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THE ELEMENTARY AND SECONDARY EDUCATION ACT AND THE ESTABLISHMENT CLAUSE

JOHN W. CALHOUN*

INTRODUCTION

Since its passage in April, 1965, the Elementary Secondary Education Act' (ESEA) has become one of the integral parts of the national elementary secondary education system, which includes both public and private schools. In general, the Act can be viewed as recognizing a need on the part of children of low income families for special educational services. Based on the theory that the "cycle of poverty" can be broken by improving

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The views expressed by the author do not necessarily represent the views of the Attorney General of the State of Wisconsin or the policies of the Wisconsin Department of Justice or the Department of Public Instruction.


3. With respect to special educational needs, Congress has declared the public policy as follows:

   In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.


   Education is a basic need in our society, yet the schooling available to the poor is pitifully inadequate. We cannot break the vicious cycle of poverty producing poverty unless we achieve a breakthrough in our educational system. Quality education for the poor, and especially
the education of children from low income families, the Act creates a series of federally funded educational programs and benefits such as books and library materials. Significantly, it requires that children attending nonpublic schools be permitted to participate in the federally funded programs.6

More specifically, Title I of the ESEA provides for relatively large grants to local school districts that have high concentrations of low income families. The purpose of these grants is to upgrade the education of economically and socially deprived children.7 The allocation of funds to the states is made on the

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for minorities who are traditionally victims of discrimination, is a moral imperative if we are to give millions a realistic chance to achieve basic human dignity. Catholic school systems, at all levels, must redouble their efforts, in the face of changing social patterns and despite their own multiple problems, to meet the current social crisis. 5. The term nonpublic includes parochial and other nonprofit private schools.


7. Examples of programs administered by local educational agencies are remedial reading and mathematics classes designed to raise the student's achievement to the appropriate grade level based on his chronological age.

8. See Alford, The Education Amendments of 1974, AMERICAN EDUCATION (Jan.-Feb., 1975), wherein it is stated:

Under the 1965 Act, funds were allocated to the schools on the AFDC (Aid to Families with Dependent Children) payments exceeded that poverty level, and (3) the particular State's per child average expenditure for elementary and secondary education. In a sense these three factors remain, but the way they are used is changed substantially.

For the first factor, under the original law the poverty level was established at an annual family income of $2,000. Now that level is variable and is determined in accordance with the so-called "Orshansky Formula works out at approximately $3,750 for a non-farm Social Security Administration. This formula goes beyond the flat dollar amount and thus is considered a more equitable instrument for identifying youngsters eligible to receive the compensatory assistance provided for by ESEA Title I. In addition to family income the formula considers family size, and to a somewhat lesser extent whether a farm or non-farm family is involved and the sex of the head of the household. To illustrate the result, the poverty level under the Orshansky Formula works out at approximately $3,750 for a nonfarm family of four at the time of the 1970 census.

Under the second factor, whereas formerly all AFDC children in families above the poverty level were counted for Title I allocation purposes, the new arrangement considers only two-thirds of those above what is referred to as "current" Orshansky level. The "current" level for this year for a nonfarm family of four is approximately $4,250.

In the case of the third factor, the formula now uses 40 percent
basis of a poverty formula. Title II has no poverty formula but focuses on the need of schools, both public and private, to improve school libraries, textbooks and instructional materials, while Title III provides for innovative programs and supplemental educational centers and services.

Two challenges to the constitutionality of these ESEA provisions requiring nonpublic student participation reached the United States Supreme Court before the statute was amended. In *Flast v. Cohen*, the appellants sought to enjoin the allegedly unconstitutional expenditures of federal funds under Titles I and II of the ESEA of 1965. After discussing briefly the purposes of Titles I and II, the Court noted that the specific criterion attacked by the appellants was the requirement 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.

However, the *Flast* opinion does not reach the merits of appellants' complaint because the three-judge panel below determined that the appellants, federal taxpayers, lacked standing to bring the action.

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11. ESEA also funds programs for the strengthening of state educational agencies, bilingual programs, and fiscally speaking, other relatively minor programs. 20 U.S.C. § 880, et seq. (1974).
12. *See note 22 infra* and accompanying text.
13. 392 U.S. 83 (1968), holding that a federal taxpayer has standing to sue to enjoin expenditure of federal funds being made allegedly in violation of the religion clauses of the first amendment.
14. *Id.* at 85-86.
The second test of the constitutionality of these ESEA provisions was made in Wheeler v. Barrera. In this case, the respondents, who were residents of Missouri and parents of children attending nonpublic schools, alleged that the petitioners, state school officials, arbitrarily and illegally approved Title I programs that deprived eligible nonpublic school children of programs comparable to those offered eligible public school children. The petitioner defended by alleging that the aid sought by respondents exceeded Title I requirements and contravened the state's constitution and state law as well as alleging the violation of the establishment clause of the first amendment to the United States Constitution. The federal district court denied relief but the circuit court reversed this holding. The Supreme Court granted certiorari "to examine serious questions that appeared to be present as to the scope and constitutionality of Title I."

