North Dakota Law Review

Volume 40 | Number 3 Article 5

1964

The Nonresident Pupil - A Public School Controversy

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THE NONRESIDENT PUPIL—A PUBLIC SCHOOL CONTROVERSY

I. INTRODUCTION

Recently the nonresident pupil, seeking admission to a public school district other than his own, has become the center of a legal and administrative public school controversy The advent of accelerated school reorganization, which radically changed school district lines, and the greatly increased state financial aid on a per-pupil basis, resulting in an incentive to maintain resident pupils, has drawn focus on the nonresident pupil. Consequently, the courts have been called upon to interpret legislation and to determine policy in an area that has been relatively without judicial review since Statehood.

The center of the controversy has evolved around a confusing statute,[1] regarding elementary nonresident tuition, which has been interpreted by the North Dakota Supreme Court in contradictory opinions.[2] The 1963 opinion has virtually eliminated the nonresident pupil. Parents, therefore, except in cases of closer distance, convenience,[3] or agreement of the school boards,[4] must send their children to the school district of their residence, and are barred from sending them elsewhere even if they are willing to pay the tuition charges. This ruling has left many nonresident pupils stranded in legal uncertainty, and has challenged the concept of "an equally free, open and accessible" public education.[5]

The questions raised by this controversy are: (1) who has the power to decide whether a child can enter another

1. N.D. CENT. CODE § 15-29-08(14) (Supp. 1963).
2. Myhre v. School Bd. of North Cent. Pub. School Dist., 122 N.W.2d 816 (N.D. 1963) Kessler v. Board of Educ. of City of Fessenden, 87 N.W.2d 743 (N.D. 1958).
3. *Supra* note 1.
4. N.D. CENT. CODE § 15-29-08(3) (Supp. 1963).
5. N.D. CENT. CODE § 15-47-01 (1960).

school district, (2) on what basis can he be admitted, (3) who shall pay the cost of his tuition, and (4) what rate of tuition must be set? Since the administration of schools is strictly bound by legislative enactment,[6] for any answers we must first look to the statutes governing the nonresident pupil.

II. LEGISLATIVE CONTROL OF PUBLIC SCHOOLS

The Northwest Ordinance of 1787 proclaimed that schools and the means of education should forever be encouraged,[7] thus establishing the foundation for a system of free public education in the United States. The North Dakota Constitution, article VIII, section 147, gave the legislative assembly the mandate to:

> make provisions for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control.

This single sentence provides the framework for the complex system of education that has developed in North Dakota. The North Dakota Supreme Court, in 1931, defined the Legislature's mandate as being unrestricted in its performance and including the "power to enact any legislation in regard to the conduct, control, and regulation of the public free schools which does not deny to the citizen the constitutional right to enjoy life and liberty and to pursue happiness and to acquire property "[8]

Therefore, it is the historical policy of North Dakota, in common with the policy of every other state in the Union, to maintain a free public school system for the benefit of all children within specified age limits.[9] The North Dakota Legislature has provided in section 15-47-01 of the North Dakota Century Code that "The public schools of the state shall be equally free, open, and accessible at all times to

6. Gillespie v. Common School Dist. No. 8, McClean County, 56 N.D. 194, 216 N.W 564, 565 (1927).

7. U.S.C. vol. 1, at XXXVII (1959).

8. Stromberg v. French, 60 N.D. 750, 236 N.W 477, 479 (1931).

9. Batty v. Board of Educ. of City of Williston, 67 N.D. 6, 269 N.W 49, 50 (1936) Anderson v. Breithbarth, 67 N.D. 709, 245 N.W 483, 484 (1932).

all children between the ages of six and twenty-one." It should be noted that prior to 1943 this privilege applied only to children "residing in the district."[10]

The courts have made it clear that the Legislature has strict control over the public schools and that local school boards are without common-law powers.[12] "School Officers have and may exercise only such powers as are expressly or impliedly granted by statute"[13] and in defining these powers, the rule of strict construction applies.[14] It therefore follows that in determining pupil rights, we are dealing with a legislative privilege rather than an absolute right.

