IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

MOLLY HOOTCH, et al.,

Plaintiffs,

v.

ALASKA STATE-OPERATED SCHOOL SYSTEM, et al.,

Defendants.

No. 72-2450

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs have moved for summary judgment on their claim of the right to secondary education in their communities of residence under the regulations, laws and constitution of Alaska. Plaintiffs are entitled to summary judgment where there is no genuine issue of material fact, and plaintiffs are entitled to judgment as a matter of law. Civil Rule 56(c).

THERE IS NO GENUINE ISSUE OF MATERIAL FACT

Plaintiffs have presented two material facts necessary to support their right to local secondary education: (1) they are secondary school age children, and (2) they reside in communities lacking local secondary educational opportunities.

Defendants contend that some genuine issues exist with respect to the second material fact: whether plaintiffs' communities lack local secondary educational opportunities. Mem. in Opposition, at 23-25. Plaintiffs agree with defendants that the essence of this material fact is that defendants "do not operate and maintain a secondary school or provide daily transportation to a secondary school" for each of plaintiffs' communities. Mem. in Opposition, at 24, lines 4-6. The other phrases upon which defendants comment, such as "they do not provide secondary education", "no secondary education is provided", "denied public education", "local secondary educational opportunities have not been made available", and "defendants have excluded plaintiffs from

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public school", are either semantic variations of the admitted fact that defendant do not operate and maintain secondary schools in plaintiffs' communities or provide daily transportation to secondary schools, or they are legal conclusions based upon the admitted fact.

As for defining the term "secondary education," plaintiffs mean and accept the definition conceived and expressed by the defendants in their regulations 4 AAC 06.020(a) and 4 AAC 06.025(a), and the minimum standards adopted thereunder. Mem. in Support, at 11-12.

Defendants assert a second genuine issue exists regarding their future plans for providing, or not providing, local secondary schools. Mem. in Opposition, at 24-25. Plaintiffs have stated that the defendants have no plans to operate and maintain secondary schools in most of plaintiffs' communities in the foreseeable future. The basis for plaintiffs' statements, at pages 3, 6, 12 and 14 in their memorandum, is paragraph 47 of defendants' Answer. Responding to plaintiffs' allegations that secondary schools were not provided in 145 eligible communities, defendants said that secondary programs were being provided in 19 of those communities and 14 other communities were scheduled for secondary programs in the next school year. Defendants then admitted plaintiffs' allegations with respect to the remaining 112 communities. Defendants failed to mention any plans to provide secondary schools in these 112 communities, therefore, plaintiffs made the reasonable inference that no such plans exist. Mem. in Support, at 12-14.

In addition, the asserted issues regarding defendants' future plans to provide or not provide schools, and speculation as to future upgrading of defendants' minimum standards for offering secondary education, are not actually genuine issues of material fact affecting this motion. The material fact is that plaintiffs reside in communities that do not have local secon[illegible]

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education. Defendants' lack of plans to provide local secondary education in the future shows only that this question is ripe for adjudication.

Finally, defendants assert that a genuine issue of material fact exists with respect to the quality of education which will be available to plaintiffs if their motion is granted. Mem. in Opposition, at 25-26. Defendants argue elsewhere in their memorandum, at 18, that criteria such as "educational needs" are not judicially manageable, and plaintiffs have not raised quality of education as a material fact in this motion. As stressed in their memorandum in support, at 8-9, plaintiffs seek only enforcement of existing regulations by which the defendants themselves have prescribed the kind of secondary education which must be provided in plaintiffs' communities.

As an additional note, hundreds of the plaintiffs are not attending school. Mem. in Support, at 5. Of the individual plaintiffs, Christine Atti, Elizabeth Friend, Herbert Peter, Lucille Evon, Stephanie Phillip, Ida Trader Duny, Frank Kameroff, Jr., Agatha Keyes, Ursula Trader and Elsie Black are in their home communities and are not in school, as shown by the pleadings and answer to interrogatories. In addition secondary school age children living in communities without local secondary schools are beyond the reach of the complusory attendance law and are not required to attend school. Mem. in Support, at 14-15. Enforcing plaintiffs' right to local secondary education will provide local schools which plaintiffs will be able and required to attend. As an obvious result, more school age children will be in school and, therefore, their achievement level will be higher.