Much attention was paid in the opinions of both the circuit court and the Supreme Court to the question of whether public school teachers were required under Title I and the accompanying regulations to teach in nonpublic schools. In his concurring opinion, Justice Powell summarized the Supreme Court's holding as follows:

[U]nder Title I of the Elementary Secondary Education Act of 1965 . . . federal courts may not ignore

16. 475 F.2d 1338, 1355-56 (8th Cir. 1973). The circuit court disposed of the case by remanding it to the district court with directions to enjoin the defendants from further violation of Title I of ESEA. The circuit court retained jurisdiction requiring the imposition and application of guidelines consistent with Title I and its regulations. The order provided that the guidelines must provide lawful means and machinery for,

effectively assuring educationally disadvantaged non-public school children in Missouri participation in a meaningful program as contemplated within the Act which is comparable in size, scope and opportunity to that provided eligible public school children.

Id. at 1356. The United States Supreme Court affirmed the disposition of the court of appeals with the understanding that the guidelines would be consistent with the Act's requirements in the opinion of the Supreme Court. Significantly, it noted further than the district court's function is not to decide which method is best or to order that a specific form of service be provided. The circuit court case is a part of the record in the Senate hearings on S. 1539, supra note 2, at 2412-52, and although the appeal from the circuit court order was argued in the Supreme Court on January 16, 1974, apparently no statement appears in the Senate hearings of the pending appeal.

18. See note 16 supra.
state-law prohibitions against the use of publicly employed teachers in private schools . . . Title I does not mandate on-the-premises instruction in private schools . . . Title I does not require that the services to be provided in private schools be identical in all respects to those offered in public schools . . . It is thus unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment.19

Significantly, Justice Powell concluded his concurring opinion by stating:

I would have serious misgivings about the constitutionality of a statute that required the utilization of public-school teachers in sectarian schools. See Committee for Public Education v. Nyquist, 413 U.S. 756 . . . 20

In his dissent, Justice Douglas argued that the case was ripe for a determination on the constitutional issue and that the criteria under consideration were clearly a violation of the establishment clause21 of the first amendment of the United States Constitution. This case is important first because it permits the state law and state constitution to determine how, within equitable standards, parochial students are to participate in ESEA programs. Secondly, the case constitutes a warning that such participation in parochial schools is simply a violation of the establishment clause.

On August 21, 1974, the ESEA was amended by the Education Amendments of 1974.22 Among other changes, it appears

19. 417 U.S. at 402. The parties were at odds over two issues: whether Title I requires the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students, and second, whether the requirement, if it exists, contravenes the First Amendment.
20. Id.
21. Id. (Douglas, dissenting).
22. The Education Amendments of 1974, PL 93-380, 88 Stat. 484-610, amending 20 U.S.C. §§ 231-843 [hereinafter cited at the Amendments of 1974]. In all, the Amendments of 1974 have eight titles. Title I extends through June 30, 1978; all except one of the programs is provided for under the ESEA of 1965. The exception is section 809, Correction Services, which expired in 1974. Title II covers school bussing and Title III bears on "impact aid" given to schools affected by presence of military bases and other federal activities.
that these amendments strengthen the previous legislation requiring that nonpublic school children be permitted to participate in the programs funded by the federal government under the Act. As the Court has not yet ruled whether such provisions are constitutional, these amendments raise new questions under the establishment and freedom of religion clauses. Related to this determination are issues concerning the constitutionality of the use of public school teachers in parochial schools and whether

Title IV, among other things, consolidates Titles II and III of 20 U.S.C. §§ 821-26 and 841-42. The remaining titles provide for assistance to federal, state and local agencies for the improvement of administration and research, as well as such projects as the study of the metric system, aid for programs for gifted children, community schools and a variety of other programs. All of the ESEA programs remain substantially as described above except the poverty formula and the provisions for requiring participation of nonpublic school children in ESEA programs. In this respect, the nonpublic participation provisions of the Education Amendments of 1974 add the so-called "bypass" provisions to Title I.

Sec. 141A. (b) (1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a), the Commissioner shall waive such requirement and the provisions of section 141(a) (2), and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a).

(2) If the Commissioner determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a), he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a), upon which determination the provisions of paragraph (a) and subsection 141(a)(2) shall be waived.

(3) When the Commissioner arranges for services pursuant to this section, he shall, after consultation with the appropriate public and private school officials, pay the cost of such services from the appropriate allocation or allocations under this title.

Finally, Title IV of the Education Amendments of 1974 has the following provision with respect to nonpublic participation:

Sec. 406. (a) To the extent consistent with the number of children in the school district of a local educational agency (which is a recipient of funds under this title or which serves the area in which a program or project assisted under this title is located) who are enrolled in private nonprofit elementary and secondary schools, such agency, after consultation with the appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and nonideological services, materials, and equipment including the repair, minor remodeling, or construction of public school facilities as may be necessary for their provision (con-
"dual enrollment" or "shared time" may be established as a right under the first amendment freedom of religion clause.\(^{23}\)

In the light of the cited opinions, it is appropriate to review the decisions bearing on the constitutionality of aid to nonpublic schools. This article will consider the effect of these cases on the statutory requirement of ESEA that nonpublic school children be permitted to participate in the federally funded programs. In particular, account will be taken of the impact of these cases on the Education Amendments of 1974. Finally, it will analyze the best methods of administering these programs to children attending nonpublic schools while avoiding direct confrontation of powerful social-political and legal forces.

sistent with subsection (c) of this section), or, if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this title.

(b) Expenditures for programs pursuant to subsection (a) shall be equal (consistent with the number of children to be served) to expenditures for programs for children enrolled in the public schools of the local educational agency, taking into account the needs of the individual children and other factors (pursuant to criteria supplied by the Commissioner) which relate to such expenditures, and when funds available to a local educational agency under this title are used to concentrate programs or projects on a particular group, attendance area, or grade or age level, children enrolled in private schools who are included within the group, attendance areas, or grade or age level selected for such concentration shall, after consultation with the appropriate private school officials, be assured equitable participation in the purposes and benefits of such programs or projects.