III. STATUTORY PROVISIONS GOVERNING THE NONRESIDENT PUPIL

In 1961[15] the Legislature consolidated school laws by eliminating the Special,[16] Common,[17] Independent,[18] and Joint School District[19] designations and created the Public School District Law[20] which governs all districts except the Fargo School District.[21] The general powers and duties of the school boards are found in section 15-29-08 of the North Da-

10. Compare 1925 Supp., ch. 12, § 1343, *with* N.D. Rev. Code § 15-4701 (1943). The words "residing in the district" were omitted in the 1943 code revision and have not since been re-inserted. See N.D. CENT. CODE § 15-47-01 (1960).

11. Myhre v. School Bd. of North Cent. Pub. School Dist., *supra* note 2, at 819.

12. Seher v. Woodlawn School Dist. No. 26, 79 N.D. 818, 59 N.W.2d 805, 809 (1953) see also McWithy v. Heart River School Dist. No. 22, 79 N.D. 744, 749, 32 N.W.2d 886, 889 (1948) Batty v. Board of Educ. of City of Williston, 67 N.D. 6, 269 N.W 49 (1936) State *ex rel.* Mannes v. Alquist, 59 N.D. 762, 231 N.W 952 (1930) Gillespie v. Common School Dist., 56 N.D. 194, 216 N.W 564 (1927) Rhea v. Board of Educ., 41 N.D. 449, 171 N.W 103 (1919) State *ex rel.* School Dist. v. Tucher, 39 N.D. 106, 166 N.W 820 (1918) Pronovost v. Brunette, 36 N.D. 288, 162 N.W 300 (1917) Kretchmer v. School Bd., 34 N.D. 403, 158 N.W 993 (1916).

13. Gillespie v. Common School Dist. No. 8, 56 N.D. 194, 216 N.W 564, 565 (1927).

14. Myhre v. School Bd. of North Cent. Pub. School Dist., *supra* note 2, at 820 Seher v. Woodlawn School Dist. No. 26, *supra* note 12, at 809 see Lang v. Cavalier, 59 N.D. 75, 228 N.W 819 (1930) Stern v. City of Fargo, 18 N.D. 289, 122 N.W 403 (1909).

15. N.D. Sess. Laws 1961, ch. 158.

16. N.D. Sess. Laws 1961, ch. 158, § 1 (formerly N.D. CENT. CODE, § 15-28, 15-29 (1960).

17. N.D. Sess. Laws 1961, ch. 158, § 89 (formerly N.D. CENT. CODE, § 15-23, 15-24, 15-25 (1960)).

18. N.D. Sess. Laws 1961, ch. 158, § 89 (formerly N.D. CENT. CODE, § 15-30, 15-31, 15-32 (1960).

19. N.D. Sess. Laws 1961, ch. 158, § 89 (formerly N.D. CENT. CODE § 15-33 1960)).

20. N.D. CENT. CODE, § 15-27, 15-28, 15-29 (Supp. 1963).

kota Century Code.[22] Subsection 3 provides for the sending of "pupils into another district when, because of shorter distances and other conveniences, it is to the best interest of the school district to do so," in which case the sending board will make arrangements with the receiving board for the payment of tuition. The nonresident pupil controversy rests mainly on the powers of a school board to admit a pupil from another district other than through the arrangement provided in subsection 3. Subsection 14 provides for such admissions, and states in part:

> To admit to the schools of the district pupils from other districts when it can be done without injuring or overcrowding the schools, and to make regulations for the admission of such pupils. The board may make proper and necessary rules for the assignment and distribution of pupils to and among the schools in the district and for their transfer from one school to another When an elementary pupil is admitted from another district, credit on his tuition shall be given by the district admitting him to the extent of school taxes paid in the admitting district by the parent or guardian of the admitted pupil. If the attendance of an elementary pupil from another district is necessitated by shorter distance or other reasons of convenience, approval or disapproval shall be given by a three-member committee consisting of the county judge, state's attorney and the county superintendent of schools [23]