Plaintiffs have shown by their analysis of the pleadings that no genuine issues of material fact exist on the claim for which they seek summary judgment. Defendants have not presented factual issues to controvert plaintiffs' analysis. Defendants have disputed some of the expressions plaintiffs have used to

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characterize these facts, but these differences are insubstantial. Nizinski v. Golden Valley Electric Assn., P.2d . (Ak. Sup. Ct. Op. #878, April 27, 1973); Braund, Inc. v. White, 486 P.2d 50 (Alaska 1971).

There is no genuine issue of material fact: (1) plaintiffs are secondary school age children, and (2) plaintiffs reside in communities which lack local secondary educational opportunities.

PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

Plaintiffs' right to secondary education in their communities of residence is derived from the Alaska Constitution, state education laws and regulations promulgated by the State Board of Education. Recognition and enforcement of this right does not depend upon finding that education is a fundamental interest under the federal constitution made applicable to the states through the Equal Protection Clause, and plaintiffs did not raise this argument. Mem. in Support, at 8 n.1. Therefore, San Antonio School District v. Rodriquez, ___U.S. ___, 35 L.Ed. 2d 16 (1973), and Lau v. Nichols, 41 USLW 2389 (9th Cir. Jan. 8, 1973), as cited by defendants, are not in point.

Education may not be among the rights afforded explicit protection in the federal constitution, as Rodriquez says at 44; however, the framers of the Alaska Constitution, with full knowledge that many Alaskan children did not have schools to attend, decided that their constitution would guarantee public education to all children in the state. Alaska Legislative Council, Alaska Constitutional Convention, 742; 2 Id. 1513-1514, 1520. Thus, the Alaska Constitution, Article VII, Section 1, does specifically create and recognize public education as a fundamental personal right belonging to all children - native and non-native, rural and urban - in the state.

Therefore, in this motion plaintiffs do not seek to find the right to local secondary education in the broad, often

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vague, language of the federal Equal Protection Clause, as defendants seem to think. Mem. in Opposition, at 11-23. Plaintiffs claim this right, as Alaskans, under the specific language of the Alaska Constitution and the state education laws and regulations. These Alaskan provisions are relevant, clear and directly on point, while federal equal protection standards may be imprecise; therefore, an Alaskan court must and should prefer to decide this motion on the basis of Alaskan law. Breese v. Smith, 501 P.2d 159, 166 (Alaska 1972).

As plaintiffs find vindication of their rights in state law and base their motion for summary judgment upon it, counsel for the defendants goes to great lengths to say that our state constitution, laws and regulations -- the laws defendants are obligated to interpret and administer -- do not entitle all Alaskan children to attend local secondary schools. The attorney general presents a novel theory in this regard: that state officials such as the Commissioner of Education, the Superintendent of the Alaska State-Operated School System, and the members of the State Board of Education have unlimited discretion to decide whether or not they will enforce and obey the state constitution, school laws and regulations of the state. This response belies the clear meaning of the constitutional provisions and laws in question, seeks nullification of regulations formulated by these defendants, and contradicts defendants' prior interpretation of their legal obligation to provide local secondary education in virtually every community in the state.

Article VII, Section 1, requires the legislature to establish and maintain a system of public schools open to all children of the state. Our Supreme Court has held this language mandatory, not permissive. Macauley v. Hildebrand, 491 P.2d 120, 122 (Alaska 1971). The legislature does not have discretion to decide whether or not it will operate schools, as defendants assert at page 5 of their memorandum: the constitution says it

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must establish and maintain schools.