23. The terms "dual enrollment" or "shared time" refer to the enrollment of nonpublic school children in public schools for specific courses of study or activity. Dual enrollment is not a two-way street. It does not contemplate that public school children, for example, will gain credit towards graduation by part-time attendance at parochial schools. However, so-called "release time" laws permitting children regularly enrolled in public schools to absent themselves from school for the purpose of obtaining religious instruction constitute an exception to the compulsory attendance law generally prevalent throughout the country. See Zorach v. Clauson, 343 U.S. 306 (1952) and State ex rel. Holt v. Thompson, 66 Wis. 2d 659, N.W.2d (1975). Also, contra, Smith v. Smith, 43 U.S.L.W. 2393 (W. Va. March 14, 1975).

In the states where dual enrollment programs have been conducted, the United States Commissioner of Education has found that teacher services are provided under Title I [of the ESEA] in a comparable and equitable manner. . . . This is one of the most feasible ways to achieve compliance [according to the report].

Barrera v. Wheeler, 475 F.2d 1338, 1349 n.18 (8th Cir. 1973).
BACKGROUND OF THE ESEA

The institution of public education has long been a function of local governmental control in many areas of the country. However, from 1954 on, powerful social and economic forces began to dictate an expanded federal role in numerous educational programs. Federal aid to education from 1954 to 1965 was increasingly evident in many areas, including desegregation, educational programs related to defense and vocation, aid to research relating to the education of the economic and culturally disadvantaged and aid to the handicapped.

The post World War II technological and informational explosions, together with the increase in the numbers of children born, exposed serious deficiencies in the country’s educational system. In addition, Brown v. Board of Education stimulated concern over the lack of quality education to the economically deprived, and racial and ethnic minority groups. In proscribing de jure segregation, the Court in this case wrote:

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Partly because of Brown and partly because of related legislation in the field of civil rights and poverty, educators and
political leaders became concerned not only with what was being taught but also with whom the contemplated legislation was to benefit. There were many school districts which were deficient in buildings, books and other materials. But even more significant was the alarming increase in the rate of dropouts, delinquency and unemployment among young people in poverty areas.29

However, if effective legislation for these disadvantaged youth were to pass, it became apparent to political leaders that it must have the support of both the parochial interests and those groups that had hitherto indicated opposition to federal aid to education where this involved aid to parochial schools.30 From the congressional committee hearings and reports of the Johnson administration's proposal in the press, it is apparent that the compromise necessary for passage of the ESEA in 1965 was obtained through the inclusion in the legislation of the concept of "dual enrollment" or "shared time"31 as the technique is also termed. It can be surmised that representatives of several of the large Protestant groups testified in support of the legislation in hearings before the House Committee because of this inclusion. Indeed, Arthur Flemming, former Secretary of Health, Education and Welfare under President Eisenhower, appeared on behalf of the National Council of Churches of Christ and stated that his organization supported the federal program because it


30. These consisted of, among other groups, the National Education Association, AFL-CIO and officials, Council of Chief State School Officers, American Jewish Congress, Baptist Joint Committee on Public Affairs, The National Council of Churches, The National Lutheran Church and Americans United for Separation of Church and State. The parochial interests were represented principally by the Catholic Welfare Council which, since 1945, had endorsed federal aid only if nonpublic schools were included as beneficiaries. Meranto, supra note 29, at 52, 54-55.

31. A New York Times article stated that the proposed aid to education program had been modified to three principal proposals for elementary and secondary education because of the necessity to skirt the church-state issue. One will be the use of the shared time concept under which parochial and other private-school students attend some classes in public schools. Several hundred public school systems in the nation, mostly in the Middle West, are already operating under such shared-time programs. N.Y. Times, Jan. 2, 1965, at 1. And on April 10, 1965, the Times, reporting on the passage of the Bill, stated:

The funds would go only to public schools, but they would be expected to provide 'special services and programs'—such as shared-time classes—for students from parochial schools.

"helps public elementary and secondary schools to make some of their facilities and other resources available to students from private schools."

Thus, led by a determined President who was himself a former school teacher, the administration neutralized the contentions of the parochial schools against further aid to public schools by including the assurances of dual enrollment. This concept appeared to be acceptable to Protestant as well as Catholic leaders. Where dual enrollment was not applicable, the aid given was justified on the "child benefit" theory. On April 9, 1965, the complex proposal passed the Senate by a vote of 73 to 18, and a few days later with President Johnson’s signature, the ESEA of 1965 became law.

The programs created by the ESEA caused a considerable change in the policy-making structure in American education by directly involving the federal government. However, the Act cannot be viewed as providing general aid to elementary and secondary education since it does not provide for block grants. Its mission is to supplement, not supplant, local educational programs.

32. Among others testifying was H. B. Sissel of the United Presbyterian Church. He stated that his group, supports in principle a program of Federal aid to public school systems that would encourage shared-time arrangements to permit students enrolled in private or parochial schools to obtain a portion of their education in public schools.

33. Arthur Flemming, in his testimony before the House Committee, justified Title II and II benefits to nonpublic schools on the "child benefit" theory developed in Everson v. Board of Education, 330 U.S. 1 (1947). See note 41 infra and accompanying text.


