Reflections on the Implications of Title I of the Elementary and Secondary Education Act of 1965

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April 1970 will mark the fifth anniversary of the enactment into law of the Elementary and Secondary Education Act\(^1\) (hereinafter the ESEA), the first Federal law in American history to give some form of aid to students in non-public schools of less than collegiate rank. Title I of ESEA provides for programs of shared time or dual enrollment—a concept which was the "compromise" formula accepted in 1965 by the representatives of parochial and public schools as the only viable and available way to break the 20 year Church-State impasse over Federal aid to non-public schools.

Title I continues to have the largest amount of money of any of the eight titles of the ESEA. In addition the concept of shared time may well be the most abiding concept of the "breakthrough" in governmental assistance to private schools. As a result the legislative history and Congressional intent behind Title I deserve the most careful exploration. The material in this article will therefore treat the following subjects:

1. The legislative history and intent of Congress in enacting the ESEA;

\footnote{Dean, Boston College Law School.}
\footnote{\textit{179 Stat. 27 \textcopyright \textit{(1965).}}
(2) The regulations and guidelines on Title I issued by the U.S. Office of Education;

(3) Issues involved in rulings of state attorneys general relevant to ESEA;

(4) Conclusions concerning the future of ESEA.

I. The Legislative Intent of Congress in Enacting the ESEA

It is always difficult to extract a degree of certainty regarding Congressional intent by fitting together the sometimes inconsistent and even contradictory purposes of legislation as these can be pieced together from affirmations made in Congressional committee reports and on the floor of the House and Senate. The difficulty in attaining certainty in such matters is probably more severe when one contemplates the history of Title I of the ESEA of 1965.

This title—and to some extent all of the provisions of the ESEA—was concededly a “compromise” on the private school issue and, consequently—as in other “compromises”—the language almost consciously and deliberately blurs and obscures the actual intent.

There is, however, a good deal of evidence that Congress clearly intended to make the granting of some assistance to private school pupils in educationally deprived areas a condition precedent to the awarding of Federal aid to public school districts.

The fundamental stipulation regarding private school pupils provides that the [s]tate educational agency will approve . . . an application only upon its determination that: to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements . . . in which such children can participate.²

A reading of this section raises the question whether it means that a local educational agency will only receive a grant if provisions are made for educationally deprived children attending private schools. Or does it mean that the amount of the grant will be based on the number of educationally deprived children that can possibly be aided? The section also suggests the possibility that, if the local educational agency makes no provisions for educationally deprived children attending private schools, then these children cannot be used as part of the basis for determining the amount of the grant. In essence the issue is whether a failure to include educationally deprived children attending private schools within the scope of a proposed program should result in a smaller grant or no grant at all.

What Was the Intent of Congress?

The statements in the Congressional Record indicate that it was the legislative intention that no local educational agency receive funds under Title I unless the program submitted contained provisions for all children who qualify regardless of whether they attend public or private schools. This was specifically stated by Mr. Brademas who said on the floor of Con-

² 79 Stat. 31 (1965) (emphasis added).
gress that "if . . . the local public school agency fails to include provisions for and include special services and arrangements for such children (those who attend private schools), the application would not be approved." Mr. Perkins, the chairman of the subcommittee, specifically agreed with this statement.

Though the above was stated in the Congressional Record, there is no discussion there of a means of insuring that this aid actually reach the private school child.

The categorical statement of Congressman Brademas receives confirmation from several sources including the report of the Senate committee.

Title One of ESEA in the Senate

The purpose of Title I as stated by the Senate Committee Report is that funds may be used by local public school districts for the broad purpose of programs and projects which will meet the educational needs of the educationally deprived child. The specific type of programs involved are to be designed by the local school districts.

The Act does not authorize a grant for providing any service to a private institution. It does, however, authorize some broadening of public educational programs and services, in which elementary and secondary school pupils who are not enrolled in public schools may participate. The extent of the broadened services will reflect the extent that there are educationally deprived pupils who do not attend public school.

Where special arrangements (such as dual enrollment) are made for the participation of children from private schools, it is the committee's expectation that the arrangements will be administered in such a manner as to avoid classes which are separated by religious affiliation.

The debate in the Senate confirms the idea that some assistance to students in private schools was considered to be a condition precedent to the awarding of funds under Title I.

The following excerpt from the committee report, as cited and adopted in principle by Senator Morse on the floor of the Senate on April 7, 1965 is most significant:

DUAL ENROLLMENT AND BROADENED PUBLIC SCHOOL PROGRAMS TO REACH ALL EDUCATIONALLY DEPRIVED CHILDREN

No provision of the act authorizes any grant for providing any service to a private institution, but at the same time the bill does contemplate some broadening of public educational programs and services in which elementary and secondary school pupils who are not enrolled in public schools may participate. The extent of the broadened services will reflect the extent that there are educationally deprived pupils who do not attend public school.

