IN THE SUPREME COURT OF THE STATE OF ALASKA

MOLLY HOOTCH, et al.,	)
	)
Petitioners,	)
	)
vs.	)
	)
ALASKA STATE-OPERATED SCHOOL SYSTEM, et al.,	)
	)
Respondents.	)
	)

Superior Court No. 72-2450

Supreme Court No. 2090

RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR REVIEW

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RULES RELIED UPON

Alaska Appellate Rule 23 provides:

> Review of Non-Appealable Orders or Decisions. An aggrieved party, including the State of Alaska, may petition this court as set forth in Rule 24 to be permitted to review any order or decision of the superior court, not otherwise appealable under Rule 5, in any action or proceeding, civil or criminal, as follows:
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> (a) From interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.
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> (b) From interlocutory orders appointing receivers or refusing orders to terminate receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property.
>
> (c) From any order affecting a substantial right in an action or proceeding which either (1) in effect terminates the proceeding or action and prevents a final judgment therein; or (2) discontinues the action; or (3) grants a new trial.
>
> (d) Where such an order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion, and where an immediate and present review of such order or decision may materially advance the ultimate termination of the litigation.
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> (e) Where postponement of review until normal appeal may be taken from a final judgment or where it will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors.
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> Relief heretofore available by writs of review, certiorari, mandamus, prohibition, and other writs necessary or appropriate to the complete exercise of

this court's jurisdiction, may be obtained by petition for review and the procedure for obtaining such relief shall be as prescribed in Part VI of these rules.

Alaska Appellate Rule 24(a) provides:

> (a) When Granted. A review is not a matter of right, but will be granted only: (1) where the order or decision sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court; or (2) where the sound policy behind the general rule of requiring appeals to be taken only from final judgments is outweighed by the claim of the individual case that justice demands a present and immediate review of a particular non-appealable order or decision; or (3) where the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for this court's power of supervision and review.

Alaska Appellate Rule 24(c) provides:

> (c) Contents of Petition and Answers. The petition shall contain a statement of fact necessary to an understanding of the controlling question of law determined by the order of the court, a statement of the question itself, and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. Where orders or decisions arising from different cases or proceedings pending in the same court are sought to be reviewed, and where they involve identical or closely related questions, it shall suffice to file a single peti-

tion covering all the cases or proceedings.

The party seeking review shall be known as the petitioner. All other parties to the proceedings shall be named as respondents. The petition shall not exceed 15 pages in length and shall include, or have annexed thereto, a copy of the order from which appeal is sought showing the date that it was signed or entered, and copies of any findings of fact, conclusions of law and opinion related thereto. Within 7 days after service of the petition, an adverse party may file an answer in opposition. No reply brief will be filed unless ordered by the court. The application and answer shall be submitted without oral argument unless otherwise ordered. Motions to dismiss a petition or cross-petition will not be received. Objections to the exercise of the discretionary power of the court to grant a petition or cross-petition must be included in memoranda in opposition.

Statement of Facts

Appellate Rule 24 requires as part of a petition for review "a statement of facts necessary to an understanding of the controlling question of law determined by the order of the court." The statement of facts contained in the petition filed by plaintiffs is both intrinsically inaccurate and, more important for the purposes of this review, violative of both the letter and spirit of Appellate Rule 24.

While the named petitioners desire to proceed as representatives of a class, the legitimacy of their status as representatives of a class has been challenged by the respondents. 1/ Respondents' motion in this regard has not yet been ruled on by the Superior Court nor have any findings or stipulations been made as to other "facts" which petitioners assert. Of equal importance, petitioners' counsel has maintained consistently throughout these proceedings that the determination as to the class action motion is wholly irrelevant to the legal claim involved in Count I of the complaint. Thus, it is apparent that petitioners' "statement of fact" is wholly irrelevant and improper for a petition for review.

