
MARGARET WILLIAMS, Infant,
by JOSHUA B. WILLIAMS,
JR., Her Father and Next
Friend, and JOSHUA B.
WILLIAMS, JR., Individu-
ally,

vs.

DAVID W. ZIMMERMAN, ET AL.

IN THE
Court of Appeals

OF MARYLAND.

APRIL TERM, 1937.

GENERAL DOCKET No. 28.

APPELLANTS' BRIEF.

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STATEMENT OF THE CASE.

(Unless otherwise clearly shown in context, figures in parentheses refer to pages of printed record.)

This is an appeal from the Circuit Court for Baltimore County in which the petitioners, Margaret Williams a graduate of the elementary schools of Baltimore County and her father, a citizen and taxpayer, sued for a writ of mandamus to require the defendants, members of the Board of Education of Baltimore County to admit said Margaret Williams to the Catonsville High School one of the public high schools of Baltimore County. The lower court dismissed the petition.

QUESTIONS FOR DECISION.

I.

Whether the judgment and order of the court is against the evidence and contrary to the law applicable to the case.

A. *The Baltimore County high schools are public institutions and a part of the free public school system.*

B. *The assertion by respondents of the right to exclude infant petitioner from the Catonsville High School solely on account of race or color on the ground that separate educational opportunities were offered her elsewhere, cast upon them the burden of proving express constitutional or statutory authority for such separation.*

1. Neither the Maryland Constitution nor statutes authorize respondents to exclude petitioner from the Baltimore County High Schools solely on account of race or color.
2. In the absence of constitutional or statutory authority an administrative agency cannot exclude a qualified resident from the tax supported public schools.

C. *When respondents refused to admit infant petitioner to the Catonsville High School on the ground that separate but equal educational opportunities were offered her, the burden of proof was upon respondents to show also by a preponderance of the evidence that the educational opportunities offered petitioner were in fact equal.*

1. Paying tuition for certain Negro pupils in the Baltimore City Schools is not the equivalent.
2. Opportunity to obtain free tuition to high schools outside the county is not a matter of right for all Negro pupils.

The trial court held that "the petition must fail if it is not shown by evidence that the petitioner passed the required examinations or tests prescribed by the School

Board to enter the county high school, if the petitioner fails in this, all the other questions raised by the pleadings are moot questions and should not be considered in these proceedings" (R. 41).

Appellants, petitioners below, alleged that infant petitioner had satisfactorily completed the elementary school course and had been refused admission to the public high schools. Appellees, respondents below, alleged that petitioners were Negroes, and (1) that separate schools were maintained and (2) that equal educational opportunities were offered Negro students.

Appellants contend that the allegations of these affirmative defenses by appellees placed upon them the burden of proving said allegations (1) and (2). Appellants further contend that the appellees failed to meet this burden of proof.

II.

Whether the refusal to admit infant petitioner to the Catonsville High School was contrary to and in violation of the declaration of rights, the Constitution and the laws of the State of Maryland.

A. The Constitution and laws of Maryland provide for a free, uniform system of public schools.

B. Adult petitioner as a citizen and taxpayer of Baltimore County has a proprietary interest in the public schools of the county.

C. The arbitrary and illegal acts of respondents in excluding infant petitioner from the high schools of Baltimore County solely on account of race or color deprive

the adult petitioner of his proprietary interest contrary to Section 23 of the Declaration of Rights of Maryland.

The trial court ruled that the appellees had a right to separate the races to provide for the education of Negroes outside the county and that the system of providing education for Negroes outside the county was within the lawful power of the appellees.

Appellants contend that the appellees were required to maintain a uniform system of public schools and that the system of providing a high school education for some Negroes outside Baltimore County under certain limitations while at the same time providing high school education within Baltimore County to white students without the same limitations was not a uniform system and therefore in violation of the Constitution and laws of the State of Maryland.

Appellants contend further that adult petitioner in suing as a taxpayer had a proprietary interest in the schools of Baltimore County and the refusal to admit his daughter to the use of these schools was a violation of the Declaration of Rights.

III.

Whether the refusal to admit infant petitioner to the Catonsville High School is contrary to and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States for the reason that said refusal deprives adult petitioner of his property without due process of law.

A. Action of the respondents in the premises was state action within the meaning of the Fourteenth Amendment.

B. The State of Maryland, through the arbitrary and illegal acts of respondents in the premises, deprived petitioner of property without due process of law.

C. The judicial sanction of this discrimination against adult petitioner amounted to depriving him of his property without due process of law.

The trial court ruled that all questions were moot other than the question as to whether infant petitioner had passed the required examination or test (B. 41, 42).

Appellants contend that the refusal to admit petitioner was in violation of the due process of law as guaranteed by the Fourteenth Amendment of the U. S. Constitution in that petitioners were deprived by the state of their property without due process of law. Appellants further contend that the ruling above of the trial court also amounted to a denial of due process of law.

IV.

Whether the refusal to admit infant petitioner to the Catonsville High School is contrary to and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States for the reason that said refusal denies petitioners the equal protection of the law.

A. The action of the respondents in excluding infant petitioner from Catonsville High School was state action within the meaning of the Fourteenth Amendment.

B. The attempt of respondents to force petitioner to abandon present advantages of attending the high schools of Baltimore County for the possible chance of obtaining a tuition scholarship in Baltimore City through competi-

tive examination is arbitrary and illegal action solely on account of race or color and a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

1. The examinations were unfair and not suited for the purpose for which they were given.

2. Respondents failed to show by a preponderance of the evidence that the Baltimore County Board of Education required the same examination of the white students as a condition precedent to their admission to the Baltimore County high schools.

C. The competitive tuition scholarships are no substantial equivalent for the high school education afforded white pupils in Baltimore County.

D. In the absence of equivalent educational opportunities an attempt by the state to exclude petitioner from the present advantages of the high school education afforded white students in Baltimore County amounts to denying her the equal protection of the law.

E. The only way for petitioners to be protected in their constitutional rights under the facts of this case is to have infant petitioner admitted to the Catonsville High School.

The trial court ruled that all questions were moot other than the question as to whether infant petitioner had passed the required examination or test (B. 41, 42).

Appellants contend that the examinations themselves denied to petitioners the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Con-

stitution of the U. S. Appellants contended that the examination to colored pupils were administered in an unfair manner and were precluded by the trial court from showing that they were unfair and unequal. Appellants contended further that the system of scholarships to Baltimore City did not furnish an equivalent for a high school education within the county.

STATEMENT OF FACTS.

There are two petitioners (appellants herein) in this case, Margaret Williams infant petitioner, and her father, Joshua B. Williams. Margaret Williams is a citizen of the State of Maryland and resident of Baltimore County (R. 52). She is of lawful school age and was born in 1921 (R. 185). She satisfactorily completed the seven-year elementary course in Baltimore County (R. 119) and applied for admission to the Catonsville High School in said county. Joshua B. Williams is a citizen of the State of Maryland, resident of Baltimore County, a taxpayer, and sues as a taxpayer to have his daughter admitted to the said Catonsville High School (R. 52).

There are several respondents (appellants herein). David Zimmerman is principal of the Catonsville High School, a tax supported, free public school established and maintained by the Board of Education of Baltimore County pursuant to the Constitution and laws of the State of Maryland (R. 52). The Catonsville High School is the nearest public high school to the residence of petitioners (R. 53). Zimmerman is the proper admitting officer thereto (R. 60). Zimmerman acts as agent of the Board of Education (R. 52).

Clarence G. Cooper is Superintendent and Secretary-Treasurer of the Board of Education of Baltimore Coun-

ty and is appointed pursuant to the laws of Maryland; he is by law the executive officer of the Board, having supervision of public schools, including the Catonsville High School (R. 52).

The other respondents are members of the Board of Education of Baltimore County; said Board of Education is an administrative department of the State of Maryland and the members thereof are appointed by the Governor (R. 52). The Board is authorized, empowered, directed and required by law to maintain a uniform and effective system of free public schools in said County (R. 53). The funds for the support and maintenance of these free public schools are derived from appropriations by the State Legislature, and out of the public treasury of the State and out of the taxes of Baltimore County, including monies paid into this tax fund by Joshua B. Williams, petitioner (R. 53). The Superintendent and Board of Education have full power over the public school system of Baltimore County (R. 62).

There is a uniform system of seven-year elementary schools and four-year high schools for white students in Baltimore County. The school system for white students is integrated. The elementary and high schools are in one system. A student completing the elementary course goes into high school (R. 62).

There are six senior high schools, one junior high school for three years and three for one year of high school work at an estimated value of \$1,883,500.00 (R. 62). These high schools are used exclusively for white pupils (R. 61). There are no colored high schools in Baltimore County (R. 98).

