

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

MOLLY HOOTCH, et al.,

Plaintiffs,

vs.

ALASKA STATE-OPERATED SCHOOL
SYSTEM, et al.,

Defendants.

No. 72-2450

ORDER DENYING
MOTION FOR SUMMARY JUDGMENT

This motion for summary judgment brings into focus a number of the most important questions of contemporary Alaska public policy -- those dealing with secondary education in rural Alaska. Anyone conversant with the history of our state and its native people's long struggle to obtain justice through the vindication of their property rights, recently resulting in the historic Native Land Claims Settlement Act, 43 U.S.C. Sec. 1601, et. seq., ^{1/} will recognize the tremendous part education must play if the full benefits of that settlement are to be realized. Conversely, should rural education fail to equip the students it serves to take their rightful place in twentieth century Alaska, all Alaskans will suffer the consequences. ^{2/}

But rural education in Alaska poses special problems to the student who wishes to share in this century's remarkable advances in science and technology without sacrificing his

1. The history of Indian efforts to vindicate their right to their lands is set out in F. S. Cohen, The Spanish Origin of Indian Rights in the Law of the U.S., 31 Geo. L. J. 1 (Nov. 1942) reprinted in Lucy Kramer Cohen (ed.) The Legal Conscience, selected papers of Felix S. Cohen (New Haven: Yale Univ. Press 1960) (hereafter cited as "Cohen"), pp. 230-51; and in two additional articles, Indian Claims, id. 264-72, and Original Indian Title, id. pp. 273-304 (reprinted from 32 Minn. L. Rev. 28 (Dec. 1947)).

2. Cf. Franz Fañon, The Wretched of the Earth (1962). Fañon's discussion of the "Third World" should in so many ways be provocative to an Alaskan.

own valuable cultural tradition in the process. ^{3/} Plaintiffs contend that it is the boarding home program which, in large part, creates this dilemma, and secondary education in the students' community of residence which will resolve it.

It is plaintiffs' claim that our constitution and statutes mandate a secondary education program in their home communities which forms the basis for the pending motion for summary judgment.

On August 15, 1972, plaintiffs filed their complaint against the state of Alaska, alleging in substance that they were being deprived by state inaction of their constitutional right to secondary education in their community of residence. On October 5, 1972, plaintiffs filed an amended complaint adding additional claims and supplementing the allegations of their initial complaint. On March 21, 1973, plaintiffs moved for summary judgment pursuant to Civil Rule 56 on their first claim for relief. ^{4/} That claim is predicated upon article VII, sec. 1, of the Alaska State Constitution, ^{5/}

3. There are really two related problems: the first, a cleavage of generations whereby the student whose education requires him to concentrate upon matters in which his parents are not involved on a day-to-day basis is separated from his family (see Cohen, *supra*, n. 1; *Anthropology and Indian Administration* at 214; and, the second, a cleavage of cultures whereby the student under the guise of education is taught to scorn his own "native heritage", particularly as a life style; and is, thereby, separated from his own culture (see Cohen, *supra*, n. 1, *Americanizing the White Man*, 315 (reprinted from 21 *The American Scholar*, 177-191 (Spring 1952) and cf. *Carle v. Carle*, 503 P.2d 1050, 1054-55 (Alaska 1972)). (The feeling which the Supreme Court attributed to the trial court is not, if Cohen is to be believed, uncommon among those to whom the education of American Indians is committed.)

4. Plaintiffs' first claim for relief is sub-titled "Right to Education." Plaintiffs' second claim for relief is sub-titled "Racial Discrimination." Plaintiffs' third claim for relief is sub-titled "Geographical Discrimination." Plaintiffs' fourth claim for relief is a claim for damages predicated on "Redress for Past Discrimination." Only the first is involved here.

5. Article VII, sec. 1, provides in relevant part:

The legislature shall by general law establish and maintain a system of public schools open to all children of the state, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

AS Sec. 14.03.080(a) ^{6/} and AS Sec. 14.14.110. ^{7/}

Because of its interplay with AS Sec. 14.03.080, attention must also be given to AS Sec. 14.14.120. ^{8/}

6. AS Sec. 14.03.080(a) provides in relevant part:

A child of school age is entitled to attend public school without payment of tuition during the school term in the school district in which he is a resident. This sub-section shall not be construed to waive the compulsory attendance requirement of AS Sec. 14.30.010.

Effective in 1972, the foregoing was amended to provide:

(a) A child of school age is entitled to attend public school without payment of tuition during the school term in the school district in which he is a resident subject to the provisions of AS Sec. 14.14.110 and AS Sec. 14.14.120.