A more accurate statement of the necessary facts relative to Count I would note that there are 27 named plaintiffs, of whom only 6 (3 in Emmonak and 3 from Kwigillingok)

1/ Defendants' Motion to Dismiss the Action as to the Class.

would be subject to the state's compulsory attendance law. 2/ AS 14.30.010. The named plaintiffs live in the villages of Emmonak, Kongiganak, and Kwigillingok each of which is located in the unorganized borough. Of the three villages only Emmonak is incorporated and none of them has taken the local initiative to operate its own schools. Thus the schools which are operated in these villages, as well as the secondary programs which are available to petitioners elsewhere are operated and supported wholly by state and federal funds. Additionally, it should be noted that prior to the filing of the original complaint in this action, respondents had already proceeded towards construction of a secondary school facility in Emmonak (as well as a number of other rural, predominantly native communities) with some 9 million dollars derived from the bond issue of ch. 170 SLA 1970. 3/ Additionally, approval of a second bond issue in November of 1972 (ch. 195

2/ First Amended Complaint, paragraphs 3-30. It should be observed that all 6 of the named plaintiffs who would be subject to the compulsory attendance law if they lived within two miles of a secondary school are in fact enrolled in fully accredited secondary programs. Further, of those named plaintiffs who claimed not to be enrolled, each one is over the age of compulsory school attendance. There is no way of determining at this point whether any of them would be enrolled in any event.

3/ See Memorandum to Governor William A. Egan from Commissioner of Education Marshall L. Lind, dated July 21, 1972 and attached as Exhibit B to the Affidavit of Robert L. Thomas, Exhibit 4 to Defendants' Memorandum Opposing Summary Judgment below.

SLA 1972) made available an additional 16 million dollars for rural secondary school construction.

The new, state financed secondary school in Emmonak should be operational during the 1974-75 school year. In the interim, defendants have agreed to make secondary program available in Emmonak using existing elementary school facilities for any secondary school-aged children who desire to participate. 4/ For the two years during which this program has been provided in Emmonak, very few secondary students elected to stay in their "community of residence" and participate in this specially established program.

It should be noted that all of the named plaintiffs have been given the opportunity to attend secondary facilities in the State-Operated School district although not in their "communities of residence." Many have done so. Others have instead elected to leave the State-Operated School district to attend secondary programs elsewhere (e.g., Anchorage). 5/ None of the named plaintiffs have been "forced" to leave their district of residence since the named plaintiffs, like all others similarly situated, select the program which they prefer

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4/ Stipulation of the parties.

5/ As has been pointed out below, respondents have taken significant steps, many of them initiated prior to the filing of this lawsuit, to reduce the distances which rural boarding students travel to attend school. In 1969, for instance, some 1100 students actually left the state to obtain their secondary education at BIA schools in the lower 48. That situation

each year. Moreover, correspondence study is available for any students who desire it. Finally, it is not contested that all of the educational costs for the named plaintiffs, including the cost of transportation and boarding where requested, have been paid for with public funds.

5/ (cont'd.)

has changed drastically, to the point where there were to be no new starts in out of state BIA schools this year. Additionally, even within the state, the addition of regional schools in Bethel and Nome, plus the further addition of a growing number of area high schools, such as the one soon to open in Emmonak means that public schools are in fact being brought closer to the homes of the petitioners. It is thus no longer true that many students are kept away from their families and communities for nine months of the year." Petition, pg. 8.

Jurisdictional Statement

Petitioners seek interlocutory review of the Superior Court order denying their motion for summary judgment as to Count I. This review is sought pursuant to Appellate Rules 23 and 24, rather than the normal type of appeal under Rule 7. This Court should deny this petition for review.

Appellate Rules 23 and 24 provide for Supreme Court review of interlocutory orders or decisions of the Superior Court. As such, they establish an exceptional procedure, and stand in distinction to the normal rules of appeal which allow appeals only from final judgments.