For Alaskans, the right to public education created and guaranteed by the state constitution is a fundamental personal right ranking with "liberty" in importance to the individual. Education "is perhaps the most important function of state and local government," Brown v. Board of Education, 347 U.S. 483, 493, 98 L.Ed. 873, 880 (1954). Education plays an "indispensible" role in modern society as a determinant of an individual's chances for economic and social success, and as a unique influence on his development as a citizen and his participation in political and community life. Serrano v. Priest, 5 Cal.3rd 584, 604, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). Education, the Serrano court said, is vital to the continuation of liberty and our way of life. It is essential for the preservation of our democratic institutions, it is universally relevant, it involves intensive contact between the government and individuals, it is unmatched in the extent to which it molds the personality of our youth, and it is so important that the state has made it compulsory. Id. at 609-610. For these reasons defendants' attempt to distinguish "liberty" and "education" as constitutional rights of varying quality is spurious. Mem. in Opposition at 12-13.

Since the right to education, like liberty, is a fundamental right specifically created by the state constitution, any impairment of this right must be scrutinized under the "compelling interest" test of Breese. It is not enough, as defendants suggest at 13, for plaintiffs to be provided some education; plaintiffs are entitled to education upon the same terms and conditions as it is provided to other Alaskans. Any abridgment or impairment of plaintiffs' fundamental right to education must be justified by a compelling state interest flowing from some enumerated constitutional power. Breese v. Smith, supra at 170-171; Mem. in Support, at 18-22. Defendants have not cited, and they will not find, any constitutional power of "administrative discre-

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tion" that permits them to withhold local secondary education from plaintiffs while providing it to others, or to impair in any other way the education which is provided them.

Plaintiffs' right to secondary education in their communities of residence is based on more than analysis of state constitutional provisions. It is set forth in detail in the laws enacted pursuant to the constitutional mandate, and regulations adopted pursuant to authority given by the legislature. By their motion for summary judgment plaintiffs are merely asking the Court to enforce these current laws and regulations. Mem. in Support, at 9-12.

To carry out the constitutional mandate to establish and maintain schools the legislature created the Department of Education, headed by the State Board of Education. A.S. 14.07.075. The Board of Education is authorized and required to promulgate regulations necessary to carry out the provisions of Title 14. A.S. 14.07.060. This delegation of rule-making authority is both proper and complete and, so long as the Board's regulations are not inconsistent with the statutes, its regulations have the force of law. Boehl v. Sabre Jet Room, Inc., 349 P.2d 585 (Alaska 1960). The Board's regulations are the law of the state and are entitled to enforcement as such, and a reviewing court has no authority to substitute judgment as to the content of the regulations. United States v. Howard, 352 U.S. 212, 1 L.Ed.2d 261 (1957); K. DAVIS, ADMINISTRATIVE LAW TREATISE, §5.03, at 299 (1958); 73 C.J.S. Public Administrative Bodies and Procedure, §108 (1951).

Among the regulations promulgated by the Board are 4 AAC 06.020(a) and 4 AAC 06.025(a) which guarantee every child the right to secondary education in his community of residence, whether that community is in a city district, borough district or the state-operated school system, and set minimum standards for the operation of such local secondary programs.

The Board of Education has discretion to decide the

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content of its regulations, and in promulgating 4 AAC 06.020(a) and 4 AAC 06.025(a), the Board has exercised its discretion by declaring where and how secondary education must be provided. These regulations are binding on all school districts including the Alaska State-Operated School System (hereafter ASOS).

Defendants argue that ASOS has discretion to decide whether, when and where to operate schools under A.S. 14.08.090 (12). Mem. in Opposition, at 6-7, 11. ASOS' discretion to establish, maintain and operate schools, however, is not absolute. ASOS' authority in all school matters is expressly limted by state laws and the regulations of the state Board of Education. A.S. 14.08.050 is perfectly clear on this point:

> Authority of the board of directors. The board of directors has exclusive management and control of all state-operated school matters associated with the state's program of education at the elementary and secondary levels subject to the state laws and the regulations promulgated by the state Board of Education. [emphasis added]

ASOS does not have discretion to decide whether or not it will follow such state laws and regulations as A.S. 14.03.080 (a), A.S. 14.14.110, 4 AAC 06.020(a), and 4 AAC 06.025(a): it must obey them. If this defendant choses to ignore these laws and pursue a course charted only by "discretion", it must be restrained. It also cannot, as defendants suggest at 10-11, avoid a regulation having the force of law which sets "minimum standards" for secondary education by just not offering secondary education at all in its schools.