35. See 45 C.F.R. § 116.17(h) (1969), wherein it is provided:

No project under Title I of the Act will be deemed to have been designed to meet the special educational needs of educationally deprived children unless the Federal funds made available for that project (1) will be used to supplement, and to the extent practical increase, the level of State and local funds that would, in the absence of such Federal funds, be made available for the education of pupils participating in that project; (2) will not be used to supplant State and local funds available for the education of such pupils; and (3) will not be used to provide instructional or auxiliary services in project area in schools that are ordinarily provided with State and local funds to children in nonproject area schools.
At the outset, it should be noted that the ESEA was not intended to, nor has it functioned as, a method of salvaging a financially crippled parochial education system even though proportionately more of the ESEA funds have been spent in the large cities where there are high concentrations of nonpublic school children. Therefore, it is probably true that aid to nonpublic schools constitutes aid to religious schools, especially Catholic.

A study by the Brookings Institution indicates that in certain cities and states having a high concentration of nonpublic school children, over four-fifths of the children attend schools run by the Catholic Church. For a variety of reasons, the enrollment in Catholic schools has been dropping at an increasingly rapid rate. Among these reasons is the precipitous decline in the potential enrollment of Catholic schools. This development could cause enrollment to decrease by 15 percent or 400,000 students by 1977, even if the current rate of Catholic enrollment remains steady. Other factors in the decline in enrollment include cost increases brought on by the shift to lay teachers, a decrease in teacher-pupil ratio and the broadening of the teaching orders to include social welfare activities. However, this situation might be reversed in the future on account of the growing dissatisfaction of parents and others with the public school system.

But if the decline in parochial enrollment continues at its present rate, the Brookings Institution study concludes that the most adversely affected state, New York, will have to increase its elementary and secondary school expenditures from 8.5 percent to 14 percent. Furthermore, the study suggests that if the economic rationale for aid to public schools is accepted, such aid should be financed at local and state levels only. In contrast,

37. Id. at 117.
38. Id. at 108-09.
39. Id. at 114, citing Swartz, The Estimated Marginal Costs of Absorbing All Nonpublic Students into the Public School System, in Fahey, Economic Problems of Nonpublic Schools, 301-50. Assuming 300,000 students transferred from private to public schools, the increase in cost would be between $72 million and $185 million, an annual increase of between 0.2 to 0.4 percent in current public school spending. The study also points out that if it costs the taxpayers $200 million to absorb 800,000 students per year and if this were disbursed to all nonpublic school students as aid, it would amount to only $40 per pupil. Furthermore, if aid is to be granted on a per-pupil basis, the states having a lower concentration of nonpublic pupils would be paying for the aid granted to areas where the concentration is heavier. The result would be an inequitable sharing of the burden that militates towards a state and a local system of aid. Id. at 116-17.
the President's Panel on Nonpublic Education concluded, "Public interest requires the federal government to take major initiatives towards a solution of the financial crisis in nonpublic schools."40

It is apparent that social and economic pressures for greater parochial aid are increasing. Thus, there is a growing sense of urgency for a determination to be made as to whether the present federal system of providing aid to nonpublic schools is indeed constitutionally valid.

LEGAL SUPPORT FOR REQUIREMENT OF NONPUBLIC PARTICIPATION IN ESEA PROGRAMS

Any search for constitutional underpinning for the requirement that nonpublic children participate in ESEA programs must begin with Everson v. Board of Education,41 a case decided eighteen years prior to the enactment of the ESEA. The Court rejected the argument that facilitating the opportunity for children to obtain an education does not serve a public purpose constituting an unconstitutional expenditure of tax raised funds. The primary argument urged before the Court was that the New Jersey statute reimbursing parents of children attending religiously oriented nonpublic schools for their children's transportation costs was unconstitutional on grounds it violated the establishment clause of the first amendment.42 Rejecting this argument, Justice Black equated school bus transportation with health, safety and welfare measures such as police and fire protection and sewage disposal, all of which are provided to everyone regardless of their religious affiliation.43 With this rationale, Justice Black developed what has come to be called the "child benefit" criterion. He was careful to point out that this reasoning does not mean that all health and welfare services must be provided to students attending sectarian schools. But it does mean that the provision of such services are constitutionally permissible. The establishment clause, wrote Justice Black,

means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.44

40. Id. at 112, citing President's Panel on Nonpublic Education, Nonpublic Education and the Public Good, Final Report to the President's Commission on School Finance, 33 (1972).
42. Id. at 8.
43. Id. at 18.
44. Id. at 15.
Through dicta, he made it clear that direct subsidy of sectarian institutions would violate the establishment clause. 45

Three years following the enactment of the ESEA, the Supreme Court decided, on the same day, two important cases concerning the establishment clause, *Flast v. Cohen* 46 and *Board of Education v. Allen*. 47 *Allen* involved a challenge of the New York statute requiring local school districts to purchase books and to lend them without charge to all children in grades seven through twelve of public and private schools. The Act restricted the distribution to nonreligious books which the school required the pupils to read. As Justice Douglas noted in his dissent, the statute empowers each parochial school to determine for itself which textbooks will be available for loan to its students since the Act permits the state to provide only those books which a pupil is required to use as texts for a semester or more in a particular class in the school he legally attends. 48

In upholding the constitutionality of the New York legislation, the Court relied almost entirely on *Everson*. It reasoned that the statute had no effect on religion because the books were loaned directly to the children without regard to the school they attended. The Court then applied the “child benefit” test developed in *Everson* and concluded on the incomplete record that the New York statute had a secular legislative purpose. Its primary effect neither advanced nor inhibited religion but did aid students in private schools and their parents. 49

