The Child Benefits System in Operation - Federal Style

Hugh L. Carey
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HUGH L. CAREY*

THE ELEMENTARY AND SECONDARY Education Act of 1965, or in Federal parlance, “ESEA” was the bill which “ran the rapids” in the 89th Congress. It was a craft of fragile compromise which weathered the turbulence over federal school aid that had been raging for over twenty years. Successfully it was guided along a legislative course laid among secularists, ironclad separationists and declared sectarian interests which ranged along the great divide over the question of federal aid to the children of America’s schools.

As one of the authors of this bill, I feel obligated to pay tribute to those in the Administration who helped in its design, to the members of the House and Senate in both parties who gave it expert guidance and to those organizations and individuals who helped to move it to final passage.

For want of better words, I shall rest on those of President Johnson who, on the signing of the bill into law, stated: “I predict that all of those of both parties of Congress who supported the enactment of this legislation will be remembered in history as men and women who began a new day of greatness in American society.”

In a time frame, his statement was an echo of his education message to Congress in January which said:

Once again we must start where men who would improve their society have always known they must begin—with an educational system restudied, reinforced, and revitalized.²

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* Member of House Education and Labor Committee of the United States Congress.
1 N.Y. Times, April 12, 1965, p. 1, 22.
In the first session of the 89th Congress, the membership, strengthened by the addition of many new and young members, reacted with the characteristic speed and thoroughness which was to earn it deserved recognition as "The Education Congress."


In just four months, a decade of inaction and neglect was swept away.

Since World War II, most people had recognized the desperate need for federal assistance for hard-pressed state and local educational units. As our former United States Commissioner of Education has pointed out, since 1945 state and local taxes for education, among other costs, have climbed about 350 per cent. Federal taxes in the same period have gone up approximately 140 per cent. And while state and local indebtedness was soaring to nearly 450 per cent, the federal debt has increased less than 15 per cent.\footnote{Address by former United States Commissioner of Education Francis Keppel before the Council of Chief State School Officers in Honolulu, Hawaii, Nov. 10, 1965.}

We are all too familiar with the grim details of the failure to meet adequately our educational needs: the drop-outs, the inability of qualified students to go on to college, the unemployment, the delinquency, the great number of children defeated before they even begin.\footnote{Supra note 1, at 1-2.} Yet time and time again Congress failed to pass bills to ease the burden on states and localities. There were several reasons.\footnote{For a popular account, see Bendiner, OBSTACLE COURSE ON CAPITOL HILL (1964).}

The issue of civil rights towered among the reasons until it became largely irrelevant by enactment of Title VI of the Civil Rights Act of 1964.\footnote{78 Stat. 252 (1964), 42 U.S.C. §2000(d)(4) (1964).}

The second reason was primarily one of principled opposition to federal aid because of fear of loss of local control of education. That this fear is still present is undeniable, but experience is likely to abate it. As a result of the 1966 test run of the law itself, the Act has been widely acclaimed in operation and criticized most sparsely.

The third reason for failure to enact a federal assistance bill, and the most important, was the so-called "church-state issue." There were those in and out of Congress adamantly opposed to the use of federal funds in any program that would in any way benefit church-related schools or even the students attending them. There were others just as adamantly insistent that the principle of distributive justice required that the federal aid benefit the pupils of non-public schools so as not to create an imbalance which could force many people to forsake their conscientious as well as religious convictions.

The great contribution of the Johnson Administration and the Committee majority was to develop a formula which, for the present, reconciled the two camps and made passage of a bill possible.

Much of the argument of the opponents of federal assistance to pupils attending
non-public elementary and secondary schools is founded upon an erroneous reading of the first amendment’s “religion” clauses. One of the most respected legal scholars of this century has extensively documented the clear purpose and intent of the first amendment as being to prohibit the federal government from establishing a national religion, or from affording any religion or religions a preferred status. Yet, a majority of the Supreme Court and many responsible persons and organizations have adopted a facile figure of speech of Thomas Jefferson—“a wall of separation between Church and State”—as if it were part of the text of the first amendment.

