ARGUMENT

I.

NEITHER THE ALASKA CONSTITUTION, ARTICLE VII, SECTION 1, NOR PROVISIONS OF THE ALASKA STATUTES, OR THE ALASKA ADMINISTRATIVE CODE CREATE AN ABSOLUTE RIGHT TO ATTEND A SECONDARY SCHOOL IN EACH VILLAGE OR TOWN IN ALASKA.

A. The Alaska Constitution, Article VII, Section 1 does not create an absolute right to attend a secondary school in one's immediate place of residence.

1. The Alaska Constitution allows the legislature to establish the system of public education to be provided in Alaska and does not require that this system include a local secondary school at every populated location in the state.

The Alaska Constitution, Article VII, Section 1 provides:

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

Appellants assert that this provision, standing alone, imposes an absolute duty on the legislature to establish and maintain "local" secondary schools, and, per force, creates a right in every child in the state to attend a secondary school in his village of residence. Appellants, however, read too much into this constitutional provision.

Throughout the country, state constitutional provisions providing for public education generally place the ultimate responsibility on the respective state legislative bodies. As appellants note in their Brief (at p. 20), the constitutions of 45 of the

states mandate the provision of public education. Considering such provisions as a general matter, it has been observed that:

> Subject to constitutional restrictions, the state legislative body possesses plenary power over public schools. If it chose to do so, the state legislature could redistrict the state (change local district boundaries) and prescribe curriculum, textbooks, school calendar, hours of operation, and practically every other detail of school operation. (Emphasis added.) William R. Hazzard, Education and the Law, p. 1 (New York, 1971).

See also Sorgen, Duffy, Kaplin and Margolin, State, Schools, and Education (1973), pp. 2 - 10.

Looking specifically at the Alaska Constitution, Article VII, Section 1, one is inescapably struck by its brevity[1/] and the near total absence of "constitutional restrictions" on the legislature. A review of the educational provisions of the constitutions of our sister states would reveal that many of them prescribe such matters as the amount of time to be spent in school (Colorado, Article IX, Section 11, Idaho, Article IX, Section 9, Wyoming, Article VII, Section 9, Oklahoma, Article XIII, Section 4, North Carolina, Article IX, Section 11); the level of grades or type of schools to be provided (California, Article IX, Section 6, North Dakota, Article VIII, Section 148, Washington, Article IX, Section 2, Utah, Article X, Section 2, Kansas, Article VI, Section 2, Arizona, Article XI, Section 1); the age of children for whom

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1/ This suggested comparison with similar provisions of other state constitutions would appear more meaningful than appellant's suggested comparison of Article VII, Section 1 with the ensuing constitutional provisions relative to public health and public welfare.

schools shall be provided (Arizona, Article XI, Section 6, Arkansas, Article XIV, Section 1, Colorado, Article IX, Section 2, Montana, Article XI, Section 7, Mississippi, Article VIII, Section 201, North Carolina, Article IX, Section 2, New Jersey, Article VIII, Section IV, Wisconsin, Article X, Section 3, Nebraska, Article VII, Section 6); the geographical area where such schools must be located (Colorado, Article IX, Section II, California, Article IX, Section 5, Arizona, Article XI, Section 6, Nevada, Article XI, Section 2, Minnesota, Article VIII, Section 3, Mississippi, Article VIII, Section 3, North Carolina, Article IX, Section 3, Vermont, Article II, Section 64); and a myriad of other details as to establishment, organization, and operation of public education. See generally Legislative Draft Research Fund, Index Digest of State Constitutions (1959) pp. 361 - 419.

In stark contrast, the Alaska Constitution provides merely that a "system" shall be "established and maintained" by general law, and that the system shall be "open" to all children of the State. The only specific prohibitions imposed by the constitution relate to the control by or support of sectarian interests. Commenting on a constitutional provision somewhat analogous to Alaska's, the Ohio Court of Appeals noted:

> When the General Assembly speaks on matters concerning education it is exercising plenary power and its action is subject only to the limitations contained in the Constitution. An examination of the Constitution reveals that the only prohibition in the Constitution concerning the exercise of this power over elementary and secondary education is as to religion . . . We can, therefore, indulge in generalities and make a broad statement to the effect that the Legislature of Ohio, in passing laws

> concerning elementary and secondary schools, is restrained only by its own conscience, fear of the electorate, and one section of the constitution. Board of Education of Aberdeen-Huntington Local School District v. State Board of Education, 189 N.E.2d 81, 83 (Ohio Ct. App. 1962).