Prior to the year 1926 there was no provision for the high school education of Negroes (R. 64). On September 7, 1926, after repeated requests from the Parent-Teacher Associations of Baltimore County (R. 218), the Board of Education decided to pay tuition to the Board of School Commissioners of Baltimore City for colored pupils who satisfactorily completed the seventh grade, passed an examination for that purpose, were recommended by the assistant superintendent, and the superintendent, and were approved by the Board of Education (R. 218, 219). The Board reserved the right to discontinue the payment of tuition for any colored students who do not maintain a satisfactory record and agreed not to pay tuition for a period longer than four years (R. 64, 65, 218).

White pupils are offered high school education within Baltimore County in public schools under the control of the Board of Education of Baltimore County (R. 70). Colored pupils who meet the requirements of the Board of Education are offered a high school education in Baltimore City solely under the jurisdiction of the Board of School Commissioners of Baltimore City (R. 70). The Board of Education of Baltimore County supervises the education of white pupils up to and including the eleventh grade, but only supervises the education of its Negro pupils up to and including the seventh grade (R. 70, 71). After the colored pupils complete the seventh grade the Board has no jurisdiction over what they will receive in the line of education (R. 71).

Transportation at public expense is provided for white high school pupils at a cost of 10 cents per day to the parent, the balance being paid by the Board of Educa-

tion (R. 62). The colored children who attend the Baltimore City Schools were not provided transportation (R. 70).

The cost of tuition for colored students taking the examination in June was provided by budget submitted the prior November. The Board on November 1 of each year would not know how many pupils would pass in the following June (R. 64). Yet no more students were ever permitted to attend the Baltimore City Schools with tuition paid by Baltimore County than there was money in the budget (R. 70). The question of expenditure for Negro education in high schools from Baltimore County depends entirely upon how many pass the examination. If a larger group of white students are admitted to the high school than usual, there would not necessarily be an increase in expense; but for each additional colored child with tuition paid there is an item of \$95.00 or \$150.00 for each student (R. 64).

The following year the Board of Education began giving examinations to Negro children for the purpose of deciding who should receive free tuition to Baltimore City (R. 65). The only requirement of the Baltimore City Board of Education for admission to the eighth grade is that the student must have a report card signed by the principal indicating that the seventh grade has been completed (R. 118, 137).

Each year there is a record kept in the minutes of the Board of Education of the number of colored students taking the examination; they are called "contestants" and "applicants" for high school tuition (R. 89). The minutes show the number who pass the examination and the number who are recommended for high school tuition

(R. 65, 218-222). There is no mention any place in the minutes of the giving of an examination to white students or the number who pass or the number who enter high school (R. 65).

A *subpoena duces tecum* was issued to the respondent, Clarence G. Cooper, as Superintendent of the Board of Education, to bring with him all records of results of examinations given to white pupils of the seventh grade as well as records of examinations given to colored students (R. 38, 39). These records for white students were never produced at the trial (R. 96, 185).

On July 12, 1927, the Board of Education agreed that all colored pupils who made an average of sixty per cent in the examination would receive tuition to the colored high schools of Baltimore City (R. 219). In 1928, 15 colored pupils passed the examination and received free tuition (R. 220). In 1929, 103 colored pupils took the examination and only 20 were reported with an average of sixty per cent. The Board instructed the Superintendent to recommend all colored pupils with a general average of fifty and no mark less than thirty. This lowering of the mark added 17 pupils to the eligible list, making a total of 37 colored pupils out of 103 who took the examination (R. 220). In 1931, 125 colored children were promoted from the seventh grade, 89 appeared for the examination and 30 passed (R. 80). In 1932, 153 promoted (R. 80), 52 out of 133 applicants were authorized to attend the Baltimore City high schools. In 1933, 153 were promoted, 62 pupils recommended. July 11, 1933, the Board ordered that in the future colored pupils must obtain a general average of seventy per cent (R. 221). In 1934, 137 were promoted, 64 out of 128 pupils passed (R. 211).

The passing mark for colored children in this examination has fluctuated down as low as an average of fifty and up as high as seventy (R. 67). The white students made much higher averages in their general examinations (R. 67). There are two possibilities to account for one group of children testing lower than another group; either the children are mentally inferior or they have received inferior instruction (R. 69).

The examinations to colored children are given after they have completed their seventh year elementary course; after they are promoted by their principals; after their report cards are made and given them and after their school term has closed (R. 55, 119). The examinations are given in centrally located colored schools and colored students in other schools are required to attend these schools in order to take the examination (R. 71). The students must furnish their own transportation and no effort is made to see that they attend the centrally located schools to take the examinations. The colored principals are instructed to send only those students who have a fair chance of passing the examination (R. 71, 199-200). The examination is not a matter of right.

The only requirement for admission of a white child to the public high schools of Baltimore County is that the child be promoted by his elementary school principal (R. 73, 74, 213). Infant petitioner was promoted by her elementary school principal (R. 119). A Negro child is denied admission to the high schools of Baltimore County under any circumstances (R. 61, 98). Colored children desiring to obtain free tuition to Baltimore City schools must not only be promoted by their principal but must also in addition pass an examination prepared by the Board of Education, then be recommended by the Assistant Super-

intendent, and then be recommended by the Superintendent; and finally be approved by the Board (R. 79, 116). The examination for free tuition to colored pupils is given after the pupils have satisfactorily completed the seven-year course and have been promoted by their principals (R. 119, 121). The examination is for the purpose of obtaining free tuition (R. 211, 212).

This examination for Negroes given by the Board of Education is the sole criterion for free tuition and a high school education (R. 77, 86, 112, 113). Tests given to white pupils by their principals are not for the sole purpose of deciding admission to high school, but for the purpose of aiding the principal in deciding upon promotion (R. 73, 74, 86). Promotion of the white pupil is left entirely to the discretion of the principal (R. 214). Admission to high school of white pupils is based upon the tests in consideration with classroom work and the judgment and personal knowledge of the pupil's ability by the school principal (R. 117, 213) and recommendation of teacher (R. 129).

Colored school principals were instructed to discourage pupils whom the principal did not think would pass the examination (R. 119, 199, 121). The same principals were also instructed not to recommend for the examination those whom the principals did not think would have a "fair chance to pass the examination" (R. 71, 73, 204). Principals of white elementary schools were instructed to be lenient and even authorized to promote some children who failed to meet the requirements of the principal for promotion (R. 213). At least one colored principal did not send any of his seventh grade pupils to take the examination (R. 122).

All tests for white children are given in their own schools to the entire seventh year class (R. 71). The examinations for free tuition for Negroes are given in three or four centrally located schools (R. 71). The colored children from other schools desiring to take these examinations are required to pay their own transportation (R. 55, 56, 71). If they are not informed of the examination, because the principal does not believe they have a "fair chance to pass" or if for any reason they do not get to the place of examination on the proper day, they cannot get free tuition to Baltimore City (R. 137).

The examinations to colored pupils for free tuition from 1928 to 1934 were prepared by the supervisors of white schools (R. 100, 101, 123, 125). These supervisors never supervise colored schools, and are not familiar of their own knowledge with the colored schools, the colored pupils, or whether or not the course of study is followed (R. 68, 87, 98, 123, 127). The assistant superintendent is the only person who supervises colored schools (R. 71, 98). He is not present when the examinations are prepared but they are carried to him for him "to look at" (R. 125).

The examination for free tuition for colored pupils is based on the course of study as issued by the Board. But modifications of this course of study are made to meet the individual needs (R. 93). However, the supervisors who prepare these examinations do not know of the modifications in the course of study (R. 127), and there is no consideration left open for modifications in the course of study by the people preparing the examination (R. 127).

The examinations for free tuition for colored students is given by the supervisors of the white schools (R. 109).

Principals of colored schools are not permitted to give the examination (R. 109).

The examinations for free tuition for colored pupils are all carried into the office of the Board of Education and marked by the supervisors of white schools or a committee appointed by the superintendent (R. 112). These are not always the same persons who give the examinations (R. 112, 125). When these examinations are marked, neither the classroom records nor report cards are before the markers (R. 94, 124). The supervisors marking the examination have no knowledge of these records (R. 124). The only factor that enters into the marking of the colored examination is what is actually on the examination papers (R. 124). The colored children are required to pass each subject of their examination (R. 127).