In a 1969 commentary strongly critical of *Allen*, Professor Freund notes that, at best, the decision was a guarded one which contained frequent references to the meager factual record. He writes:

[T]he sharp dichotomy between pupil benefit and benefit to the school seems to me a chimerical constitutional criterion. It is akin to the ineffectual effort in the mid-nineteenth century to classify such local measures as pilotage laws as either regulations of safety or regulations of commerce, and to make their validity turn on the classification. It was the beginning of wisdom when the Court candidly recognized that such measures were

45. Id. at 16.
47. 392 U.S. 236 (1968).
48. Id. at 254-55.
49. Id. at 244.
regulations of both safety and commerce, and... a
closer look had to be taken at their consequences for
both, as well as their exigency, in light of the policies
underlying the commerce clause.50

Professor Freund argues that busses, lunches and nurses are not
ideological, but that the use of textbooks, which are chosen by
parochial school personnel and used in a religious atmosphere,
involves issues which could and should have been answered with
a fuller record.51 In a sense forecasting the “excessive govern-
mental entanglement” criterion,52 Professor Freund points out
that the religion clauses of the first amendment require “mutual
abstention—keeping politics out of religion and religion out of
politics,” a task which was obviously not made any easier by
Allen.53

RECENT CASE LAW MILITATES AGAINST
PAROCHIAL SCHOOL PARTICIPATION

The rationale of the Allen and Everson cases, relying on the
child benefit-school benefit dichotomy, presents the primary con-
stitutional underpinning for the ESEA. However, despite the
efforts of Congress to bring the Act within the purview of the
“child benefit” concept, there remain grave doubts as to whether
these provisions have not become infected with the “effect” and
“entanglement” criteria. The “entanglement” criteria surfaced
in Walz v. Tax Commissioners,54 a case in which the Supreme
Court held that state real estate tax exemptions granted to a
wide variety of religious organizations were not in violation of the
establishment clause. The ruling was based largely on the
Court’s finding that similar governmental involvement in the past
had not led to any erosion of the religion clauses of the first
amendment. Standing by itself, this case and its development of
the excessive governmental entanglement criterion, appears not

50. Freund, Public Aid to Parochial Schools, 82 HARV. L. REV. 1680, 1682-
83 (1969) [hereinafter cited as Freund].
51. Some of these questions would concern the differences, if any, be-
tween the books used by the public school children and private school children,
who actually selects the books and whether the books are to be loaned or given
to the private schools.
52. See note 50 supra and accompanying text.
53. One has only to observe the problems that have been recently develop-
 ing throughout the country with regard to the kind of books being used in
the public schools to recognize that religion and politics do enter into the
matter and, in some areas, quite extensively.
so much to set limits upon, as it does "provide play in the joints" of, the body politic as far as the establishment clause is concerned.

That interpretation, however, differed from the one given by the Court in *Lemon v. Kurtzman,*55 a case involving legislation in two states to aid nonpublic elementary and secondary education. The Pennsylvania legislature had endeavored to provide reimbursement to nonpublic schools for the cost of teachers' salaries, textbooks and instructional material in specified secular subjects.66 In Rhode Island, the legislature had sought to supplement salaries of nonpublic school teachers.57 The Court's opinion, delivered by Justice Burger, concluded that the cumulative impact of the entire relationship arising under the statutes in each state, involved excessive governmental entanglement.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, in a separate opinion in *Walz . . .* echo the classic warning as to "programs whose very nature is apt to entangle the state in details of administration * * *"58

The concurring opinions also viewed the legislation as having the "primary effect" of advancing religion because of the "direct" nature of the subsidies, notwithstanding the fact that the subsidies were paid solely for secular education.59

These cases seem to have identified three classes of parochial aid forbidden by the establishment clause: (1) governmental subsidy of sectarian instruction, whether direct or indirect, where there is a direct subsidy notwithstanding that the subsidy is solely for nonreligious education in parochial schools, (2) action whose purpose or primary effect is to advance religion, and (3) excessive governmental entanglement in religion.

These criteria were further developed in *Committee for Public Education v. Nyquist,*60 a case which involved a New York law establishing three distinct financial aid programs for nonpublic

55. 403 U.S. 602 (1971).
59. Id. at 639.
60. 413 U.S. 756, 773-78 (1973).
elementary and secondary schools. The first section provided direct money grants for maintenance and repair costs to those nonpublic schools which served a high concentration of pupils from low income families. "Maintenance and repairs" included operating expenses, such as heat, light, water, cleaning and custodial service, renovation costs for buildings and grounds, and "such other items as the commissioner deems necessary to ensure the health, welfare and safety of the enrolled pupils." The second program provided tuition reimbursement to low income families. No restrictions were placed on the use of the reimbursed funds. The third program was a tax refund plan for parents of nonpublic school children whose incomes exceeded $5,000 per year.

