II. THE ESTABLISHMENT OF SECONDARY SCHOOLS IN SOME BUT NOT ALL LOCALITIES IN ALASKA SHOULD NOT BE FOUND BY THIS COURT TO CONSTITUTE A DENIAL OF EQUAL PROTECTION AS PROVIDED BY THE ALASKA CONSTITUTION, ARTICLE I, SECTION I.

A. Appellants affirmatively waived any equal protection claim before the Superior Court. They should not now be allowed to seek reversal due to that Court's adherance to their directive not to consider such a claim.

Appellants assert that the Court below failed to make an equal protection analysis. "Plaintiffs submit that this failure alone warrants reversal of the dismissal by the Court below." This argument appears particularly unwarranted as appellants specifically eschewed an equal protection claim below.

Throughout their opposition below, respondents assumed that the vague arguments in appellants' Motion for Summary Judgment constituted a claim under the equal protection clause of either the federal or state constitution. (R. 751 - 763) Appellees dealt with these issues at length. In their Reply Memorandum of Points and Authorities, however, plaintiffs stated:

> . . . in this motion plaintiffs do not seek to find the right to local secondary education in the broad, often vague language of the federal Equal Protection Clause, as defendants seem to think. Memorandum in Opposition, at 11 - 23 (R. 788 - 789).

Consideration under the state equal protection provision, while not controlled by federal decisions, is generally similar in the type of analysis used, and in fact, this Court normally looks very closely at federal precedent. Breeso v. Smith, 501 P.2d 534, (Alaska 1972). The state's equal protection analysis is equally "broad" and "vague". Appellants eschewed state as well as federal equal protection below. They should not now be heard to seek

reversal of the lower court decision which failed to address issues which they specifically directed it not to address!

B. Even if this Court were to consider appellants' untimely equal protection claim, the decision of the Superior Court should be affirmed since appellants have not been denied a fundamental right, nor have they been invidiously or arbitrarily discriminated against.

Appellants allege since most Alaskans are able to receive secondary education in their "communities of residence" and they are not, and since education is a compelling interest under the Alaska Constitution, that therefore they have been denied equal protection as guaranteed by Alaska Constitution Article I, Section 1. (Brief, pp. 40 - 46) Their equal protection claim is no more supportable than were in of the other claims already discussed and rejected.

1. Attending a secondary school in one's town or village of residence is not a fundamental right under the Alaska Constitution.

The United States Supreme Court has declared that public education is not a fundamental right under the Federal Constitution. San Antonio School District v. Rodriquez, op. cit. at 29 - 39. That court therefore refrained from employing the test of "strict judicial scrutiny", and instead viewed the Texas educational finance plan there before it pursuant to the traditional "rational basis" analysis. Id.; see also State v. Wylie, 516 P.2d 142, 145 (Alaska 1973). While this Court is not bound by the decisions of the United States Supreme Court in construing the Alaska Constitution, this Court usually does carefully look to the precedent which this Court has established. Breese v. Smith, op. cit. at 167.

Various state high courts have held education to be a fundamental right under their respective state constitutions,

Serrano v. Priest, 5 Cal.3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241, 1255-58 (1971); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1970). It is instructive though that since Rodriquez, state courts considering these sorts of educational issues have refrained from mechanically applying the "strict scrutiny" standard. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 282 - 285 (1973); Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590, 592 (1973); Millikan v. Green, _____ Mich. _____, 212 N.W.2d 711 (1973).

While this Court has had the opportunity, it has never declared education to be a "fundamental right" under the Alaska Constitution.[1/] Be that as it may, the Court need not reach this issue here, for as was noted in Section I.B.2 above, the interest which appellants assert does not amount to education per se. (R. 689 - 690, 692 - 693, 707 - 708, 724 - 725) Rather, it is the provision of secondary schools in their respective towns or villages of residence.

2. Appellants do not constitute a "suspect classification" nor have they been invidiously or arbitrarily denied a benefit provided to other school aged children in the state.

Lacking an identifiable constitutional right or interest, appellants' equal protection claim must per force rest on the

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1/ Breese v. Smith, 501 P.2d 159 (Alaska 1972) held that "children are possessed of fundamental rights under the Alaska Constitution" at 167. The court specifically averred to Article VII, Section 1 (at p. 167). However, the court there conspicuously avoided deciding the case on that basis. It rather chose to decide the case under "the Alaska Constitution's affirmative grant to all persons of the natural right to 'liberty'" under Article I, Section 1. 401 P.2d 168.

allegation that the benefit of secondary schools in their local villages has been denied on some impermissible or invidious basis. Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed.2d 811 (1963); State v. Wylie, op. cit., p. 146. Appellants, however, can show no such impermissible discrimination.