Petitioner, Margaret Williams, attended public elementary school of Baltimore County at Cowdensville, her residence. She completed the seven-year elementary course in June, 1934. She was tested by her principal and given a report card (Petitioners' Exhibit #1) showing that she was promoted to the eighth grade. She was included on the list from the respondent Board of Education to the State Board of Education among the group promoted and included in the list "graduates" (R. 119). The promotion of Margaret Williams was based upon the examination given by her principal and upon her work in the school (R. 119). According to her principal, infant petitioner had satisfactorily completed the seven-year elementary course and was a good student (R. 119). She was given an examination before being promoted (R. 119). The purpose of this examination was to determine from her school work and the examination whether

she was qualified to pass from the seventh grade (R. 119). The Assistant Superintendent stated infant petitioner's report card showed she was rated as "a very good student" (R. 105).

After having been promoted from the seventh grade and after having received her report card showing that she was promoted, infant petitioner was instructed to attend the elementary school at Catonsville for another examination. Catonsville is more than three miles from her home and she was not offered transportation by the Board of Education, but was required to furnish her own transportation (R. 55).

The examination given in Catonsville in 1934 was prepared by the supervisors of white schools who were not acquainted of their own knowledge with the methods of instruction in the colored elementary school (R. 123). The examination was given by a supervisor who had never been in infant petitioner's elementary school (R. 123). The supervisor giving the examination at Catonsville did not help to prepare or compile the questions (R. 123). She helped to mark the papers (R. 124). When the papers were marked she knew nothing of the school records of the children, the records did not come to her knowledge (R. 124). She had no information of petitioner's classroom work. The only factor taken into consideration was what was said on the examination (R. 124). The colored children were required to pass each subject of the examination (R. 127).

About a month later the Superintendent of Schools of Baltimore County informed petitioner's father that she had failed and it would be advisable for her to take the

seventh grade again. In September, 1934, petitioner entered the Baltimore City High School and was admitted on her report card alone (R. 58). The Baltimore City school authorities did not require her to take an examination for entrance (R. 58, 118). The only requirement for admission to the Baltimore City schools of a student from Baltimore County is that the student must have a report card signed by the principal indicating that the seventh grade has been completed (R. 118). A report card marked as Petitioners' Exhibit #1 "Promoted to the eighth grade" is sufficient in itself to entitle the student to admission into the Baltimore City schools (R. 118). After staying in the Baltimore City school for a month and doing satisfactory work, she was informed that since her parents lived in the County she would have to pay tuition in order to remain in the school. Her school work was satisfactory (R. 58).

Petitioner went back to the seventh grade in Baltimore County and repeated the seventh grade (R. 58). In June, 1935, Margaret Williams was given an examination by her principal; was again given a report card marked "Promoted to the eighth grade" and her name was included in the list marked "graduates" which was recorded with the State Board of Education (R. 119). According to her principal, she had again satisfactorily completed the seven-year elementary course and was a good student.

She again went to the Catonsville Elementary School for the purpose of taking an examination, paying her own transportation.

The 1935 examination given to the infant petitioner and others of her race in June was the same examination

given to all white students in January (R. 75). The examination was sent out by the State Board of Education in January for the expressed purpose of checking the work of the pupils in the schools of the counties of the State—for the purpose of having the State Department survey the work of schools throughout the State—the results to be used for diagnostic purposes and remedial work (R. 133).

The examination was used for that purpose in the white schools (R. 76). Those who failed the examination remained in the grade. In June another examination was given by the principals and teachers. The children who failed the January test were not precluded from the June test (R. 117). If a student failed the January test and passed the June test he could go to high school (R. 117). He had six months to improve his grade standing (R. 117). In recommending white pupils for high school the principals took into consideration the January test, the June test prepared by the individual teachers, classroom work and general knowledge of the student (R. 117, 128, 129).

The same examination was given to petitioner and others of her race in June in the centrally located schools by the supervisors of white schools (R. 74). This examination was used as the sole criterion for the payment of tuition for colored students (R. 77).

There are no penmanship instructors for colored schools (R. 107). Penmanship was one of the subjects upon which petitioner was tested in 1935. The possible score that she might have made on penmanship was 15, while her actual score was 6, being a difference of 9 points. Her total actual score on the examination was

244. The passing mark was reduced to 250 (R. 97), a difference of 9 points, which might have been allowed for spelling or handwriting, and which would have passed her (R. 107).

It is admitted that if a white student had failed the examination by six points and should be a very good pupil she would not necessarily fail (R. 129). Promotion would take into consideration the classroom work and the recommendation of the teacher (R. 129).

ARGUMENT.

I.

THE JUDGMENT AND ORDER OF THE TRIAL COURT ARE AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO THE LAW APPLICABLE TO THE CASE.

A. The Baltimore County High Schools Are Public Institutions and a Part of the Public Free School System.

This point is conceded by respondents, and needs no argument (R. 11).

B. The Assertion by Respondents of the Right to Exclude Infant Petitioner from the Catonsville High School Solely on Account of Race or Color on the Ground that Separate Educational Opportunities Were Offered Her Elsewhere, Cast Upon Them the Burden of Proving Express Constitutional or Statutory Authority for Such Separation.

1. Neither the Maryland Constitution nor statutes authorize respondents to exclude petitioner from the Baltimore County High Schools solely on the ground of color or to set up a separate system of high school education for Negroes.

The Maryland statutory law beginning with the Declaration of Rights and Constitution in 1867 has provided

for a uniform system of education for the citizens of the State of Maryland. These provisions are:

1867—*Declaration of Rights*:

Art. 43. "That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general amelioration of the condition of the people."

1867—*Constitution*:

Article VIII, Section 1. "The General Assembly, at its first session after the adoption of this Constitution, shall, by law, establish throughout the State a thorough and efficient system of free public schools; and shall provide by taxation or otherwise, for their maintenance."

In construing this section of the Constitution, the Court of Appeals of Maryland has held that:

"The Constitution of this state requires the General Assembly to establish and maintain a thorough and efficient system of free public schools. This means that the schools must be open to all without expense. The right is given to the whole body of the people. It is justly held by the authorities that to single out a certain portion of the people by the arbitrary standard of color, and say that these shall not have rights which are possessed by others, denies them the equal protection of the laws."

Clark v. Maryland Institute, 87 Md., 643, at p. 662 (1898)

Cited and followed in *Pearson v. Murray*, 169 Md. 478, 182 A 590, 103 A. L. R. 706, (1936).

It is interesting to note that the provisions for education in the Declaration of Rights and in the State Constitution are absolutely silent on the question of race, and these provisions neither authorize nor require the separation of white and colored students. Pursuant to these provisions, the State Legislature provided for a system of free public schools as follows:

Bagby's Maryland Code, Article 77.

Sec. 72. "*Elementary* schools shall be kept open for not less than one hundred and eighty (180) actual school days and for ten months in each year, if possible, and shall be free to all white youths, between six and twenty years of age." (Italics ours.)

Bagby's Maryland Code, Article 77.

Sec. 200. "It shall be the duty of the County Board of Education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and sixty (160) actual school days or eight months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools."

According to the above statutes, there is still no requirement for the separation of the races. Even if Section 72, quoted above, is construed as authorizing the establishment of separate schools for white pupils, it is by its own terms limited to elementary schools. State Legislatures wishing or intending to require the separation of the races do so by positive legislative enactment requiring separation.

Continuing its provisions for the education of the youth in this State, the legislature codified the law as to high schools in the following Act of 1916:

Bagby's Maryland Code, Article 77.

Sec. 192. "The county board of education of any county shall have authority to establish high schools, subject to the approval of the state superintendent of schools, in their respective counties, when, in their judgment, it is advisable to do so. All high schools so established and those now in operation shall be under the direct control of the several county boards of education, subject to the provisions of this article. * * *"

The above provision of the Code neither requires nor authorizes the separation of the races in high schools. The systems of high schools in the counties are controlled by this section.

See *School Commissioners v. Henkel*, 117 Md. 97 (1912).

Under these provisions all the public schools in Baltimore County are maintained. There is no express statutory authority for the separation of the races in the high schools of Baltimore County. It is admitted in the pleadings that respondents were under a duty of providing a *uniform* and *efficient* system of public schools [Sec. 41, Art. 77, Md. Code] (B. 10).

2. In the absence of Constitutional or statutory authority an administrative agency cannot exclude a qualified resident from the tax supported public schools.

The system of high schools in Baltimore County is controlled by Section 192 of Article 77 of the Code *supra*, and under this provision there is no authorization for the separation of the races. Under such a provision the

Board of Education of Baltimore County cannot legally discriminate against or exclude from such benefits the petitioners in this case.

“Where a state establishes a free school system and makes no distinction in regard to the race or color of the children of the state who are entitled to its benefits, equal school facilities must be provided, and no school officer or public authority can legally discriminate against or exclude from such benefits, directly or indirectly, because of race or color, any child who is otherwise entitled to attend a school established under such system.”

