B. The legislature has established a "system" of public education in the state which allows for, but does not require the establishment of local secondary schools in isolated, sparsely populated areas of the state.

The Alaska Constitution, Article VII, Section 1 directed the legislature to "establish and maintain a system of public schools open to all children of the state . . ." The legislature recognized this mandatory responsibility and "established in the state a system of public schools." AS 14.03.010. (R. 872) General authority to administer this system was delegated to the state board and Department of Education. AS 44.27.020; AS 14.07.020(1). Actual operation of the system was made the responsibility of the Alaska State-Operated School System in the unorganized borough (AS 14.08.010; AS 14.12.020(a)) and city or borough school boards in the organized areas. (AS 14.12.020(b); AS 14.14.090(2))

The essential questions raised by appellants in this appeal is as to the nature of this "system". They seek to have this Court declare that the "system" must include local secondary schools in practically every village or town in the state. The legislature, however, has not mandated such system, and it is not the proper role of this Court to usurp the legislative perogative in this area. Alvarado v. State, 486 P.2d 89, 906 (Alaska 1971); Macauley v. Hildebrand, 491 P.2d 120, 122 (Alaska 1971).

1. Statutory Provisions relied on by appellants do not create an obligation to provide secondary schools in every village and town in the state.

There does not exist under Alaska statutes a duty to provide classes or to build schools where there are at least 8 school aged students, or any other number of potential students

for that matter. Appellants can nowhere point to a general statutory requirement to establish secondary schools or provide secondary classes. AS 14.03.060 defines elementary, junior and senior high schools in terms of grades served,[1/] but it does not say if or when such programs must be offered. AS 14.03.070 defines "school age" as to be from 6 to 20 or completion of grade 12. It does not say where, or in what form, schooling is to be received.

AS 14.03.080 establishes a right to free public education for any school aged student who desires it. Generally, education is to be provided in a student's "district of residence". If a student elects to attend a public school in other than his district of residence, tuition can be charged by the district where he does attend. 4 AAC 09.030.

Under certain circumstances, a student may be required to attend school other than in his district of residence. AS 14.14.110, AS 14.14.120, AS 14.30.285 - 295. Where this occurs, his public education remains free, and he is not required to bear the expense either of travel or his education. Therefore, AS 14.03.080(a) then gives the school aged children of the state the right to participate tuition free in the "system" which is available. It does not prescribe the nature of that system.

AS 14.14.110 empowers "school districts" to enter into certain types of "cooperative arrangements" which would perhaps

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1/ It should be observed in passing that the American Civil Liberties Union are in error when they claim that appellants are forced to leave their home to obtain "education beyond the sixth grade." (ACLU Brief, p. 2)

be beyond their authority otherwise. As is stated expressly in the first sentence of this section, its purpose is to facilitate "more efficient or more economical educational services" through cooperative arrangements between a school district and other school districts, state-operated schools, and/or the Bureau of Indian Affairs.

The language in the last sentence of this section on which appellants rely is essentially a proviso to this section. It lists exceptions to the districts' ability to make such arrangements. It is not a general provision requiring establishment of secondary schools or classes wherever there are at least 8 school aged children and conferring individual rights to that end. 2/

A well established rule of statutory construction forbids making a rule of general applicability from such a proviso to a single statutory section. Application of Babcock, 387 P.2d 694, 696 (Alaska 1963); State v. American Can Company, 362 P.2d 291, 297 (Alaska 1961). Rather, such a proviso is to be narrowly construed, Application of Babcock, 387 P.2d 694, 696 (Alaska 1963) and read with an eye to the whole instrument. State v. City of Anchorage, 513 P.2d 1104, 1110 (Alaska 1973). Had the legislature intended to require that secondary schools be established wherever certain specific conditions were met, such as physicial presence

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2/ Examination of the language of Sec. 2 ch. 64 SLA 1972 and the Governor's cover letter (R. 745) indicate that the 1972 amendments to this section did not alter the basic intent of this section. If anything, these changes served to increase the authority of the Department of Education to regulate educational services so as to facilitate educational and economic feasibility and efficiency.

of 8 eligible students, it would have so provided. As will be discussed in detail, and as the Superior Court held below, the system established by Title 14 contains no such requirement. Rather, it demonstrates a firm commitment to substantial flexibility and the application of sound administrative discretion in tailoring one system to the intricate and widely diverse circumstances of the state. Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92, 99 (Alaska 1974).

