

JURISDICTION

This Court has jurisdiction over this appeal under Appellate Rule 5. The order of the Superior Court entered January 11, 1974, granted summary judgment to the Appellees on Count I of the amended complaint, severed that count from other claims presented below pursuant to Civil Rule 54(b), and is by its terms a final judgment. [R. 897-898]

STATEMENT OF ISSUES

I. Whether public school attendance is a fundamental right guaranteed to all Alaskan children by Article VII, Section 1, of the Alaska Constitution which may not be impaired, unless the abridgment is justified by a compelling governmental interest.

II. Whether public school attendance is a right which under the equal protection clause of the Alaska Constitution, must be provided to all Alaskan children upon equal terms.

III. Whether, as required by 4 AAC 06.020, Alaskan children in every community with eight or more school age children have a right to local secondary education.

STATEMENT OF THE CASE

1. HISTORY OF THE LITIGATION

This is a civil action brought by certain Alaska Native (Eskimo, Indian and Aleut) school age children to secure equal educational opportunity. Specifically, they seek to enforce their right to attend a public secondary school in their community of residence,¹

Plaintiffs-appellants, MOLLY HOOTCH, et al., are 27 named plaintiffs who represent a class² of Alaska Natives consisting of secondary school age children who are citizens of the United States and Alaska, and who live in cities, communities, and villages (communities of residence) where there are no public secondary schools or which lack daily transportation to such schools.

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1. Other counts of this action, which have been severed from this appeal, seek to redress a willful and continuous pattern and practice of racial discrimination against plaintiffs in the provision of educational services.
 2. This action was brought as a class action. [R.7,109-110] The amended complaint was filed on October 5, 1972. On May 18, 1973, defendants moved to dismiss the action as to the class. That motion was fully briefed. Despite the provision of Rule 23(c)(1) that a determination as to whether a class action may be maintained should be made by the court "as soon as practicable after the commencement of an action," the court below failed to make such a determination prior to denying summary judgment on Count I on October 3, 1973.

Defendants-appellees are the Alaska State-Operated School System, the members of the State Board of Education, the Commissioner of Education, and other education officials. To varying degrees, each defendant is responsible for the terms upon which public education is provided to the plaintiffs.

Plaintiffs commenced this action August 15, 1972; [R.1] filed their first amended complaint October 5, 1972; [R.100] and, after answer and initial discovery, filed a motion for summary judgment on Count I of the amended complaint on March 21, 1973. [R.662] The court below denied the motion for summary judgment on October 3, 1973. [R.867] On October 12, 1973, plaintiffs filed a petition for review with this Court, which was denied without opinion on November 27, 1973. [R.896]

While the petition for review was pending, the defendants filed a motion to dismiss Count I, [R.878] which was granted by the court below on January 11, 1974. [R.897] At that time, the court below severed Count I from the other claims presented under Civil Rule 54(b) and entered a final judgment in favor of defendants. Count I sets forth plaintiffs' claim that they have a right to attend public school under the Alaska Constitution, statutes and regulations, which right embraces the right to attend secondary school in their communities of residence. It is from the Superior Court's orders dismissing Count I and denying plaintiffs' motion for summary judgment on Count I that plaintiffs appeal.

2. THE PLAINTIFFS

The plaintiffs are a class of approximately 3000 Alaska Natives [R.157, 325-333, 430, 666-667] of school age³ who are entitled to attend public school, AS 14.03.080(a), but who live in 145 communities in Alaska which lack public secondary schools or daily access to such schools. [R.110-115, 125-134, 139-140, 143-144] They live within borough school districts⁴, city school districts⁵, and the state-operated school district. [R.139-140] The plaintiffs live in communities with eight or more children of school age which vary in size from 2104 (Barrow) to 36 (Rampart and Iguigig). [R.126, 128,129]

Because plaintiffs lack daily access to secondary school, they are exempt from the state compulsory education statute and are not required to participate in any educational program, AS 14.30.010(b)(7). As a result, many plaintiffs do not presently attend secondary school. Some have dropped out of boarding schools, while others never attended any school beyond the grades offered in their home communities. [R.115, 140-141] Accurate data is

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3. A child between the ages of six and twenty who has not completed the twelfth grade is of school age. AS 14.03.070.
 4. Kodiak Island Borough, Kenai Peninsula Borough and North Slope Borough.
 5. Hydaburg, King Cove and St. Mary's.

unavailable, but the number of plaintiffs who are not attending school is in the hundreds. [R.530, 455-459, 658, 660-662, 667] Other plaintiffs presently attend secondary schools outside their communities of residence at public and non-public boarding schools in Alaska and other states. [R.115, 140-141] Attendance at these schools requires the children to live away from their families and their usual homes for most or all of the school year.