11 *C. J. Civil Rights*, Sec 13, p. 807.

As a matter of fact, by the great weight of authority, it has been held that in the absence of express authority, a municipality or school district has no right to separate white and colored children for purpose of education:

Board of Education v. Tinnon, 26 Kans. 1 (1881).

Crawford v. District, 68 Or. 388, 137 Pac. 217 (1913).

“* * * It must be remembered that unless some statute can be found authorizing the establishment of separate schools for colored children that no such authority exists. * * *”

Board of Education v. Tinnon, supra.

The administrative authority, in the absence of express power delegated by statute, cannot exclude Negro students from schools established for white students, even though the educational facilities in the segregated Negro school are equal or superior to those of the white school.

People ex rel. Bibb v. Mayor, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. (1901).

All youth stands equal before the law.

Clark v. Board, 24 Iowa 266, 277 (1868).

The question as to what the Legislature might have done is beside the point; the administrative authority cannot arrogate to itself the Legislative functions.

Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885).

While the Board of Education has large and discretionary powers in regard to the management and control of the schools, it has no power to make class distinctions or racial discrimination.

See:

Chase v. Stephenson, 71 Ill. 383, 385 (1874).

The reason is obvious. A discrimination by the Board against Negroes today may well spread to discrimination against Jews on the morrow; Catholics on the day following; red headed men the day after that.

“ * * * It is obvious that a board of directors can have no discretionary power to single out a part of the children by the arbitrary standard of color, and deprive them of the benefits of the school privileges. To hold otherwise would be to set the discretion of the directors above the law. If they may lawfully say to the one race you shall not have the privilege which the other enjoys they can abridge the privileges of either until the substantive right of one or both is destroyed.”

Maddox vs. Neal, 45 Ark. 121, 124 (1885).

See also:

Foltz vs. Hoge, 54 Cal. 28 (1879).

State vs. White, 82 Ind. 278 (1882).

Connell vs. Gray, 33 Okla. 591, 127 P. 417 (1912).

C. When Respondents Refused to Admit Infant Petitioner to the Catonsville High School on the Ground that Separate But Equal Educational Opportunities Were Offered Her, the Burden of Proof Was Upon Respondents to Show Also by a Preponderance of Evidence that the Educational Opportunities Offered Petitioner Were in Fact Equal.

The petition in this case alleged that infant petitioner, as a resident of Baltimore County, had satisfactorily completed the elementary school course and had been refused admission to a public high school in Baltimore County (R 5-9). The answer of respondents was in substance a plea in confession and avoidance. The answer alleged that there had been set up a system of paying tuition to Baltimore City Schools for Negroes and that the system offered colored pupils of Baltimore County educational advantages in all respects equivalent to those afforded by the white schools maintained by said Board of Education of Baltimore County (R 12). That put upon respondents the affirmative of the issue and the burden of proof.

“Should defendant not traverse, generally or specifically, the allegations of plaintiff’s case, but rely upon an affirmative defense, as in abatement, or confession and avoidance, which plaintiff denies, the burden of proof is on defendant to prove *every material allegation* relied on by him, although the replication itself is argumentative, or although the declaration negatives the defense by anticipation.” (Italics ours.)

22 *C. J. Evidence*, Sec. 16, pp. 72, 73.

“ * * * But where plaintiff takes issue upon the plea by the general replication * * * and replies at the same time by a special replication in confession and avoidance the burden of proving the plea remains with defendant, and until some evidence is

offered in its support the issue tendered by the special replication is immaterial.

Ray vs. Fidelity-Phoenix Fire Insurance Company, 187 Ala. 91, 94, 65 So. 536 (1914).

“Where the relator has made out a prima facie case, the burden of proof is on defendant to justify his action.

38 C. J. *Mandamus* 915, Sec. 671.

See also:

Dixon vs. McDonnell, 92 Mo. App. 479 (1902).

Berger vs. St. Louis Storage & Commission Co., 136 Mo. App. 36, 116 SW 444 (1909).

Bathe vs. Metropolitan Life Insurance Co., 152 Mo. App. 87, 132 SW 743 (1910).

Menzenworth vs. Metropolitan Life Insurance Co., 249 SW 113 (Mo. App. 1923).

Maddox vs. Neal, 45 Ark 121 (1885).

The burden of proof is important in the instant case for several reasons. Information concerning the school system of Baltimore County, the examinations, methods of administering examination and other material facts were peculiarly within the knowledge of respondents. The only possible way for petitioners to deny allegations of respondents was by calling respondents and their agents to witness stand and examining them as adverse witnesses. (R 59, 61, 97, 98, 116, 119, 120, 123, 127, 129, 183).

All knowledge of the facts concerning the allegations that white pupils were required to pass the same examin-

ation as infant petitioner, the actual examinations (if given), the records of these examinations, etc. were within the peculiar knowledge and control of the respondents. The law of evidence is settled as to the effect of peculiar knowledge or control of evidence.

“EFFECT OF PECULIAR KNOWLEDGE OR CONTROL OF EVIDENCE. In the administration of justice it is often wise to place the burden of producing evidence on the party best able to sustain it, and ambiguity, concealment, or evasion react with peculiar force on a pleader who asserts a fact and fails to produce the evidence, which if his assertion were true would be in his possession. Hence it is very generally held that where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within his control, the burden rests on him to produce the evidence, although he is obliged to go no further than necessity requires. It is, however, anomalous that mere difficulty in discharging a burden of making proof should displace it; and as a matter of principle the difficulty only relieves the party having the burden of evidence from the necessity of creating positive conviction entirely by his own evidence; so that, when he produces such evidence as it is in his power to produce, its probative effect is enhanced by the silence of his opponent. Where the party on whom rests the burden of evidence as to a peculiar fact has the essential documents or evidence within his control, a peculiar clearness of proof is demanded, although the fact is negative.”

22 *C. J. Evidence*, Sec. 24, pp. 81, 82.

See also :

Runkle v. Burnham, 163 U. S. 216, 14 S. Ct. 837, 38 L. Ed. 694 (1893).

Graves v. U. S., 150 U. S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1893).

Farrall v. State, 32 Ala. 557 (1858).

Cumberland Coal, etc. v. Parish, 42 Md. 598 (1874).

Respondents alleged in their pleadings that the same examinations are given white and colored students (R 12, 16). Petitioners denied this allegation and demanded strict proof of same (R 21, 24, 25). Petitioners issued a *subpoena duces tecum* to respondent Cooper to bring with him all examinations given to white pupils and the records of the results of said examinations (R 38, 39).

Throughout the trial respondents alleged that the examination was given white and colored students alike, and that the white students took the examination. Examination papers and records of examinations for colored students for years back were produced but despite reiterated demands throughout the trial (R 96, 185), and a formal demand at the close of petitioners' case (R 185-187) not a single examination paper of a white student was produced nor was a single record exhibited showing the authorization for giving of an examination to white pupils nor a single record offered to show the results of any white students examination, even though the office of respondents was in the Court House itself, there was a white school within two blocks of the Court House and the trial lasted several days with respondents and their agents in constant attendance. Obviously there is no way for petitioners to show that the examina-

MARGARET WILLIAMS, Infant,
by JOSHUA B. WILLIAMS,
JR., Her Father and Next
Friend, and JOSHUA B.
WILLIAMS, JR., Individu-
ally,

vs.

DAVID W. ZIMMERMAN, ET AL.

IN THE
Court of Appeals

OF MARYLAND.

APRIL TERM, 1937.

GENERAL DOCKET NO. 28.

**A MEMORANDUM TO FOLLOW THE CASES
CITED ON PAGE 28 OF OUR BRIEF.**

Jones on Evidence, 2d Ed., Sec. 179:

“Of course the pleadings are the guide in the first instance; and pleadings are so framed that in most cases the plaintiff is the actor who must take the initiative and the one on whom the burden of proof rests. Ordinarily, in the absence of any evidence on either side, the plaintiff’s action would fail, but this is not necessarily true. For example, in an action on contract the defendant may admit the due execution of the contract but set up an independent defense. In such cases he becomes the actor; and it is then incumbent upon him to establish the affirmative defense which he alleges. This is well illustrated in actions on insurance policies where the answer admits the issuing of the policy and the loss and damages claimed, but alleges a breach of conditions; in such cases the plaintiff is entitled to a verdict unless the defendant satisfies the jury that the conditions have been broken. Nor is the rule changed in cases where the complaint alleges that none of the conditions of

the policy have been broken and where the answer denies such allegation, since that is an allegation which is not necessary for the plaintiff to make or prove. In the instances above cited, it appeared from the state of the pleadings that the burden of proof rested, not with the plaintiff, but with the defendant. When the form of the pleadings is such that at the beginning the burden is cast upon the plaintiff and he establishes his prima facie case, the burden of answering such case must then be met by the defendant or the plaintiff prevails."

