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The General Assembly, at its regular session in 1955, enacted a law for the enrollment of pupils in the public schools.[1] This had been recommended by the Governor's Special Advisory Committee on Education and was designed to meet the "School Segregation" decision.[2] The Governor's Committee was of the opinion that "the enrollment and assignment of children in the schools is by its very nature a local matter." It recommended that "complete authority over these matters should be vested in the county and city boards of education." And this is exactly what the 1955 Pupil Enrollment statute appears to do.[3]

By Joint Resolution,[4] the General Assembly also approved "the report of the Governor's Special Advisory Committee on Education and the brief of the Attorney General of North Carolina filed in the Supreme Court in the pending segregation cases" and provided for "a continuing study of the problems which may arise as a result of the decision of the United States Supreme Court on May 17, 1954" by creating "The Advisory Committee on Education" which was directed to advise the Governor, the General Assembly, the State Board of Education and local school boards throughout the state. The April 5th., 1956, report of this committee (the Pearsall Committee) recommended that a special

* This article follows the plan of "Statutory Changes in North Carolina," which the LAW REVIEW publishes every two years following the regular session of the General Assembly. It is descriptive of the legislation passed. It raises questions and points to answers. Interested readers are directed to much more exhaustive treatments of the problems raised by the public school segregation cases and recent state legislation. The RACE RELATIONS LAW REPORTER, which began publishing in February, 1956, contains court decisions, legislation, administrative action, Attorneys General opinions and general articles on pertinent subjects. See: *State Action: A Study of Requirements under the Fourteenth Amendment,* 1 RACE REL. L. REP. 613-637 (1956); *The Three-Judge Federal Court: A Study of Injunctions against Discriminatory State Action,* 1 RACE REL. L. REP. 811-832 (1956). See also: McKay, *"With All Deliberate Speed." A Study of School Desegregation,* 31 N. Y. U. L. REV. 991-1090 (1956); Comment, *Constitutional Law—Equal Protection—Legality of Plans for Maintaining School Segregation,* 54 MICH. L. REV. 1142-1170 (1956); Note, *Obstacles to Federal Jurisdiction: New Barriers to Non-Segregated Public Education in Old Forms,* 104 U. OF PA. L. REV. 974-997 (1956); *Legislative Proposals in the South against Integration,* 16 LAWYERS GUILD REV. 83 (1956).

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[1] N. C. GEN. STAT. §§ 115-176 to 115-179 (1955).

[2] Brown v. Board of Education, 347 U.S. 483 (1954), 349 U. S. 294 (1955).

[3] Survey of Statutory Changes in North Carolina in 1955, 33 N. C. L. REV. 513, 552-555.

[4] N. C. Sess. Laws 1955, Resolution 29.

session of the General Assembly be called "this summer to consider submitting to the people the question of changes in our State Constitution."

"We recommend that this Legislature cause to be submitted to a vote of the people of North Carolina constitutional amendments, or a single amendment to achieve these desirable and, we think, necessary results:

"1. Authority for the General Assembly to provide from public funds financial grants to be paid toward the education of any child assigned against the wishes of his parents to a school in which the races are mixed—such grants to be available for education only in non-sectarian schools and only when such child cannot be conveniently assigned to a non-mixed public school.

"2. Authority for any local unit created pursuant to law and under conditions to be prescribed by the General Assembly, to suspend by majority vote the operation of the public schools in that unit, notwithstanding present constitutional provisions for public schools."

Acts of the 1956 Special Session

The 1956 Extra Session of the General Assembly followed the recommendations of the Advisory Committee on Education.

Chapter 1 is an act to amend the Constitution of North Carolina, Article IX, by adding a new section 12, as follows:

"12. Education expense grants and local option. Notwithstanding any other provision of this Constitution, the General Assembly may provide for payment of education expense grants from any State or local public funds for the private education of any child for whom no public school is available or for the private education of a child who is assigned against the wishes of his parent, or the person having control of such child, to a public school attended by a child of another race. A grant shall be available only for education in a nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, a grant shall, in addition, be available only when it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race.