7. AS Sec. 14.14.110 provides in relevant part:

Cooperation with other districts. When necessary to provide more efficient or more economical educational services, a district may cooperate or the department may require a district to cooperate with other districts, state-operated schools, or the Bureau of Indian Affairs in providing educational services or in establishing boarding and tuition arrangements, arrangements for the exchange of pupils or teachers or other similar arrangements. However, if a cooperative arrangement requires pupils to live away from their usual homes, the school board shall provide classes within the attendance area when there are at least eight children eligible to attend elementary and secondary school in the attendance area.

Prior to the 1972 amendments, AS Sec. 14.14.110 provided in relevant part:

Cooperation with other districts. When necessary to provide more efficient or more economical educational services, a district may cooperate with other districts, state-operated schools, or the Bureau of Indian Affairs in providing educational services or in establishing boarding and tuition arrangements, arrangements for the exchange of pupils or teachers, or other similar arrangements. However, if a cooperative arrangement requires pupils to live away from their usual homes, the school board shall provide classes within the district for any grade represented by more than three elementary pupils or five secondary pupils.

Thus, the 1972 amendment substituted the language beginning "attendance area" for "district for any grade represented by more than three elementary pupils or five secondary pupils" in the second sentence.

Finally, plaintiffs rely upon an administrative regulation, 4 Alaska Administrative Code, Sec. 06.020(a), which provides:

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 system.

Plaintiffs contend that there are no material facts in dispute, that they are children of school age, have a "community of residence" and are not provided a "secondary education" in that community of residence. Consequently, since they view the administrative

8. AS Sec. 14.14.120 provides in relevant part:

Inoperative district.

(a) When there are fewer than eight children eligible to attend elementary and secondary school in a district, the school board may declare the district inoperative for that school year.

(b) During the school year in which a district is inoperative, the school board shall perform those functions necessary to preserve the financial integrity of the district, to preserve the property and assets of the district, and to otherwise insure against disruption of the continuity of the district business.

(c) An inoperative school board shall, if practical, pay the tuition and boarding costs necessary to enable the school-aged children within the district to attend school in another district. If a child in an inoperative school district is not attending school in another district, the department shall provide correspondence courses and other materials and charge the school board of the inoperative district in an amount equal to the actual costs to the department.

(d) The terms of office of a school board are not affected by a declaration that the district is inoperative. However, new board members shall not be elected during the time a district is inoperative. In the event more than three terms expire during the time a district is inoperative the functions of the school board shall be assumed by the assembly or council until the district becomes operative. When the district becomes operative an expired school board term shall be filled by the assembly or council until the next regular school election when a school board member shall be elected to serve the balance of the term.

regulation just cited as interpretative of state statutes and the state constitution, they conclude that they are being deprived of their constitutional right to a secondary education and are entitled to a mandatory injunction from this court directing the state to forthwith provide the required secondary education in their community of residence. Further, since plaintiffs proceed as a class action, they ask that their requested injunction direct the state of Alaska to provide "secondary education" in every Alaska native village in which there are "at least eight children eligible to attend . . . secondary school in the attendance area."

In order to view plaintiffs' claims in context, we must first review the system of public schools established in the state of Alaska in conformity with the constitutional mandate. Cf. Secs. 14.03.010, et. seq.

Consistent with a constitutional mandate, to maximize local government and local governmental authority throughout the state of Alaska, and to avoid overlapping and inconsistent levels of local government, our constitution provides for only two types or forms of local government -- cities and boroughs. (Alaska Constitution, art. X, sec. 2.) The education code accepts this constitutional mandate in favor of local control and local government (cf. id. art. X, sec. 1) in education by dividing the entire state into "school districts."^{8a/}

It is clear from the foregoing that while the state of Alaska remains responsible for substantially all of the expense of educating its children (see AS Sec. 14.17.010, et. seq., relating to the public school foundation account and AS Sec. 14.17.021 which implies that the average contribution by the state to a school district per pupil will cover ninety

8a. AS Sec. 14.12.010 provides in relevant part:

The districts of the state public school system are as follows:

- (1) Each first, second and third class city in the unorganized borough is a city school district;
- (2) Each organized borough is a borough school district;
- (3) The area outside organized boroughs and outside first, second and third class cities is the state-operated school district.

percent of that pupil's cost of education), actual control over education has been all but delegated to boroughs and cities, each of which has its separate "school district" and its separate "school board." ^{8b/}

It is also clear from the foregoing that the "state-operated school district" is intended to be transitional; that implicit in the entire education code is the understanding that as Alaska grows and its communities develop, each "community" will in time take on the responsibility of a "local school district"; but that during this transition period, the entire area outside of first, second and third class cities and organized boroughs will be lumped together in a single "district." Thus, 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 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.