Despite its ruling that the statute's legislative purpose was valid, the Court had little difficulty in finding that the maintenance and repair provisions of the New York law violated the establishment clause "because their effect, inevitably, is to subsidize and advance the religious mission of the sectarian schools" and because "assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State." The Court also invalidated the tuition reimbursement program, holding that it failed the "effect" test. "The effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." The Court noted that no provision was made to guarantee "that the state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes." "[I]t is clear . . . that direct aid in whatever form is invalid." Furthermore, the Court noted that if the grants were offered as an incentive to parents to send their children to school by making unrestricted cash payments to them, the establishment clause was violated whether or not the dollars given actually find their way into the sectarian institutions. The Court reiterated that because of the tension between the freedom of religion and establishment clauses of the first amendment, the state must maintain a neutral attitude and take measures which neither advance nor inhibit religion. The New York statute was

61. Id. at 763.
62. Id. at 779-80.
63. Id. at 780.
64. Id.
65. Id. at 783.
66. Id. at 780.
67. Id. at 783.
68. Id. at 775.

https://scholar.valpo.edu/vulr/vol9/iss3/2
invalid because, "the State [had] taken a step which can only be regarded as one 'advancing' religion."\(^9\)

The Court also invalidated the third program, a tax benefit plan for the parents of children attending nonpublic schools. The legislature had contemplated the tax benefit as being comparable to the tuition grant for lower income parents. The Court summarily rejected the Allen and Everson "child benefit" argument. And it tenuously distinguished the Walz argument on the ground that the tax exemption in that case covered all property devoted to charitable or religious purposes, whereas the tax benefit program involved in Nyquist resulted in the disbursement of funds to parents of children attending nonpublic schools which has "the impermissible effect of advancing the sectarian activities of religious schools."\(^9\)

Three Justices dissented in Nyquist. Chief Justice Burger refuted the "effect" argument in Justice Powell's opinion for the majority. The more resourceful opinion of Justice White cites interesting statistics and reports showing the various types and extent of aid being provided to nonpublic schools by several states.\(^7\) Justice White reiterated that the establishment clause does not absolutely forbid all aid to religion, citing numerous cases, such as Tilton v. Richardson\(^7\) and Hunt v. McNair,\(^7\) which approved aid to religiously oriented post-secondary schools. Justice White dismissed the Court's excessive entanglement argument and concluded with the remonstrance that, "the test is one of 'primary' effect not any effect."\(^7\)

From these cases, it is obvious that the "play in the joints" of the body politic in Walz has received less than enthusiastic acceptance. It remains to be seen whether the more restrictive position of the Court will be changed. At best, the position of the Court is becoming less clear with respect to what is constitutionally permissible state aid to education.\(^7\)

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69. *Id.* at 794.
70. *Id.*
71. *Id.* at 795.
72. 403 U.S. 672 (1971).
73. 413 U.S. 734 (1973).
74. 413 U.S. 825 (1973).
THE IMPACT OF RECENT LEGAL DEVELOPMENTS ON THE ESEA

Despite the criticism of the ESEA, the legislation has achieved a considerable degree of success. It has gained the support of educators as well as minority groups and parochial interests. However, enactment of the 1974 Amendments took its social and political toll just as did enactment of the original Act. Witness, for example, the social and political turmoil occasioned by the bussing requirements of Title II of the 1974 Amendments, as well as the strenuous and successful efforts of the parochial interests to achieve the new provisions in the 1974 Amendments relating to equitable programming and equal expenditures as between public and nonpublic school children. The present position of the Supreme Court, though confusing, seems to place it on a collision course with the parochial interests which have successfully influenced Congress to provide for nonpublic school participation in the ESEA during the past ten years.

Are these forces so irreconcilable as to spell the ultimate end of federal aid to education? Perhaps not. As suggested by Professor Freund, it would be the beginning of wisdom if the Court were to look at parochial student participation as a benefit both to the student and to the parochial school. However, such a position would not necessarily solve the problem. More specific answers are needed. One constructive approach would be either for Congress to establish as a national policy (more cogently than has been done) or for the courts to establish as a constitutional right, the technique of dual enrollment.

In Wheeler v. Barrera, the Court, holding that federal courts may not ignore state law prohibitions against use of publicly em-

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76. D. KIRKP AND M. YUDOF, EDUCATIONAL POLICY AND THE LAW, 555-67 (1974). Most of the criticism concerns the administration of the Act rather than the specific legislative enactment. The chief criticism regarding the latter appears to have been concerned with the poverty formula, along with the criticism of the nonpublic school officials regarding lack of equitable treatment.


78. See, e.g., the statement of Edward R. D'Alessio and others representing the parochial interest. 1973 House Hearings, supra note 77, at 1156-1200.

79. See note 50 supra and accompanying text.

ployed teachers in nonpublic schools, has clearly established that, insofar as Title I of the ESEA is concerned, the Act does not require that public school teachers teach Title I programs in the parochial schools and that the "comparability" requirement of the regulations may be satisfied by a wide variety of programs which do not include public school teachers teaching in nonpublic schools.\textsuperscript{82} This case, when considered in the light of other recent decisions, places dual enrollment in the foreground as legally the most acceptable approach to administering publicly funded educational programs to nonpublic school children.

Since the Supreme Court decided \textit{Allen} in 1968, several states have endeavored to aid parochial education by means of various legislative enactments. The Supreme Court has emphatically rejected all of these attempts as being in violation of the establishment clause.\textsuperscript{83} It seems highly likely that, given the opportunity, the Court would also declare unconstitutional the use of federal, as well as state, funds for the payment of salaries of public school teachers who are teaching Title I programs in the parochial schools.