The provision for nonresident high school students[24] is similar to the elementary school statute cited above except that if the three-member county committee should disapprove the payment of tuition to a receiving district, the parent may appeal the decision to the State Board of Public School Education.[25] The high school statute also has an additional criterion for the committee to use in determining whether

21. N.D. CENT. CODE § 15-27-01 (Supp. 1963).
22. N.D. CENT. CODE § 15-29-08 (Supp. 1963).
23. N.D. CENT. CODE § 15-29-08(14) (Supp. 1963).
24. N.D. CENT. CODE § 15-40-17 (Supp. 1963).
25. See School Bd. of Eagle Pub. School Dist. No. 16 v. State Bd. of Pub. Educ., 126 N.W.2d 799 (N.D. 1964).

they will approve nonresident tuition payments, which is "previous attendance in another high school."[26]

IV FACTORS CONTRIBUTING TO THE NONRESIDENT PUPIL PROBLEM

It is not within the scope of this note to trace the entire development of the Public School Law, but rather to explore the factors leading up to the present nonresident pupil problem. Two historical developments provide the setting for this problem. The first is the system of state financing of public schools, and the second is the recent trend toward school reorganization.

"North Dakota state aids trace their origin prior to statehood and were a condition for admission to statehood statehood and were a condition for admission to statehood. The enabling act of 1889 to create North and South Dakota from Dacotah Territory required that Section Number 16 and 36 in every township be retained for the support of public schools."[27] At first, the state aid was small, but it has grown until it now represents a major part of the local school district budget.

School financing today is primarily based on the Foundation Program which was established by the 1959 Legislature[28] after two years of study by the Legislative Research Committee.[29] This program guaranteed 60 per cent of the state average per pupil cost of education to every school district in the state with the balance of forty per cent to be carried by the local district.[30] Since monies from the County Equalization Fund for school finance follow the pupil,[31] the admission or nonadmission of a nonresident pupil into a dis-

26. *Ibid.*

27. Howard J. Snortland, *A Proposed Foundation Program of State Support for Public Education in North Dakota,* Unpublished Master's Thesis, University Library, University of North Dakota, p. 60 (1958) Howard J. Snortland is presently Director of Finance and Statistics of the North Dakota Department of Public Instruction.

28. N.D. Sess. Laws 1959, ch. 170.

29. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, 1959, at 17.

30. *Id.* at 3.

31. N.D. CENT. CODE § 15-40-14 (Supp. 1963).

trict becomes very important to both the receiving district and the home district as it represents either an increase or a decrease in state aid.

Reorganization of school districts progressed very slowly until 1957[32] at which time the Legislature modified the method of voting,[33] and for the first time charged high school tuition to non-high school districts.[34] Prior to this act, districts without a high school had no direct financial responsibility for students attending adjoining high school districts. These districts now had a financial stake in high schools and, therefore, to gain voice and vote, sought annexation with a high school district. The advent of a liberal state program of aid for transportation in 1959[35] as well as mandatory high school attendance until graduation or the sixteenth birthday[36] furthered the desirability of reorganization.

School reorganization resulted in better schools and provided greater opportunity for learning. Where districts were slow to reorganize, the new schools in adjoining districts were tempting to parents forced to send their children to inferior schools. Often parents, having fought on the losing side of a reorganization battle, would attempt to send their children to another school district. Districts would also "pirate" pupils from adjoining districts to obtain the additional state school aid that follows the pupils[37] or to encourage reorganization. These factors created the nonresi-

32. School District Reorganization Elections in North Dakota

	Approved	Rejected	Total
to June 30, 1951	42	27	69
July 1, 1951 to June 30, 1957	20	44	64
July 1, 1957 to June 30, 1958	57	12	69
July 1, 1958 to June 30, 1959	41	9	50
July 1, 1959 to June 30, 1960	38	7	45
July 1, 1960 to June 30, 1961	15	1	16
July 1, 1961 to June 30, 1962	11	3	14
July 1, 1962 to June 30, 1963	5	1	6
	229	104	333

Source. REPORT OF DEPARTMENT OF PUBLIC INSTRUCTION, M. F Peterson, Superintendent, Bismarck, North Dakota.