The minutes of the Alaska Constitutional Convention, while concededly sparce regarding the area of public education, reinforce the conclusion that the type of school"system" to be "established and operated" in Alaska was left to the legislature. The Health, Education and Welfare Committee to the Alaska Constitution Convention originally proposed Committee Proposal No. 7 which read in pertinent part:

> The state shall establish and maintain by general law a system of public schools which shall be open to all children of the state . . .

The Committee on Style and Drafting substituted the word "legislature" for the word "state". (From the files of the Constitutional Convention kept in the legislative affairs library in Juneau.) According to the official minutes of the Constitutional Convention, this change (which was unanimously ratified by the Convention as a whole) was made "in order to pinpoint it to a particular division of the state government with the thought that the state is a combination of the executive, the judicial and the legislative branches. It was felt the intent was that the legislative branch was the one that should make provisions." Proceedings of the Alaska Constitutional Convention, pp. 3312, 3319. (R. 743)

It could not be more clear that the framers of our constitution intended that in Alaska, the legislature, and not the judiciary or the executive, was to establish the "system" of public education.

A review of our constitution indicates not only the dominance of the legislature in educational matters; it also indicates the broadest framework in which the legislature is to exercise its authority. The history of our constitutional convention does not reveal precisely where the language which ultimately became Article VII, Section 1, came from. However, the language used is closely analogous to the suggested model constitutional provision which the Committee on State Government of the National Municipal League endorsed at that time. The provision, which was apparently derived from the New York Constitution, Article IX, Section 1, reads:

> Sec. 1100. Public Education. The legislature shall provide for the maintenance and support of free common schools, wherein all the children of this state may be educated, and of such other educational institutions, including institutions of higher learning, as may be deemed desirable. Committee on State Government of the National Municipal League, Model State Constitution, 5th Edition, 1954, p. 19.

The explanatory comments for this section state:

> The provisions of article X are purposely couded in the broadest possible terms. Individual states seeking to incorporate these or similar provisions in their existing constitutions will frequently find it necessary to meet their special needs and requirements . . . It must be emphasized that the primary purpose of the committee here is to outline a general framework of constitutional powers which will guarantee to the state ample authority to establish and maintain a complete program of public welfare services. Id., p. 49.

It is remarkable indeed that in the face of language which is if anything more sparce than that cited above, appellants can seriously assert that Article VII, Section 1 imposes the duty to provide secondary schools in practically every populated enclave of the state

when Article VII, Section 1, by its own terms does not even require the establishment or operation of any secondary schools.[2/]

Indeed, a fair view of the system of public education in Alaska does reveal that it has been wholely established and implemented by the legislature, either directly or through delegated authority. Thus, while the constitution speaks of education for "all" children of the state, the legislature has defined what constitutes "school age". AS 14.03.070, AS 14.30.010. While the constitution provides that the system shall be "open", it was the legislature which determined that the schools would be "tuition free". AS 14.30.080(a).[3/] The legislature has provided when the schools would be open (AS 14.03.020 - 050), what grades may be offered (AS 14.03.060) who shall operate the schools (AS 14.08, AS 14.14.010, AS 14.14) and how the operation and construction of schools shall be paid for. (AS 14.08.120, AS 14.12.020, AS 14.17, AS 43.18,100, AS 43.45.010) Additionally, and of primary significance to the issue now on appeal, the legislature has also determined generally where and when schools may be established and/or operated, and what sort of public instruction may be offered. (AS 14.03.080, AS 14.07.030(1), (5), (10), (12), AS 14.08.090(12),

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2/ The appellants assert that our constitution "would not permit a school district now operating a high school to close the school and issue correspondence materials to the children." (Brief, p. 26). While not at issue in this case, respondents would, as a matter of constitutional law, disagree with this gratuitous statement.