Sec. 180:

" * * * Whoever desires a court to give judgment as to any legal right or liability dependent upon the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist. * * * In some of the cases cited the allegation, negative in form was made by the plaintiff, in others by way of defense; they all illustrate the rule that where a claim or defense rests upon a negative allegation, the one asserting such a claim or defense is not relieved of the onus probandi by reason of the form of the allegation or the inconvenience of proving a negative. But in such cases a less amount of proof than is usually required may avail. Such evidence as renders the existence of the negative probable may change the burden to the other party."

Sec. 181:

"On principles already discussed the burden of proof as to any particular fact rests upon the party asserting such fact. The burden of proof may during the course of the trial be shifted from one side to the other; and where the fact is one peculiarly within the knowledge of one of the parties, slight evidence may suffice for that purpose. Many illustrations within this chapter clearly show that where the

facts lie solely within the knowledge of one party, this is an important consideration in determining the amount of evidence necessary to be produced by the other party. 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other; and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.' "

2 Jones, Commentaries on Evidence, 2d Ed., Sec. 495:

" * * * The law places the general burden of proof of making out a case by a preponderance of evidence upon one party, and in this it is arbitrary and brooks no interference; likewise the law arbitrarily declares the essential and material averment of particular actions. These rules no court can alter. But as to what shall constitute a prima facie case, and as to the burden of going forward with the evidence, the court has certain discretion which permits it in order that justice may be done, to do indirectly that which it cannot do directly, and to avoid the rules to the extent of declaring a prima facie case as made out upon such slight evidence as the party sustaining the general burden of proof is fairly able to produce, then to call upon the opposite party to meet this evidence or suffer the presumptions arising from failure to produce."

Sec. 496:

"Where the evidence to substantiate a certain averment lies solely within the knowledge of one party, but the general burden of proof in regard to

the particular averment lies upon the opposite party, determination of the amount of evidence necessary to be produced by the party having the general burden in order to place the burden of going forward with the evidence upon the party having possession of the facts, become important. (Citing *U. S. v. Denver & R. Ry. Co.*, 191 U. S. 83, 48 L. ed. 106, 24 S. Ct. 33—cutting timber on right of way)."

See also:

- 39 Y. L. J. 117;
- 1 Phillips on Evidence (Edward's 5th Am. Ed.), *822 N. 8;
- 2 Ency. of Evidence, 804, 809;
- Jones on Evidence (2d Fed.), Sec. 179;
- 2 Chamberlyne on the Law of Evidence, Sec. 984;
- 1 Greenleaf on Evidence, 16th Ed., Sec. 79;
- 5 Wigmore on Evidence, Sec. 2486;
- Gorter on Evidence, p. 58;
- 3 Nichols on Applied Evidence (Mandamus), p. 2972.

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tions were not given to white students except by the logical inference which arises from the failure of respondents to sustain the burden of proof placed upon them by their own pleadings and testimony.

Respondents allege that the examinations were ordered given to white and colored pupils alike pursuant to the rules and regulations of the Board of Education of Baltimore County (R 12, 16). The minutes of the Board accurately represent all that transpires in the Board. There are no official acts not recorded in the minutes (R 62). There is no mention of an examination to white pupils any place in the minutes (R 65). The first mention in the minutes of any examination is coincident with the decision of the Board to pay tuition of Negro students to go to Baltimore City and is limited solely to Negroes (R 218, 219). The minutes for each year after 1927 show full records of the examinations to Negro pupils and the results (R 219-222). There is no mention of any type of examination to white pupils prior to July 7, 1936 (R 222), almost four months after case was filed, two months after replication and two days before argument of the demurrer (R 3-4).

Perhaps the nearest case in point on the question of the power to require examinations is *Crayhon v. Bd. of Education*, 99 Kan. 824, 163 Pac. 145, L. R. A. (1917C) 993 (1917). This case involved the giving of examinations to pupils who had completed the eighth grade of a parochial school and who had applied for admission to the public high schools. No examinations were given to the graduates of the public elementary schools. The answer of the defendants admitted that the students of the parochial school had received the same type of educa-

tion as the pupils in the public elementary schools. The Supreme Court of Kansas granted the mandamus to admit the pupils without the taking of the examination and although the Court held that the case should not be a precedent for all cases it held that it would apply under the facts as admitted in the answer. In the case at bar the Board admits that the infant petitioner received the same type of education as offered all students in Baltimore County. She was tested and graded while an elementary student and promoted or "graduated" from the seventh grade.

In a similar case practically the same ruling was handed down by the Supreme Court of Illinois in *Trustees v. The People*, 87 Ill. 303, 29 Am. R. 55 (1877). In this case the relator, a citizen and taxpayer applied to have his son admitted to the high school. The son passed a satisfactory examination and was sufficiently proficient in all branches of study, except that of grammar, to entitle him, under the regulations prescribed by respondents, to admission to the high school. The relator had forbidden his son to study grammar, and desired that he should pursue no study which necessitated a previous knowledge of grammar and asked that he be admitted to pursue only those studies in which he was sufficiently proficient to entitle him to admission to the high school. The Respondents denied the son admission to the high school, solely because of his inability to pass satisfactory examination in grammar.

Power of trustees "to adopt and enforce all necessary rules and regulations for the management and government of the schools; to direct what branches of study shall be taught, and what text-books and apparatus shall be

used, and to enforce uniformity of text-books (Rev. Stat. 1874, pp. 962-3, Sec. 48).

In speaking of act which created high schools, the Court stated:

“It is apparent the object of the legislature was simply to increase the facilities for acquiring a good education in free schools. The high school thus established can no more be controlled for the benefit of some to the exclusion of others, than can the district schools. All children in the township, within the prescribed ages for admission to the public schools, have equal rights of admission to the high school when they are sufficiently advanced to need its instruction. It would be contrary to national right and the manifest purpose of the legislature, to hold that the high school, by arbitrary and unreasonable regulations of the trustees should be practically closed to all but a favored few. Every taxpayer contributes to its benefits, in equal degree by all.” at p. 306

“We think the exclusion of the relator’s son from the high school, upon the ground alleged, by the respondents, unauthorized by the statute. The regulations requiring it is arbitrary and unreasonable, and cannot be enforced, but must be disregarded.” at p. 309

1. *Paying Tuition for Certain Negro Pupils in the Baltimore City Schools Is Not the Equivalent of Educational Opportunities Offered to White Pupils in Baltimore County.*

Respondent Board of Education maintains an integrated school system for white pupils in Baltimore County consisting of a uniform elementary course of seven years and a high school course of four years (R 62). White pupils pass from the seventh grade of the elementary school to the first year of the high school

in the same manner as they pass from one grade to another in the elementary and high schools, and in many instances both elementary and high schools are housed in the same building, all part of the same system.

There are ten high schools in Baltimore County used by white pupils, the same being estimated at a value of \$1,883,500 and operating at a total annual current expense of \$336,594.88 (R 62). The Board of Education furnishes transportation at public expense to white pupils attending these high schools except for 10 cents a day paid by parents (R 62).

The colored pupils who are approved by the Board of Education are offered free tuition to the Baltimore City high schools. The colored pupils in the Baltimore City schools are under the sole control of the Board of School Commissioners in Baltimore City. The respondents supervise and control the education of the white pupils through the elementary and high schools. They supervise and control the education of the colored child only up to the seventh grade. After the seventh grade respondents have no jurisdiction over what the colored child shall receive in the line of education (R 70-71).

Under the system of education of Baltimore County there are seven years elementary school and four years high school making a total of 11 years to complete the education in public schools. Under the system of sending colored children into Baltimore City the children are required to take five years high school, making a total of 12 years to acquire the same education offered to white pupils in 11 years. This amounts to a loss of one year of the Negro pupils' life.

Adult petitioner as a taxpayer of Baltimore County has a proprietary interest in the public school system of said county, which gives him a corresponding power of control over the administration and conduct of such schools and the type of education which should be offered therein—a right which he does not possess over the schools of Baltimore City and the type of education offered to his daughter under the plan adopted by the Baltimore County Board of Education.

“ * * * the public school system owes its existence and perpetuity to taxes drawn from the people; in a sense therefore the citizen may be said to have a proprietary interest in the system.

This is true not only in a pecuniary sense in that he contributes annually to its support but on account of the advantages extended to his children, who, within the contemplation of the law, are entitled, without stint or distinction, to whatever rights and benefits the system affords.”