Where special arrangements (such as dual enrollment) are made for the participation of children from private schools, it is the committee's expectation that the arrangements will be administered in such a manner as to avoid classes which are separated by religious affiliation.

The act does not authorize funds for the payment of private school teachers. Nor does it authorize the purchase of materials or equipment or the construction of facilities for private schools. However, consistent with the number of educationally deprived children in the school district who are enrolled in nonpublic elementary and secondary schools, the local educational agency will make provision, under the terms of the act, for including special educational services and arrangements. These could include dual enrollment, educational radio and television, educational

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media centers, and mobile educational services and equipment in which such children can participate.

It should be emphasized, however, that no suggested program is in itself mandatory upon a public school authority. The selection of an appropriate program or programs for which State educational authority approval is sought, rests with the local educational agency.

Thus, the act does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary school students who are not enrolled in public schools.4

The excerpt of the report cited by Senator Morse does, however, reveal an ambiguity apparently unresolved with respect to the meaning of Title I. The fourth paragraph makes it clear that Congress, while suggesting various programs for private school pupils, is not making any "suggested program . . . in itself mandatory upon a public school authority." At the same time Congress does not back away from its apparent determination to require in each instance that there be "broadened instructional offerings . . . available to . . . students who are not enrolled in public schools." It is not entirely clear from the Senate report or the Senate debate that Congress intended to withhold all grants from public school districts unless some provision was made for pupils in non-public schools.

The Senate's determination to extend aid to all educationally deprived children regardless of the school they attend and the Senate's reluctance to change any aspect or even language of the ESEA contributed to the lack of complete clarity regarding the Senate's ultimate intent with respect to the priority to be attached to the stated purpose of aiding pupils in private schools.

The intent of the Senate as expressed in the record is nonetheless that the educationally deprived child be given educational aid whether he attends public or private schools, as long as the programs are publicly controlled.

The only proposed amendment which touched on aid to private education was offered by Senator Dominick. The amendment would have altered section 605 of H.R. 2362 to provide that nothing in the Act shall be construed to authorize the making of any payment for "the construction of facilities or for the hiring of teachers wherever there is religious worship or sectarian instruction."5 The amendment was defeated and the view was stated that the existing safeguards were "more than adequate to assure that payments under this act may not be made for the construction of facilities or for the hiring of teachers for the provision of religious worship or sectarian instructions."6

In summary one can say that, while there is not complete clarity regarding senatorial intent as to the scope of Title I as it relates to private schools, one can nonetheless conclude that it was the Senate's intent that the educationally deprived child be aided regardless of the type of school that he attended. The programs under this

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6 Id.
title are to be directed at children as individuals and not as members of a class attending a particular school.

The House of Representatives and Title I of ESEA

There is clearer evidence from the deliberations of the House of Representatives than from the Senate debates that Congress intended to make aid for private school pupils an indispensable element of Title I of the ESEA.

In the House's discussion of Title I of the ESEA the question of whether a local school district could receive funds under Title I if it did not provide programs for eligible children in private schools was raised and rather conclusively resolved.

The most decisive testimony with respect to the House’s interpretation of Title I can be seen in a discussion which occurred on March 24, 1965. On that day Congressman Perkins, the chairman of the subcommittee which reported the bill and authoritative spokesman for the Administration's bill stated categorically that

in the plan that the local school authorities submit to the state boards or state school officer for approval, it is one of the requirements that they detail whether or not there are any educationally deprived children attending the non-public schools and to that extent what arrangements have been made to take care of special services for that type of youngster.7

Congressman Perkins' understanding of Title I is made clearer in the following exchange with Congressman Cahill:

Mr. Cahill: “Suppose the local school district or the board of education for reasons best known to themselves, refused to give aid to the private school on the basis of the number of children in the private schools who would qualify under this bill. Would the school district or the board of education then be completely deprived of any state or Federal aid under the bill?”

Mr. Perkins: “[W]e do not undertake to say what any state does with its own funds . . . but local educational agencies must make some provision for educating children who do not attend public school.”8

A subsequent exchange in the same discussion between Congressmen Cahill and Perkins with remarks from Congressman Brademas strengthens the inference that aid to children in private schools was thought to be mandatory by Congress when it enacted the ESEA. The exchange is as follows:

Mr. Cahill: “Suppose the public school district does not determine that the pupil in a private school qualifies, even though the child comes from a family such as described in this bill, my question is this: Are all of the funds under this bill then taken away from that school district?”

Mr. Brademas: “[I]f . . . the local public school agency fails to include provision for special educational services and arrangements for such children, the application would not be approved.”