Beyond the required minimums for secondary education in each of plaintiffs' communities, the regulations permit boarding programs. A.S. 14.08.090 (14), A.S. 14.14.110, 4 AAC 06.025(b). This point was clearly stated in plaintiffs' Memorandum in Support at 15-16 n.12, despite defendants' remarks to the contrary. Mem. in Opposition, at 11. The defendants' minimum standards for offering secondary education require that the boarding programs be

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continued, and plaintiffs would insist that they continue in addition to local secondary education to provide plaintiffs equal educational opportunity.

City and borough school districts also exercise authority subject to state laws and regulations of the state Board of Education. A.S. 14.14.060(g); A.S. 14.14.065; A.S. 14.07.070; Macauley v. Hildebrand, supra.

The defendants do not have discretion to decide whether to follow or enforce the state school laws and regulations of the Board of Education. Defendants, however, dispute the meaning of 4 AAC 06.020(a). They argue that the term "community of residence" really means "school district". Mem. in Opposition, at 10. Therefore, defendants argue, the regulation is satisfied if school age children who reside in any community in the huge state-operated school district are offered secondary education at some other place also within the boundaries of the district. "There is no indication that the phrase was intended to mean population enclaves, no matter how small, within the State-Operated School System" Mem. in Opposition , at 10.

Plaintiffs disagree. The clear meaning of 4 AAC 06.020 (a) is that secondary education must be provided in every community, no matter how small, in accordance with the minimum standards of 4 AAC 06.025(a), except for communities within the statutory classification of inoperative districts [A.S. 14.14.120]. The text of 4 AAC 06.020(a) is decisive on this point:

> 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 district. [emphasis added]*

*The quotation of this regulation in the Memorandum in Support, at 11, is erroneous. The above quotation is correct. Also see Appendix B-3.

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The effect of this regulation is not to delegate the decision as to whether secondary schools will be established "to any settlement or other unorganized community no matter how remote, small or transitory." Mem. in Opposition, at 10. The regulation was adopted by the state Board of Education in the exercise of its discretion to establish statewide administrative policy. As such, the regulation has the force of law and must be followed by every school district.

Defendants also characterize plaintiffs' reliance upon A.S. 14.03.080(a) and A.S. 14.14.110 as a source of the right to local secondary education as a "tortured interpretation" of these laws. Mem. in Opposition, at 6. Yet, the Department of Education and defendant Marshall L. Lind, Commissioner of Education, published a similar interpretation of these laws nearly two years ago, before 4 AAC 06.020(a) was adopted or proposed. The department's publication, "Small Secondary Schools Administrative Manual", issued in September, 1971, [Appendix A] contains the following statement, on page 1:

> 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: A.S. 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. [emphasis in original]*

Administrative interpretations of law, such as the foregoing, as with the specific regulations already mentioned, are binding upon the defendants. Now that plaintiffs have sued to enforce these laws and policies, defendants cannot reinterpret the laws, reject their own policy manuals and argue that their own regulations are over-broad. Defendants' role in drafting and

*This publication was written prior to 1972 legislative changes in A.S. 14.14.110, discussed in Mem. in Support, at 10.

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promulgating these regulations and interpretations of law should estop them from now denying their clear meaning and should compell this Court to conclude that plaintiffs are entitled to summary judgment.

If following the state constitution, laws and regulations means that schools must be established where now there are none, then this must be done. If there is to be a system of public schools open to all children of the state, then the schools must be sufficiently numerous so that all children of the state may receive the education to which they are entitled. Judd v. Board of Education, 278 N.Y. 200, 15 N.E. 2d 576, 118 A.L.R. 789, 792 (1938) The fundamental right to education under the state constitution and plaintiffs' rights to receive education in the manner required by state law cannot be dependent upon the subjective discretion and good faith of school administrators. Breese v. Smith, supra, at 171; Hosier v. Evans, 314 F. Supp. 316, 320-321 (D.V.I. 1970).

