhere in Alaska or in other states. However, none of the plaintiffs are required to attend these boarding schools.⁵ For those of the named plaintiffs who do attend boarding schools, they do so because secondary education is not provided in their home communities.⁶

Plaintiffs commenced this action August 15, 1972, and the amended complaint was filed October 5, 1972. In Count I of the amended complaint plaintiffs allege that the defendants' failure to provide them local secondary educational opportunities contravenes state education laws and regulations and denies them their constitutional right to public education.⁷ As relief on Count I plaintiffs sought a mandatory injunction to compel defendants to provide secondary education in their home communities.⁸

In denying plaintiffs' Motion for Summary Judgment the Superior Court refused the injunctive relief sought on Count I and ruled the entire matter non-justiciable. In the Court's words:

Finally, I do not mean, by denying plaintiffs summary judgment in a manner casting doubt on the legal sufficiency of their Count I, to downgrade the importance of the local school vs. boarding school controversy which I consider for reasons previously mentioned one

4. Mem. in Support, 5.

5. Reply Mem., 13.

6. Reply Mem., 13-14.

7. Amended Complaint, para. 57-65.

8. Amended Complaint, Prayer for Relief, para. 1; Order Denying Motion for Summary Judgment, [hereafter Order], 5.

of the most important facing the state today. I only mean that under our system the reconciliation of quality education with local education is one to be resolved in the legislature and executive departments and not the courts.⁹

QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioners' claim of a constitutional right to public education, including secondary education in their communities of residence, is a justiciable question.

II. Whether, as a matter of law, petitioners have a right to public education which, under the Alaska Constitution, school laws and education regulations, includes the right to local secondary education.

STATEMENT OF REASONS

I. THE PRECONDITIONS FOR REVIEW ARE MET; THE IMPORTANCE OF THE QUESTIONS PRESENTED SHOULD MOVE THIS COURT TO GRANT REVIEW.

Appellate Rules 23 and 24 set forth the standards governing petitions for review. This petition is proper as it is taken from an interlocutory order refusing an injunction Appellate Rule 23(a). The preconditions expressed in Appellate Rule 23 (d) and (e) are also met here. The ruling below involves controlling questions of law, and substantial ground for difference of opinion exists because the Order below conflicts with this Court's decisions in Breese v. Smith 501 P.2d 159 (Alaska 1972), and Macauley v. Kildebrand, 491 P.2d 120 (Alaska 1971), and decisions in other jurisdictions.

9. Order, 9.

Postponement of review until normal appeal will produce great injustice and impairment of a fundamental right, the right to public education. Postponement of review will mean that the hundreds of petitioners not presently attending school will continue to be without local secondary educational opportunity. Postponement of review will mean that many other petitioners will continue to attend boarding schools away from their families because their home communities lack local secondary educational opportunities.¹⁰ Postponement of review will mean, in effect, that thousands of Alaskan children will continue to be excluded from school.

Immediate review may also materially advance the ultimate termination of the litigation because if petitioners are entitled to judgment as a matter of law trial may be unnecessary, because of the importance of the questions presented and the rights at stake, this Petition for Review should be granted.

II. THE COURT BELOW ERRED IN HOLDING THAT PETITIONERS' CLAIM OF A CONSTITUTIONAL RIGHT TO PUBLIC EDUCATION, INCLUDING SECONDARY EDUCATION IN THEIR COMMUNITIES OF RESIDENCE, IS NOT A JUSTICABLE QUESTION.

Petitioners' Motion for Summary Judgment below was founded on the premise that they possessed constitutional right to public education enforceable through the courts. Article VII, Section 1, of the Alaska Constitution is the source of this right, and reads, in relevant part:

10. Petitioners insist, as argued below, that boarding programs be continued for all entitled to them. Mem. in Support, 15-16, n. 12; Reply Mem., 8-9.

The legislature shall by general law establish and maintain a system of public schools open to all children of the State....

This section goes beyond requiring the legislature to establish and maintain a statewide system of public schools open to all children, Macauley v. Hildebrand, supra at 122; this Court has said that this provision also guarantees all Alaskan children a right to public education. Breese v. Smith, supra at 167.¹¹

The court below found that this constitutional mandate was satisfied by the legislature's creation of a "system" of public schools, consisting of city school districts, borough school districts and the state-operated school district.¹²

Petitioners are in serious disagreement with the court's analysis. The court looked merely to find whether a school system, existed, and did not examine the more substantial question of whether the system functioned to provide schools open to all children of the state. In petitioners view, if there is to be a system of public schools open to all children of the state, then the schools must be sufficiently numerous so that all children of the state may receive the education to which they are entitled. Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 118 A.L.R. 789, 792 (1938).