Initially, Count I of this case does not rest on, nor does the record contain, allegations of racial discrimination. (R. 116 - 118) The mere assertion that discrimination has occurred is not sufficient to demonstrate a denial of equal protection based on race. Malvo v. J.C. Penney Co., Inc., 512 P.2d 575, 581 (1973); Jefferson v. Hackney, 406 U.S. 535, 548, 92 S. Ct. 1724, 32 L.Ed.2d 285 (1972). Moreover, the record demonstrates that most small predominantly caucasian communities which are not easily accessible are also not provided local secondary schools. (R. 140) Alaska Natives in communities both large and small which do have local secondary schools are educated on equal terms with all others in such schools (R. 161, 851 - 852). There are indeed more predominantly Native communities with local secondary schools than non-Native communities with local secondary schools. (R. 139, 413 - 427)

Second, appellants are in no way locked into a status whereby a benefit is unalterably denied. As has already been stated, there will soon be a sharp drop in the number of the named plaintiffs who do not possess local secondary schools. The same is true about the "class" which they allegedly represent. It is typical of courts when deciding equal protection claims to con-

sider the steps which a state has taken to attempt to lessen or resolve existing differences. San Antonio School District v. Rodriquez, op. cit., p. 45, McInnis v. Shapiro, op. cit., p. 334, Briggs v. Korrigan, 307 F. Supp. 295, 303 (D.C. Mass 1969). The record in this case clearly demonstrates that substantial "efforts are being made at every level of involvement in the program to expand it, especially to reach those in the poorer communities . . .", Briggs v. Korrigan, op. cit.

Third, it is almost too obvious to require a statement that there do exist differences between appellants and other secondary school aged children which the state can quite permissibly recognize. Appellants live in small communities, while most of the people of the state live in more urban areas. Alvarado v. State, op. cit., at 895. Appellants live in isolated, relatively inaccessible communities, while most of the people of the state live in areas served by major highways or other transportation systems. Courts have uniformly recognized that small numbers of students in remote or inaccessible locations do not require provision of local schools. In Re: Dissolution and Distribution of School District Number 5 of Dodge County, 257 Minn. 409, 102 N.W.2d 30, 34 (1960). Davis v. Chilmark, 199 Mass. 112, 85 N.E. 107, 108 (1908); Fogg v. Board of Education of Union School District of Littletown, 76 N.H. 296, 82 at 173, 174 - 75 (1912); Herman v. Medicine Lodge School District No. 8, 71 N.W.2d 323 (N.D. 1955); Kreigor v. Drummond, 235 N.C. 8, 68 S.E.2d 800 (1952); Kling v. Nyquist, 317 N.Y.S.2d 477 (1971); Manjares v. Newton, 49 Cal. Rptr. 805, 411 P.2d 901, 909 (1966). The cost of living (including the

cost of construction) in the villages where appellants live is much higher than it is in the areas where most of the state's people live. In the case of rural secondary schools, this situation is intensified by the small number of students leading to large diseconomies of scale. Serrano v. Priest, op. cit., p. 125.

Further, appellants do not live in organized school districts. 2/ (R. 748) No costs of operation and construction of schools are borne by these local towns or villages. Most of the people in the state live in organized school districts, where local effort is required for the operation 3/ and construction of schools. This Court has itself recently recognized the Alaska

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2/ As appellants note (Brief, p. 41), a number of the places listed in their amended complaint as lacking local secondary schools are either city school districts themselves or isolated communities within organized borough school districts. (R. 139). Respondents filed with the Superior Court a Motion to Dismiss the Complaint for failure to name such districts as indispensible parties, or alternatively to compell appellants to join such districts as parties defendant. The Superior Court has not ruled on this motion, though it appears evident from its opinion below that it was considering only localities in the state-operated school district. (R. 872)

3/ It has been asserted by appellants and the Superior Court (R. 871 - 872) that the Foundation Support Program supplies organized school districts with at least 90% of the cost of operating their schools. This is not precisely true. The Foundation formula provides at least 90% of basic need (AS 14.17.021(b)) a figure determined by a series of mathematical calculations. (AS 14.17.021(b) and (c)) The state pays from 90% to 100% of basic need, the exact amount varying inversely with the districts' valuation per pupil in average daily membership. The difference between basic need and state aid is supplied by the districts' required local effort. (AS 14.17.071) However, nothing prevents any given district from spending more than their "basic need". As a result, a number of school districts receive less than 90% of their actual total educational expenditures from the state. (R. 448 - 449)

Constitution's bias favoring organized local governments. Mobil Oil Corporation v. Local Boundary Commission, op. cit., 98 - 99. As noted in that case, the Alaska Constitution, Article X, Section 1, expresses a policy "to provide for maximum local self-government."

It might be noted in passing that a number of courts have recognized the importance of "local control" of schools, and also the fact that responsibility can be expected to go hand in hand with local control. Within the past few days, the United States Supreme Court has again reaffirmed this principle:

> No single tradition in public education is more deeply rooted than local control over the operations of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public school, and to quality of the educational process. Milliken v. Bradley, 42 L.W. 5249, 5257 (1974)

See also Wright v. Council of the City of Emporia, 407 U.S. 451, 469, 33 L.Ed.2d 41 (1972); San Antonio School District v. Rodriquez, op. cit., 49 - 53.