However, along with the rigidity otherwise maintained in this area, there has developed the so-called “child benefit” theory, which is that children as children are entitled to equal educational and welfare benefits, regardless of their faith or lack of it. In order for a measure which would aid all children irrespective of where they go to school to pass the constitutional test, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. With many opponents of direct federal aid to private schools accepting the child benefit theory, the administration was able to present a bill which, being fully in accord with the theory, was accepted and passed.

The child benefit theory is so engaging in its practicality that it is sometimes brushed aside as too common a panacea—like aspirin. Yet aspirin is prescribed for headaches, and the child benefit prescription proved to be a patent and potent remedy for the school aid headache. For those looking for institutional type aid to bloc interests it was too simple—“let the dollar follow the child” was a schoolboy shibboleth unsuited to the complex field of scholarly needs.

For others it was too bitter a pill to swallow because it carried a connotation of “freedom of choice,” a phrase anathema to those who believe that the only true freedom is state school freedom tightly regulated by the local school board.

The bill we drew and passed was in truth a “well watered” child benefit bill in every sense. It was “watered” in the sense that H₂O is the simplest solvent in the field of chemistry. Therefore, whenever we ran into a complication in the bill involving needy children, or textbooks, or supplementary centers, or research projects we sprinkled in the simple solvent of child benefit and it dissolved the blockages to successful passage.

8 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. Const. amend. I.
14 See for a critique, Blum, ACLU and Civil Rights for Children, 113 America 160-63 (1966).
When someone said: "you cannot give money to a public agency for a private purpose," the Committee said: place the funds in the public agency "for the use and purposes of this title," using the local educational agency as the funnel to translate money into services for children on a comparable basis in all schools, public and private. When another source said "you cannot donate books and equipment to private school usage," the Committee responded by loaning the texts and equipment on a library basis so that the knowledge reaches the child and the instrument of knowledge never leaves the public ownership. In section after section, we utilized the child benefit device which protected the public ownership interest and yet served the individual need.

After a year of operation it is time to look at the Act in its intent and effect to measure its impact and importance as a device to meet possible future needs.

Briefly summarized, this is what the 1965 Act undertakes to do.

Title I of the Act creates a program of grants to local school districts to broaden and strengthen elementary and secondary school programs. Its purpose is to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families. As former Commissioner of Education Keppel testified, it was designed to improve the educational opportunities of educationally deprived children.

The new program . . . looks to the educational needs of the children of poverty—all of them—whether in public or private schools. It commits education to end the paralysis that poverty breeds, a paralysis that is chronic and contagious and runs on from generation to generation.

Funds under Title I may be used for a wide variety of purposes such as in-service training for teachers, additional teaching personnel, teacher aids, and instructional services. There can be special classes for physically handicapped, disturbed and socially maladjusted children and for preschool and remedial programs. In fact, the school districts have wide latitude with respect to the type of programs to be adopted.

Participation of private school children is spelled out in section 205(a)(2) by requiring that in plans submitted by local educational agencies provision must be made 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 (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate.

Regulations issued under this section require that equitable arrangements be

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made to foster the participation of private school children. This participation is to be through programs of dual enrollment and shared services with title to and control over funds and property remaining in a public agency for the uses set out in the Act.\textsuperscript{20} As our Committee noted in its report, 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." \textsuperscript{21}

Title II of the Act creates, in the words of the statute, a program for making grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.\textsuperscript{22}

Thus, it was hoped and planned that private school children would be enabled to have the benefits of the availability of books and other such materials on a basis much like the public library principle. Title to the materials is to remain vested in the public agency and the public agency must approve the materials which are to be used by these children.\textsuperscript{23}

Because it was recognized that some states were limited, or considered themselves limited, by their own constitutional provisions in participating in this program, authority is granted for the Commissioner of Education to "arrange for the provision on an equitable basis of such library resources, textbooks, or other instructional materials for such use and [to] pay the cost thereof . . . out of that State's allotment."\textsuperscript{24}

Title III of the Act is a far-reaching and potentially revolutionary section. It authorizes grants to local educational agencies for supplementary educational centers and services. The service centers will be community ventures designed for the development, establishment and operation of enrichment programs and supplementary educational services and activities.