AS Sec. 14.03.080, supra, entitles each child to attend a public school within the school district in which he is a resident. The plaintiffs in this action are residents within the state-operated school district which is state-wide. It is not contended that there is no school within the entire state which these children may attend. In fact, they specifically reject attendance at the "boarding schools" established within the state-operated school district for those lacking a school within their community of residence.

AS Secs. 14.14.110 and 120 are, by their terms, inapplicable to the present litigation. The former refers to cooperation between districts and does provide that where a cooperative arrangement between districts requires pupils to live away from their usual homes, the school board (of the district) shall provide classes within the "attendance area" when there are at least eight children eligible to attend elementary and secondary

8b. I realize that ultimate responsibility rests with the state (McCauley v. Hildebrand 491 P.2d 120 (Alaska 1971)), but the legislature has made it clear that this authority is to be delegated in large part to local communities.

school in the attendance area;" but attendance area is not viewed by the legislature as synonymous with "community of residence" ^{9/} for it is not the contention of plaintiffs that the Department of Education has designated the area within which they live as one served by a specific school. In fact, plaintiffs' complaint is that no school has been established and assigned an "attendance area including their community of residence" to serve them. But even if this were not so, AS Sec. 14.14.110 would have no application to this case because plaintiffs reside within the state-operated school district and there is no evidence in the record that the Department of Education has required the state-operated school district to cooperate with any other "districts" with respect to these plaintiffs. Plaintiffs' complaint goes to the arrangements made within the state-operated school district for their education. ^{9a/}

Finally, AS Sec. 14.14.110 is equally inapplicable since the district in which the plaintiffs reside, i.e. the state-operated school district, is not "inoperative."

Thus, neither the constitution of the state of Alaska nor the statutes enacted pursuant to it entitle the plaintiffs to a secondary education within their community of residence.

Finally, we must consider the regulation. In enacting it the Department cited as authority AS Sec. 14.03.080(a) previously cited and set out; AS Sec. 14.07.020(1) and (2); ^{10/} and AS Sec. 14.07.060. ^{11/}

9. AS Sec. 14.60.010 has been amended to add sub-paragraph (9) which provides in relevant part:

"Attendance area" means the geographic area designated by the department to be served by a school.

9a. It is, of course, possible that among the options available to these students is attendance at a school within an urban area which has its own school district which has contracted with the state-operated school district, but this would not bring AS Sec. 14.14.110 into operation unless there were no schools within the entire state-operated school district which they could attend, i.e. the statute only applies where students must attend school outside their district of residence.

10. AS Sec. 14.07.020(1) and (2) provide:

"The Department shall

(1) Exercise general supervision over the public schools of the state except the University of Alaska;

(2) Study the conditions and needs of the public schools of the state and adopt or recommend plans for the improvement of the public schools . . .".

The state presents two related arguments to support a finding that this regulation does not guarantee the plaintiffs a "secondary education" in their community of residence. First, the state contends that community of residence, as used in the regulation, means "district" as used in AS Sec. 14.03.080(a), the statute upon which the regulation is based. Alternatively, the state contends that if community of residence does not mean "district", then it is not "consistent with the statute and reasonably necessary to carry out the purpose of the statute." See AS Sec. 44.62.030. ^{12/}

The state's first argument is textual. The state points out that the last clause in the regulation, "whether in a city district, a borough district, or the state-operated school system is in apposition to 'community of residence' " and, therefore, serves to define it. Plaintiffs contend that the clause modifies community of residence rather than being in apposition to it, and properly could be paraphrased as follows: "Every child of school age shall have the right to a secondary education in his community of residence, whether his community of residence is in a city district, a borough district, or the state-operated school system."

11. AS Sec. 14.07.050 provides in relevant part:

Promulgation of regulations. The board shall promulgate regulations which are necessary to carry out the provisions of this title. All regulations shall be promulgated under the Administrative Procedure Act. (AS 44.62)

12. AS Sec. 44.62.030 provides in relevant part:

Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

A mere examination of the words in sequence would, in my opinion, support either interpretation of the regulation. It is, therefore, ambiguous.^{13/} Since the state's interpretation is more in line with the statutory scheme under which the regulations were promulgated, I feel constrained to accept the state's interpretation in the absence of some strong evidence connected with the adoption of the regulation indicating the intent to expand coverage of the statute by the adoption of the regulation.^{14/} The record is devoid of any indication regarding why the regulation was adopted or the purposes intended to be obtained.^{15/}

The foregoing analysis makes it unnecessary to determine whether this court has jurisdiction to compel an executive agency, i.e. the State Department of Education, to perform a duty,^{16/} i.e. enforce its regulation, an issue which has not been briefed.^{17/}

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 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.^{18/}

13. In Port Valdez Co. v. City of Valdez, 437 P.2d 768, 772, n. 14 (Alaska 1968), the Supreme Court defined an ambiguous term in an agreement as one in which "... application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which of two or more meanings is the proper meaning." I assume the same rule applies to statutes and regulations. See 2 Sutherland, Statutory Construction (3rd Ed.) Sec. 4503 at 317.