In \textit{Earley v. Di Censo,} a case dealing with Rhode Island legislation subsidizing salaries of nonpublic school teachers, Chief Justice Burger discussed the problems of a teacher in a parochial school maintaining a neutral attitude regarding religion. He wrote:

We do not assume, however, the parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from secular responsibilities. But the potential for impermissible fostering of religion is present. . . . [T]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. . . . To ensure that no trespass occurs, the State has

\textsuperscript{81} The comparability requirement means that:
\textit{[W]hen a group of children in a private school are found to have a need which is similar (not identical) to a need found in a group of public school children, the response to that need with Title I resources should be similar (not identical) in scope, quality and opportunity for participation for both groups.}


\textsuperscript{82} 417 U.S. 402, n.20 (1974).

\textsuperscript{83} \textit{See} notes 55 and 60 \textit{supra} and accompanying text.

\textsuperscript{84} 403 U.S. 602 (1971).
therefore carefully conditioned its aid with pervasive restrictions.\textsuperscript{85}

A comprehensive discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.\textsuperscript{86}

Finally, in the very recent case of \textit{Meek v. Pittenger},\textsuperscript{87} the Court declared unconstitutional two Pennsylvania statutes providing for a wide variety of aid programs to be provided for children attending nonpublic schools.\textsuperscript{88} Here the emphasis was not on the fiscal provisions but rather on the specific type of academic and auxiliary programs being furnished to the child attending nonpublic schools.\textsuperscript{89}

It seems that the Office of Education would be well advised to phase out local programs, using public school employees in nonpublic schools, and substituting wherever possible, not only under Title I but also under Title IV provisions, programs which involve the dual enrollment of children attending nonpublic schools. This technique permits a child attending a nonpublic school to enroll for one or more programs or courses in the public schools.\textsuperscript{90} Justification for nonpublic student participation in Title IV pro-

\textsuperscript{85} The ESEA has also conditioned its aid with pervasive restrictions. \textit{See}, e.g., Education Amendments of 1974, § 404, 20 U.S.C. § 1806 (1974), which provides that the children attending nonprofit elementary and secondary schools shall be provided,

 - secular, neutral, and nonideological services, materials, and equipment including the repair, minor remodeling, or construction of public school facilities as may be necessary for their provision. . . .

\textsuperscript{86} 403 U.S. at 619 (1971).

\textsuperscript{87} 95 S. Ct. 1753 (1975).

\textsuperscript{88} \textit{Id.} This legislation provided for the loan of textbooks and instructional materials to nonpublic school children free of charge, Act 195, § 1 (a), \textit{Pa. Stat. Tit.} 24, § 9-972 (a), and for auxiliary services, Act 194, § 1 (a), \textit{Pa. Stat. Tit.} 24 § 9-972 (a). The majority of the Court upheld the loaning of textbooks but struck down the loaning of instructional materials and furnishing of auxiliary services as a violation of the establishment clause of the first amendment.

\textsuperscript{89} At this writing, the impact of this case on ESEA is being considered by the Office of General Counsel, HEW. \textit{See} \textit{Memo from Dwight R. Crum, Director, Nonpublic Educational Services, Office of Education, to State Educational Agencies Liaison Officers for Nonpublic Educational Services, June 18, 1975}, on file in Valparaiso University Law Library.

\textsuperscript{90} \textit{See} note 23 supra and accompanying text.
grams has been based on the "child benefit" theory. Title IV provides for a wide range of programs, including the furnishing of books, library materials, equipment, guidance counseling and innovative educational programs. Some of these programs might acquire support from the "child benefit" theory as interpreted by Allen.

However, in the light of Meek, this view appears doubtful if the programs are being provided in parochial schools. The 1974 Amendments now require consultation between appropriate private school officials and either officials of the local district, the state educational agency or the Office of Education. Furthermore, Title IV requires that as between public and nonpublic school children, expenditures for programs shall be equal. In the writer's opinion, this type of venturesome legislation would clearly entail the "comprehensive, discriminating, and continuing state surveillance" condemned in Lemon v. Kurtzman. The following comment by Justice Powell in Nyquist is also relevant:

[T]he importance of the competing societal interests implicated here prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

On the other hand, dual enrollment was an integral part of the quid pro quo between competing societal interests leading to the initial enactment of the ESEA.

The technique of dual enrollment is the most legally acceptable vehicle for extending public school programs to all in need of them regardless of the school in which they are initially enrolled. Administrative and logistical problems do exist with respect to dual enrollment. However, with declining enrollments,

91. See note 49 supra and accompanying text.
93. Education Amendments of 1974, § 406 (c), (d) and (e).
94. 403 U.S. 602 (1971).
95. 413 U.S. 756, 794 (1973).
96. See note 31, supra and accompanying text regarding the statements of religious leaders in hearings before the House and Senate concerning the original legislation.
97. It has been said that most of the objections to dual enrollment involve anticipated problems in implementation and that the requirement of cooperation between public and parochial officials would cause a violation of
additional classroom space will become available. Moreover, the use of computers for the scheduling of private and public school children, as in modular scheduling, can overcome these problems. Dual enrollment is not necessarily based on the "child benefit" theory for its legal existence. Furthermore, there is less chance that excessive governmental entanglement will develop in its administration. Problems of "comparable," "equitable" and "equal" treatment, whether encountered in the fiscal or the academic sector, are more readily solved by the application of dual enrollment than by such means as the use of public school teachers in parochial schools.

Although the ESEA refers briefly to "dual enrollment," the statute does not require its utilization. In general, the Act requires aid to be provided for children attending parochial schools, but it is silent on the issue of how such aid is to be dispensed. The states are left to make a choice of what appears to be an extemporaneously suggested list of items including "educational television," "dual enrollment" and "mobile classrooms." The list was not intended to be complete or exclusive. Thus, despite the provisions in the Act requiring the rendering of aid to students attending nonpublic schools, there is no defined policy on how this aid should be provided.