3/ Appellants assert that "open" Article VII, Section 1, means at the very least, free of charge." While our schools are tuition free (AS 14.03.080(a), this aspect of the "system" would again appear to have been legislatively established.

(14), AS 14.08.100, AS 14.14.110, AS 14.14.120, AS 14.30.010, AS 44.27.020). This legislatively established scheme will be examined in the next section. At this juncture it should be noted only that if a right to attend secondary school in one's location of residence exists, it would have to be found in this legislative matrix, rather than in the Alaska Constitution.

This Court, while never directly addressing this problem, has provided precedent supporting both the need for and the existence of legislative authority to determine the exact nature of Alaska's "system" of public education. In Macauley v. Hildebrand, 491 P.2d 120 (Alaska, 1971), this Court upheld and enforced a statutory provision allowing school boards to maintain accounting control over funds appropriated for the operations of schools. The Court noted that under Article VII, Section 1, "no other unit of government shares responsibility or authority" with the legislature. Moreover, the Court specifically endorsed a legislative enactment which "delegate[d] certain education functions to local school boards in order that Alaska schools might be adapted to meet the varying conditions of different localities . . .", p. 122. (Emphasis added.)

Courts in other jurisdictions have also consistently recognized the need to allow the legislative authorities a free hand in developing solutions to complex education problems. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 43, 93 S. Ct. 1278, 35 L.Ed.2d 16 (1973); McInnes v. Sharpiro, 293 F. Supp. 327, 333, (N.D. Ill. 1968), affd sub. nom McInnis v. Oglivie, 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969).

That appellants read too much into Article VII, Section 1 is further indicated by rules of constitutional interpretation which this Court has previously developed and pursued. In Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), this Court was called on to interpret our constitutional provision relative to the right to trial by jury. Justice Connor there wrote for the Court that:

> . . . the wording of the constitutional guarantee as to the right to a jury trial in all criminal prosecutions must be read in the light of the established practice that existed in Alaska at that time . . . (p. 399)

Further on, the majority opinion continued:

> If, historically, jury trial had always been available on a broad basis in Alaska, it is only reasonable to conclude that the framers thought they were continuing an existing practice. (p. 400)

Examination of the provision of public education in Alaska prior to and at the time of the Constitutional Convention indicates an almost complete lack of local secondary programs in rural Alaska. See for instance, Frank Darnell "Systems of Education for the Alaska Native Population" in Education in the North (Darnell, ed.) 1972; Charles K. Ray Alaskan Native Education: An Historical Perspective (A Report Prepared for the Alaska Native Needs Assessment in Education Project), 1973; Warren I. Tiffany Education in Northwest Alaska, 1966; Don M. Dafoe, Some Problems in the Education of Native Peoples in Alaska (1959); Reports of the Commissioner of Education (issued bi-annually by the Alaska Department of Education). Generally, these reports indicate that until the mid 1960's, only a handful of rural communities possessed secondary programs. As late as 1950, up to 40 rural communities

possessed no school facilities or programs at all. Ray, op. cit., p. 9. Indeed, this Court has previously recognized the lack of educational attainment among rural Alaskans which formerly existed at this statehood. Alvarado v. State, 486 P.2d 891, 900 (Alaska 1971). In the face of the "established practice" which existed in Alaska at the time of statehood, therefore, it is again evident that appellants asserted the right to attend a secondary school in each village of the state is not compelled by the Alaska Constitution, Article VII, Section 1.