14. Given the disposition here, it is unnecessary to determine whether the regulation is considered "legislative" or "interpretative". See 1 Davis, Administrative Law Treatise, Sec. 5.03 at 298 (1958).

15. It should be noted that the regulation is of comparatively recent enactment and cannot, therefore, be treated as a contemporaneous construction of any of the relevant statutes. See Swindel v. Kelly, 499 P.2d 291 (Alaska 1972).

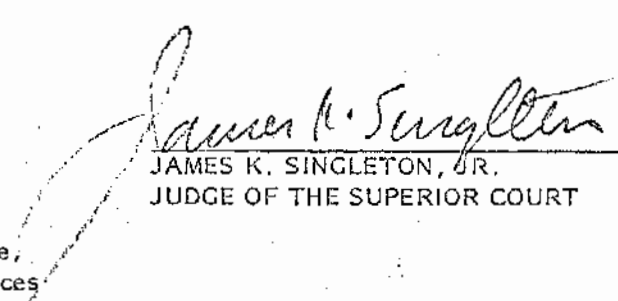
16. Cf. Miller, Toward a Concept of Constitutional Duty, 1968 The Supreme Court Review 199, and Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972).

For the foregoing reasons, based upon my analysis of the record and review of the arguments of the parties,

IT IS ORDERED:

Plaintiffs' motion for summary judgment on its first claim for relief is denied.

DATED at Anchorage, Alaska, this 3 day of October, 1973.



JAMES K. SINGLETON, JR.
JUDGE OF THE SUPERIOR COURT

cc: Christopher R. Cooke,
Alaska Legal Services
Peter C. Partnow,
Asst. Attorney General

17. AS Sec. 44.62.570 (e) which provides in relevant part:

" . . . if agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action"

would appear inapplicable (see AS Sec. 44.62.330; but cf. Supreme Court Rule 45) if Sec. 44.62.570(e) were applicable, I believe the issue whether agency action is unreasonably withheld involves disputed issues of material fact precluding summary judgment.

18. A hopeful sign that the legislature recognizes the problems of rural education is found in the enactment in 1972 of AS Sec. 14.08.160. Particularly encouraging are the findings and purposes which accompany the enactment:

(1) Traditionally, basic language differences in Alaskan schools have been overlooked to the extent that the need for an educational program which incorporates both English and the Native language dialects has been vastly underestimated and often the program has tended to ignore and sometimes belittle classroom use of the Native dialect, a practice deplored by modern educators, concerned parents and students alike.

(2) The right to one's native language and culture is inherent in the concepts underlying our constitutional guarantees; and continued disregard of this right has been protested by many who believe that Alaskan schools have an obligation to provide education which does not bypass this right and which is not designed to shift students unilaterally

(Cont'd)

18. (Cont'd)

from one culture to another. Students in the villages of Alaska are representatives of a viable, valuable culture which is in a continual process of change, as are all cultures, but which has a right to continue its existence as a unique culture whether Indian, Eskimo, or Aleut.

(3) The absence of a bilingual program of education has worked a great learning handicap for those students who use English as a second language by placing a double burden of learning both the language and academic concepts simultaneously. Singular emphasis on English usage has contributed to a communications gap between parents and child and school and community, even though educational research has shown that the most successful educational method in primary programs is one that instructs in the Native dialect and then proceeds to promote literacy in English. It is a well-known fact that contrary traditional methods have resulted in below-standard achievements by Alaskan Native students which, in turn, spawn difficulties in secondary and higher educational pursuits, exacerbate acculturation problems, present significant barriers in securing adequate employment and constitute a serious hindrance to the full enjoyment of life and its benefits.

(4) Establishment of a bilingual program of education for Native Alaskans will encourage the development of educational materials relevant to Native history, legends, folklore, artistic expression, and characteristic lifestyles by recognizing that the local culture is a legitimate source of study and interest. Adoption of a bilingual program of education will tend to bring about an end to the deprecation of local culture elements and values by the schools, stimulate better communication between the community and the school in solving educational problems, effect a positive student self-image, provide more effective use of both English and the Native dialect, foster higher achievement levels in academic performance, encourage more successful secondary and higher education careers, ease the obtaining of employment, allow genuine options for Native Alaskan students in choosing a way of life, and facilitate a more harmonious blending of Native Alaskan culture with the mainstream of society.