33. N.D. Sess. Laws 1957, ch. 145, § 1 N.D. CENT. CODE § 15-53-14 (1960).

34. N.D. Sess. Laws 1957, ch. 140, § 2 N.D. CENT. CODE § 15-40-17 (Supp. 1963).

35. N.D. Sess. Laws 1959, ch. 170 N.D. CENT. CODE, §§ 15-40, 15-56, 57-15 (Supp. 1963).

36. N.D. Sess. Laws 1959, ch. 159, § 1 N.D. CENT. CODE § 15-34-01 (1960).

37. *Supra* note 31.

dent pupil problem which, today, faces the Legislature and the courts.

V THE KESSLER OPINION

Prior to the large influx of reorganization plans in 1957,[38] the nonresident pupil had not been a difficult problem for the courts. In 1932, the North Dakota Supreme Court decided what constituted residency for school purposes. Residency was declared not synonymous with domicile or legal voting residence, rather:

> 'Residing in the district' means what it says—a child who makes its home in that particular district, whether with its parents or with other persons, when that place is the only home it has, a place to which she comes and where she remains when not 'called elsewhere for labor or special or temporary purposes' [39]

The Supreme Court has also stated that the nonresident pupil can only be admitted when facilities for seating and instruction are available,[40] and that the school board cannot be compelled to admit children from adjacent districts.[41] An admitting district cannot charge the sending district for more than four years of high school tuition for any pupil,[42] and for any additional attendance it would appear that the pupil himself must meet the tuition demand.[43]

On September 3, 1957, Linda Kessler of Germantown Township of Wells County registered to attend the eighth grade of the Special School District of the City of Fessenden. When she came to attend classes on the morning of September 4, 1957, she was denied admission and returned to her home by the superintendent of the Fessenden School. The reason given for this refusal to admit Linda was that she resided in

38. *Supra* note 32.
39. Anderson v. Breithbarth, 62 N.D. 714, 245 N.W. 483, 487 (1932).
40. Todd v. Board of Educ. of City of Williston, 54 N.D. 235, 209 N.W 369 (1926).
41. State *ex rel.* Johnson v. Mostad, 34 N.D. 330, 158 N.W 349, 350 (1916).
42. Batty v. Board of Educ. of City of Williston, 67 N.D. 6, 269 N.W 49, 51 (1936).
43. REP. ATT'Y GEN. N.D., 1958-1960, at 196, 197.

a district where a petition for annexation was circulated and rejected; and, therefore, pursuant to a resolution passed by the Fessenden School Board, she could not be admitted. Linda's father who had sought the greater opportunity offered by the larger Fessenden School for his daughter, rather than the township school of his district having less than 10 pupils in attendance, sought a writ of mandamus compelling the Fessenden School to admit his child pursuant to the provisions of section 15-2908, North Dakota Revised Code of 1943, as amended by chapter 134 of the 1957 Session Laws.[44]

The District Court of the Fourth Judicial District, Judge Rittgers presiding, granted the writ and required that the Fessenden School District admit Linda as provided by section 15-2908.[45] The Court, in construing this elementary nonresident tuition statute, rebuked the Legislature by pointing out that:

> The person or group which prepared this statute certainly did not have the services of any experts in the use of the English language. The law is carelessly drawn, there is a mixture of subjects and sentences jumbled together in a form which is very difficult to analyze and understand.[46]

The question centered on whether the permission of the three-member committee is a prerequisite to any attendance by a nonresident pupil. The District Court admitted that "Such construction appears at first glance to be reasonable. Taking the language of the statute literally, and without considering the history of the law, it might reasonably be held to mean that before a pupil could be admitted to a school other than that of this residence approval must first be received from the three-member committee."[47] The Court, however, reasoned that:

> it has been the policy of our State Legislature to broaden and liberalize the school laws of this State [and] there has been a continual lessen-

44. Kessler v. Board of Educ. of City of Fessenden, 87 N.W.2d 743 (N.D. 1958).
45. Kessler v. Board of Educ. of City of Fessenden, Fourth Dist. N.D., Sept. 17, 1957.
46. *Id.* at 6.
47. *Ibid.*

> ing of the control of the school boards over the reception of pupils from other districts. This is evidenced by the change in the words of 'may' to 'shall' in several places. This process has continued until the present laws have entirely removed from the school boards any right to refuse reception of a pupil when the pupil could be received 'without injuring or over-crowding the schools' [48]

The three-member committee provided in the statute, therefore, is only to decide the question of whether the sending district rather than the parents will pay the tuition because such attendance is necessitated by "shorter distance or convenience." Judge Rittgers, in accordance with his construction, redrafted the statute and divided it into two separate paragraphs as follows:

> 15-29082. Admission of Pupils From Other Districts; Tuition.
>
> The payment of tuition to such receiving district, sufficient to warrant admission, shall be governed as follows:
>
> (1) When the tuition for the pupil seeking admission to such school is paid by or on behalf of such pupil.
>
> (2) If it is sought to require the district of the pupil's residence to pay such tuition, and it is claimed on behalf of such pupil that his attendance from another district is necessitated by shorter distance of travel or other reasons of convenience, then and for that purpose the approval or disapproval of the application shall be given by a three member committee [49]

The Supreme Court, in January of 1958,[50] upheld the District Court opinion, and agreeing with Judge Rittgers' statutory construction, stated:

> Thus it is clear that the subsection deals with two separate matters. The first sentence deals exclusively with the obligation of the receiving district

48. Kessler v. Board of Educ. of City of Fessenden, *supra* note 45, at 7.
49. *Ibid.*
50. Kessler v. Board of Educ. of City of Fessenden, *supra* note 44.

> to admit the pupil. The remainder of the section deals with the liability of the home district for tuition when the attendance of the pupil outside of his home district involves reasons of convenience.[51]
>
> Thus if approval is not obtained, then the district from which the pupil comes is not obligated to pay tuition to the district receiving the pupil.[52]
>
> [T]he receiving district is still under the duty to admit the child if it can be done without injuring or overcrowding the school, but the party responsible for the education of the pupil would have to procure the approval of the committee before the school district of his residence is obligated to pay the tuition. If he cannot procure such approval he becomes personally obligated to pay the tuition.[53]

Judge Burke, dissenting, analyzed the various amendments to section 15-2908 and concluded that the 1955 amendment that changed the language from "and is approved by the county superintendent of schools" to "approval or disapproval shall be given by the county superintendent of schools" meant that:

> in the original statute the county superintendent's approval was a condition essential to fix liability for payment of tuition and in the amended statute it became a condition essential to the absolute right to attend school in a school district in which the pupil was not a resident.[54]

Aside from the dissent, the *Kessler* case had settled three of the questions involving the nonresident pupil. The receiving district had to admit a nonresident pupil if it could be done without injuring or overcrowding the school, and, secondly, the sending district would only be responsible for the tuition of the pupil, if for reasons of convenience, approval was granted by the three-member committee. Thirdly, the decision established the obligation of the pupil or his parents to pay if such approval was not received by the three-member committee. This obligation had been implied from

51. *Id.* at 750.
52. *Id.* at 751.
53. *Ibid.*
54. *Id.* at 755.

other statutes[55] by the Attorney General[56] prior to this decision.

