IV. VALID, UNAMBIGUOUS REGULATIONS OF THE STATE BOARD OF EDUCATION REQUIRE LOCAL SECONDARY SCHOOLS IN COMMUNITIES OF RESIDENCE THAT HAVE EIGHT OR MORE SCHOOL AGE CHILDREN.

The preceding analysis makes clear that local secondary schools are required by both Article VII, Section 1, and Article I, Section 1, of the Alaska Constitution. In addition, plaintiffs are entitled to local secondary schools under regulations of the State Board of Education.

A. The State Board of Education is vested with legal responsibility for setting state education policy and promulgating binding regulations to carry out its duties.

Statutes passed by the legislature pursuant to the constitutional mandate of Article VII, Section 1, create a seven-member State Board of Education, which governs the State Department of Education AS 14.07.075, and appoints the Commissioner of Education as the chief executive officer of the Department. AS 14.07.145. This Board is vested with power to issue "by laws for the mangement of the department," AS 14.07.160, and is required to promulgate regulations under the Administrative Procedure Act, AS 44.62.010, to carry out its enumerated duties. As 14.07.060. Among the duties vested in the State Board are the duties to "exercise general supervision over the public schools of the State," AS 14.07.020(1); to "adopt or recommend plans for the improvement of the public schools," AS 14.07.020(2); and to "prescribe by regulation a minimum course of study for the public schools." AS 14.07.020(4).

B. The State Board of Education has promulgated regulations mandating local secondary schools.

Pursuant to its mandate, the Board revised several regulations, effective July 9, 1972, which defined with great specificity the right of Alaskan children to attend local secondary schools and the minimum programs that were required. The text of the first regulation provides in part:

> 4 AAC 06.020. SECONDARY EDUCATION. (a) 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.
>
> (b) This section does not apply if a child
>
> (1) has daily access to a secondary school transported a reasonable distance in accordance with pupil transportation regulations;...

At the same time, the Board promulgated a new regulation, 4 AAC 06.025, Standards for Secondary Education Levels. [R.840-841] As promulgated the regulation provided in part:

> Section 4 AAC 06.025(2)
>
> 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 remaining sections of the regulation "define the minimum levels of secondary educational services" to be provided by "elementary schools not otherwise in a secondary school

attendance area." [R.841] These standards provide that in places having 1-20 secondary age pupils (Level I), existing elementary facilities may be utilized, with the possible addition of 1-2 teachers (depending upon the enrollment) to supervise the secondary work. In places where 21-32 secondary age pupils live (Level II), the standards require "basic courses taught by secondary teachers, supplemented by correspondence studies" and other optional equipment and offerings. Students from these communities also have the option of attending a boarding program. Where 33-62 secondary age pupils are found (Level III), expanded program and limited secondary facilities are required.

Read together, these regulations are clear and consistent. They "establish the right" -- in the words of the notice of their promulgation [R.837] - of school age children to local secondary schools, so that "no child of school age shall be required to live away from his usual home in order to obtain an education." [R.841] This legal standard has been amplified by the Department of Education, in its Small Secondary Schools Administrative Manual, as follows:

> Legally, a district must provide a secondary program for its resident pupils. As a district may not require a pupil to live away from home in order to obtain a secondary education, it must make some provision for those pupils who elect to stay in their home communities. [Footnote: AS 14.14.110] A small school which generates five or more secondary pupils annually has no options and is required to provide a secondary program. [R.804] [emphasis added in part] [20]

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20. This publication was written prior to 1972 legislative changes in AS 14.14.110, discussed below at p. 58-59.

C. These regulations are not ambiguous.

In the face of these clear and consistent regulations and defendants' own pronouncements, the court below found ambiguity and ignored substantial evidence that dispelled any uncertainty. On page 7-9 of its opinion [R.873-875] the court considered what it labeled "the regulation." "The regulation" considered by the court was the single sentence from 4 AAC 06.020(a) which 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 System.

The court below found textual ambiguity in the meaning of the phrase, "whether in a city district, a borough district, or the State-Operated School System" The State argued that this phrase was in apposition to the term "community of residence" or therefore defined that term. By this interpretation, "community of residence" should be read to mean "school district" -- Under this interpretation of the regulation, a child would merely be guaranteed the right to attend school somewhere within his district -- even though, in the state-operated school district, the nearest school might be hundreds of miles away. Plaintiffs submit, however, that the phrase in question modifies "community of residence," so that the regulation means:

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

The court below found that "a mere examination of the words in sequence would...support either interpretation" [R.875], declared

the phrase to be "ambiguous," and adopted the State's rather than the plaintiffs' interpretation.