The petitioners are not required to attend school because they do not have daily access to a school. A.S. 14.30.010 (b) (7).¹³

11. Petitioners have not claimed that education is a "fundamental interest" under the federal constitution. Mem. in Support, at 8, n1; Reply Mem., 4. Compare San Antonio School District v. Rodriguez, ___ U.S. ___, 35 L.Ed. 2d 16 (1973).

12. Order, 6.

13. Mem. in Support, 14-15.

In fact, hundreds of them do not attend school because defendants do not provide secondary educational opportunities in their communities. Many hundreds more of them attend boarding schools away from home against their will because there are no secondary educational opportunities in their home communities. In these circumstances the public schools are not sufficiently numerous to comply with the constitutional requirement of a system of public schools open to all children.

Also, the court below failed to consider the individual right of petitioners to receive public education guaranteed by Article VII and recognized in Breese. The court failed to acknowledge the existence of this right and, similarly, failed to enforce and protect it. As discussed at length in petitioners' memorandum below, the court was urged to recognize this fundamental right and to apply the "strict scrutiny" standard of Breese to distinction in the terms upon which education is provided to petitioners, as compared with other Alaskan children.¹⁴ The analysis due such a fundamental individual right, however, does not appear in the Order.

In holding that the matters raised in Count I are not justiciable, the court below cited no authority. The absence of any reference to precedent also indicates that review by this Court is necessary. Petitioners can see no reason why their constitutional

14. Mem. in Support, 18-22; Reply Mem., 6-7.

right to public education should be beyond the cognizance of the courts. The court below said that the issues raised must be resolved in the legislature and executive departments; yet this Court has said that such fundamental rights cannot be dependant upon the subjective discretion and good faith of school administrators. Breese v. Smith, supra at 171. See also Hosier v. Evans, 314 F. Supp. 316, 320-321 (D.V.I. 1970). Similarly, such fundamental rights may not be denied or abridged by a legislative body's failure to act. Griffin v. County School Board, 377 U.S. 218, 12 L.Ed.2d 256 (1964); Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), aff'd 368 U.S. 515, 7 L. Ed.2d 521 (1962); United States v. School District 151 of Cook County, 301 F. Supp. 201 (N.D. Ill 1969); Baker v. City of Fairbanks, 471 P. 2d 386 (Alaska 1970).¹⁵

The Order below places denials of petitioners' constitutional right to public education by the legislature or executive branches of government beyond judicial review. This ruling is erroneous and this Court should act to correct it at once.

III. PETITIONERS HAVE A RIGHT TO PUBLIC EDUCATION WHICH, UNDER THE ALASKA CONSTITUTION, SCHOOL LAWS AND EDUCATION REGULATIONS, INCLUDES THE RIGHT TO LOCAL SECONDARY EDUCATION.

In denying petitioners' Motion for Summary Judgment the court below found no genuine issue of material fact; it found that petitioners were not entitled to relief as a matter of law. This holding is in error; petitioners are entitled to relief as a matter of law.

15. See Mem. in Support, 19-21.

Public education, as courts have consistently recognized, is a governmental function of the highest importance and is essential to the operation and continuation of our social, economic and governmental system. Brown v. Board of Education, 347 U.S. 483, 493, 98 L.Ed. 873, 880 (1954); Serrano v. Priest, 5 Cal. 3d 584, 609-610, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). The special status of education as a fundamental personal right under the Alaska Constitution has been discussed above. Therefore, substantial distinctions between citizens regarding the terms upon which public education is made available should be viewed with strict scrutiny and upheld only when justified by a compelling governmental interest. Breese v. Smith, *supra* at 171.¹⁶

Public education is available to petitioners on terms much different than those upon which it is provided to most Alaskan children. Petitioners have no local secondary educational opportunities, while most Alaskan children do. Petitioners are beyond the reach of the compulsory attendance law and are not required to attend school, while most Alaskan children must attend school.¹⁷ In order to obtain the complete secondary education to which they have a right, petitioners must leave their families and home communities for nine months of the year and attend boarding schools elsewhere in Alaska or in other states, while most Alaskan children can obtain complete secondary education without living away from home.¹⁸

16. Mem. in Support, 18-22.

17. Compulsory attendance laws reflect the great importance of education. Mem. in Support, 14-15.

18. As discussed in Note 10, boarding school opportunities must be continued for those desiring and entitled to them; however, the boarding programs are the only educational opportunity provided petitioners.