VI. THE MYHRE CASE

The remaining question, regarding the amount of tuition to be charged nonresident pupils, was answered by the Supreme Court when it decided the *Myhre* case.[57] Selmer Myhre and others had sought a restraining order to stop North Central School District No. 10 of Richland County from allegedly soliciting resident students of Eagle Public School District and promising the parents of such school children transportation and tuition at little or no cost.[58] A writ of mandamus was sought commanding the school district to collect, or to resort to every legal means to try to collect, tuition fees and bus transportation costs provided by law from the parents and guardians of nonresident pupils.[59] The receiving school district had contended that it was not necessary to charge the nonresident pupil full tuition equal to the county average when they were not overcrowded and the monies received from the state on a per-pupil basis were nearly sufficient to meet the increased costs of the nonresident pupil.

In 1962, Judge Schneller, in the District Court of the Third Judicial District sitting in Richland County, decided that it was not necessary for an agreement to be reached between the sending and receiving districts in order to admit nonresident pupils unless the home district is to pay the tuition.[60] The *Kessler* case is cited in support of the conclusion that the district has the power to admit nonresident pupils if it will not injure or overcrowd the admitting school, and that "parents or parties in charge of school students have a perfect right to send the pupil to any school of their choice so

55. N.D. CENT. CODE §§ 15-40-16 (1960), 15-40-17, 15-29-08(14) (Supp. 1963).

56. *Supra* note 43 (1956-1958) REP. ATT'Y GEN. N.D. 1956-58, at 173, 174, 179.

57. Myhre v. School Bd. of North Cent. Pub. School Dist., 122 N.W.2d 816 (N.D. 1963).

58. Myhre v. School Bd. of North Cent. Pub. School Dist. No. 7671, Third Dist. N.D., Jan. 19, 1962.

59. *Supra* note 57.

60. The School Bd. of Eagle Pub. School Dist. No. 16 of Richland County v. The School Bd. of North Cent. School Dist. No. 10 of Richland County, No. 7669, Third Dist. N.D., Jan. 19, 1962.

long as they individually pay for the transportation and tuition fees."[61]

As to the amount of tuition to be charged, the District Court cited sections 15-40-17, 15-40-26 and 15-29-08(14) of the North Dakota Century Code and concluded:

> [I]t is my opinion that the defendant district must charge the parents or parties having charge of nonresident high school students the average cost of high school education per child in Richland County, and in the case of elementary school students the tuition charge shall not exceed the average cost of elementary education per child in the county The only reasonable interpretation that can be given the tuition charge for nonresident elementary school students is that it should be the average cost per pupil of maintaining the school in which the student attends if such cost does not exceed the county average. There is no valid reason why the defendant school board should not collect from the parents or parties in charge of nonresident elementary school students the same amount as the average cost per student of maintaining their elementary school.[62]

Judge Strutz handed down the opinion for the Supreme Court on May 29, 1963. The portions of section 15-40-17 and 15-29-08(14) of the North Dakota Century Code referred to in the District Court opinion were again cited and the trial court decision regarding the amount of tuition to be charged was accepted. The Court further pointed out that "No provision is made, in either case, for payment of tuition by the parents of such non-resident children."[63] Statutes in force prior to 1961,

> although they did allow the school board to permit children who were not residents to attend the schools of the district, upon such terms and conditions 'as the board may prescribe' and gave to the board authority to fix and collect tuition, the statutes did not provide that such tuition should be paid by the district from which such pupils were admitted.[64]

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61. *Id.* at 5.
62. *Id.* at 7.
63. Myhre v. School Bd. of North Cent. Pub. School Dist., *supra* note 57, at 820.
64. *Ibid.*

With this statement the Court distinguished the *Myhre* case from former situations. What the Court meant by the reference to tuition being "paid by the district" is certainly unclear because this language has been included in section 15-29-08(14) of the North Dakota Century Code since its inception in 1949,[65] and in section 15-40-17 of the North Dakota Century Code since 1957.[66]

Without reference to the *Kessler* opinion, the Court proceeded to construe the same statute interpreted by the *Kessler* case. Similar to Judge Burke's dissent in that case, the Court concluded that no student could attend another district unless an agreement had been reached between the school boards or permission had been granted by the three-member committee, consisting of the county judge, the state's attorney, and the county superintendent of schools, for reasons of convenience.[67]

Upon a "vigorous" petition for rehearing,[68] the *Kessler* opinion was brought to the attention of the Court. The Court denied the petition and declared that "the decision in the *Kessler* case is no longer applicable."[69] The Court reasoned that the *Kessler* opinion was based on 15-29082 of the North Dakota Revised Code of 1943, as amended by chapter 134 of the 1957 Session Laws, which was wiped out by the 1961 Legislature which enacted chapter 158 of the 1961 Session Laws.