Plaintiffs submit that the Superior Court's ruling on ambiguity is in error because the words of the regulation do not meet the legal test of ambiguity. Although it is possible to stretch the common sense and contextual meanings of the words to suggest theoretical ambiguity, this artificial ambiguity does not constitute legal ambiguity, as defined by this Court in Port Valdez Co. v. City of Valdez, 437 P.2d 768 (Alaska 1968). In Port Valdez Company, this Court defined an ambiguous term 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. 437 P.2d at 772, n.14

Here no "pertinent rules of interpretation" leave any "genuine uncertainty" as to what is the proper meaning of the regulation. The word "in" is not normally used to mean "it is". One must stretch to find "genuine uncertainty" about that. The term "community of residence" has an almost universal connotation of being a town, a village, or perhaps a residential city or neighborhood. "Community of residence" is not a label that under "pertinent rules of interpretation" would normally apply to a 400,000 square mile, geographically-gerrymandered area containing more than 150 villages separately identified and incorporated under the Alaska Native Claims Settlement Act, (43 U.S.C. §1601), with 150 separate airstrips, 150 separate post offices and zip codes, and separate listings in the Dictionary of Alaska Place

Names -- united only by being located within the unorganized borough and, therefore, the state-operated school district. No "pertinent rules of interpretation" create "genuine uncertainty" about that. Yet that is the interpretation the court below found to be a genuinely certain possibility as the basis for its finding that ambiguity existed. This "interpretation" makes the "State-Operated School System" synonymous with a "community of residence," when the common usage of the citizenry of the State, the United States Postal Service and the state and federal governments are all to the contrary. In short, there is no "genuine uncertainty" as to "which of two or more meanings is the proper meaning" of the term "community of residence." No real ambiguity in the meaning of these regulations exists. It was error for the court below to rule that it does.

D. Any ambiguity that exists is properly resolved by requiring local secondary schools in each village rather than in each district .

To the extent that ambiguity exists concerning the meaning of 4 AAC 06.020(a), two reasons compel that the regulation be read to require local secondary schools in every village having eight or more school age children. The first reason is the "common usage" analysis set forth in the previous section. The "face of the instrument" conveys a normal meaning of the words of the regulation. The second is that a companion regulation and the notice announcing their joint promulgation both indicate that this is its intent and its meaning.

The court below stated that "the record is devoid of any indication regarding why the regulation was adopted or the purposes intended to be obtained" [R.875] Yet plaintiffs' Reply Memorandum [R.791-794] and Appendix B attached thereto, [R.837-847] set forth and discussed these contemporaneous related documents and demonstrated how they resolve any doubts as to the meaning of 4 AAC 06.020(a).

The Department of Education's public announcement of the proposed regulations -- issued November 29, 1971 -- stated that part of the change would reenact 4 AAC 06.020, Special Secondary Schools, so that

> "he new section establishes the right of a school age pupil to secondary education in his community of residence. [R.837]

Here there is no modification of a term that has an acknowledged common usage, and the announcement does not say that the regulation guarantees secondary education in each school district. It states plainly and directly and without qualification that it guarantees secondary education in each community.

The companion regulation, 4 AAC 06.025(2)(1), grants every student

> the right to an elementary-secondary education in his district or community of residence. [R.841]

Here, if district and community of residence mean the same thing, the two phrases are inexplicably redundant. It is only by interpreting them as meaning different things that this language can be reconciled with that of 4 AAC 06.020(a). Similarly 4 AAC 06.025(2)(2) guarantees that no school age child

> shall be required to live away from his usual home in order to obtain an education. [R.841]

Yet under the lower court's interpretation, hundreds of the plaintiffs who live in villages lacking daily access to a secondary school would be and are required to live away from home in order to receive a secondary education. Moreover, the Minimum Standards for Offering Secondary Education spelled out in 4 AAC 06.025(2) lose their meaning and become superfluous under the lower court's construction.[21]

While any one of the sentences in the public notice and the companion regulations, taken alone, may be subject to a strained ambiguous construction, the meaning of the regulations, taken together, presents a clear and coherent picture. They provide that pupils living in a community with eight or more school age children shall be provided the opportunity for daily access to a secondary school without having to leave "their usual home." This applies to communities in the state-operated school district where this right has heretofore been largely denied, as well as to the cities and boroughs, where it generally has not been.[22]

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21. Plaintiffs' interpretation of 4 AAC 06.020 is also harmonious with 4 AAC 06.027(b) which permits the Board of Education to establish school attendance areas without regard to district lines, "subject to the provisions of 4 AAC 06.020."

22. The court's holding below was silent as to how even under its interpretation of 4 AAC 06.020, plaintiffs in Hydaburg, King Cove, and St. Mary's -- all city districts -- could continue to be denied local secondary schools.