Appellants also look to AS 14.14.120 to buttress their assertions. They apparently contend that this section reflects a judgment "that a minimum of eight children is necessary for a school to come into being." (Brief, p. 25) By its terms, however, AS 14.14.120 indicates when an already existing school district may suspend its operations. It does not speak to individual schools as such. Of more significance to the instant discussion, it does not speak to the problem of when a new school or a new school district must be created. It is evident that the considerations involved in discontinuance of an on-going institution would differ from those involved in determining whether or not to initiate a new institution. Undoubtedly, the minimum threshhold for continued operation would be lesser than that ordinarily required to justify creation of a new operation. Thus, AS 14.14.120 does not establish the requirement which appellants here assert.

While neither AS 14.14.110 nor AS 14.14.120 support on their face appellants' contentions, any uncertainty which might exist is removed by an examination of the legislative history of

these two sections. Both AS 14.14.110 and AS 14.14.120 appeared in Alaska Statutes for the first time in 1966 as part of an omnibus bill recodifying Title 14 (§1 ch. 98 SLA 1966). These particular sections first appeared in the committee substitute for the house bill which eventually became ch. 98 SLA 1966. When this committee substitute was introduced, the House Health, Welfare and Education Committee requested from the Department of Education a fiscal note as to the economic impact of this proposed bill. This fiscal note was at the request of the legislature incorporated in the House Journal when CSHB 12 am passed, 1966 House Journal, March 22, 1966, p. 683. This fiscal note (R. 767) became part of the legislative history on that bill. It is evident from this note that neither the Department of Education nor the legislature envisioned or intended that either AS 14.14.110 or AS 14.14.120 would "increase costs to the state." (R. 767) Indeed, no additional appropriation was made by the state legislature, or any subsequent legislature to fund either of these sections. Given the extreme costs of rural school construction[3/] plus the higher costs of operation occasioned as a function of both smallness, Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 1251 (1971) and cost of living differences, this expression of legislative intent is wholly inconsistent with the requirement which appellants would read from these sections for it abundantly clear that the cost of imposing appell-

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3/ This Court can take judicial notice of the fact that in the most recent general bond issue for rural school construction authorized by the legislature, a general cost figure of $200.00 per square foot was used, ch. 142 SLA 1974.

ants' claims would be many millions of dollars.[4/]

2. Additional provisions of the Alaska Statutes not discussed by appellants indicate that local secondary schools may be established only when economically and educationally sound.

Below, and in their Brief to this Court, appellants have chosen to hurriedly skip over or wholly ignore the pertinent sections of the Alaska Statutes which clearly indicate that the "system" of public education as established by the legislature does not include the requirement of providing secondary schools in every populated town or village in the state. AS 14.08.090 provides that the board of directors of the state-operated schools shall "(12) establish, maintain, operate, discontinue and combine state-operated schools where it considers necessary." Subsection (14) of that same section directs the board of directors of the state-operated schools to "pay tuition and boarding or transportation costs of secondary school students in cases where the establishment of state-operated secondary schools is unsound for economic or educational reasons." Taken together, these two provisions clearly indicate broad discretion on the part of the board of directors. They are utterly antagonistic to and irreconcilable with appellants' interpretation of AS 14.14.110 and AS 14.14.120.

The only limitation upon the reasonable exercise of this

4/ This Court can take judicial notice of the fact that the sum of $76.6 million has been authorized since 1970 for rural school construction, ch. 170 SLA 1970, ($20.3 million); ch. 195 SLA 1972 ($16 million); and ch. 142 SLA 1974 ($40.3 million).

administrative discretion is provided for in AS 14.08.100 which reads:

> The board of directors shall submit all plans relating to the establishment, discontinuance, or combining of schools to the department, and may not execute these plans until they are approved. The plans shall be considered approved unless they are disapproved by the department within 120 days of submission.

See, City of Nenana v. Alaska State-Operated School System, No. 71-643 Superior Court, Fourth Judicial District at Fairbanks (Memorandum Opinion); Johnson v. State-Operated School System No. 71-767 Superior Court, Fourth Judicial District at Fairbanks (Memorandum Opinion).