"Notwithstanding any other provision of this Constitution, the General Assembly may provide for a uniform system of local option whereby any local option unit, as defined by the General Assembly, may choose by a majority vote of the qualified voters in the unit who vote on the question to suspend or to authorize the suspension of the operation of one or more or all of the public schools in that unit.

"No action taken pursuant to the authority of this Section shall in any manner affect the obligation of the State or any political subdivision

or agency thereof with respect to any indebtedness heretofore or hereafter created."

Chapter 2 provided for a general election to be held on September 8, 1956, to vote on the adoption of amendments to the Constitution of North Carolina.

The above amendment authorizing education expense grants for private education and authorizing a local vote to suspend local schools was approved by the voters by a margin of four to one and is now part of the North Carolina Constitution.

Chapter 3. Education Expense Grants.

Every child, residing in the State, is entitled to apply for an education expense grant if (a) no public school is available or (b) the child is assigned to a public school attended by a child of another race, against the wishes of his parent or guardian. As further conditions, such grants shall be available only (1) for education in a private nonsectarian school and (2) when it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race.

A nonsectarian school is defined as a school whose operation is not controlled directly or indirectly by any church or sectarian body or by any individual or individuals acting on behalf of a church or sectarian body. State and Local education expense grants are authorized, the amount to be equal to the per capita cost of public education to the State or the local government during the preceding school year. On the basis of expenditures during 1955-56, a state grant would amount to $135.00. Local expense grants would be much less.

The conditions of eligibility for a state education expense grant, as well as for a local grant, are, as follows:

1. Application must be filed with the Board of Education of the Administrative unit within which the child resides.[5] This application shall be on standard forms prescribed by the State Board of Education, shall specify the number of school days for which the grant is requested and be signed, under oath or affirmation, by the parent or guardian of the child for whom the application is made.

2. The Board of Education shall approve an application, if it finds

(a) Residence of the child within the administrative unit; and

(b) That there is no public school available for such child or such child is now assigned against the wishes of his parent or guardian to a public school attended by a child of another race, and it is not prac-

[5] Residence may refer to a child's legal domicile or to the child's actual residence at the time. Note, *Statutes—Interpretation of "Residence,"* 33 N. C. L. REV. 697 (1955). Note, *Residence or Domicile—Non-resident Motorist Statutes,* 33 N. C. L. REV. 680 (1955).

ticable to reassign such child to a public school not attended by a child of another race; and

(c) Such child is enrolled in or has been accepted for enrollment in a private nonsectarian school, recognized and approved by Article 32 of this Chapter.[6]

3. Upon approval of the application, the Board shall give notice in writing to the parent or guardian of an educational grant commitment for a specified number of school days, not to exceed 180.

In case of disapproval of an application for a state or local education expense grant, the following procedure is set up:

1. The Board of Education shall notify the applicant by registered mail.

2. The applicant may, within 10 days after receipt of notice, apply to the Board for a hearing.

3. The Board shall provide a prompt and fair hearing on the question of entitlement to an education expense grant and shall render a prompt decision.

4. If the Board affirms its disapproval, notice shall be given to the applicant by registered mail.

5. The applicant, within 10 days, may file a petition in the Superior Court for a hearing on all questions of fact and of law. Notice of this petition is to be served on the Board of Education.

6. The Board has 15 days after receipt of notice within which to prepare and furnish to the petitioner or his attorney a certified transcript of the record in the case for filing in the Superior Court, which record shall include a copy of the application and any official orders and rulings of the Board in the case.

7. The petition may be heard by the resident judge of the district or by the judge presiding at a term of court in that district, who shall have authority to take testimony and examine into the facts, determine all questions of fact and law and enter judgment.

8. Appeal by either the applicant or the Board from such judgment to the Supreme Court.

Payments of education expense grants shall be made by check upon receipt of satisfactory evidence that the child actually attended a private nonsectarain school. Payments may be monthly, bi-monthly or quarterly in accordance with uniform regulations adopted by the State Board of Education. Checks are to be made payable jointly to the parent or guardian and the private school, and mailed to the parent or guardian. The State Board of Education is directed to prescribe standard forms for applications for grants, for notice of grant commitments, for cer-

[6] N. C. GEN. STAT. c. 115—Education.

tificates of attendance and other forms necessary or desirable in the administration of this law. The State Board of Education has general supervision and administration of the funds for education expense grants.