Elementary schools are provided in plaintiffs' communities, but secondary schools are not. [R.313-320, 321-324] Thirteen live in the City of Emmonak, an incorporated city of 439 people near the mouth of the Yukon River. Located in the state-operated school district, [R.110, 138] Emmonak has an elementary school⁶ operated by the Bureau of Indian Affairs; its 1972-73 enrollment was 161. [R.321] After the commencement of this action, defendants agreed to provide one teacher in Emmonak to supervise correspondence study for secondary students who did not go away to boarding school, and construction of a high school there was begun. [R.97-99] The Emmonak plaintiffs range in age from 15 to 19 years old and attend or have attended boarding schools in Chemawa (Oregon) and Wrangell, Kodiak,

6. By definition, an "elementary" school does not go beyond the eighth grade. AS 14.03.060(a).

Anchorage and Bethel. [R.101-104, 135-136] Many have returned home without completing high school, and are not now in school.

Thirteen-named plaintiffs live in Kwigillingok, an unincorporated village of 148 on Kuskokwim Bay, located within the state-operated school district. [R.110, 138] The enrollment of the Bureau of Indian Affairs elementary school there is 55. [R.322] The named plaintiffs in Kwigillingok range in age from 15 to 19 and attend or have attended boarding schools in Chemawa (Oregon) and Wrangell, Mt. Edgecumbe, Anchorage, Bethel and Unalakleet.⁷ [R.105-108, 136-137] Several dropped out of school without completing the secondary grades, have returned home, and are not now in school. There are no secondary level teachers or classes in Kwigillingok, and defendants have indicated no plans to provide a secondary school there. [R.110, 138-140]

Two of the named plaintiffs live in Kongiganak, an unincorporated village of 190 located less than ten miles from Kwigillingok. The elementary school in Kongiganak operated by

7. Chemawa Indian School (Oregon), Wrangell Institute (Alaska) and Mt. Edgecumbe High School (Alaska) are boarding schools operated by the federal Bureau of Indian Affairs. Covenant High School in Unalakleet Alaska, is a parochial boarding school. Appellants attended public schools in Bethel and Anchorage via boarding programs operated by the Division of Regional Schools and Boarding Programs of the Department of Education.

the Alaska State-Operated School System has an enrollment of 72. [R.316] There are no secondary level classes or teachers in Kongiganak, and defendants have indicated no plans to provide a secondary school there. [R.110, 138-140]

The plaintiffs desire to obtain a high school education without living away from home. Many of those not in school are not able to leave home for family or personal reasons. Lindsay and Ursula Trader, for example, cannot leave home because their parents are ill. "The rigors of village life demand that the children remain at home to help with such labor as hauling ice and wood and filling the oil tanks. [R.75, 83-84, 727]

Elizabeth Friend never went to high school because her parents needed her at home. [R.712] Herbert Peter returned home and quit school after a death in the family. [R.712] Ida Trader Dany went to boarding school for two years and completed tenth grade. In the summer of 1972 she married, and though she would like to finish high school, she cannot bring herself to leave her husband and home community in order to do so. [R.727-729]

Many of the plaintiffs who have attended boarding schools have dropped out or failed to return for a variety of reasons. Christina Atti attended Bethel Regional High School for two and one-half years, but after Christmas decided not to return because her parents didn't want her to go back and she didn't like the school. [R.712] Elsie Mute left Diamond High School in Anchorage and returned home to Kongiganak because she

found her boarding family too strict and she was often sick in Anchorage. [R.726] Stephanie Phillip has dropped out twice, from Anchorage in 1970 and Bethel in 1973, because she was restless, couldn't concentrate on her school work and missed her home and family. [R.726]