> Section 1 of that chapter provides that several chapters of the North Dakota Century Code, including Chapter 15-29, 'are hereby amended and re-enacted to read as follows: ' Then follows a complete re-enactment of Chapter 15-29. Such amendment and re-enactment wiped out Section 15-29-08.2 of the North Dakota Century Code, since it had been a part of Chapter 15-29.[70]

The Court concluded that "the decision in the *Kessler* case

65. N.D. Sess. Laws 1949, ch. 143, § 3.
66. N.D. Sess. Laws 1957, ch. 140, § 2.
67. Myhre v. School Bd. of North Cent. Pub. School Dist., *supra* note 57.
68. *Id.* at 821.
69. *Id.* at 822.
70. *Ibid.*

no longer is the law since it is based on a statute no longer in existence."[71]

It was within the Court's power to overrule the *Kessler* opinion either explicitly or implicitly, but rather it stated that the case was "inapplicable" because of the statutory change. The statutory change referred to was the passage of the Education Act of the 1961 Legislative Session.[72] This act, as discussed previously, consolidated the several school district laws into one Public School District Law With minor wording changes to comply with the new district designations, the section construed by the *Kessler* case is carried over into the new law in exactly the same language, and is the present 15-29-08(14) of the North Dakota Century Code. The "Kessler" construction, that the statute deals with two separate subjects—the power of the school board to admit nonresident pupils and the payment of tuition for elementary pupils—would still appear to be applicable. Section 15-40-17 of the North Dakota Century Code covering nonresident high school students has remained virtually unchanged since 1957

Legislative intent of the North Dakota Legislature is generally difficult to determine due to the lack of records of committee action and floor debates. The 1961 Education Act, however, was introduced by the Legislative Research Committee which described its purpose as:

> The Committee agreed that the purpose of its deliberations was to consolidate presently existing law, and not to create new school district law Some small provisions have been inserted into the proposed bill which may have no direct counterpart in present law, but only where it is necessary to do so in order to more easily obtain uniformity of procedures, authority, or duties. It attempted to make no other substantive change even where it realized that present law could be improved upon.[73]

71. *Ibid.*
72. N.D. Sess. Laws 1961, ch. 158.
73. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, 1961, at 7.

V CONCLUSION

It would appear that the *Myhre* opinion was contrary to the intent of the 1961 Legislature and that the "Kessler" construction was assumed by the drafters of the Education Act to follow the statute in question into the new law However, one cannot be too critical of the *Myhre* decision when we remember the admonition given the Legislature by Judge Rittgers for a poorly drafted statute, and the dissent of Judge Burke in the *Kessler* case.

The result of the *Myhre* decision is threefold. First, from a public policy standpoint, it will encourage reorganization and stop school district "pirating" of pupils. Second, it has left nonresident pupils already admitted within the "Kessler" interpretation of the statute stranded in legal uncertainty Finally, it should serve as a mandate to the 1965 Legislature to make a clear determination of what the policy is going to be concerning the nonresident pupil.

It is the opinion of the writer that Judge Rittgers' opinion and the *Kessler* case represent the proper construction of the nonresident pupil statutes in light of the basic principle established by the Legislature that the schools shall be "equally free, open and accessible" to all pupils. Education of a child is a personal endeavor, and parents should always have the privilege of sending their children to another district, providing, it will not overcrowd or injure the receiving school and they are willing to pay the tuition.

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