The statute, in three places, provides that a private, nonsectarian school, which a child may attend under an education expense grant, must be a private school recognized and approved by Article 32 of Chapter 115.[7] This article, making provisions for non-public schools, requires that such private schools shall meet the State minimum standards as prescribed in the course of study, that children therein shall be taught the branches of education which are taught to children of corresponding age and grade in the public schools, and such instruction, except for foreign language courses, shall be given in English. Further, all private schools and teachers employed or who give instruction therein, shall be subject to and governed by the provisions of law for the operation of public schools insofar as they apply to the qualifications and certification of teachers and the promotion of pupils. Thus all teachers in private schools must have teacher's certificates entitling them to teach corresponding courses or classes in the public schools. The State Board of Education is given power to regulate and supervise all non-public schools serving children of secondary age or younger.[8]

The principle is well established that the action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the State.[9] The adoption of standards relating to the kind or quality of education for which state grants may be made, renders the whole plan vulnerable to a charge of state action whose acknowledged purpose is to permit continued segregation in the public schools.[10] Section 12 of Chapter 3 provides that no education expense grant shall be paid for any child except for attendance at a private nonsectarian school found to be in compliance with the provisions of the law regulating private schools. In addition, the State Board of Education has the duty of maintaining a current list of all such approved schools and to furnish such information from time to time to county and city boards of education. The purpose of Chapter 3 is stated in Section 1, as follows: "Our people need to be assured that no child will be forced to attend a school with children of another race in order to get an education. It is the purpose of the State of North Carolina to make available, under the conditions and qualifications set out in this Act, education

[7] N. C. GEN. STAT. §§ 115-255 to 115-257 (1955).

[8] The Board of Education shall not, in its regulation of private schools, interfere with any religious instruction. N. C. GEN. STAT. § 115-255 (1955).

[9] Shelley v. Kramer, 334 U. S. 1 (1948); Comment—27 N. C. L. REV. 224 (1949).

[10] McKay, *"With All Deliberate Speed." A Study of School Desegregation,* 31 N. Y. U. L. REV. 991, 1047, 1079-83 (1956).

expense grants for the private education of any child of any race residing in this State."

However, the last sentence of Section 12 is apparently an attempt to renounce state control over private schools by virtue of the payment of education expense grants, as follows: "Payment of education expense grants for or on behalf of any child attending such a school [approved private school] shall not vest in the State of North Carolina, the State Board of Education or any agency or political subdivision of the State any supervision or control whatever over such non-public schools or any responsibility whatever for their conduct or operation." The most likely meaning of this sentence is that no *additional* authority or control over private schools is conferred by Chapter 3, Education Expense Grants. Whether there is state action involved in providing education expense grants depends on the facts and not on a legislative declaration disclaiming state control.[11]

Parents or guardians, who elected to take education expense grants for children in lieu of their attending desegregated schools, would waive any constitutional objections they might otherwise have.[12] But a citizen and taxpayer, who had not availed himself of any benefits under the education expense grant law, might bring a taxpayer's suit to enjoin the payment of such grants as an unlawful use of public funds to his injury[13] and raise the constitutional issue—violation of the Fourteenth Amendment.