This is, moreover, the only interpretation of the regulations that is consistent with the mandate of the Alaska Constitution. Unless these regulations contradict the state constitution or statutes, AS 44.62.030, they have the full force of law. Boehl v. Sabre Jet Room, Inc., 349 P.2d 585 (Alaska 1960).

E. The state board's regulations guaranteeing local secondary schools are consistent with Alaska statutes.

State statutes declare that regulations issued by state agencies are invalid and ineffective if they clash with the statutory authority on which they are based. AS 44.62.030 sets forth a test for consistency between statutes and regulations. It provides that regulations must be "consistent with the statute and reasonably necessary to carry out the purposes of the statute."

The State argued in the court below that plaintiffs' interpretation of 4 AAC 06.020(a) as requiring secondary schools in every community would make the regulation inconsistent with its statutory basis. [R.874]. The lower court, in what appears to be an application of a test that does not comport strictly with AS 44.62.030, rejected plaintiffs' interpretation, in part, on the grounds that "the State's interpretation is more in line with the statutory scheme under which the regulations were promulgated." [R.875] That ruling is incorrect. Tested against the proper standard, the regulations are consistent with the statutes under which they were promulgated and reasonably necessary to carry out the purpose of those statutes.

The statutory authorities set forth by the State Board for the simultaneous promulgation of 4 AAC 06.020 and 4 AAC 06.025 were AS 14.07.060 (State Board authority to promulgate regulations); AS 14.07.020(1) and (2) (State Board's general supervisory duties; and AS 14.03.080(a) (free public education). The text of this latter statute makes reference to two other statutes, AS 14.14.110, (cooperation among districts); and AS 14.14.120 (inoperative districts). Because the State Board's authority to promulgate regulations concerning general standards for the administration of the public school system is conceded by all parties, the focus of this dispute is AS 14.03.080(a) and the two statutes cited therein.

AS 14.03.080(a), Free Education, currently[23] provides:

> 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 14.14.110 and AS 14.14.120.

This statute, consistent with the state constitution, unambiguously affirms each student's entitlement to school attendance in his district of residence. One of the two statutes

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23. Before As 14.03.080(a) was amended in 1972, it provided:

> 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 14.30.010.

it is subject to, AS 14.14.110, Cooperation With Other Districts,[24] indicates further the legislature's determination that the place where the right is to be exercised is closer to home than the farthest reaches of the vast state-operated school district. The statute shows that the legislature intends this right to be exercised while living at the student's "usual home" so long as the community has what might be termed a "critical mass" of at least eight students to constitute a school. AS 14.14.110 provides that even where a district was entered into cooperative arrangements with another district, nonetheless:

> 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. [emphasis added].

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24. AS 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 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 fromf 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.

This means that even in those instances where a school district (District A, for illustrative purposes) has made a cooperative arrangement with another district (District B) for its students to attend school in that other district, District A is still obligated to provide local schools within District A wherever the cooperative arrangement requires District A students to live away from their homes in order to attend school in District B. This is an unambiguous provision which emphasizes the legislative requirement of local schools -- efficiency or economics notwithstanding. The statute's applicability to the state-operated school district could not be more clear. Even though state-operated school students may attend school in city and borough districts under cooperative arrangements through the boarding home program, the Alaska State-Operated School System is required to provide local schools wherever there are eight eligible school age children because the cooperative boarding arrangement obviously requires them to live away from home.[25]

The accuracy of this interpretation is further underscored by the fact that the legislature amended the text of AS 14.14.110 in 1972 to make this requirement more clear. Prior to that time, the text of AS 14.14.110 provided that school boards "shall provide classes within the district" [emphasis added] wherever a certain minimum number of children resided. The 1972 amend-

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25. Consistent with this the State Board's power to define attendance areas is specifically limited by and subject to the right of each child to secondary education in his community of residence. 4 AAC 06.027(a)(b).

ments changed the minimum number of children and changed the word "district" to "attendance area." This change indicates that the use of the term "attendance area" in AS 14.14.110 is not inadvertent, or inconsequential, and does not mean the same thing as "school district." Moreover, Governor Egan's April 11, 1972, letter to House Speaker Guess, explained these legislative changes as follows:

> A second change envisioned by the amendment of AS 14.14.110 is to harmonize it with AS 14.14.120 in terms of the number of students for whom classes must be provided...This amendment corrects the language to reflect what is believed to have been the original legislative intent regarding when a district must provide local educational services [emphasis added]. House Journal, p. 718-719 (April 11, 1972). [R.672]

The words "for whom classes must be provided" and "when a district must provide local educational services" [emphasis added in both] further underscore that these are mandatory legislative provisions believed "to reflect...the original legislative intent."

In light of this statutory exposition of State policy, the provisions of the regulation requiring that a school be provided in a child's "community of residence" must be compared with the statutory requirement that classrooms and teachers be provided in children's "school districts" and "attendance area." The regulations fully comport with the test of AS 44.62.030: they are "consistent with the statute and reasonably necessary to carry out the purpose of the statute."