Wright vs. Board of Education, 295 Mo. 466,
246 SW 43 (1922).

See:

Chase, et al. vs. Stephenson, et al., (supra).

The respondents cannot discharge their admitted obligations to the adult petitioner as a taxpayer and to infant petitioner as a resident infant of lawful school age by requiring infant petitioner to go out of the county to a school not maintained or controlled by respondents.

“The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep un-

der their exclusive control, through their representatives the education of those whom it permits to take part in the affairs of the state.”

Piper v. Big Pine School District, 193 Cal. 664,
226 P. 926 (1924).

2. Opportunity to Obtain Free Tuition to High Schools Outside the County Is Not a Matter of Right for All Negro Pupils.

Prior to 1926 there was no provision for the high school education of Negroes (R. 64). Up to the present time there are no separate high schools for Negroes in Baltimore County and by administrative rule Negroes are not permitted to attend the existing high schools.

Starting with 1927 there has been a system of payment of tuition for certain Negro students in Baltimore City schools. There are several reasons why this system was never meant to be a matter of right for colored pupils. In the first place the Board was very careful in granting this privilege to impose certain limitations. The Negro child could only receive tuition upon the promotion by his principal plus the approval of the Board after a recommendation by the Assistant Superintendent plus a recommendation by the Superintendent (R. 218-19).

Principals of colored elementary schools were instructed by respondents to discourage certain pupils from taking the examinations for high school tuition and to only recommend those who had a “fair chance to pass” (R. 99, 199).

If for any reason a colored pupil does not take the examination or is not present at the designated place

when the examination is given, the pupil cannot be recommended for approval by the Board of Education for the payment of free tuition (R. 88, 137).

II.

THE REFUSAL TO ADMIT INFANT PETITIONER TO THE CATONSVILLE HIGH SCHOOL IS CONTRARY TO AND IN VIOLATION OF THE DECLARATION OF RIGHTS, THE CONSTITUTION AND LAWS OF THE STATE OF MARYLAND.

A. *The Constitution and Laws of Maryland Provide for a free, Uniform System of Public Schools.*

See I B (1) *supra*.

B. *Adult Petitioner as a Citizen and Taxpayer of Baltimore County Has a Proprietary Interest in the Public Schools of the County.*

See:

Wright v. Board of Education, supra.

Chase, et al. v. Stephenson, et al., supra.

C. *The Arbitrary and Illegal Acts of Respondents in Excluding Infant Petitioner from the High Schools of Baltimore County Solely on Account of Race or Color Deprive the Adult Petitioner of His Proprietary Interest Contrary to the Declaration of Rights of Maryland.*

“That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land.”

Art. 23, Declaration of Rights of Maryland.

III.

THE REFUSAL TO ADMIT INFANT PETITIONER TO THE CATONSVILLE HIGH SCHOOL IS CONTRARY TO AND IN VIOLATION OF SECTION 1 OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT SAID REFUSAL DEPRIVES ADULT PETITIONER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

A. The Action of the Respondents in the Premises Was State Action Within the Meaning of the Fourteenth Amendment.

Respondents admit that the Board of Education of Baltimore County is an administrative department of the State of Maryland (R. 52). It follows that the action of respondents in refusing to admit infant petitioner to the public high school of Baltimore County was state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Ex parte Virginia, 100 U. S. 339, 346, 25 L. Ed. 676 (1879).

Pearson v. Murray, *supra*.

B. The State of Maryland, Through the Arbitrary and Illegal Acts of Respondents in the Premises, Deprived Petitioner of Property Without Due Process of Law.

The property interests protected by the due process clause include not only physical possession but all rights of use and enjoyment.

Buchanan v. Warley, 245 U. S. 60, 62 L. Ed. 149 (1917).

The tax supported public high schools of Baltimore County maintained from tax funds contributed to by adult petitioner are of no benefit to him if his child, in-

fant petitioner, is denied use thereof. The arbitrary acts of respondents in excluding infant petitioner have deprived adult petitioner of this proprietary right without due process of law.

C. *The Judicial Sanction of This Discrimination Against Adult Petitioner Amounted to Depriving Him of His Property Without Due Process of Law.*

The refusal of the trial court to issue its peremptory writ of mandamus in effect ratified and endorsed the deprivation of adult petitioner's property by the arbitrary and unconstitutional acts of the respondents, and itself amounted to depriving adult petitioner of his property without due process of law.

IV.

THE REFUSAL TO ADMIT INFANT PETITIONER TO THE CATONSVILLE HIGH SCHOOL IS CONTRARY TO AND IN VIOLATION OF SECTION 1 OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT SAID REFUSAL DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAW.

A. *The Action of the Respondents in Excluding Infant Petitioner from the Catonsville High School Was State Action Within the Meaning of the Fourteenth Amendment.*

See argument III A, *supra*.

As evidence that respondents refusal to admit infant petitioner to the privileges of a high school education was based solely on her race or color it appears that when her report card was presented to the proper admitting officer of the Catonsville High School, infant petitioner was denied admission prior to any knowledge on his part that she had allegedly failed to pass the so-called

uniform examination, relying on the assertion that he had no jurisdiction over the colored race. Respondents and their agents testified that if infant petitioner had passed the so-called uniform examination and had presented herself for admission to the Catonsville High School, still they would not have admitted her because of her race or color. It thus appears that no question of the qualifications of infant petitioner was considered by respondents or their agents, but that, irrespective of qualifications, infant petitioner's race or color was the sole consideration incident to the refusal of admission to infant petitioner. Or in other words, respondents, reacting to an age-old custom of assuming a dual standard of the enjoyment of state and federal rights of citizenship between the white and Negro citizens, were set in their ideas that infant petitioner, a Negro, had no right to enjoy the privilege to a high school education equivalent to that offered white pupils.

See:

Strauder v. West Virginia, 100 U. S. 303, 307 (1879).

B. The Attempt of Respondents to Force Infant Petitioner to Abandon Present Advantages of Attending the High Schools of Baltimore County for the Possible Chance of Obtaining a Tuition Scholarship in Baltimore City Through Competitive Examination Is Arbitrary and Illegal Action Solely on Account of Race or Color and a Denial of the Equal Protection of the Laws as Guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The theory upon which petitioner proceeded was that the requirement of an examination as a condition precedent to the payment of tuition in the high schools of Baltimore City was an arbitrary and illegal imposition

placed only upon petitioner and members of her race and purposely set up to discourage rather than encourage Negro pupils to attend high school; that the examinations were conducted in such a manner as to diminish the chances of Negro pupils' passing them; that the examinations were given under unfavorable conditions which further lessened these chances; and were given for the purpose of limiting the amount of money to be paid by the respondent Board of Education for Negro pupils (R. 21, 24). It is submitted that the lower court erred in ruling as a matter of law, prior to the trial, throughout the trial, and restricting consideration of the case and his opinion to such sole proposition, that the petition must fail unless petitioner showed that she had passed the examination set up by respondent Board of Education and that all other questions raised by the pleadings were moot questions and not to be considered in these proceedings (R. 34, 37, 42, 103-182). Evidence on behalf of respondents attempting to show the fairness of the examination was admitted into the record over objection of petitioner (R. 125, 126, 188-191). Petitioners were precluded from introducing testimony from an expert witness as to the unfairness of the examination or its lack of suitability for the purposes for which it was used (R. 141-182).

1. The Examinations Were Unfair and Not Suited for the Purpose for Which They Were Given.

The record is replete with testimony which clearly establishes that the examinations given to Negro pupils for the purpose of obtaining free tuition to the Baltimore City High Schools are unfair. This unfairness manifests itself both in the administrative practices governing the preparation, the giving and the marking of the

examination, and the constitution of the examination itself.

There is abundant evidence to sustain the fact that only certain Negro pupils were encouraged to take the examination (R. 99-116, 199). Just how the principals of the Negro schools were to determine who were to be encouraged and who discouraged was only one of the mysterious things left unexplained by the respondents during the course of the trial.

The discriminatory practices as to the preparation of the examination are evidenced by the fact that white supervisors who have never been officially in the colored schools, who have no knowledge of the pedagogical practices therein, and have no actual knowledge of their own as to the extent which the course of study, as given in the colored schools, deviates from the standard course of education prescribed by the Baltimore County Board of Education, prepare these examinations without any consultation with the teachers who have instructed the persons to be examined (R. 123-125, 127, 128). Moreover, these examinations were given by the same supervisors and these young colored pupils were required to take the examinations under the supervision of these unfamiliar tutors, not acquainted with their particular mental and physical problems and in strange surroundings, all of which factors have tended to make it even more difficult for the pupils to meet the rigorous standards set up by the examiners, rather than to produce an atmosphere in which the child would be encouraged to display his true intellectual level. In those few instances in which their colored instructors were even permitted to be present, they were allowed to take no part in the actual

conduct of the examination and acted only as monitors to maintain discipline (R. 109).