[11] State action does not include purely private action, Charlotte Park and Recreation Commission v. Barringer, 242 N. C. 311, 88 S. E. 2d 114 (1955) *cert. denied* 350 U. S. 983 (1956), Comment, *Use of Fee Simple Determinable to Enforce Racial Restrictive Provisions,* 34 N. C. L. REV. 113 (1955), but does include action by any agency of the State and any level of government, executive, judicial and legislative. It may include private action that results from mandatory state statutes. State action may include state inaction which permits private control of important functions, for instance, primary elections. Rice v. Elmore, 165 F. 2d 387 (4th Cir. 1947); Terry v. Adams, 345 U. S. 461 (1953). State action may include action of private organizations receiving state aid. Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (4th Cir. 1945) *cert. denied,* 326 U. S. 721 (1945), the Library received financial aid from the city, and the city owned the real and personal property involved, audited its accounts and established rules for the appointment of trustees. A different result was reached in Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (1948) where an art school was characterized as a private instrumentality and a negro complainant who had been refused admission on account of race was denied relief. The school received a subsidy from the state and city, but the court emphasized the fact that the management of the school was free from public control and that the actions of the management were not state action. See generally, *State Action—A Study of Requirements under the Fourteenth Amendment,* 1 RACE REL. L. REV. 613 (1956); Comment, *Legality of Plans for Maintaining School Segregation,* 54 MICH. L. REV. 1142 (1956).

[12] Note, *Estoppel to raise the Constitutional Question,* 34 N. C. L. REV. 514 (1956); Convent of Sisters of St. Joseph v. Winston-Salem, 243 N. C. 316, 90 S. E. 2d 879 (1956).

[13] Teer v. Jordan, 232 N. C. 48, 59 S. E. 2d 359 (1950), "the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied." See discussion in Doremus v. Board of Education, 342 U. S. 429, 433-35 (1952).

Chapter 4. Local Option to suspend operation of public schools.

The legislative purpose, as stated in Section 1, is to give the "people in each community . . . a full and meaningful choice as to whether a public school, which may have some enforced mixing of the races, shall continue to be maintained and supported in that community."

For the purposes of this statute, public schools are classified as:

(1) An elementary school. All or part of the first eight grades, including the elementary portion of a union school.
(2) A high school. Grades 9 through 12, including the high school portion of a union school.
(3) A union school, which embraces a part or all of the elementary and high school grades.
(4) A junior high school. Grades 7, 8 and 9.
(5) A senior high school. Grades 10, 11 and 12.

Section 2 also defines "local option unit" as "Any county or city school administrative unit, or the combination of two or more administrative units in whole or in part, or any convenient and reasonable territorial subdivision within an administrative unit which includes within its boundaries one or more public schools."

Section 3 tells how local option units may be established. (1) Each county and city adminisistrative unit constitutes a local option unit; (2) the Board of Education of any school administrative unit (city or county) may subdivide the administrative unit into two or more local option units; (3) two or more administrative units, in whole or in part, may by agreement of each respective board of education constitute a local option unit; (4) two or more different and distinct local option units having the same or overlapping territorial boundaries may be established within an administrative unit by the Board of Education thereof.

One or more public schools shall be included within the territorial boundaries of each local option unit, but a specific public school shall be included in only one local option unit at any given time. An elementary division of a union school or junior high school may be in one local option unit and the high school division of the same school in a different local option unit.

Any board of education, by resolution of a majority of its members, may call for an election on the question of closing the public schools within a local option unit which is under the board's jurisdiction. Such an election shall be called by the board when a petition signed by 15 percent of the registered voters residing within the local option unit is presented to the board requesting an election.

If a majority of votes cast in such election are in favor of suspending the operation of the schools in such local option unit, the Board of Edu-

cation shall suspend the operation of such public schools. Elections on the question of reopening the closed schools are provided for under the same terms and conditions governing elections on the question of closing the public schools.

County boards of elections are authorized to conduct these elections upon receipt of a certified copy of the resolution of the board of education calling an election. Notice of the call of an election shall be given, once a week, for four successive weeks, in a newspaper of general circulation in the area, containing the date on which the election is to be held and full information as to the schools and the local option unit involved. The County Board of Elections may order a new registration of the qualified voters concerned in an election under this statute, and may also order a separate registration with separate registration books exclusively for elections under this statute. The Board of Education is to bear the cost of holding such elections.

When the operation of a public school is suspended, principals, teachers and supervisors under contract shall continue to receive their salaries for the term of the contract, unless and until they secure suitable and adequate employment prior to the expiration of the term. The term is the current school year.

