III. PLAINTIFFS' CONSTITUTIONAL RIGHT TO ATTEND PUBLIC SCHOOLS HAS BEEN ABRIDGED BY DEFENDANTS' FAILURE TO PROVIDE THEM SECONDARY SCHOOLS ON THE SAME TERMS AS THEY ARE PROVIDED TO OTHER ALASKAN CHILDREN, IN VIOLATION OF ARTICLE I, SECTION 1 OF THE ALASKA CONSTITUTION

A. Local secondary schools are provided to most Alaskan secondary school age children no matter where they live.

The public school system of Alaska was established by the legislature when it enacted Title 14 of the Alaska Statutes. While ultimate responsibility for the system rests with the State, rather than local administrative units, Macauley v. Hildebrand, Supra, at 122, the educational system created by the legislature establishes local schools across the state offering both elementary and secondary education. Under this system, local public schools are in fact provided to 90% of all secondary students. In the eighteen city school districts, approximately 1057 secondary students are enrolled; [R.309-311] and virtually all attend school without living away from home. In the ten Borough school districts approximately 17,803 secondary students are enrolled; [R.309-311] and virtually all attend school without living away from home. Within the state-operated school district 1094 secondary students attend on-base day schools and live nearby with their families. [R.312] Also within the state-operated school district, approximately 1455 secondary students are enrolled in Alaska State-Operated School Systems' schools, [R.320] which most attend without living away from home. In a few other communities within the state-operated school district 205 secondary students

attend Bureau of Indian Affairs' schools without living away from home. [R.321-324]

According to Commissioner Lind, the total of those enrolled in secondary schools throughout the state is inflated by the number attending through the boarding home program. [R.156] Therefore, if the total public secondary school enrollment of 21,409 is reduced by the number in the boarding home program, 1171, [R.325] then it is accurate to say that approximately 20,238 Alaskan children attend public secondary school without living away from home. Members of this majority live in urban areas and small rural communities and in borough school districts, city school districts and the state-operated school district. Forty-six Alaskan communities with populations of less than 1000 have either their own high school or daily access to one. [R.131-133]

Plaintiffs are the sizeable minority who cannot attend secondary school without living away from home. As described above at p. 5, they live in 145 native communities ranging in size from 2104 to 36. Most are within the state-operated school district, but several are city districts and others are located in borough school districts.[17]

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17. Akhiok, Karluk, Larson Bay, Old Harbor, Ouzinkie and Port Lions are in the Kodiak Island Borough, and English Bay, Port Graham, and Tyonek are within the Kenai Peninsula Borough. [R.139-140]

Approximately 2286 plaintiffs attend secondary school away from home. [R.325] Of these, 1171 attend the State's boarding home and regional schools program which scatters them haphazardly across the state. Children from Aniak, for example, a village of 205 [R.126] located 80 air miles from Bethel [R.328] attend school in five different cities: Anchorage, Bethel, Kodiak, McGrath and Palmer. [R.326, 328, 330-331] As another example, seven children from Barrow, population 2104, [R.126] travel 675 miles to attend high school in Tok, [R.332] population 214. [R.133] The other 1115 appellants attending school are enrolled in boarding schools operated by the Bureau of Indian Affairs in Alaska and in Oregon. [R.325]

B. Plaintiffs are denied the local secondary day school opportunities that are provided to almost all other secondary school age children in the state.

The plaintiffs constitute the only significant exception to the pattern of local schools described above. By State practice the plaintiffs are given different treatment than their similarly situated peers in the provision of a fundamental constitutional right. There is no dispute concerning this fact. In its Memorandum of Opposition to Summary Judgment in the court below, the State conceded:

> Defendants concede that not all school-aged children in the state are provided identical educational services and that some children live away from their normal home while attaining a secondary education. [R.759]

As a result, the children in 145 native communities have no secondary school to attend. They are not required to attend school anywhere. Those who attend do so at the sacrifice of family life, while those who live at home must accept the premature termination of their education.

