

## Private School—Public School: What Are the Issues?

AMERICAN public education is by design one of the most sensitive and daring of our institutional innovations. It is necessarily fragile because its unity depends on continuous public support and operation of schools by the people of each state, adapted to maintain the flexibility and diversity in education required to permit effective local autonomy in local school communities. Impacts from national insecurity, desegregation and technological change have in recent years placed public education under exceptional political, economic and social tensions. The result has been an unusual amount of discord over such topics as content and methods of instruction, pupil services, district organization, and especially local and intergovernmental financing. Public education has become more vulnerable than for many decades, and those among us who would curtail or eliminate it have become more active.

A contest over national policy involving both public and private educational institutions currently centers on federal legislation to authorize tax support of education. A secondary phase is developing which involves judicial definitions of constitutional limitations on private and sectarian school aid as authorized by some federal laws and as may further be authorized.

There are several reasons why the fed-

eral government is the principal arena for this fundamental controversy. In the first place, it collects two-thirds of all taxes, and spends in billions rather than in millions. The large, zealous, and well-organized groups that lead the movement for tax support of private education are a dominating political influence in Washington, with their strength conveniently concentrated where public school influence is weakest. They do less well in the state legislatures because state constitutions and laws unambiguously prohibit state or local tax support of sectarian institutions of education. At the national level, however, the ambiguous Federal Constitution tends to encourage efforts to obtain federal tax funds for private schools because federal taxpayers have been denied jurisdiction in court to ascertain the constitutionality of a federal expenditure.<sup>1</sup>

<sup>1</sup> See the stimulating article by the late Edmond Cahn, "How to Destroy the Churches," in *Harper's Magazine* for November 1961. Here it is argued that if the principle of separation of church and state gets tangled up with legalities in courts, and self-pity among church members at the burden of financing their own sectarian institutions brings the churches to seek and use tax funds, the result will be secularized churches supported on the state's terms and stripped of independence to assert moral issues involving the state. Since 1962 Congress has rushed ahead of the courts, expediting what Cahn says will destroy the churches, so that now the courts may be the best recourse of the people to slow or prevent such destruction.

Under these circumstances there should be no surprise that private education is receiving increased tax support in the Congress. Public and private colleges and universities are tax supported alike. Federal funds for private elementary and secondary schools are increasing. Proponents hope for a breakthrough comparable to that in higher education. Leadership in these directions has been assumed by authorized agencies of the Roman Catholic Church, which operates parochial schools enrolling a large majority of all private school pupils in the country. These agencies oppose federal funds for public schools if for any reason their own schools cannot share them.

The principal proponents of tax support for church schools work zealously to implement religious doctrines and civil policies that require the Church, rather than all of the people acting through government, to assume primary responsibility for organized education beyond the home.<sup>2</sup> Public schools are authoritatively regarded as unsatisfactory to its members.<sup>3</sup> The combination of religious doctrine, church policy and strong political action supported from sanctuaries of organized religion poses a crisis for the public schools more fundamental than mere competition for tax funds. The real issue is the religious claim of primary

responsibility for all of education both religious and secular, on the ground that the religious and secular aspects cannot satisfactorily be separated. Such an authoritative position is quite as difficult to reconcile with the idea of cooperative pluralism in American society as it is with the idea of public responsibility for the education of all the people.

Private and parochial schools operated for church members and others who may be admitted are constitutionally protected within American standards of religious freedom.<sup>4</sup> When financed by their supporters, such schools supplement without substituting for systems of tax-supported education available to all. The current difficulty is caused by hardships among users of nonpublic schools in financing as many schools as they desire, their persistent political demand for tax assistance for their own schools that teach their own religion, and more specifically their direct opposition to tax support for public schools unless their own schools also receive tax funds.

### The Drive for Tax Support of Private School Systems

There is a drive in Congress to provide federal tax funds equally to public and

<sup>2</sup> Explained in detail in the Encyclical "Christian Education of Youth" of Pope Pius XI. Title XXII of the Canon Law deals with schools. Canon 1381 provides that the religious instruction of children in all schools is subject to the inspection and authority of the Church. Of course this is not implemented in the United States.