A Board of Education, county or city, may from time to time subdivide the school administrative unit into two or more local option units, and two or more different and distinct local option units may have the same or overlapping territorial boundaries. Apparently, the Board may change boundaries at will as long as one specific public school is within that local option unit and not in any other at the same time. Such untrammeled discretion in an administrative agency, permitting in this situation a checkerboard of overlapping local option units, raises a question of unlawful delegation of legislative power.[14] The new section 12 of Article IX of the North Carolina Constitution specifies "any local option unit, as defined by the General Assembly." Has the General Assembly provided a satisfactory definition of local option unit?

Are there any available remedies in the event that the operation of a public school is suspended by a Board of Education following an election in a local option unit? The purpose of Chapter 4, as already indicated, is to meet the situation of "some enforced mixing of the races" in a public school. For all practical purposes, this means an order of a federal district court requiring the admission of a Negro child to a presently segregated white public school. This is the event which the statute would prevent by the closing of the public school involved. And

[14] Bizzell v. Board of Aldermen of Goldsboro, 192 N. C. 348, 135 S. E. 50 (1926); Hospital v. Joint Committee, 234 N. C. 673, 686, 68 S. E. 2d 862, 872 (1952), Barnhill, J. concurring, "they must confine their activities to the enforcement of the standards established by the legislature."

this event might occur only after a Negro parent or guardian, dissatisfied with the assignment of his child to a segregated Negro public school, makes application to the governing Board of Education for reassignment, and the application is finally disapproved.[15] A Negro child whose right to attend a "white" public school has been upheld by a federal district court is likely to find that school closed. The Negro child may still attend the "Negro" public school to which he was assigned. The parent or guardian of such Negro child might conceivably proceed a second time in the federal courts to secure admission to the next conveniently located "white" public school. Again, and after much time has elapsed, the Negro child, if successful, may be faced with another closed school. Obviously, the "white" public school, whose operation is suspended, is just as effectively closed to all of its former students.

It is not to be doubted that the United States Constitution does not require that a state afford any education to its children. But no state has abolished its public school system or completely denied any support for public education. It is not likely that North Carolina will do so. Chapter 4 provides, in effect, for the discontinuance of public support for separate public schools. The closing of a public school is thus pursuant to state statute and the result of state action. The closing of a "white" public school brings about a difference in treatment of the one administrative unit where the school is closed from that accorded other administrative units comparably situated, and this difference occurs because of the enforced mixing of the races in the school in question. Apparently, there is set up a classification scheme, vulnerable to attack as a denial of equal protection not only to the Negro child involved but to the white child whose school has been closed.

White children in other localities would be able to attend public schools. Negro children in the same locality would be able to attend a public school. A dissatisfied parent or guardian might apply for an education expense grant, which assumes an approved, conveniently located, private, nonsectarian school. If such a grant is acceptable, the parent or guardain would be estopped to attack constitutionality.[16] But if there were no private schools available or if a parent or guardian could not afford to send his child to a private school or preferred a public education for his child, he might seek to enjoin the appropriate state officials from suspending the operation of the public school in question. The existence of a "Negro" public school in the locality would not preclude such action. It is not likely that a white parent would make an

[15] 1956 EXTRA SESS. LAWS, Ch. 7—The Pupil Assignment Act.
[16] See note 12 *supra*.

application to have his child assigned to a "Negro" public school,[17] where a "white" public school has been closed, and, in the event that such an application were made, the Board of Education, pursuant to the purpose and policy of the 1956 statutes, would reject it.

The public school injunction suits in the federal courts have been brought under Section 1983, Title 42, United States Code, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In these cases,[18] a prayer for injunctive relief is usually accompanied by a prayer for declaratory judgment establishing the rights of the plaintiffs in the premises. In a proper case, an action for damages may be maintained.[19] In *Carson v. Board of Education,* the Circuit Court of Appeals of the Fourth Circuit, in a per curiam opinion, stated, "Discrimination on account of race and color was alleged with respect to the right to attend schools in Old Fort, and the removal of this discrimination as well as the declaration of the rights of plaintiffs was asked. The decision of the Supreme Court did not destroy or restrict these rights, except with respect to the right to separate schools, and the plaintiffs were entitled to have their prayers for declaratory judgment as well as for general injunctive relief considered in the light of the Supreme Court decision."[20]

Chapter 5. Amendment of compulsory school attendance law.