Those plaintiffs who have continued to attend boarding schools would prefer to attend high school in their home communities. [R.713-714, 716-717, 727-728, 730-731] They, too, suffer the effects of prolonged separation from their family, village, and culture. The father of two plaintiff children expressed some of these effects as follows:

When the students are gone they forget and lose the things they should know about Eskimo life and village life, such as fishing, mending nets, cooking, sewing, and keeping house. [R.86]

Sixteen-year-old Lorene Kamcroff who has attended Chemawa boarding school in Oregon, described the effect on her in simpler terms: "Miss the family . . . It's no good to be away from home." [R.71]⁸

3. THE ALASKA SCHOOL SYSTEM

The school system of the State of Alaska, established by the legislature, AS 14.03.010, operates under the general

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8. Recent studies of secondary education for rural Alaska Natives suggest that the experiences of the individual plaintiffs are typical of the class they represent. See Kleinfeld, J., A Long Way From Home: Effects of Public High Schools on Village Children Away From Home (CNER/ISEGR 1973); Kleinfeld, J., Alaska's Urban Boarding Home Program (ISEGR 1972).

direction of the State Board of Education, AS 14.07.075, and is administered by the Department of Education, AS 14.07.010-050. The state school system is composed of city school districts, borough school districts, and the state-operated school district. AS 14.12.010. Each city and borough school district is under the management and control of a school board; the operation of the state-operated school district is under the management and control of the board of the state-operated schools. AS 14.12.020. All districts are operated subject to state education laws and regulations. AS 14.07.070, AS 14.09.050, AS 14.14.060(g), AS 14.14.065.

Funds for the operation of schools in city and borough districts are derived primarily from the State's Public School Foundation Program,⁹ with lesser amounts contributed from local sources. Money to operate and maintain the state-operated school district must be provided by the legislature.¹⁰

9. AS 14.12.020(c), AS 14.17.010--250. See Macauley v. Hildebrand, 491 P.2d 120 (Alaska, 1971).

10. "The legislature shall provide the state money necessary to maintain and operate the state-operated school district..." [emphasis added] AS 14.12.020(c).

There are ten borough school districts¹¹ and eighteen city school districts.¹² All other communities and places in the state are located within the state-operated school district. The Alaska State-Operated School System operates schools on six military reservations,¹³ and in 121 communities within the district. [R.313-320] In 53 additional communities within the state-operated school district, schools are operated by the federal Bureau of Indian Affairs.¹⁴ [R.321-324]

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11. Bristol Bay, Gateway, Greater Anchorage Area, Greater Juneau, Greater Sitka, Haines-Port Chilkoot, Kenai Peninsula, Kodiak Island, Matanuska-Susitna and North Star. [R.295]
 12. Cordova, Craig, Dillingham, Hoonah, Hydaburg, Kake, King Cove, Klawock, Nenana, Nome, Pelican, Petersburg, Skagway, St. Mary's, Unalaska, Valdez, Wrangell and Yakutat. [R.295]

After the commencement of this action, the North Slope Borough and Galena city school districts were organized. However, no facts regarding the operation of these districts are in the record.

13. Adak, Wialson, Elmendorf, Ft. Greely, Ft. Richardson, and Ft. Wainwright. [R.312]
14. Schools operated by the Bureau of Indian Affairs are not part of the state school system. AS 14.60.010(1), AS 14.60.020.

High schools are operated by all borough districts, most city districts, and in many locations within the state-operated school district. Of these, many are small high schools. Statistics provided by the defendants indicate that there are 48 complete high schools in the state, of which 20 enroll less than 100 students, and 10 of these, less than 50 students.¹⁵

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15. High schools enrolling less than 50 are Cape Pole, Craig, Fort Yukon, Kake, McGrath, Pelican, Thorne Bay, Tri-Valley, Yakutat, and Unalakleet; others with less than 100 are Bristol Bay, Hoonah, Metlakatla, Nenana, Seldovia, Skagway, Talkeetna, Tanana, Tok, and Valdez. [R.453 (#18)]

SUMMARY OF ARGUMENT

Plaintiffs are entitled to attend public secondary school in their communities of residence. They offer three independent arguments in support of this conclusion.