The regulations certainly cannot be said to contradict the statutes. The statutes require schools in "attendance areas" within districts, and the regulations require schools in "commu-

nities" within districts. Thus, although the regulations may make the requirements of the statute somewhat more narrow and specific, they are not at odds with the statute's requirement. Nor does the fact that they define more narrowly the precise meaning of the statute mean that they are inconsistent with it, for this is one purpose for which state agencies are authorized to promulgate regulations. See, e.g., Boehl v. Sabre Jet Room, 349 P.2d 585, 589 (Alaska 1960), quoting with approval Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398, 84 L.Ed 1263 (1939), and American Power & Light Co. v. SEC, 329 U.S. 90, 105, 91 L.Ed. 103 (1946).

In Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971), this Court examined another regulation challenged for failing to meet the consistency requirement of AS 44.62.030 and explained there the purpose of the test and the manner in which it is to be applied. The purpose of review is to "insure that the agency has not exceeded the power delegated by the legislature," 486 P.2d at 911, and the review is undertaken by "look[ing] to the legislative enactments here involved." 486 P.2d at 912.

One of the legislative enactments involved here, AS 14.07.020, declares that it is the duty of the Department to

> (1) exercise general supervision over the public schools of the state...;
>
> (2) study the conditions and needs of the public schools of the state and adopt...plans for [their] improvement...;
>
> [and]

> (4) prescribe by regulation a minimum course of study...

AS 14.07.060 further directs the State Board of Education to "promulgate regulations which are necessary to carry out the provisions of this title." Thus, there can be no question that 4 AAC 06.020 and 4 AAC 06.025 are consistent with and necessary to carry out the State Board's duty.

Further acknowledgement of the regulations' consistency with statutory provisions is found in the November 1971 Attorney General's Opinion Letter to Commissioner Lind concerning "Establishment of Schools in Outlying Areas of School Districts." [R.41] The Attorney General wrote that

> It would seem that the Department [of Education] does have the authority to promulgate uniform regulations which require such "schools" ["in an isolated community within the school district"] to be established under the appropriate conditions. [R.41]

Interpreting, AS 14.03.080(a) and emphasizing the "Right to Attend School," the Attorney General wrote that

> The State has demonstrated a strong policy of providing actual classroom facilities and teachers. [R.42]

On the following page, the Attorney General further opined that:

> It is clear that there is a strong bias to have actual attendance facilities or teachers in the vicinity of school age children wherever practical [emphasis added]. [R.43]

The Attorney General concluded his analysis of the "Right to Attend School" in remote areas by stating his formal legal opinion of the intent of the legislature. He wrote:

> That the state legislature looked on remote areas... as similar to separate rural school districts and that it wished to encourage the actual operation of public schools where practical is further indicated by the provision of special state funds for schools in such remote areas [under AS 14.17.031(c)]. [emphasis added]. [R.43]

The "Conclusion" of the Opinion Letter sets forth a firm basis for a finding by this Court that 4 AAC 06.020 and 4 AAC 06.025 are not inconsistent with the statutes under which they were promulgated. The Attorney General wrote:

> It would be proper under current statutory authority for the Department of Education to promulgate uniform regulations setting forth the circumstances in which "schools" must be provided in rural areas of school districts [emphasis added]. [R.44]

AS 44.62.060(a) requires that the Department of Law review all regulations that state agencies propose to promulgate; render a formal opinion of "the validity of the regulation;" recommend changes, if necessary, "to make the regulation...valid;" and give formal approval prior to promulgation. The Attorney General's Opinion Letter quoted from above is the opinion rendered to the Department of Education on the validity of 4 AAC 06.020 and 4 AAC 06.025.[26] The Attorney General's conclusion there that it

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26. A brief second memo dated May 2, 1972 gave the Attorney General's final approval to the formal promulgation. It stated in full:

> Attached please find regulations submitted by the Department of Education to this office for approval pursuant to AS 44.62.060. We have reviewed these regulations hereby and approve them for filing by you into the Alaska Administrative Code.

would be "proper under current statutory authority" to promulgate regulations concerning when "schools must be provided in rural areas," directly contradicts the State's present position that regulations requiring local secondary schools are inconsistent with statutory provisions. Plaintiffs submit that the Attorney General's original interpretation was the correct one.

Thus, 4 AAC 06.020 and 4 AAC 06.025 meet the test of AS 44.62.030. They are consistent with the statute and necessary to carry out its purpose. They are valid and have the full force of law. They require the provision of local secondary schools in plaintiffs' communities of residence. Plaintiffs urge this Court to require the defendants to enforce these regulations.