Every parent, guardian or other person in charge of a child between the ages of seven and sixteen years shall cause such child to attend school continuously for a period equal to the time which the public school shall be in session.[21] To this general requirement of the law, Chapter 5 adds the following proviso:

[17] In Romero v. Weakley, 226 F. 2d 399 (9th Cir. 1955), one of the plaintiffs was a white person, claiming that his white child was segregated from a school wrongly limited to Negro and Mexican descended children, and compelled to attend a more distant school of white children.

[18] The first four issues (Feb., April, June and Aug. 1956) RACE RELATIONS LAW REPORTER, contain reports of 23 federal district court decisions in public school cases.

[19] Nixon v. Herndon, 273 U. S. 536 (1926); Smith v. Allwright, 321 U. S. 649 (1944). Actions for damages for refusing plaintiffs the right to vote in the Democratic Party Primary.

[20] Carson v. Board of Education of McDowell County, 227 F. 2d 789, 790 (4th Cir. 1955).

[21] N. C. GEN. STAT. § 115-166 (1955).

"provided, this requirement shall not apply with respect to any child when the board of education of the administrative unit in which the child resides find that: (a) such child is now assigned against the wishes of his parent or guardian, or person standing in loco parentis to such child, to a public school attended by a child of another race and it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race; and (b) it is not reasonable and practicable for such child to attend a private non-sectarian school. . ."

This proviso assumes a situation which Chapters 3 and 4 make every effort to avoid, that is, a school attended by both white and Negro children. Chapter 3 provides for education expense grants for the dissatisfied parent or guardian and Chapter 4 provides for the closing of such mixed school. But if such mixed school should exist in North Carolina, the compulsory school attendance laws do not apply to a dissatisfied parent or guardian if it is not reasonable and practicable to assign the child to a public school not attended by a child of another race and not reasonable or practicable for such child to attend a private nonsectarian school.

The last provision would cover cases where the parent or guardian could not afford to send his child to a private school, or where there was no approved private nonsectarian school conveniently located, so that such children would actually be deprived of education in either public or private schools, as their parents or guardians chose.

Chapter 7. Pupil Assignment Act.

Chapter 7 is a revision of the School Enrollment law of 1955. The words "assignment" and "assign" are used throughout instead of "enrollment" and "enroll." The 1955 Act vested authority in city and county boards of education to provide for the enrollment in a public school within their administrative units of each child residing within such administrative unit.[22] Under the 1956 Act, local school boards have authority to provide for the assignment to any school—not limited to a school within that administrative unit—of each child residing within the administrative unit. Each board of education may adopt reasonable rules and regulations as in the opinion of the board are necessary for implementing this power. As in the 1955 Act, the standards laid down to guide local boards are very broad. "Each county and city board of education shall make assignments of pupils to public schools so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils." The statute makes no mention of race as a criterion for assignment.

[22] N. C. GEN. STAT. § 115-176 (1955).

A new section[23] provides for notice of assignment, which may be a written notice of assignment on each pupil's report card or by written notice by any feasible means to the parent or guardian of each child. In the case of assignment of groups or categories of pupils, notice may be given by publication in a newspaper having general circulation in the administrative unit.

A dissatisfied parent or guardian may, within ten days after notification of the assignment or the last publication thereof, apply in writing to the board of education for reassignment of a child to a different public school. If the application is disapproved, the board shall notify the applicant by registered mail and the applicant may, within five days, apply to the board for a hearing and "shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school." The majority of the members of the board shall be a quorum for such hearing and for passing upon applications for reassignment. "If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail."