First, plaintiffs argue that Article VII, Section 1 of the Alaska Constitution guarantees them the right to a public education. More specifically, the constitution establishes the right to attend "public schools" which are "open" to them. That right is fundamental. It may not be abridged by the State absent a compelling governmental interest. Yet the State has abridged that right through failing to provide secondary schools in plaintiffs' communities. As a result, plaintiffs must live away from home for approximately nine months each year to exercise their right to attend school, a burden that is great for all plaintiffs, and impossible for many. As a result, plaintiffs are not required to attend school, hundreds of them are not in school, and those who attend do so at the sacrifice of family and community life. The extension of the right to attend schools on such terms constitutes an abridgment of the fundamental right. There exists no compelling state interest to justify this abridgment.

Second, plaintiffs argue that public school attendance is a fundamental right under Article VII, Section 1, and that most Alaska secondary school age children are provided the opportunity to exercise this right in their communities of residence. The State's denial to plaintiffs of the opportunity to attend secondary schools where they live constitutes a deprivation of "equal

rights, opportunities and protection" in violation of Article I, Section 1 of the Alaska Constitution. There exists no compelling state interest to justify this denial.

Third, plaintiffs argue that specific regulations promulgated by the State Board of Education clearly require the provision of local secondary schools. These regulations were lawfully promulgated, were approved by the Department of Law, and are consistent with and necessary to carry out the purpose of the statutes upon which they are based. Defendants must carry out the requirements of these regulations and provide plaintiffs with secondary schools in their communities of residence.

ARGUMENT

I. PUBLIC SCHOOL ATTENDANCE IS A FUNDAMENTAL
RIGHT GUARANTEED PLAINTIFFS BY THE ALASKA
CONSTITUTION.

A. The right to attend public school is specifically recognized
by Article VII, Section 1.

Throughout this litigation plaintiffs have argued that public school attendance is a fundamental right guaranteed them by the Alaska Constitution. [R.116]

The test for whether a right is fundamental under the constitution was stated by this Court less than six months ago to be whether there is "any particular textual source in the constitutional framework." State v. Wylie, 516 P.2d 142, 145 n.5 (Alaska 1973). See also United States v. Guest, 383 U.S. 745, 758, 16 L.Ed.2d 239 (1966) ("explicit mention in the Constitution"); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16, 43 (1973) ("explicitly or implicitly guaranteed by the Constitution").

There can be no question that the right to attend public school is fundamental under the Alaska Constitution. Article VII, Section 1, addresses education specifically, and provides:

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

This Court has held that this command of the Constitution is "mandatory, not permissive." Macauley v. Hildebrand, 491 P.2d 120, 122 (Alaska 1971). The words "schools open to all children" are unambiguous and clearly create for every school age child an individual right to attend a public school. As this Court ruled in Bresne v. Smith, 501 P.2d 159, 167 (Alaska 1972), this constitutional provision "guarantees all children of Alaska a right to public education." ¹ In Alaska, therefore, a child's right to public education is a fundamental right on a par with

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1. A further demonstration of the unique importance ascribed to public education in the Alaska Constitution is shown by constrasting the fuller statement of duties and rights in the constitutional guarantee of education with the abbreviated language directing the legislature to provide for public welfare and health:

The legislature shall provide for the promotion and protection of public health. Article VII, Section 4.

The legislature shall provide for public welfare. Article VII, Section 5.

Compare San Antonio Independent School District v. Rodriguez, 411 U.S. at 32-37, 36 L.Ed.2d at 42-43, 45.

liberty,² freedom to travel,³ voting,⁴ free speech and expression,⁵ and the rights of criminal defendants.⁶

This is properly so because of the fundamental importance of education, the unique status accorded public education in our society, and the close relationship between education and our other most basic constitutional values. The central role of education in our society is best summarized in a passage from Brown v. Board of Education, 347 U.S. 483, 493, 98 L.Rd. 873, 880 (1954):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic

2. Breese v. Smith, *supra*, at 168.

3. State v. Wylie, 516 P.2d 142, (Alaska 1973).

4. State v. Van Dort, 502 P.2d 453 (Alaska 1973).

5. Marks v. City of Anchorage, 500 P.2d 146 (Alaska 1972). Anniskette v. State, 489 P.2d 1012 (Alaska 1971); Hanby v. State, 479 P.2d 486 (Alaska 1970).

6. Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970) [jury trial]; Alvarado v. State, 486 P.2d 891 (Alaska 1971) [impartial jury]; Whitton v. State, 479 P.2d 302 (Alaska 1971) [no double jeopardy], Glasgow v. State, 469 P.2d 682 (Alaska 1970) [speedy trial]; Alexander v. City of Anchorage, 490 P.2d 910 (Alaska 1971) [right to counsel].

public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

This statement has lost none of its vitality over the past twenty years. The Supreme Court has repeatedly stressed

the unique importance of education.⁷ Clearly Alaska, which has

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7. "Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted." San Antonio Independent School District v. Rodriguez, supra at 30 (41).

In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172, 31 L.Ed.2d 768, 777 (1972), the majority recognized education as a "fundamental personal right."

In Palmer v. Thompson, 403 U.S. 217, 29 L.Ed.2d 438 (1971) the Court allowed the closing of previously segregated public swimming pools but distinguished this from the closing of schools. In the words of Justice Blackmun, "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety." Implicitly, education is essential.

In Wisconsin v. Yoder, 406 U.S. 205, 213, 32 L.Ed.2d 15, 24 (1972) the Chief Justice, for the majority, declared: "providing public schools ranks at the very apex of the function of a State."

In Shelton v. Tucker, 364 U.S. 479, 484, 487, 5 L.Ed.2d 231, 235-236 (1960) the majority declared the Court's commitment to a special view of equal protection in those areas where "freedoms guaranteed by the Bill of Rights" may be affected and which "is nowhere more vital than in the community of American Schools."

In Abington School District v. Schempp, 374 U.S. 203, 10 L.Ed.2d 844, (1963), Justice Brennan, concurring at 230 (863) noted that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encountered their severest test when they are sought to be applied in the school classroom."

enacted a compulsory attendance statute, AS 14.30.010; penalizes people who violate it, AS 14.30.020; and commits a substantial portion of the state budget to provide at least 90% of each student's school costs under the Public School Foundation Program, AS 14.17.01E [See Macaulley v. Hildebrand, supra], regards education as "perhaps the most important function of state and local governments." Moreover, education directly affects the ability of a citizen to exercise other fundamental rights such as free speech, voting and, indeed, liberty itself.⁸ Like the jury right and voting, education is "fundamentally preservative of ideals which are essential to our democratic system" Alvarado v. State, 496 P.2d 891, 904 (Alaska 1971).

The unique importance of education is further underscored by the fact that the constitutions of 48 states mandate the provision of public education,⁹ and various state courts which

8. San Antonio Independent School District v. Rodriguez, supra, at 110-117 (88-92) (Marshall, J. dissenting); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, 604-610 (1971).

9. San Antonio Independent School District v. Rodriguez, supra, at 111-112 (89) and n.69 (Marshall, J. dissenting).

have considered the issue have generally held that education is a fundamental interest under their own constitutions.¹⁰

In the face of clear constitutional language, the court below erred in failing to find that Alaska citizens of school age have a fundamental right to attend public school. The court below incorrectly interpreted the Alaska Constitution to require "only" that a school "system" with similar textbooks and similar curriculum be established. [R.872] The court implicitly denied that Article VII, Section 1, gives rise to individual constitutional rights, in clear contradiction to this Court's ruling in Breese, supra at 167:

Article VII, Section I...guarantees all children of Alaska a right to public education.

In deeming the constitutional mandate satisfied by uniform textbooks and curriculum within existing schools, the court below failed to examine the critical question of whether the system provides each individual child of the state the substance of his constitutional "right to public education" -- the right to attend

10. See, e.g., Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Robinson v. Cahill, 62 N.E. 473, 303 A.2d 273 (1973); Milliken v. Green, 389 Mich. 1, 203 N.W. 2d 457, 468-469 (1972), vacated -- Mich. -- 212 N.W. 2d 711 (1973); Serrano v. Priest, supra; McIlvaine v. Pennsylvania State Police, ___ Pa. ___, 309 A.2d 801, 808 (1973) (dissenting opinion).