As a final example of unfairness in the administration of the examination, attention is called to the fact that the papers were marked by the same group of supervisors, or other persons especially assigned for that purpose. But the papers were not always marked by the same person who gave the examination, and quite frequently not marked by the persons who had prepared the examination (R. 123-125, 127, 128). The Negro teachers who had instructed the pupils never participated in the marking of the examinations and were not even consulted as to the peculiar abilities of their students in order to afford the marker a basis for evaluating the students' answers to the questions (R. 124, 128).

As indicated above it is difficult for petitioner to prove by the testimony that the examinations were unfair in their content for the reason that the court erroneously excluded all testimony offered or tendered to establish that fact while permitting respondents' witnesses to testify, even by hearsay, that the examinations were fair. However, petitioners did introduce Dr. Robert R. Davids for this purpose. It should here be parenthetically noted that Dr. Davids is the only expert who testified at the hearing, and is the only witness qualified to speak with authority upon the many technical questions that these examinations produced. Each of the respondents, their agents and their witnesses who testified disclaimed any expert knowledge on these matters. Moreover, Superintendent Cooper, who has charge of the white schools, and Assistant Superintendent Herschner, who has charge of the colored schools in Baltimore County, each dis-

claimed knowledge of the facts relative to the examinations given under the supervision of the other.

While petitioner contends that the court below committed error in refusing to concede Dr. Davids' qualifications as an expert and refused to admit him as such expert witness (R. 141-145), the evidence does disclose that Dr. Davids' opinion, elicited largely by cross-examination, is to the effect that such examinations are not a fair method of testing a student's ability, and does not represent the prevailing practice in accredited schools in this country.

Even if the respondents had the authority to give these examinations and if they were in fact given to white and colored students alike under exactly identical circumstances, it still follows that the examinations would not be suited for the purpose of determining whether or not the student should be promoted to high school (R. 141-183). More particularly is this true in regard to the 1935 examination, the so-called "progressive achievement" test. All of the testimony discloses that it was issued by the State Board of Education for the sole purpose of obtaining a diagnosis of all the schools and students throughout the state, and was so distributed and used in all of said schools with the lone exception of the Negro students in the seventh grade in Baltimore County (R. 75, 105, 116-18, 132, 136, 190-191). It was in fact so used with the white seventh grade students in Baltimore County in January in that year and its purpose served by remedial work given to those students thereafter. Dr. Davids' testimony is clear and uncontradicted that the use of this examination alone for the purpose of promotion is unsound and not the accepted form in modern schools (R. 145-182).

2. Respondents Failed to Show by a Preponderance of the Evidence that the Baltimore County Board of Education Required the Same Examination of White Students as a Condition Precedent to Their Admission to the Baltimore County High Schools.

Respondents in alleging that infant petitioner failed in the required uniform examination given to white and colored pupils alike as a precedent to admission to high school assumed the burden of proving that the examinations were in fact required of white pupils for admission to high school and that they were uniform. (See I C.)

White pupils are admitted to the ten so-called "white high schools" maintained by the county solely on the recommendation of their own principal, whose recommendation is based on examination given by such white principal in his own school along with a consideration of his class room work. Thus the admission of the white pupil to the high school becomes a matter of absolute right upon the satisfactory completion of the seven years of prescribed elementary work. And the determination of whether or not the white pupil has satisfactorily completed this work rests within the sole judgment of the white principal, and does not require even the consideration of or any consultation with the Assistant Superintendent, the Superintendent, or any member of the respondent Board,—much less a recommendation from any one of them. In fact, according to respondents' own testimony, no administrative officer or member of the respondent board has any knowledge of how many white pupils are "promoted to the high school" as distinguished from those merely "promoted out."

In contrast to the above method of admitting white students to high school as a matter of right upon the

satisfactory completion of the seventh grade, the Assistant Superintendent who is supervisor of Negro schools and is the only person authorized to recommend Negro pupils for approval of the Board of Education and the payment of tuition testified that he does not put any confidence in the colored teacher's certification that the child has completed the work of the seventh grade (R. 111-112). The only requirement for admission of a white student to the Baltimore County high schools is that the pupil satisfactorily complete the seven year elementary course. Not only does a colored pupil have to satisfactorily complete the seven year elementary course as required of all pupils, but must in addition thereto be recommended by his principal, second, take the so-called uniform examination for tuition to the Baltimore City high school, third, be recommended by the Assistant Superintendent, fourth be recommended by the Superintendent, and fifth and finally must be approved by the Board of Education (R. 79, 115, 116).

The practical result of these discriminatory practices are shown by a comparison of the statements of respondent witnesses that practically all white students go from the seventh grade to high school and the figures in the minutes as to colored students: viz:

- 1931—128 colored children promoted from 7th grade.
(Report of State Board of Education).
89 took examination for high school tuition
30 passed (Minutes, p. 75)
- 1932—158 colored children promoted from 7th grade.
(Report of State Board).
133 took examination for high school tuition
52 passed (Minutes, p. 137).

- 1933—153 colored children promoted from 7th grade.
 (Report of State Board).
 135 took examination
 62 passed (Minutes, p. 189).
- 1934—137 colored children promoted from 7th grade.
 (Report of State Board).
 112 took examination
 31 passed (Minutes, p. 243).
- 1935—153 promoted from 7th grade.
 (Report of State Board).
 128 took examination
 64 passed (Minutes p. 307).

Respondents at trial refused to make any distinction as to the mental qualifications of Negro children or that they were inferior as to ability to absorb education. They maintained that the Negroes received the same type of education as whites. Then how can they explain that only about 36% of the Negroes pass the examination and that only about 32% of the Negroes who leave the seventh grade are approved by the Board?

If it were assumed that the Court could find that prior to 1935 the examinations had been uniform, evidence adduced by respondents themselves disclosed that the 1935 examination was sent out by the State Board of Education for the purpose of determining the grade placement level of all students, white and colored, as well as to detect and analyze deficiencies in the method of classroom instruction, and to obtain an analysis of the efficiency of the courses of study in use in the various counties, and was used for this purpose in the seventh grade of the so-called white elementary schools in Baltimore County and was given to the pupils of such grade

in January of 1935. But this examination was arbitrarily withheld from the Negro pupils of the seventh grade in Baltimore County until June of 1935, when it was given to petitioner, along with a few others, arbitrarily selected by the principals of the colored elementary schools, in accordance with the instructions previously mentioned, from the Assistant Superintendent, and was used as the sole basis for determination of whether or not those successfully passing such examination, should receive the recommendation of the Assistant Superintendent and other administrative officers for approval by the Board for free tuition.

Contrasted with the practice followed in 1935 respecting petitioner and others of her race, the Court's attention is directed to the testimony of Principal Zimmerman, who stated that after the examination was given to the seventh grade white students in January, 1935, remedial work was given to those students who showed any deficiencies on such examination, and that their promotion to high school was based upon their daily class room work, along with an examination prepared and given by the seventh grade teachers to their individual classes. Assuming, for the sake of argument, that there is any merit in respondents' contention that there has been a long-continued practice of giving uniform, county-wide examinations to white and colored students alike for the purpose of determining "promotion to high school", their own testimony shows that this practice was abandoned for the year 1935, one of the years upon which petitioner bases her claim that she has been unjustly discriminated against. No argument need be advanced to disclose the discrimination lurking in this practice. The white pupil is given the advantage of analysis of her de-

fects, remedies applied, and promotion to high school granted upon the basis of an examination constructed by the teacher who is aware of her peculiar educative problems, plus a consideration of class room work. On the contrary, petitioner was required to stand or fail for admission to high school upon the results of the test alone, given under the discriminatory circumstances outlined previously. That these strange surroundings must have militated against petitioner and others of her race is shown by the fact that 95.5% of the white pupils were said to have successfully passed the test in January of 1935, while only 50% of the Negro students could pass it in June of the same year, six months later. This, despite the fact the respondent Board contends that the course of study for the Negro schools is the same as that in the white schools, and despite the fact that the officers and agents of the respondents would not contend that the Negro child is inferior in learning ability to the white child.

While the 1935 examination was used as the sole criterion for free tuition for colored pupils white principals were instructed that "If you feel that certain seventh grade pupils who failed to meet the prescribed requirements should be given a chance to prove their ability to carry high school work, you may enter the following on their reports, "Promoted to high school on trial" (R 213). Margaret Williams is alleged to have failed the 1935 examination by six points (R 97). According to respondents' testimony, if a white student had failed by about six points he would not necessarily not be promoted to high school (R 129). It was possible for a white student to fail the examination and still be promoted to high school (R 116-118).