This hearing is the only administrative remedy provided by the 1956 Act. Unlike the 1955 Act, there is no provision for appeal to the superior court from an adverse decision of the board of education.[24]

In the case of *Carson v. Board of Education of McDowell County*,[25] action was brought by certain Negro children to enjoin alleged discrimination against them in the administration of the schools of McDowell County, North Carolina. The complaint was filed prior to the decision of the Supreme Court in the school segregation case. It alleged that the plaintiffs were not allowed to attend schools maintained by defendants for white children in the town of Old Fort but were required to go to a school in Marion 15 miles away and that this discrimination was made solely on account of race and color. One of the prayers for relief was that defendants be required to provide for plaintiffs in the town of Old Fort educational facilities equal to those provided for white children. There was a general prayer for injunctive relief against discrimination and a prayer for a declaratory judgment establishing the rights of the plaintiffs. The District Court dismissed the action on the ground that

[23] N. C. GEN. STAT. § 115-177 (1956).
[24] N. C. GEN. STAT. § 115-179 (1955).
[25] 227 F. 2d 789 (4th Cir. 1955).

the decision of the Supreme Court had made inappropriate the relief prayed for. The Circuit Court of Appeals vacated the order of the District Court and remanded the case with directions to consider it in the light of the decision of the Supreme Court in the school segregation case and of the 1955 North Carolina statute, which had been enacted subsequent to the bringing of the action, providing an administrative remedy for persons who feel aggrieved with respect to their enrollment in the public schools. The Court stated the rule as to exhaustion of state administrative remedies, as follows:

"This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have the power to do in the premises is to enjoin violation of constitutional rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary."[26]

The district court was empowered to stay proceedings pending the exhaustion of administrative remedies under the statute and to order a repleader if this were desirable. In July, 1956, District Judge Warlick ruled that complainants had not exhausted administrative remedies and refused plaintiffs' petition to file supplemental pleadings. Plantiffs then brought a petition for mandamus to the Circuit Court of Appeals to order Judge Warlick to hear the case on its merits and to permit the filing of supplemental pleadings. This petition was argued before the Circuit Court of Appeals in Richmond on October 1, 1956. A newspaper account indicates that the court raised a question as to whether, under the rule of exhaustion of state administrative remedies, the Superior Court, on appeal from the board of education, would be acting as an administrative or a judicial body.[27]

[26] Carson v. Board of Education, 227 F. 2d 789, 790 (4th Cir. 1955).

[27] Raleigh News and Observer, October 2, 1956, p. 1. It is doubtful whether under existing precedents, the federal courts would be required to consider state court review of school authorities' decisions as a part of the administrative process which must be exhausted. The 1955 Pupil Enrollment Act provides that upon such appeal, "the matter shall be heard de novo in the superior court before a jury in the same maner as civil actions are tried and disposed of therein." N. C. GEN. STAT. § 115-179 (1955).

"While the federal district courts might accept jurisdiction once relief has been sought before the state administrative body, it might be thought desirable to include judicial review of the administrative action before applying the exhaustion rule. This might more readily follow where judicial review is limited to the facts found in the record of the board of education. But where a trial de novo before a jury is provided, the review in the superior court could hardly be considered

Meanwhile, the plaintiffs in the Old Fort case proceeded with the administrative remedies provided by the 1955 Pupil Enrollment Act.[28] A petition was presented to the McDowell County Board of Education on August 27, 1955, as follows:

"The undersigned, on behalf of their own children and on behalf of other Negro children and parents similarly situated, petition your Board that you forthwith issue a directive, order or mandate to the aforesaid Superintendent and Principal requiring them forthwith to admit children of petitioners and other Negro children similarly situated to the school and school facilities maintained by your Board in the Town of Old Fort."

The petitioners appeared before the Board in support of their request. In a letter dated January 5, 1956, the petitioners were informed of the denial of their request, as follows:

"A request on the part of Taylor and Mitchell on behalf of the Negroes of Old Fort to allow Negroes to attend school at Old Fort rather than to be transporated to Marion to attend school at Hudgins High, was formally denied by virtue of necessity in that facilities and room are available at Hudgins High and are not available at Old Fort."

An appeal was then taken to the Superior Court, as provided by the 1955 Act, and defendant's demurrer on the ground that there was a misjoinder of both parties and causes of action was sustained.[29] The North Carolina Supreme Court dismissed the appeal from this ruling, holding that the 1955 Pupil Enrollment Act provides for an application for assignment relating to named individuals, whereas this is in reality a class suit, which constitutes a misjoinder of parties and causes of action.[30]

Covington v. Montgomery County Board of Education[31] is a third

"legislative" or "administrative." See Note, *Obstacles to Federal Jurisdiction: New Barriers to Non-Segregated Public Education in Old Forms,* 104 U. PA. L. REV. 974-997 (1956).