The effect of these distinctions is that petitioners are excluded from school and denied their constitutional right to public education.¹⁹ This exclusion is not justified by an governmental interest, compelling or otherwise; indeed, strong governmental interests require elimination, not perpetuation, of the distinctions between plaintiffs and other Alaskan children.²⁰

Petitioners right to local secondary educational opportunities is confirmed by the state school laws and education regulations. The school system, as designed by the legislature, consists of statewide local elementary and secondary schools. A.S. 14.03.010 et seq.²¹ For example, A.S. 14.03.080 entitles each child to attend school in the district in which he is a resident "subject to the provisions of A.S. 14.14.110 and A.S. 14.14.120." This section is not satisfied if an elementary or secondary child living in the State-Operated School District may attend a school located somewhere within the statewide district perhaps hundreds of miles from his home.²² The reference to A.S. 14.14.110 localizes the place of the school required.

The court below found A.S. 14.14.110 "inapplicable to the present litigation;"²³ yet recent amendments to this section were adopted, in the words of the Governor, to clarify "the number of students for whom classes must be provided" and "legislative intent regarding when a district must provide local educational services."

19. Mem. in Support, 14-18.

20. Mem. in Support, 18-19.

21. Mem. in Support, 9-12.

22. Compare Order, at 7, n.9a.

23. Order, 6.

[emphasis added].²⁴ Petitioners believe that A.S. 14.14.110 is applicable and states the circumstances in which the Alaska State-Operated School System and other school districts must provide local elementary and secondary educational services.²⁵ The same interpretation of A.S. 14.14.110--that a school district may not require a pupil to live away from home in order to obtain a secondary education --- was made by the Department of Education itself over two years ago.²⁶

Finally, regulation 4 AAC 06.020 (a) is of particular interest to the petitioners.²⁷ It reads:

Every child of school age shall have the right to a secondary education in his community of residence, whether in a city district, a borough district, or the state-operated school district.

The court below found this regulation "ambiguous" and that the phrases "community of residence" and "state-operated school district" were "apposite." Further, the court said, the record lacked "any indication regarding why the regulation was adopted or the purposes intended to be obtained."²⁸ Petitioners disagree. The regulation is clear on its face. The Department of Education's Notice of the proposed regulations of November 29, 1971, explains the purpose of 4 AAC 06.020 as establishing "the right of a school age pupil to secondary education in the community of his

24. Mem. in Support, 10, n11.

25. Alaska State-Operated School System must operate and maintain schools in accordance with state education laws and regulations.

A.S. 14.08.050. Reply Mem., 8.

26. Reply Mem., 10, Appendix A-4.

27. Mem. in Support, 11, Reply Mem., 9.

28. Order, 8-9.

residence."²⁹ Also, companion regulation 4 AAC 06.025 (2), clearly expresses their intent as follows:^{30,31}

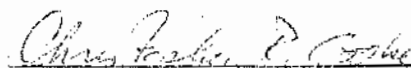
1. Every child of school age shall have the right to an elementary - secondary education in his district or community of residence.
2. No child of school age shall be required to live away from his usual home in order to obtain an education.

The court below was in error on these points and petitioners are, as a matter of law, entitled to secondary education in their communities of residence.

CONCLUSION

For the reasons given, and in particular because of the important fundamental rights at stake, petitioners respectfully request that this Petition for Review be granted and that a decision be entered in their favor on the questions presented for review. Further, petitioners stand ready to submit supplemental memoranda and present oral argument on these vital issues, if this Court so desires.

Respectfully submitted this 10th day of October, 1973.


CHRISTOPHER R. COOKE
Attorney for Petitioners

29. Reply Mem., Appendix B-1

30. Mem. in Support, Appendix; Reply Mem., Appendix B-5.

31. Other information in the Record pertaining to A.S. 14.14.110 and these regulations can be found in Plaintiffs' Memorandum in Support of Application for Temporary Restraining Order and Motion for Preliminary Injunction, Exhibit A, pp. 2-11.