In establishing Rules 23 and 24, it was recognized that severe injustice could be done to a party who was required to wait until after final judgment to gain review of certain lower court rulings. On the other hand, it was also recognized that the traditional appeal procedure (as opposed to piece-meal interlocutory review) was in most cases the better way to proceed. The Court was thus given discretion to grant petitions for review in extraordinary instances.

The actual operation which these rules were to have was discussed and stated in the two early cases of City of Fairbanks v. Schaible, 352 P.2d 129 (Alaska 1960) and State of Alaska v. Hillstrand, 352 P.2d 633 (Alaska 1960) and has been consistently adhered to since then. In Schaible, the Court set out the considerations governing the petition for

review as follows:

> The court is of the belief that ultimate justice is more likely to be attained if the issues are required to be processed in the normal manner. A full adversary treatment of all issues of fact and law by the trial court, before resorting to the appellate court, has been found to be sound policy. The fact that the ultimate decision in the case is of great importance . . . is all the more reason to require that the issues be handled in the normal manner in the absence of reasons that compel a different approach. Deviation from the normal procedure is only warranted in the unusual cases mentioned in the rules to prevent injustice. At pg. 131.

Ten years later, this Court recounted the history of the petition for review and reaffirmed its long standing position in Hanby v. State, 479 P.2d 486, (Alaska 1970). There the Court said:

> . . . we have granted petitions for review only in a few cases. 6/ Most petitions for review are denied without opinion. In light of trial court realities, we prefer in most instances to wait until the final judgment before ascertaining the most important issues in the case. We also refrain from prematurely imposing our views upon the parties and trial court, thereby possibly confusing the issues and prejudicing the outcome. Contento v. Alaska State Housing Authority, 398 P.2d 1000. It has, therefore, been our avowed policy to almost always require cases to proceed to final judgment before review may be had in this court as of right.
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> Not only must the case usually pose an important question for us to grant review, that question must demand an immediate review. 7/ The conditions of both Supreme Court Rules 23 and 24 must be met. At pg. 489

6/ Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), right to jury trial in any criminal prosecution; Green v. State, 462 P.2d 994 (Alaska 1969) cert. den. 398 U.S. 910, 90 S. Ct. 1704, 26 L.Ed.2d 70 (1970), constitutionality of method of impaneling jurors; Security Industries v. Fickus, 439 P.2d 172 (Alaska 1968), significantly broadening pretrial discovery; Hebel v. Hebel, 435 P.2d 8 (Alaska 1967), abrogating parental immunity; Crawford v. State, 408 P.2d 1002 (Alaska 1965), constitutionality of method of jury selection; Walters v. Cease, 388 P.2d 263 (Alaska 1964), popular referendum does not postpone the effective date of legislative act; Knudsen v. City of Anchorage, 358 P.2d 375 (Alaska 1960), right to jury trial for violation of city ordinance, overruled on other grounds; Miller v. Harpster, 392 P.2d 21 (Alaska 1964), defendant's automobile insurance policy and written statement of eyewitnesses to the accident are discoverable.

It is important to note also that in the relatively few instances where this Court has granted petitions for review, the issues reviewed have almost invariably involved some procedural decision the resolution of which would materially affect the result of the whole litigation and thus place undue burden on all parties to the litigation if not resolved. Besides those cases noted in footnote 6 of the above cited language from Hanby, procedural issues were involved in each of the following cases where review was granted by this Court: Hartwell v. Cooper, 380 P.2d 591 (Alaska 1963), improper service of process; Hartford Accident and Indemnity Co. v. Consolidated Trucking Co., 498 P.2d 274 (Alaska 1972), failure

of Superior Court judge to disqualify himself; Alexander v. City of Anchorage, 490 P.2d 910 (Alaska 1971), right to counsel in ordinance violation case; and State v. Browder, 486 P.2d 925 (Alaska 1971), right to jury trial in direct criminal contempt of Court charge. Second in frequency, and overlapping to an extent are instances where the Superior Court's ruling on the interlocutory matter has "so far departed from the accepted and usual course of judicial proceedings "as to require immediate review to prevail clear injustice. Miller v. Atkinson, 365 P.2d 550 (Alaska 1961); Knudsen v. City of Anchorage, op. cit.; and Hartford Accident and Indemnity Co. v. Consolidated Trucking Co., op. cit. Indeed, as noted in the above cited language from Henby, this Court has said that this sort of departure from normal judicial proceedings is the only exception to the required need for immediate review.