Mr. Cahill: “I would assume that the gentleman is saying that if children in a private school qualify under this legislation, regardless of the purposes or the desire of the local school board, if they are not included then, in the gentleman's opinion, the Commissioner should not approve the

7 111 Cong. Rec. 5567 (1965) (emphasis added).
8 Id.
program and they would not get Federal funds?"

Mr. Brademas: "I think we are in agreement on this interpretation."

Mr. Perkins: "I agree with the statement made by the gentleman from Indiana (Mr. Brademas)."9

While conceding the inherent limitations in any attempt to trace the precise legislative intent of a Congressional enactment, there is nonetheless persuasive evidence that the framers of ESEA sought to make assistance to pupils in private schools an essential and indispensable element of Title I of the nation's first massive Federal aid bill for elementary and secondary education.

II. Guidelines and Regulations of the United States Office of Education

The fact that the authors of the ESEA felt obliged to make educational officials at the state level the judges of the sufficiency of the participation of pupils in private schools will undoubtedly create many and varied interpretations of what Congress intended with respect to the level of that sufficiency.

The Guidelines issued by the United States Office of Education (hereinafter USOE) attempt to define that sufficiency—but without notable success. The foreword to the Guidelines asserts that the purpose of the ESEA is "to help broaden and strengthen education for the children of poverty, wherever they may be found in public schools, in private schools or out of school."10

The Guidelines affirm the indispensability of participation by private school pupils when they state that before a state educational agency may approve a grant it must determine that the applicant has provided sufficient opportunities for the participation of educationally deprived children enrolled in private schools who reside in project areas.11

No attempt is made to define the crucial word "sufficient." Can token "participation" by children in non-public schools be "sufficient"? Or must there be participation that is somehow proportionate to the number of pupils in private schools in the assisted area? And do the representatives of pupils in non-public schools have the right to challenge the sufficiency of the participation of their constituents before any plan under Title I is approved by the state agency? And if such a right exists by what norms is the "sufficiency" to be judged?

The Guidelines make some attempt to resolve these questions by the statement that the requirement of "sufficient opportunities" is to be "interpreted as applying to the total program of the local educational agency, not necessarily to each project."

The Guidelines do not furnish any quantitative or qualitative norms by which state

10 Guidelines to the ESEA 1965, issued by the Department of Education Office, HEW.
11 Guidelines to the ESEA 1965, issued by the Department of Education Office, HEW, at 24 (emphasis added).
or Federal officials could judge the adequacy or sufficiency of participation by non-public school pupils. Since neither the statute itself nor the legislative history of the ESEA yield any norms with respect to the minimum or maximum allowable participation by pupils in non-public schools, it may not be appropriate for the U.S. Office of Education to devise such norms. If, however, the officials of HEW declare, as they have, that “sufficient opportunities” constitute an essential pre-requisite for approval, the necessity for a definition of the term “sufficient” is clear.

The Regulations attempt to be more specific than the Guidelines. The key regulation states that:

Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. The special educational services shall be provided through such arrangements as dual enrollment, educational radio and television, and mobile educational services and equipment. The term “shall” as used in this regulation ordinarily means that the legal duty imposed is mandatory and not merely directory. The Regulations moreover do not contain any excusing provision or even any directive as to the applicability of the requirement when its fulfillment is probably or clearly impossible.

The manner in which the needs of private school pupils are to be ascertained is stated as follows:

The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children.

The application for each project shall show the number of educationally deprived children enrolled in private schools who are expected to participate therein and the degree and manner of their expected participation.

The Regulations do not specifically state that funds will not be granted if the local educational agency does not make provisions for eligible children attending private schools. On the other hand it must be assumed that the USOE, like any Federal agency, has the right and duty not to approve a grant of Federal money to a state agency unless the work of that agency is in substantial compliance with the essential purposes for which the Federal money is authorized.

The unresolved ambiguities over the tests of the sufficiency of participation of private school children seem, however, to leave the USOE without any real norms by which it might decide to withhold Federal funds from a state educational agency which provides for token or insignificant plans for shared time or other programs under Title I. It may be that Congress will have to clarify its intent and furnish some statutory guidelines before the USOE can publish meaningful regulations or minimum standards.
A further ambiguity exists in the Regulations of HEW. They state that:

The project for which an application for a grant is made by a local educational agency should be designed to meet the special educational needs of those educationally deprived children who have the greatest need for assistance.\(^{15}\)

What would happen if a state educational agency determined on objective evidence that all or most of the children with “the greatest need for assistance” attended non-public schools? Such a determination might well be arrived at in certain areas of the nation. If such a case arose would the USOE be required to carry out the clear intent of Congress to reach children with “the greatest need for assistance” even though the whole thrust of the ESEA is to bring financial aid to poverty-impacted public schools—in combination with some unspecified aid by way of dual enrollment for non-public school children?