Ironically, perhaps, appellants themselves have in fact admitted that the right to attend a local secondary school in Alaska arises, if at all, from the statutes rather than the constitution. In their brief, appellants concede that "the statutes set forth certain circumstances under which children may be barred from school." (emphasis added) Brief, p. 24. They concede that the right to attend school may be limited where there are "fewer than eight children eligible to attend elementary and secondary school, AS 14. 14.120." (Id.) These exceptions are, of course, statutory. Even if appellant's statutory interpretations were correct, it is evident that it is up to the legislature, not the courts, to draw the line which indicates where local secondary programs can, or must, be provided. AS 14.14.120 refers to "eight" students. One can see no constitutional reason why it could not refer to 80 or 800. Appellants concede that "the constitutional right to attend school in [remote areas with less than eight eligible children] must yield to the reality that there are too few children present to constitute a school." (Brief, p. 25) Decisions concerning

"realities" of this sort are uniquely legislative. In areas where a constitutional right really exists, such limiting legislative decisions could not be allowed. Surely, for instance, indigent criminal appellants could not be legislatively denied the right to a transcript over a certain length. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Black students could not be compelled to attend separate schools from white students if there were less than a certain number of blacks (or whites) in a district. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), nor could a jury trial be denied in a criminal case where a certain area contained too few jurors. Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

From all of this it is evident that the Superior Court was correct in ruling that a right to secondary education in ones village of residence cannot be found in the Alaska Constitution, Article VII, Section 1.

2. While the Alaska Constitution does create a right to receive public education, which right has been granted to appellants, the right to attend a local secondary school in all populated areas of the state is not thus implied.

What has been said to this point should not, of course, be taken as refuting the right to receive a public education in Alaska, Dreese v. Smith, 501 P.2d 159 (Alaska 1972), nor is it in any way meant to denigrate the importance of education. What appellants fail to distinguish is the difference between the existence of a right, and the manner in which that right is provided in any specific instance.

From the record of this case, it is evident that each

of the appellants has in the past been provided the opportunity for free public secondary education either in conjunction with the various described boarding programs[1] or that have through correspondence study. The "right" which appellants here seek to vindicate, therefore, is a right not to education per se but rather to local secondary schools in their respective towns of residence. As is pointed out in various places in this brief, the respondents have, as a matter of policy, moved with increasing vigor toward providing secondary schools in remote areas. This is a matter of educational policy and discretion within the allowable perimeters of the legislative framework described in the following section. In no way could the asserted interest in secondary schools in ones location of residence be deemed a right, fundamental or otherwise, under the Alaska Constutition.

Appellants' apparent position that all matters relating to the provision of public education in Alaska involve a "fundamental right" so as to invoke strict judicial scrutiny is indeed

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[1] While it does not appear on the record, this Court should perhaps be informed that as of the 1973-74 school year, respondents no longer operate or sponsor regional dormitory programs. The dormitories were expensive to run and perhaps most fraught with conditions leading to non-school related problems. Closing of these dormitories, while hastened by the loss of federal funds, was also made possible by the drastic increase in local secondary programs which eliminated the need for spaces provided by these programs. Also not on the record but appropriate for this Court's consideration since judicial notice can be taken of legislative acts, is the fact that starting in the 1973-74 school year, the vast majority of the state's remaining domiciliary programs in conjunction with secondary education, are operated by various regional native associations, rather than directly by the state. See Free Conference Committee Report Fiscal Year 1975 Operating and Capitol Budget: Department of Education, p. 54.

not supported by the weight of authorities. Walgren v. Howes, 482 F.2d 95, 99 (1973); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Shofstall v. Hollins, 515 P.2d 590, 592 (1973); Millikin v. Green, 212 N.W.2d 711, 714 (1973). Even one of the amicus briefs filed in this case in support of appellants concedes that:

> Prior to Rodriquez, the phrase 'fundamental right' was employed somewhat loosely. A number of courts (citations omitted) had ruled, and a number of authorities, including Amicus, had argued, that education was in and of itself a fundamental right, and that any regulation affecting education was to be strictly scrutinized. Rodriquez has partially laid this motion to rest.
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> Upon careful consideration, the wisdom of the Court's ruling is apparent. The width of corridors in school buildings, the color scheme in classrooms, the materials to be used in the construction of educational facilities, the number and location of drinking fountains - all of these matters 'affect' education. Are such matters to be strictly scrutinized by the courts, and are differences between schools or educational systems to be upheld only where a compelling state's interest can be shown? The Court, understandably said no; relative differences within the public education system are ordinarily not proper subjects for strict judicial scrutiny. (Brief of The American Civil Liberties Union, pp. 10 - 11)