Accordingly, there can be absolutely no doubt that in the case of the unorganized borough, both the State-Operated School System and the department have been authorized to provide schools only where both have found that schools are necessary and economically and educationally sound.[5/] Indeed, a fair reading of the statutes suggests that they lack authority to establish secondary schools

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5/ In discussing the type of discretion vested in a board of education under a statute which allowed for certain types of student transfers when "desirable", the Kentucky Supreme Court said:

> In our opinion, the word 'desirable' is not used in the sense of personal preference either on the part of the parents or the children, or the board of education, or the teacher. What is meant by desirable in the sense of being for the best interest of the school and the pupils, and whether or not the transfer is desirable from that standpoint is a matter to be determined by the board of education and not by the parents or children, who might never consent to the change, although not to do so would seriously impair the educational advantages of all concerned.

Brown v. Bailey, 238 Ky. 287, 37 S.W.2d 58 (1931).

in the absence of such findings.

In the case of organized school district, AS 14.12.020(b) provides generally that:

> Each borough or city school district shall be operated on a district-wide basis under the management and control of a school board.

See also, AS 29.33.050, AS 29.43.030 and AS 14.14.065. The duty of such school boards is to "provide for, during the school term of each year, an educational program for each school age child who is a resident of the district," AS 14.14.090(2) (emphasis added) Provision of an "educational program" does not by its own terms, or in the context of the total statutory scheme, translate into a duty to provide "local secondary schools". With regard to school construction and particularly to the location of schools, AS 14.14.060(d) states:

> The borough assembly shall determine the location of school buildings with due consideration to the recommendations of the borough school board.

Furthermore, AS 14.17.031(c) which allows a favored treatment under the foundation support for rules for districts "operating a school in a remote area" is permissive, rather than mandatory. Thus, the organized school district, like the department and the state-operated schools, have not been commanded by the legislature to locate secondary schools in each populated area within district boundaries.

An additional section supportive of the discretion to be used in determining whether or not to establish local secondary schools is found in the state's compulsory attendance law. AS 14.30.010. It generally requires children from 7 to 16 to "attend

school at the public school in the district in which the child resides during each school term." However, AS 14.30.010(b)(7) exempts from this requirement any child who "resides more than two miles from either a public school or a route on which transportation is provided by the school authorities . . ." Clearly, by realizing that children would in some cases live beyond daily access to established public schools, the legislature has also indicated that schools within the daily access of all secondary students cannot or need not be established where it is economically or educationally unsound to do so. AS 14.08.090(14). In such circumstances, an "educational program" must, nonetheless, be provided at no cost to those school aged children who desire to enroll. AS 14.03.080(a); AS 14.08.010(a); AS 14.14.090(2). However, it is not compelled that this "educational program" be a local secondary school.

3. As part of the state's educational system, it is permissible to condition provision of local secondary schools on economic feasibility.

Appellants have belittled the concern expressed over economic and educational feasibility. (Brief, pp. 31 - 37). Concerning the economic argument, appellants contend that failure to provide local secondary schools for such a reason would constitute an impermissible attempt to "abridge constitutional rights as a means of saving money." (Brief, p. 32) Respondents would, of course, agree that total denial of individual constitutional rights strictly as a means of cutting costs would be impermissible. State v. Wylie, 516 P.2d 142, 149 (Alaska 1973); Alvarado v. State, 486 P.2d 891, 905 (Alaska 1971); San Antonio School Dis-

trict v. Rodriguez, 411 U.S.1, 37, 93 S. Ct. 1278, 35 L.Ed.2d 16 (1973); Palmer v. Thompson, 403 U.S. 217, 226, 91 S. Ct. 1940, 29 L.Ed.2d 438 (1971); Hosier v. Evans, 314 F. Supp. 316, 320-21 (D.V.I. 1970); Manjares v. Newton, 49 Cal. Rptr. 805, 41 P.2d 901 (1966); Justice v. Board of Education, 351 F. Supp. 1252, (S.D.N.Y. 1972). This, however, is not what has occurred, for, as has been shown in Section IA of this Brief, no constitutional right has been denied. Secondary education has been made available to appellants. They question the manner in which it has been provided. The case on appeal is this different from Hosier v. Evans, op. cit., where there occurred a total denial of any public education in local areas where schools did exist. Judd v. Board of Education, 275 N.Y. 200, 15 N.E.2d 576, 118 A.L.R.2d 789 (1938), relied on by appellants is also inapplicable since in the instant case, schools are "sufficiently numerous so that all children of the state may receive their education . . ." Id., at 579. See also San Antonio School District v. Rodriquez, 411 U.S.1, 20 ff, 93 S. Ct. 1278, 35 L.Ed.2d 16 (1973); Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956).