In the instant case, respondents would certainly concede that the legal issues decided by the Superior Court are of some substance and importance. That by itself however is not enough to invoke the petition for review. Indeed, as the Schaible Court noted, the very fact that a legal issue is of great importance to a large number of people and/or groups is by itself all the more reason to adhere to the normal manner of trial and appeal. Moreover, this Court has consistently held that petitions for review are to be granted only when the requirements of both Rule 23 and Rule 24 have been met.

State v. Browder, op. cit., Hanby v. State, op. cit. Here, petitioners fail to satisfy either rule.

Clearly the refusal of the type of mandatory injunction which petitioners seek as relates to Count I is not what was intended by Rule 23(a). What petitioners seek is in fact more in the nature of mandamus or declaratory action which would, if resolved according to their assertions, provide for a massive change of the status quo. Certainly, the immediate, irreparable harm which was traditionally required to invoke equity jurisdiction is not present here in a manner requiring departure from the normal appeals process.

Moreover, it is problematic whether review will "materially advance" the ultimate termination of the litigation. Only if this Court were to reverse the Superior Court order as a matter of law would the necessity of a trial be eliminated, and even in that eventuality, further proceedings would be required at least as to damages and remedy, to say nothing of the issues raised in Counts II and III which might well be pursued in any event.

It is also clear that petitioners are in error when they assert a conflict between the previously announced decisions of this Court in Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971) and Breese v. Smith, 501 P.2d 159 (Alaska 1972) and the order of the Superior Court in the instant case. Macauley recognized that plenary authority of the legislature

in the area of public education. However, Macauley also recognized and accepted that the legislature may delegate various educational functions to local school boards. 491 P.2d at 122. Footnote 8b of the Superior Court order is entirely consistent in this regard. Similarly, petitioners attempt to turn this Court's finding in Breese that "the" Alaska Constitution's affirmative grant to all persons of the natural right to 'liberty'", 501 P.2d at 168, into a fundamental right of all school-aged children to attend a public school facility in their community of residence. If anything, it would appear that petitioners use of Breese is the unfair reading of that opinion. Since subsections (b) and (c) of Rule 23 are clearly not applicable, it is evident that Rule 23 has not been satisfied. State v. Hillstrand, 352 P.2d 633, 634. Similar assertions as to saving expenses and avoiding a protracted trial were put forth by the petitioner in Schaible. There the Court said:

> It has not been shown, for example, that undue or extraordinary hardship will result from the requirement that petitioner participate in a trial, or that injustice will or might result unless an immediate review of the decision below is granted. And although a present consideration of the decision might well advance the ultimate termination of the litigation, this would be so only as to petitioner and not as to other parties to the action. (emphasis added)

op. cit. at pg. 131. This final consideration mentioned by the Schaible Court is even more compelling here where

petitioners have in fact failed to name various indispensible parties. 6/ Since the Superior Court has not yet ruled on defendants' Motion to Dismiss for Failure to Name Parties, review at this point might foreclose any opportunity for such parties to have their day in Court on these issues which are of great moment to them and their continued operation.

The same factors all lead to the conclusion that neither subsection (1) nor (2) of Rule 24(a) are met.

Finally, it is not contended that there has occurred a departure from "the accepted and usual course of judicial proceedings" by the Superior Court. Nor does the instant petition involve the sort of procedural issue which could taint all further proceedings and thus adversely affect all parties (as well as the judiciary).