98. See note 104, infra and accompanying text.
99. Dual enrollment has been called the most innovative aspect of Title I and at the time of the hearings on the legislation, it was said to be considered the only important means of providing these services. The Commissioner of Education, Francis Keppel, after the passage of the Act, discussed the state-church compromise only in terms of dual enrollment. Educational television and mobile services were not mentioned. La Noue, supra note 97, at 231, citing Keppel, The Necessary Revolution in American Education (1966).
100. The Education Amendments of 1974, § 141 (A), 20 U.S.C. § 241e(1) (1974), simply states that the agency shall make provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television and mobile educational services and equipment).
A national policy emphasizing dual enrollment is needed. Such a policy would justify the initial inconvenience involved in scheduling and transportation as well as the sacrifice of principles on the part of parochial educators who see dual enrollment as making inroads on their institutions. In the absence of such a policy, the continued development of extreme social and legal pressures may well result in the demise of one of the best programs to which our federal dollars have been appropriated. The adoption of such a policy will necessitate some sacrifice of principle on the part of parochial interests inasmuch as some of the programs which they have been providing in their schools will of necessity be transferred either to public schools or to some neutral classroom center. Such a policy, if based on dual enrollment, might well preserve the concept of federal aid.

To establish a national policy of dual enrollment, at least two events must occur. First, either Congress or possibly the Office of Education, must provide greater incentives for state and local bodies to adopt programs employing dual enrollment. And secondly, there must be a Supreme Court ruling establishing dual enrollment as a constitutional right of students attending nonpublic schools. The latter would probably be more easily accomplished than obtaining a judicial determination upholding the constitutionality of the ESEA as it now reads. Under such a ruling, current state statutory and constitutional proscriptions against dual enrollment would be rendered invalid.102 Viewed in this manner, the basic preference expressed by Professor Freund in another context becomes readily acceptable here:

Although great issues of constitutional law are never settled until they are settled right, still as between open-ended, ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury.103

In this connection, a strong argument can be made that dual enrollment is required as a constitutional right, at least where special educational programs are being offered for students such as those who are educationally disadvantaged, handicapped or gifted. Pierce v. Society of Sisters of the Holy Names104 estab-

102. E.g., Mo. Const., art IX, §§ 5, 8 and Special District v. Wheeler, 408 S.W.2d 60, 63 (1966) and La Noue, supra note 97 at 231-35.
103. Freund, supra note 50 at 1692.
104. 268 U.S. 510 (1925).
lished the right of parents to send their children to private religiously oriented schools to satisfy the compulsory school attendance laws. In that case, the Court wrote:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. 105

And in Wisconsin v. Yoder, 106 the Supreme Court upheld the right of old order Amish parents to refrain from sending their children to school beyond the eighth grade where such action was based on religious beliefs. The Court in the latter case placed considerable reliance on Sherbert v. Verner. 107 In this case, the plaintiff, an unemployed Seventh Day Adventist, had been denied the benefit of the South Carolina unemployment compensation laws because she refused to make herself available for work on her Sabbath, which was Saturday. Finding that her ineligibility arose in connection with the practice of her religion, the Court noted that “the pressure upon her to forego that practice is unmistakable.” 108 Furthermore, “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” 109

While it is clear that Sherbert v. Verner did not establish public aid as a constitutional right, its principal thrust, and that of Pierce and Yoder, is that administrative inconvenience, fiscal uncertainties and other problems of accommodation must be borne and dealt with by the state in the face of a claim of impairment of religious freedom. This required “accommodation,” it is submitted, extends to the offering of dual enrollment where the exclusiveness of the state’s educational system otherwise would require the child to make a choice between enrolling in the public school and giving up his religious education or foregoing the public school program and remaining a full-time student in the parochial school.

Professor Freund suggests that the right to dual enrollment is limited to the neutrality criteria defined in Sherbert v. Verner. 110 Perhaps dual enrollment does extend to the limits of neutrality.

105. Id. at 535.
108. Id. at 404.
109. Id.
110. Freund, supra note 50 at 1687.
But in so doing, it stands a chance of defusing an explosive set of circumstances primarily involving excessive governmental entanglement which might bring an end to federal aid to education if allowed to proceed in a natural course. The circumstances involve such things as disputes concerning on-site teaching and potential disagreement over requirements of consultation with private schools regarding "equitable," "equal" or "comparable" treatment which will inevitably lead to excessive entanglement of religion with government. Restoring dual enrollment to the position it was intended to have as a primary tool for extending public education to nonpublic schools will more readily provide the equitable treatment attempted by the legislation which is in danger of being declared unconstitutional.

CONCLUSION

The United States Supreme Court has severely limited the method and kind of aid that may be provided children attending nonpublic schools. Congress, on the other hand, has in the passage of the Education Amendments of 1974, not only reaffirmed, but, in part, has strengthened the policy of aid to children attending nonpublic schools. The problem of the Office of Education is to implement that policy in a manner that will not violate the establishment clause of the first amendment.

Of the possible techniques available, it appears that dual enrollment would be the most successful in providing constitutionally valid and, at the same time, equitable participation. On the other hand, if the Office of Education continues to approve of such techniques as providing the services of publicly paid employees on the premises of nonpublic schools, then there is a very real danger that the entire policy of providing such aid will be found to violate the establishment clause.