This section is designed to stimulate imaginative programs that will improve the education of children.

Shared facilities and services are permitted under the section and the Act contemplates therapeutic, remedial and welfare services in regard to non-public school pupils.\textsuperscript{25}

Title IV of the Act provides for grants to universities and colleges and other public and private agencies, institutions, and organizations, and to individuals for research, surveys, and demonstrations in the field of education, and for the dissemination of information derived from educational research.\textsuperscript{26}

Title V proposes a five-year program to stimulate and assist in the strengthening of the leadership resources of state edu-

\textsuperscript{21} H.R. REP. No. 143, 89th Cong., 1st Sess. 7 (1965).
cational agencies. No private educational involvement is contemplated. 27

It was not until September 23, 1965, that action was completed on a bill appropriating funds to get the Act under way, 28 and by then the 1965-66 school term had begun. The difficulties of getting the program into operation, of letting multitudinous state and local officials know what was expected of them, and of approving the many plans which were submitted were extremely burdensome. 29

Assessing the impact of the program, then, in general terms and in terms of the church-state issue is difficult. There are just not enough facts to allow much generalizing. However, some early conclusions have emerged. In a major survey by a Washington Post staff writer in mid-May of 1966, it was stated that in spite of numerous problems,

the Act has had considerable impact in focusing the attention of school officials on the problems of the have-not schools. Instead of being the last schools to get a new piece of equipment or a flashy program, they are now the first. And the scene of the most exciting experimentation in the schools has shifted from the suburbs to the inner city. 30

On the specific issue of aid to private school children, the survey writer noted:

The compromise on aiding non-public school students in low-income areas is working smoothly in the vast majority of school systems, but the church-state applemat could easily be upset by court rulings. Better than 80 per cent of the parochial school systems (which enroll nearly 90 per cent of all non-public school students) report they are participating in the program. The patterns vary according to state laws and the disposition of local school officials.

Some groups feel that the Federal aid for pupils in church-related schools is overstepping the Constitution and are pressing for Supreme Court review. But regardless of the outcome of such efforts, most public and private school officials feel that the cooperation the law required has already created a revolution of changed attitudes. “Do you realize that we didn’t even talk to these people five years ago?” one public educator asked. “And now we’re sending some of our teachers into their classrooms.” 31

While a few states—Oklahoma, Missouri, Wisconsin, Nebraska—have taken restrictive views of their constitutional prohibitions on aid to church-connected schools, others have adopted more enlightened policies. A number have followed the lead of the Attorney General of New York, who, interpreting the application of that state’s constitutional provision, 32 ruled that the provision would not inhibit the administration of the Act in New York if the entire cost of the program in the state were paid out of federal grants without the use of any state or local

31 Id. at p. H2.
32 N.Y. Const. art. 11, § 4 prohibits the use of property or credit of the State, or a subdivision thereof, or public money directly or indirectly “in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . . .”
property or credit or public money at any stage of the program, and if the federal funds were at no time commingled with monies of the state or a local subdivision. Similar rulings were made in other states.

Two states, Oklahoma and Nebraska, have decided, according to the Office of Education, that their constitutions will not permit them to include private school children under Title II of the Act. The Commissioner of Education, therefore, in compliance with the Act, has contracted with private agencies to administer the program with administrative costs subtracted from the funds available under the program.

In Oklahoma, too, it has been held that no public school teacher may conduct classes in a parochial school, thus making impossible the special remedial classes which the Act contemplates. However, private and parochial students may participate in such classes through dual enrollment classes conducted in public school buildings, although no public school transportation may be provided them.