C. Article I, Section 1, of the Alaska Constitution forbids unequal provision of fundamental rights unless justified by a compelling governmental interest.

Article I, Section 1, of the Alaska Constitution guarantees to all citizens "equal rights, opportunities and protection." The State's haphazard provision of local secondary education, however, creates two classes of secondary school age children: those who are provided secondary schools in or near their community of residence, and those not required to attend school who must

leave their families and their usual homes to attend secondary school.[18] These classifications constitute decidedly unequal provisions of educational opportunity and of the right to attend public schools. They also discriminate against secondary school age children whose home community lack a secondary school. As the United States Supreme Court formulated the effect in Dunn v. Blumstein, 405 U.S. 330, 339, 31 L.Ed.2d 274, 282 (1972), in a case involving the right to travel -- quoted by this Court with approval in State v. Wylie, supra at 147 -- this is a "classification which serves to penalize the exercise of that right..." These classifications:

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18. The two classes created by the State's practices may also be defined in another way: those who are provided schools -- elementary and secondary -- in or near their community of residence, and those who must leave their families and usual homes to attend secondary school. Defined in this way, the "privileged" class includes very nearly all school age children in the state -- except plaintiffs. In addition to the 20,238 secondary students who attend local schools, this "privileged" class includes 63,431 elementary students: approximately 48,134 in city and borough school districts, 8978 attending on-base schools, and 6319 within the state-operated school district who attend state schools within their community of residence. [R.309-320] In addition 4755 elementary students in the state-operated school district attend B.I.A. schools [R.321-323] Many of these schools are extremely small, such as those at Gustavus, Igiugig, Paxson and Tanacross, enrolling fewer than 20 students. [R.316, 318-319] Although local elementary schools are available in each of plaintiffs' communities of residence, local secondary schools are not. There is no statutory basis for operating elementary, but not secondary schools, in these communities.

> impermissibly condition and penalize the right... Absent a compelling state interest, a State may not burden the right...in this way. 405 U.S. at 342.

The right to attend school, specifically guaranteed by Article VII, Section 1 of the Alaska Constitution, is a fundamental right. As a result, as this Court explained less than six months ago in State v. Wylie, supra at 145, a classification which abridges this right or places an unequal burden upon its exercise must be justified by a compelling state interest:

> ...If the classification denies or abridges a "fundamental" right, then the classification will "withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." Oregon v. Mitchell, 400 U.S. 112, 231, 27 L.Ed.2d 272, 346 (1970).

Otherwise, the classification constitutes a denial of equal protection in violation of Article I, Section 1.[19]

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19. This court also ruled in Wylie that a classification which did not involve a fundamental interest (or a "suspect" criteria) could nonetheless constitute a denial of equal protection unless it passed the judicial rational basis test. To pass this constitutional test a classification:

> must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. [emphasis added].

D. Neither a compelling state interest nor a rational basis exists to justify the unequal provision of secondary schools.

The court below made no finding of any compelling government interest that could justify the State's unequal provision of the basic constitutional right to attend school. Indeed, the court below made no equal protection analysis at all. Plaintiffs submit that this failure alone warrants reversal of the dismissal by the court below. Plaintiffs also submit, as discussed above at that the record below is devoid of any demonstration by the defendants of a compelling state interest that could justify such discriminatory treatment.

Moreover, plaintiffs submit that even if the right to attend public school were deemed not to be fundamental, the haphazard manner in which secondary schools have been provided in small communities would fail to meet even the rational basis test. No "ground of difference" has been identified by the State and been shown to have "a fair and substantial relation to the object of the legislation."

The court below thus committed reversible error by dismissing plaintiffs' claim without undertaking any constitutional analysis of whether their right to equal protection has been denied and without requiring the State to bear its burden of demonstrating a compelling interest, or even a rational basis, for its unequal provision of the constitutional right to attend school.