On November 14, 1956, the petition for mandamus to order District Judge Warlick to proceed with the McDowell County school suit was declined by the Fourth Circuit Court of Appeals. Raleigh News and Observer, November 15, 1956, p. 1.

[28] N. C. GEN. STAT. §§ 115-176 to 115-179 (1955).

[29] Defendant's demurrer on the ground that the petition failed to state a cause of action was overruled.

[30] Joyner v. McDowell County Board of Education, 244 N. C. 164, 92 S. E. 2d 795 (1956). Note, *Pleading and Parties—Class Actions in North Carolina,* 26 N .C. L. REV. 223 (1948). The North Carolina holding that a class action could not be brought under the Pupil Assignment Law in the superior court, is not controlling in the federal courts. The Federal Rules of Civil Procedure, Rule 23, governs the bringing of class actions in the federal district court. A number of the public school segregation cases in the federal courts are class actions. Brown v. Rippy, 233 F. 2d 796 (5th Cir. 1956); McSwain v. Board of Education, 214 F. 2d 131 (6th Cir. 1954); see note 17 *supra.*

[31] Covington v. Board of Education, 139 F. Supp. 161 (M. D. N. C. 1956).

case involving the Old Fort petitioners. On September 7, 1955, District Judge Hayes had refused to constitute a three-judge court on the ground that the pleadings did not show that defendants were state officers and undertaking to enforce state statutes. An amendment to the complaint was made alleging that defendants maintained certain schools for white children exclusively and other schools exclusively for Negro children and that in the performance of these acts the defendants were acting pursuant to state constitutional provisions and state statutes and, as such, were officers of the State of North Carolina enforcing and executing state statutes and policies. The Court found that this was the case, saying, "The Montgomery school officials are appointed (elected) by the Legislature of North Carolina and are paid by the State; they expend for the State the school funds of the State allocated to Montgomery County. There can be no real doubt that they are acting as officers of the State and therefore meet one of the tests for determining the requisite of the jurisdiction of a three-judge court."[32]

The Court found, however, that the second requisite for giving a three-judge court jurisdiction was lacking—"the suit must seek to have a state Statute declared unconstitutional." This means that there must be a real controversy presented as to the constitutionality of the State Constitution, statutes or orders of State Boards compelling segregation in the public schools of the state. The Court found that this was lacking and stated why a three-judge court was not necessary, as follows:

"The validity of that part of the North Carolina Constitution requiring separate schools for the two races is no longer the subject of legal controversy. Nor is any statute,—state or local—, or order of a Board compelling segregation in the public schools, a legal controversy now. . . .

"If, then, the State Constitution or statutes or orders required that separate schools for the races must be maintained, it follows as the night the day that, being in conflict with the Constitution of the United States as defined by the Supreme Court, they are to that extent, null and void. No three-judge court is needed to make that declaration. . . . If the defendants are discriminating against the plaintiff, it will be the duty of a one-judge court to hear and determine the facts."[33]

The 1956 pupil assignment law provides for a single step administrative remedy—application to the board of education for reassignment of a child to a different school, a prompt and fair hearing of this application before the board and a prompt decision by the board with

[32] *Id.* at 162.

[33] *Id.* at 163. See statements of the Court in Constantian v. Anson County, 244 N. C. 221, 227-229, 93 S. E. 2d 163, 167-68 (1956).

notice thereof to the applicant. A parent or guardian, dissatisfied with the board's decision, might proceed in the federal courts at this point, as no further administrative remedy is provided by the State. This, of course, assumes the contention of a complainant that he had been denied access to a state public school solely on the basis of race or color, which would state a federal claim giving the district court jurisdiction under either the "federal question"[34] or the civil rights[35] provision of the Judicial Code.

[34] 28 U. S. C. 1331.
[35] 28 U. S. C. 1343 (3).