Therefore, since petitioners have failed to satisfy the requirements of either Appellate Rule 23 or 24, the petition for review must be denied.

6/ See defendants' Motion to Dismiss for Failure to Name Parties, which motion seeks to have joined various school districts clearly averred to in the complaint but not named as parties.

Argument for Affirming Order of Superior Court

While respondents maintain that review of the Superior Court order denying summary judgment as a matter of law on Count I should not be granted, they would also maintain that if review is granted, the results reached by the Superior Court must be affirmed.

The limitations imposed by Appellate Rule 24(c) prevent respondents from fully briefing the merits of the Superior Court order in this Answer. Respondents arguments are expressed in their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment filed with the Superior Court. Rather than rehash and summarize the information set out therein, respondents would instead use this limited opportunity to note various additional errors which appear in the Petition for Review.

Initially, it seems evident that petitioners have misread the actual holding of the Superior Court. A fair reading of the order below does not support petitioners' assertion that that Court found the issues raised in Count I to be non-justiciable. 7/ Quite to the contrary, the Superior Court clearly faced the constitutional issue:

> . . . to the extent that plaintiffs seek to predicate their rights upon the Alaska Constitution or the specific statutes which they have cited, they must fail. The Alaska

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7/ Petition for Review, Pgs. 3, 4-7.

> constitutional provision requires only that the legislature establish a uniform system of public education and a "system" simply means that the same "system" shall be operable in every school within the state, i.e., there shall be a similarity of textbooks and a similarity of curriculum in the various schools. See Serrano v. Priest, 487 P.2d 1241, 1248-49 (Calif. 1971). The legislature has established a "system of public education" in article 14, and nothing in the constitutional provision or the statutes require a secondary school or even a program of secondary education in each individual town or village within the unorganized borough. (emphasis added) 8/

Petitioners' first "question for review" is thus a red herring.

Petitioners state the second question for review as being "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." 9/ As stated, this question is somewhat misleading, for it is evident that petitioners do have available to them local secondary educational opportunities in the form of correspondence study. Additionally, the state system of local government would allow petitioners to form a local governmental unit which had the ability and responsibility to provide local schools. Thus, in effect, the question which petitioners are really asking this Court

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8/ Order, Pg. 6.

9/ Petition for Review, Pg. 3.

to review is whether as a matter of law, petitioners have a right to public education which, under the Alaska Constitution, statutes, and education regulations, includes an absolute right to attend a secondary school facility, constructed and operated wholly by the state, in each village or population enclave where at least 8 school-aged children reside.

The Superior Court answers this question in the negative. The only problem which the Court had with the various statutory and regulatory material involved 4 AAC 06.020(a). 10/ The Court found this regulation ambiguous on its face, but held that respondents' interpretation must prevail: as being the one "more in line with the statutory scheme under which the regulations were promulgated." 11/ It should be noted that in order to clear up this ambiguity, make evident the original intent of the subject regulations, and prevent further unnecessary confusion, respondents commenced shortly after the Superior Court order was issued with the redrafting of this regulation in an unambiguous fashion. A notice of rule making in this regard will be issued in the near future.

10/ Order, Pgs. 7-9.

11/ Ibid. Pg. 8.

Conclusion

It is the contention of respondents that petitioners have failed to provide justification for immediate review by this Court of the interlocutory order of the Court below denying as a matter of law plaintiffs' Motion for Summary Judgment. Furthermore, the respondents contend that the order issued by the Court below squarely met the legal issues contained in Count I and properly concluded that petitioners are not, as a matter of law, under state constitution, statutory, and regulatory provisions entitled to attend a state constructed and operated secondary program in every community of at least 8 secondary school-aged children in the state. For the reasons set forth in the Jurisdictional Statement, this Court should deny review. Should this Court grant review, the results reached by the Court below should be affirmed.

DATED at Juneau, Alaska this 24th day of October, 1973.

Respectfully submitted,

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