The case on appeal is perhaps most analogous to the situation which arose several years ago when the Congress first instituted the National School Lunch Act. Under regulations adopted in a number of states, free and reduced priced lunches were typically made available only in schools which already possessed lunchroom and cafeteria facilities. As a result, a benefit accrued to that class of students who had a "local" lunchroom facility available, while the benefit was not provided to others who

lived in areas where such facilities were lacking. In the leading case challenging this situation, the federal district court in Boston rejected the claim put forth by students in schools lacking cafeteria facilities. Briggs v. Kerrigan, 307 F. Supp. 295 (D.C. Mass. 1969) aff'd. 431 F.2d 967 (1st Cir., 1970). The district court held that this was not a situation where a "fundamental right . . . is conditioned in a way that puts a price on the priviledge, thus precluding the poor because of their inability to pay." 307 F. Supp. at 302. The court went on to note:

> If in order to save costs, Boston were to eliminate from the program half of the schools that do have kitchen facilities, the situation would then be similar to that in the Shapiro case. Here, however, what Boston has avoided are expenses unique to schools without facilities and of a totally different nature from those it is already incurring as costs of administering the program. Boston's fiscal purpose is therefore not arbitrary. Tax dollars must be allowed among a wide range of competing community interests. Id. at 304.

Interestingly, the situation regarding the school lunch program was subsequently changed on the basis of Congressional action. A federal district court reviewing the situation after the intervening legislative action, noted:

> Citizens may not be compelled to forego their constitutional rights because official . . . desire to save money. Palmer v. Thompson, 403 U.S. 217, 226, 91 S. Ct. 1940, 1945, 29 L.Ed.2d 438 (1971). That pretty observation reflects, among more important things, that the marginal analysis, whether dismal or not, is for people other than judges and for contexts other than constitutional law. It is not a court's business to choose, as a matter of taste or political advantage, among school football teams, dance bands, and lunches for hungry children. It seems enough here, as we have said, that Congress has chosen.

Justice v. Board of Education, 351 F. Supp. 1252, 1267 (S.D.N.Y. 1972).

This Court too has recognized that cost can be a legitimate concern in the manner in which state services, even involving constitutionally protected rights, are provided, and that the decision regarding costs is a legislative one. Thus, for instance, in Alvarado v. State, 486 P.2d 891 (Alaska 1971), this Court noted that in making the determination of the "community" from which juries could be selected in criminal cases, the election district's alternative might be preferred since the legislature had already chosen under 126 SLA 1971 to make the Senate election districts the proper venue for criminal trials.

> . . . [I]t may reasonably be anticipated that the overall effect of this legislation will be to require numerous trials within the election district in which the crime has been committed. The administrative and financial impact of selecting jurors from within the election district in which the crime occurred will be considerably diminished given the fact that trial will at any rate have to be held within the district. 486 P.2d at 905.

Again, as happens in a number of areas, the very argument which appellant puts forth to refute respondent's position also serves rather to support respondent's contentions. Appellants assert (Brief, p. 34) that "the cost in many villages [of local secondary schools] may be de minimus." (Emphasis added.) Of course, this is precisely the sort of analysis which the legislature has mandated and respondents have pursued, rather than requiring a blanket construction program for all areas, in total disregard of costs.

4. Determination of soundness of the educational program is properly a consideration to be made by the legislature and educational authorities, rather than courts, in considering establishment of secondary schools in sparsely populated locations.