These are substantial differences which can, and under the statutory scheme laid out by the legislature and the constitution, must be considered. Differences in the manner in which state services are provided based on these factors does not constitute a denial of equal protection under either the federal or the state constitution.

3. That small local secondary schools have been or are being established in some but not all rural villages and towns does not constitute a denial of equal protection.

Respondents, of course, concede that local rural secondary schools do exist in many towns and villages in the state. They further concede that additional secondary schools are being

provided in some but not all isolated rural towns and villages. Emmonak, for instance, has a new high school about to open, while Kwigillingok does not. In dealing with complex situations of deep social significance, the state need not choose between attacking every aspect of the situation or not addressing that situation at all. Dandridge v. Williams, 397 U.S. 471, 486 - 487, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970); Jefferson v. Hackney, op. cit.; Williamson v. Lee Optical, 348 U.S. 483, 75 S. Ct. 461, 99 L.Ed. 563 (1955); San Antonio School District v. Rodriguez, op. cit., at 51; Briggs v. Kerrigan, 431 F.2d 967, 969 (1st Cir. 1970).

4. The non-applicability of the state's compulsory education law to school aged children who do not live in the vicinity of an established secondary school does not constitute an invidious discrimination.

Appellants also assert that it is a denial of their right to education by respondents to fail to make them subject to Alaska's compulsory education law. AS 14.30.010. (Brief, pp. 20, 30, 36) This argument is at least novel. It would appear that most, if not all previous judicial consideration has involved situations where it has been asserted that the application of compulsory attendance laws violates the rights of those who are subject to them. Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1400, 32 L.Ed.2d 15 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925); In Re: Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1965); Application of Auster, 100 N.Y.S.2d 60, 198 Misc. 1055 (1950).

Appellants, it would appear, fail to fully appreciate the rationale behind compulsory education laws. Essentially, they are established for the benefit of the state rather than the students who are compelled to attend.

It may well be that the school aged children are beneficiaries of this state policy. However, compulsory attendance laws are not needed for this purpose, as school aged children are in any event entitled to tuition free education in Alaska, AS 14.03.080, regardless of the distance which they might live from a school. Certainly, the fact that one is not compelled to take advantage of a statutory or constitutional right does not mean that the right has been denied or abridged. Respondents therefore fail to see any relevance to the non-applicability of the state's compulsory attendance law. AS noted in Section I.B. above, if anything, these laws serve to reinforce the view taken by respondents that secondary schools do not have to be established within daily access of every child in the state.

CONCLUSION

The Superior Court demonstrated particular sensitivity to both the magnitude and the sensitivity of the basic problem which appellants have attempted to have resolved through judicial scrutiny. The court referred to the problem of secondary education in rural Alaska as involving "a number of the most important questions of contemporary Alaska public policy." (R. 867) The court recognized the difficulty and interest tension involved in any system which attempts to assist the rural native student "who wishes to share this century's remarkable advances in science technology without sacrificing his own valuable cultural tradition in the process." (R. 867-8) Upon its thorough examination of applicable constitutional and statutory provisions, the court held that "nothing in the constitutional provisions or the statutes require a secondary school or even a program of secondary education in each individual town or village within the unorganized borough." (R. 872) In concluding, the court again stepped back from its legal analysis:

> . . . I do not mean, by denying plaintiff's summary judgment in a manner casting doubt on the legal sufficiency of their Count I, to downgrade the importance of the local school vs. boarding school controversy which I consider for reasons previously mentioned one of the most important facing the state today. I only mean that under our system the reconciliation of quality education with local education is one to be resolved in the legislative and executive departments, and not the courts. (R. 875)

Respondents, of course, could not agree more as to the importance of education. They also are, and have been aware of the problems involved in bringing quality secondary education to

rural education. The substantial resources, both financially and in terms of man hours, which has been devoted to these problems surely indicate the existence of this concern and the fact that this concern has been transformed into on-going programs and policies to deal with these complex problems. Appellants would concede also that substantial problems still exist and that the efforts which were put forth two years ago would not be satisfactory today, any more than the efforts now existent will be totally satisfactory as a status quo years from now.

However, respondents would note that importance of a problem does not per se make it subject to judicial resolution. Horace v. McGinnis, 494 P.2d 534 (Alaska 1972); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); San Antonio School District v. Rodriquez, 411 U.S.1, 93 S. Ct. 1278, 35 L.Ed.2d 16 (1973); Nor does the fact that past efforts at resolving a serious social problem have been less than a total success mean that the judiciary either ought to or is qualified and able to step in and impose the total resolution. Milliken v. Bradley, op. cit.; San Antonio School District v. Rodriquez, op. cit., p. 55; Dandridge v. Williams, op. cit.; Delgadio v. Fawcett, 515 P.2d 710, 712 (Alaska 1973); Jefferson v. Hackney, op. cit.; Robison v. Cahill, op. cit., 277 ff; Carle v. Carle, op. cit..

The decision of the Superior Court must therefore be affirmed by this Court.

Respectfully submitted,

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DATED at Anchorage, Alaska, this 7th day of August, 1974.