The multiple objectives of the ESEA need not necessarily be inconsistent. But if the first and principal aim of the ESEA is to reach those educationally disadvantaged children with “the greatest need of assistance” the priority and primacy which the Act gives to the public school may well render impossible the attainment of the objective of reaching all those pupils with “the greatest need.”

The fact that Congress intended to reach all educationally deprived children—regardless of the school they attend—is, of course, confirmed by the fact that the formula for the ESEA is based on the number of all children in a district between the ages of 5 and 17 in families with incomes under $2,000 (raised to $3,000 in 1968) or families who receive Aid to Dependent Children. The additional fact that this formula is to be multiplied by the average per pupil expenditure in the state does not negate the Congressional intent of reaching all children.

The legislative history of the ESEA and the Guidelines and Regulations of the USOE adumbrate some of the questions and issues raised by rulings of state attorneys general and by court decisions.

### III. Issues Raised by State Attorneys General

Among the several issues raised by legal rulings at the state level are the following:

1. May children in non-public schools legally become part-time students in public schools?

2. If the answer is in the negative can state educational officials insist on receiving their proper allotment of money under the ESEA even though they cannot under state law comply with the requirement of shared time or dual enrollment?

3. If children attending private schools are permitted to enroll as part-time students in the public schools can there be state reimbursement to the local school system for these students—according to the usual pattern by which the state returns to the local communities an amount of money allocated according to the number of full-time students?

4. Is it legal to commingle Federal funds derived from the ESEA with state or local monies appropriated specifically for the public schools?

5. If state law permits bus transportation for children attending private schools (as it does in at least 23 states) can such bus transportation be authorized for students travelling to the public school from a non-public school in order to participate in a program of shared time?

Answers to these questions will have, however, a limited importance. The opinions of attorneys general constitute persuasive authority of the law but are not per se binding as law. Furthermore, the opinions which do exist with respect to the ESEA frequently join shared time and shared services as involving the same legal problem whereas in reality, this is not necessarily so. Hence the opinions of attorneys general which do exist seldom refer specifically and exclusively to the problems under Title I of the ESEA.

IV. Conclusions

In view of the serious legal difficulties involved in the implementation of any program of dual enrollment it is not surprising that in the first two years of operation of the ESEA less than ten percent of all children attending non-public schools were enrolled in any shared time program. Whatever programs did exist, moreover, were frequently only one hour per week and were heavily concentrated in large urban areas. The statistics on dual enrollment for the first two years of its existence are as follows:

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<th>7/1/66 to 6/30/67</th>
<th>7/1/67 to 6/30/68</th>
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<tbody>
<tr>
<td>Number of programs</td>
<td>22,000</td>
<td>17,500</td>
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<tr>
<td>Number of children participating</td>
<td>8,300,000</td>
<td>9,046,200</td>
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<tr>
<td>Non-public school children</td>
<td>526,600</td>
<td>466,100</td>
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It is always risky to even attempt to set forth the long-range legal, constitutional and educational implications of a massive Federal program like the ESEA after only some 40 months of its actual operation. Certain tentative conclusions do, however, suggest themselves:

1. Title I of the ESEA is clearly intended to identify and help all educationally deprived children. It appears to be ever more certain that this objective can be carried out in some states only with the greatest difficulty. This difficulty arises from policies at the state level which prohibit aid to sectarian schools.

When barriers of this type arise in connection with benefits under Title II and Title III of the ESEA, the administration of the Act can be transferred from state to Federal agencies. But the varieties of services constituting a Title I program make it almost impossible for the Federal government to replace the state agencies.

It is possible therefore that the fulfillment of the purposes of Title I may simply not be possible in a significant number of states.

2. If the Federal government is to continue to endorse shared time and channel the largest share of ESEA money for this
purpose it seems inevitable that the USOE or the Congress must establish national norms with respect to the minimum level of participation by non-public school children before a Title I project can be funded. Similarly Federal guidelines must be established as to the rights of private school children in target areas when programs of shared time are simply not feasible.

3. At least in the long run, state policies prohibiting all forms of aid to sectarian schools cannot co-exist with a national, Congressionally approved policy which asserts that pupils in private schools have a right to share in the fruits of a Federal program designed to assist the educationally deprived. Either the Federal government must withdraw as a policy-maker and give Federal funds to the states with no restrictions attached or the Federal government must face up to the task of insisting that all children who are educationally deprived, regardless of the school they attend, actually receive those benefits intended for them by the ESEA.

Which way the Federal government will eventually go in this area should be a concern of the utmost urgency to every jurist devoted to the implementation of the principle of equality of educational opportunity for every child in America.