Turning to the question of possible educational deficiencies in local secondary programs, appellants assert that respondents' publications have indicated the validity of local secondary programs from an educational standpoint. (Brief, pp. 35 - 36) This is, of course, true, but not as a universal axiom. In the Small Secondary Schools Administrative Manual, (R. 801 - 836) on which appellants put so much credence, it is specifically noted that:

> There is no single type of education that will please all individuals or groups of individuals. Parents in some . . . (R. 805)

The manual itself specifically describes itself as addressing only one of a number of permissible alternatives. (R. 806)

Moreover, it might also be noted that the question of educational feasibility is not one on which educators generally agree. While the very small local high school is currently preferred by the respondents, there would not be universal agreement with this preference, nor would their preference apply in every location in the state. One leading Alaskan educator has recently noted that:

> Most small communities with elementary schools are unable to support a high school program . . . Although small elementary schools may be operated with only one teacher, much more difficulty arises in successfully operating small high schools. Frank Darnell, "Systems of Education for Alaska's Native Population" in Education in the North, (Darnell ed.) 1972, at 295.

See also, Dr. Charles Ray, Alaskan Native Education: An Historical Perspective (1973) p. 16.

This then is an educational, social policy question of precisely the type on which courts defer to the expertise of legislative and administrative bodies. San Antonio School District v. Rodriquez, op. cit. at 42 - 43; Milliken v. Bradley, 42 L.W. 5249, 5257 (1974); McInnes v. Shapiro, op. cit. at 336; Briggs v. Kerrigan, 307 F. Supp. 295, 304 (1969); Breese v. Smith, 501 P.2d 159, 177 (Alaska 1972) (concurring opinion). This Court has recognized that the widely diverse conditions in Alaska require varying and flexible solutions. Macauly v. Hildebrand, op. cit. at 122; Alvarado v. State, op. cit. at 905; Breese v. Smith, op. cit.; Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92 (1974); Carle v. Carle, 503 P.2d 1050 (Alaska 1972). The question of what may or may not constitute "sound education" in the varying circumstances of rural Alaska is just such a situation. The legislature has recognized this, and this Court must respect that determination.

5. Correspondence study is a constitutionally permissible, statutorily recognized, and educationally sound component of Alaska's "system" of public schools.

A word should no doubt be said concerning the place of correspondence study in the "system" of public education. Initially, respondents concede that the program of secondary correspondence study which has been provided has not always been as good as would be desired. In part, this is no doubt due to the emphasis which has been placed on actual physical presence in a classroom situation by respondents, in accord with the traditional preference for such presence over correspondence study. In Re Shinn, 195 Cal.App.2d 683, 16 Cal. Rptr. 165 (1961). The recent substantial

increase in appropriations to respondents' secondary correspondence programs will undoubtedly strengthen them to desirable levels. Free Conference Committee Report Fiscal Year 1975 Education Operating Budget, p. 60.

Respondents would observe, however, that correspondence study is a constitutionally and statutorily acceptable, as well as being an educationally sound alternative to actual classroom participation. See Deposition of Margaret Justice, p. 55ff (R. 348). Our statutes indeed specifically envision that correspondence courses will be part of the state's "system" of public education. AS 44.27.020(1) states it is the duty of the department of education to administer the state's program at the elementary and secondary levels, including programs of vocational education, vocational education, library services and correspondence courses . . ." (Emphasis added.) While the predominant bias may well continue to favor the actual classroom experience over correspondence, is per se unconstitutional or illegal.

The Attorney General's Opinion to which appellants refer (Brief, pp. 25 - 27) does no more than recognize this traditional preference for the actual classroom experience and inform the department of education that such a preference could be, under our statutes, as a matter of administrative discretion, imposed upon organized school districts. (R. 41) As noted in that opinion, our statutes impose on organized school districts the general duty to provide "an educational program for each school age child." (AS 14.14.090(2) (R. 42) This obligation would appear to be less than a duty to provide actual classrooms and teachers in all cases.

Indeed, as was noted in that opinion (R. 43) the permissive nature of AS 14.17.031(c) reinforces the conclusion that while involvement in actual classroom learning may be preferred, provision of such is not required.

Appellants are particularly in error in assuming that the use of the term "school" in Alaska Constitution, Article VII, Section 1 cannot "remotely be construed to near correspondence study." (Brief, p. 25) It would be completely contrary to the leeway allowed in our constitution to so narrowly construe the word "school" as to exclude any new, innovative, or unusual educational program which does not occur between the four walls of the proverbial little red school house in the presence of a teacher and other students. State v. Peterman, 32 Ind. App. 655, 70 N.E. 550, 551 (1904); Commonwealth v. Roberts, 34 N.E. 4024 (1893). Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923).