Missouri, on the other hand, may not provide for dual enrollment because its compulsory attendance law stipulates that a pupil must be enrolled full time in one school or the other, otherwise he is not fulfilling the requirement of full attendance. State officials have provided for equal participation of all pupils, however, by scheduling special classes in public facilities in the evenings, on Saturdays, and in the summer when public schools are not in regular session.

Aside from constitutional and statutory restrictions, the attitude of some local public administrators may have caused less than full and complete participation by private school students. In mid-February, the Office of Education sent out a memorandum to state officials chiding them for the “rather minimal involvement for private school students” and because of participation of public and private school pupils on a noncomparable basis. Since then, matters seemingly have picked up.

Of great interest in this connection is the First Annual Report of the President's National Advisory Council on the Education of Disadvantaged Children.

The Report clearly emphasized the fundamental child benefit concept of Title I, stating:

Title I firmly directs the attention of the Commissioner of Education and the state and local systems of education toward disadvantaged children. As far as possible, it should follow those children wherever they may be found—in public or in private schools. But in the administration of the Title, it is important to insist that its objective is to help children, not institutions.

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34 See, e.g., 1965 KY. ATT'Y GEN. REP. 865; 1965 NEV. ATT'Y GEN. REP. 276.
36 Ibid.
39 Drew, supra note 29, at 43; Buel, supra note 37.
40 FIRST ANNUAL REPORT OF THE PRESIDENT'S NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN 3 (1965).
The Report stresses that children in non-public schools are not yet receiving their full share of benefits. This has been particularly true in the City of New York where the Board of Education rejected a sound plan of its own superintendent and substituted, after months of inexplicable delay, an abortive and unworkable program of its own to satisfy anti-parochial school pressure groups. This is clearly what the Advisory Council was driving at when it stated:

There are, however, some early indications that the disadvantaged children in private and parochial schools are receiving less help than Title I intended for them. While private and parochial school children live in 256 of the project areas studied, they are fully participating in Title I projects in only 180 of them. Many localities seem to involve private school pupils in the periphery of a project, or at a time and place that is inconvenient. Unfortunately, many of the projects reviewed by the Council were either vague or silent about the participation of disadvantaged children from non-public schools.\(^4\)

It is believed, that with the continued insistence on compliance with the statute by the Office of Education, local public officials will more and more actively bring private and parochial school students into equitable participation in the program. Certainly, there seems to be in practically none of the states any insuperable legal barrier to such participation.

Supporters of more equitable treatment for non-public school pupils may not relax, however. Those who have opposed such treatment are still active.

Representatives of the major organizations opposed to equal treatment—the ACLU, the Protestants and Other Americans United for Separation of Church and State, the National Council of Churches’ Commission on Religious Liberty, the Baptist Joint Committee on Public Affairs—appeared before the General Subcommittee on Education in the House this year to oppose a four-year extension of the Act alleging constitutional violations by the Office of Education and by local officials. This opposition is getting publicity.\(^4\)

The first direct court challenge to the 1965 Act was filed in federal court in Dayton, Ohio, on June 27, 1966. As of this writing, hardly anything is known about it. Peripheral attacks on shared time and shared services, which, if successful, could be turned into direct attacks on the Act have been filed in federal court in Detroit, and in the New York Supreme Court. No trial has yet been conducted in any of these so that little speculation can be made as to their possible impact.

The Act seems certain to be extended this year, for at least a one-year period. Hearings have been conducted in both House and Senate and the House Education and Labor Committee is now considering an extension bill reported by its Subcommittee.

The prospects are good, then, that we shall be able to take giant strides to fulfill

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CHILD BENEFITS

(Continued)

former Commissioner Keppel's twin objectives. As he phrased them, they are:

First, to raise the quality of education in our schools everywhere and for everyone. In the 20th century, we cannot tolerate second-class education if we intend to remain a first-class nation.

Second, to bring equality of educational opportunity to every child in America whatever his color, or creed, or handicap, or family circumstance.48