Defendants argue that plaintiffs have not applied for special secondary schools under State-Operated School By-Law, §2.06. They offer the Affidavit of G. Lee Hayes to show the process by which communities may apply for high schools. Mem. in Opposition, at 9, and Exhibit 2. However, the application form attached thereto refers only to the establishment of elementary schools. Defendants do correctly point out that plaintiffs have wholly ignored the provision in these by-laws referring to establishment of special secondary schools, §2.06(B). Plaintiffs ignored this provision because it is based upon regulations which have been repealed. This By-Law reads:

> B. Special secondary schools may be established.
>
> 1. Special high schools may be established in connection with an existing elementary school where there are twelve (12) or more eighth grade graduates under twenty-one (21) who will enroll and attend classes regularly.

This By-Law is identical to former 4 AAC 24.020(b), which read:

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(b) Special secondary schools may be established.

(1) Special high schools may be established in connection with an existing elementary school where there are 12 or more eighth grade graduates under 21 who will enroll and attend classes regularly.

This By-Law and former 4 AAC 24.020(b) are also quite similar to former 4 AAC 06.020(a), which read:

SPECIAL SECONDARY SCHOOLS. (a) The board may establish special secondary schools, either graded or ungraded, for those pupils who would otherwise be unable to attend high school, if there are 12 or more eighth grade graduates under the age of 20 who will attend classes regularly.

These two regulations were repealed and replaced by 4 AAC 06.020 and 4 AAC 06.025, the regulations under which plaintiffs claim the right to secondary education in their communities of residence. [See Appendix B] The new regulations went into effect July 9, 1972. Therefore, By-Law §2.06(B) is inoperative.

It is also no answer for the defendants to tell the plaintiffs that their communities should organize into first class cities and boroughs, operate their own schools and thereby secure their right to local secondary education. Mem. in Opposition, at 8. The state-operated school district is part of the public school system of the state, just as are other districts. A.S. 14.12.010. The ASOS is required to operate schools in accordance with state laws and regulations of the State Board of Education, and all defendants have a duty to enforce and follow those laws. Plaintiffs are Alaska citizens. The Alaska Constitution guarantees them the right to public education, and Article I, Section 1, of that constitution declares that they and all Alaskans are "equal and entitled to equal rights, opportunities and protection under the law". Therefore, it is totally improper and unconstitutional for defendants to decree that plaintiffs' communities must become first class cities or boroughs before they, mere children who could not even vote on such a question, can exercise their right to local secondary education. Obviously this was not required of the communities of Anderson, Annette, Cape Pole, Copper Center,

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Delta Junction, Gakona, Glenallen, Gustavus, Healy, McGrath, Northway, Suntrana, Tanana, Thorne Bay, Tok, Bethel, Christochina, Fort Yukon, Gulkana, and Metlakatla, all of which are within the state-operated school district and all of which have local secondary schools or daily transportation to secondary schools. See Plaintiffs' Request for Admission, filed October 24, 1972.

Defendants attempt to distinguish cases cited on pages 16-17 of plaintiffs' memorandum from the situation now before the Court on the basis that those cases involved complete denials of public education. Mem. in Opposition, at 16-17. In those cases the plaintiffs were denied the right to attend public school. That is precisely the situation here: the plaintiffs are denied their right to attend public school at the secondary level because their is no local secondary school for them to attend.

Plaintiffs are not required to go to school. Because there are no local secondary schools they are beyond the reach of the compulsory attendance law, a point not argued and apparently conceded by defendants. Mem. in Support, at 15-16. Plaintiffs may take correspondence courses which, defendants argue, is an educational opportunity available to all. Mem. in Opposition, at 13, and Exhibit 5. However, there is nothing in the compulsory attendance law which require plaintiffs to take these courses, the one regulation describing correspondence courses requires that the courses be properly supervised (4 AAC 33.060), and it is well settled that correspondence courses are not the legal equivalent of school. In Re Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165, (1961); State v. Counort, 69 Wash. 361, 124 P. 910, 41 L.R.A.N.S. 95 (1912). Defendants say they also operate "supplemental" boarding programs which plaintiffs may attend. Mem. in Opposition, Exhibit 5. However, plaintiffs are not required to attend these boarding programs either.