C. *The Competitive Tuition Scholarships Are No Substantial Equivalent for the High School Education afforded White Pupils in Baltimore County.*

See argument I C (1).

D. *In the Absence of Equivalent Educational Opportunities an Attempt by the State to Exclude Petitioner from the Present Advantages of the High School Education afforded White Students in Baltimore County Amounts to Denying Her the Equal Protection of the Law.*

All cases which hold that the races may be segregated in public schools under statutory authority base this holding upon the condition that equal educational opportunities are offered the two races. With one exception, it is uniformly held that Negro students cannot be denied admission to the public schools maintained for whites in the absence of provisions for their education equal to those offered other citizens of the state.

“As a result of the adoption of the Fourteenth Amendment to the United States Constitution, a state is required to extend to its citizens of the two races substantially equal treatment in the facilities it provides from the public funds. It is justly held by the authorities that ‘to single out a certain portion of the people by the arbitrary standard of color, and say that these shall not have rights which are possessed by others, denies them the equal protection of the laws’. * * * Such a course would be manifestly in violation of the Fourteenth Amendment, because it would deprive a class of persons of a right which the constitution of the state had declared that they should possess. *Clark v. Maryland Institute*, 87 Md. 643, 661 41 A. 126, 129. Remarks quoted in argument from opinions of courts of other jurisdictions, that the educational policy of

a state and its system of education are distinctly state affairs, have ordinarily been answers to demands on behalf of non-residents, and have never been meant to assert for a state freedom from the requirement of equal treatment to children of colored races. 'It is distinctly a state affair. * * *

But the denial to children whose parents, as well as themselves, are citizens of the United States and of this state, admittance to the common schools solely because of color or racial differences without having made provision for their education equal in all respects to that afforded persons of any other race or color is a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States. * * *"

Pearson v. Murray, supra.

"The right to segregate the races for the purposes of education does not mean that either may be denied the privilege of attending the public schools. And when a uniform system of public schools has been adopted under the authority of the state, any discrimination in the enjoyment of its privileges on account of race is forbidden by the equal protection clause of the 14th Amendment, and there is no question that a legislature cannot exclude colored children, merely because they are colored, from the benefits of a system of education provided for the youth of the state, nor can a school board discriminate against them in exercising the discretion vested in them over school matters. But their rights are amply protected if separate schools of equal merit are maintained for their education. Therefore, where the law provides for separation of the races in education separate schools must be maintained for colored children, *and if this is not done, colored children cannot be excluded from schools kept for white pupils. If a school is maintained for white children, but none for colored children, the*

*remedy of the latter is not by injunction to prevent the maintenance of the school for whites, for this could only result in harm to the whites without any compensatory good to the blacks, but a writ of mandamus to compel the admission of the colored children to the school maintained for whites. * * **”
(Italics ours.)

24 *Ruling Case Law* 653 11 C. J. (Civil Rights) p. 807.

See:

State v. Duffy, 7 Nev. 342 (1872).

See also:

Ward v. Flood, 48 Cal. 36, 17 Am. R. 405 (1874).

U. S. v. Buntin, 10 Fed. 730 (C. C. Ohio) (1882).

Corey v. Carter, 48 Ind. 327 (1874).

Williams v. Bradford, 158 N. C. 36, 735, E. 154 (1911).

Cooley on Torts (Perm. Ed.) Sec. 236.

In *Piper v. Big Pine School District*, 193 Cal. 664 (1924), a fifteen year old Indian girl applied for a writ of mandamus to compel the trustees of the school district in which she resided and its teachers to admit her into the school as a pupil. A California Statute provided for statewide system of public schools for all children between the ages of 6 and 21. *It authorized, but did not require, the establishment of separate schools for children of Indian, Chinese, Japanese or Mongolian parentage. It required that when separate schools were established, Indian children could not be admitted into the white schools. Another statute also provided that where the*

United States Government had established an Indian school in a California school district, the Indian children therein eligible to attend the Indian school, might not be admitted into the district school.

In the district where the petitioner resided, there was a federal government school for Indians to which she was eligible for admittance, but no separate state school. There was a white school to which she had been denied admittance on the ground that she could attend the Indian school.

The Court, in granting the mandamus, held:

“ * * * But the denial to children whose parents as well as themselves, are citizens of the United States and of this state, admittance to the common schools solely because of color or racial differences without having made provisions for their education equal in all respects to that afforded persons of any other race or color, is a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws.” (668-669)

“Respondents call our attention to the serious effect that the issuance of the writ will have upon the respondents’ district. Big Pine School District is located in a sparsely settled portion of the state and contains a number of Indian children, who, it is fairly inferable, attend the Indian or Federal school, either as a matter of choice or under the belief that they may not, as a matter of right, attend the district school. It appears from the papers in the case that children of non-taxpaying Indian parents are, by government rule or upon other authority eligible to attend the federal school, but Indian children

whose parents are taxpayers are not admitted into said school. The effect of this decision, it is suggested, will probably cause a greatly increased attendance of Indian children upon the district school who cannot be cared for because of the economic or administrative problem which it will create. No doubt it would add to the cost of the district should it be required to maintain a separate school for Indian children, but this is a consequence for which the courts are not responsible. The economic question is no doubt an important matter to the district, but it may very properly be addressed to the legislative department of the state government."

See:

U. S. v. Buntin, 10 Fed. 730 (C. C. Ohio)
(1882)

Corey v. Carter, 48 Ind. 327 (1874)

Williams v. Bradford, 158 N. C. 36, 73 S. E.
154 (1911)

There are no separate high schools for colored children in Baltimore County. Under such conditions where separate schools are not actually established the colored children are entitled to admission to the other public schools.

See:

Cooley on Constitutional Limitations, p. 807,
N. 1

State v. Duffy, 7 Nev. 342 (1872)

The Supreme Court in *Gong Lum v. Rice* 275 U. S. 75, 72 L. Ed. 172 (1925) set down certain very definite rules as to separate schools. In that case involving the admission of a Chinese child to the white public schools of

Mississippi it appeared there was a statute which provided "Separate schools should be maintained for children of the white and colored races." Mr. Chief Justice Taft in deciding this case held:

"We must assume then that there are school districts for colored children in Bolivar County, but that no colored school is within the limits of the Rosedale Consolidated High School District. This is not inconsistent with there being, at a place outside of that district and in a different district, a colored school which the plaintiff Martha Lum, may conveniently attend, if so, she is not denied, under the right to attend and enjoy the privileges of a common school education in a colored school. * * *"

"If it were otherwise, the petition should have contained an allegation showing it. Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the State Supreme Court's construction of the State Constitution as limiting the white schools provided for the education of children of the white or caucasian race. But we do not find the petition to present such a situation." (275 U. S. at p. 84.)

It is contended by respondents that there is no demand for separate high schools in Baltimore County for Negroes because of the small number of Negro pupils seeking high school education (R. 17, 91). It does not lie in the mouths of agents of the state to complain that there is no demand on the part of Negroes for high school facilities within the county when the state fails to offer to all Negro pupils substantially equivalent high school opportunities either within or without the county. There, too infant petitioner is an individual. And a citizen's con-

stitutional rights receive protection on an individual basis. No less authority than the Supreme Court of the United States supports petitioner in this contention.

“This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is a personal one.”

McCabe v. Atchison Topeka & Santa Fe Railway Co., 235 U. S. 151, 160, 38 S. Ct. 69, 59 L. Ed. 169 (1914).

E. *The Only Way for Petitioners To Be Protected in Their Constitutional Rights Under the Facts of This Case Is to Have Infant Petitioner Admitted to the Catonsville High School.*

Pearson v. Murray, supra.

State ex rel Masters v. Beamer et al., 109 Ohio 133, 141 N. E. 851 (1923).

See also :

Woolridge v. Bd. of Education, 98 Kan. 397, 157 P. 1184 (1916)

Smith v. Independent School Dist., 40 Ia. 518 (1875)

Cummings v. Bd. of Education, 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262 (1899).

State ex rel Roberts v. Wilson, 221 Mo. App. 9, 297 S. W. 419 (1927)

Lowery v. Board, 52 S. E. 267 (N. C.) (1907).

CONCLUSION.

It is respectfully submitted that the order of the trial court dismissing the petition for a peremptory writ of mandamus should be set aside and that the lower court be ordered to issue said writ, as prayed for in the petition for writ of mandamus.

Respectfully submitted,

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