What the plaintiffs want and need, and what the defendants have failed to provide, is local secondary education. The

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plaintiffs' answers to defendants' interrogatories (original and two supplemental answers) show that all plaintiffs would prefer to attend high school in their home communities and that this opportunity has never been made available to them. Ans. to Interrogatories, 10, 15, 20. Many of the plaintiffs are not able to leave their homes for nine months of the year to attend distant boarding schools for personal or family reasons. Plaintiff, Lindsay Trader, for instance, did not return to boarding school this school year because his father is ill and cannot do heavy work, so Lindsay was needed at home. Second Supp. Ans. to Inter., No. 9. Plaintiff Herbert Peter returned to his home in Kwigillingok after a death in the family and then didn't want to leave his family again and go to boarding school. First Supp. Ans. to Inter., No. 12. Plaintiff Elizabeth Friend did not want to leave her family and, as a result, has never attended boarding school. Id., No. 10. Plaintiff Ida Trader Duny attended boarding school for two years and completed the tenth grade; however, in the summer of 1972 she got married and though she would like to finish high school she is not willing to leave her husband and home community to do so. Second Supp. Ans. to Inter. No. 7, 9, 15.

Many of the plaintiffs don't like boarding schools or have had bad experiences there. Given the Hobson's choice of boarding schools or no secondary school at all, they prefer to remain home. Plaintiff Christina Atti attended Bethel Regional High School for two years but midway in her third year there she went home for Christmas and decided not to return because her parents didn't want her to go back and she didn't like the school. First Supp. Ans. to Inter., Nos. 7, 12. Plaintiff Elsie Mute dropped out of Diamond High School in Anchorage and returned to her home in Kongiganak because she found her boarding family too strict and because she was often sick in Anchorage. Second Supp. Ans. to Interr., No. 9. Similarly, Plaintiff Stephanie Phillip

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has dropped out of high school twice, from Anchorage in 1970, and from Bethel in 1973. She dropped out becuase she was restless, couldn't concentrate on her school work and missed her home and family. Id.

Plaintiffs such as these, who cannot or do not want to leave their families and homes to attend boarding schools, have no opportunity to get a secondary education. They are denied their right to public education. They are excluded from school. They are prevented from receiving the education to which they are entitled under the Alaska Constitution because defendants have failed to enforce and follow the laws and regulations which require that secondary education be provided in plaintiffs' communities of residence.

The Plaintiffs are not isolated individuals living on islands or in otherwise uninhabited areas, as those in the 60 and 65 year old cases cited by defendants. Mem. in Opposition, at 14-15. Similarly situated people in Alaska, such as remote homesteaders, would be in an inoperative district situation.

Plaintiffs live in settled, permanent communities. The individual plaintiffs are from Emmonak, Kwigillingok and Kongiganak which have 439, 148 and 190 people, respectively. Mem. in Support, at 2. The 1972-73 enrollment in the elementary school in Emmonak, operated by the Bureau of Indian Affairs is 161. The enrollment in the Kwigillingok elementary school is 55. Lind, Answer to Interrogatories, No. 21, Exhibit 21A. The 1972-73 enrollment in defendants' elementary school in Kongiganak was 72. Id., No. 19, Exhibit 19.

Plaintiffs are eligible for and entitled to secondary education in their communities of residence. The Alaska Constitution commands that plaintiffs be provided public education. To effectuate the constitutional mandate, schools must be sufficiently numerous and geographically situated so plaintiffs have access to

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them. Under the school laws and regulations, plaintiffs have the right to secondary education in their communities of residence. These directives are specific and clear, and defendants must obey them. The defendants have not followed or enforced these laws and, as a result, they have denied plaintiffs their right to local secondary education and, with it, their right to public education. To secure plaintiffs' rights immediate judicial action is warranted and necessary.

For these reasons, plaintiffs urge this Court to grant their motion for summary judgment.

Respectfully submitted this 25th day of May, 1972.

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