<sup>3</sup> Canon 1374 requires permission of the bishop of the diocese before Catholics may attend public schools, and has been extended by some diocesan authorities to include attendance at non-Catholic colleges. See references to St. Louis and Cleveland in *St. Louis Post Dispatch* of June 7, 1960; *New York Times*, June 19, 1960; *Lorain (Ohio) Journal*, June 8, 1958; *Washington Post*, January 26, 1963.

<sup>4</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Such protection applies to religious and private secular schools alike, but both must meet state standards for secular education. For reasons that go beyond our scope here, most states seldom define or enforce any substantial educational standards for these schools, although the minimum secular education program of the state can be legally enforced even over religious objections. The constitutional protection of religious liberty to operate religious schools involves no obligation of the government to finance them. On the contrary, the Supreme Court has repeatedly held that tax financing of sectarian institutions of education violates the "establishment" clause of the First Amendment, which protects religious freedom through separation of church and state.

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private schools for general purposes. This is the purpose of a bill introduced by Congressman James J. Delaney of New York<sup>5</sup> that would authorize general federal payments to parents of private school children and equal payments to public school districts for public school children. Bidding for constitutional approval, the payments would theoretically be for the individual educational benefit of each child in elementary and secondary schools in all states. The bill's sponsor calls it the "G.I. bill for children." Along with other proposals, it is supported by the forces seeking federal aid for denominational schools.

The Delaney bill differs only slightly in factual details, and not at all in legal theory, from the Virginia Assessment Bill which led to the adoption of the First Amendment. The Virginia legislation would have authorized tax funds to be paid directly to the taxpayers, who in turn would pay them to the churches of their choice or to general education. Madison and Jefferson defeated this proposal in Virginia in 1785, and wrote the First Amendment precisely to prevent such legislation as the Delaney bill from using religion "as an engine of civil policy."

The Delaney approach is a logical first step toward dividing all school tax funds from all levels of government among public and private schools on a per capita basis. Msgr. Francis T. Hurley, a representative of the National Catholic Welfare Conference, supported such legislation at a meeting called jointly by the American Council on Education and the National Education Associa-

<sup>5</sup> H. R. 320, introduced January 9, 1963.

tion in Washington on February 8, 1963. He also promised church-wide opposition to every new proposal for federal aid for public elementary and secondary schools not including parochial schools, saying that this decision of policy is "irrevocable," and that it "will be implemented to the full." He said his organization was examining all present federal public school aids, considering whether to oppose them when they come up for extension or amendment in Congress unless they include parochial schools. This attitude is faithfully reflected by some Congressmen today.

Congressman Hugh L. Carey of New York has recited the great gains in the drive for federal aid for denominational schools and colleges in a recent report to his constituents. He began by saying, "The Higher Education Facilities Act is the first general college aid program ever enacted. It provides for loans and grants for both public and private colleges on a fair and equal basis." Up to the time of final decision in the House-Senate joint conference committee compromise on this Act (P.L. 204 of 1963), its sponsors claimed that it did not provide for *general* aid. Perhaps this view was assumed because the legal brief released in March 1961 by the Department of Health, Education, and Welfare, and approved by the Department of Justice, cast doubt on the constitutionality of *general* federal aid to sectarian colleges.

Congressman Carey feels no need for such fiction, however, and honestly calls the Higher Education Facilities Act one of general aid. It is the type of legislative precedent he seeks to establish at all levels of education. The Congressman concluded his report as follows:

This entire report could be devoted to our gains in education but to do so would be to slight our progress in many other fields. But

before leaving the subject of education, I wish to emphasize that every bill we passed made adequate provision for fair and equal treatment for all students and all interests in education—public and private—without discrimination. In considering every bill that comes before my committee I will continue to urge that the basic American principle of equality in educational assistance at every level of government must prevail. In general education, our G.I. bill for junior is earning support steadily.

More recently, Monsignor Frederick H. Hochwalt and others from the National Catholic Educational Association have encouraged experimentation with shared time. However, Msgr. Hochwalt has informed a Congressional committee that even general adoption of shared time would not change the policy of his organization on federal aid to education. Much more substantive steps than shared time have been and are being taken to obtain federal funds for private schools.

### Legislative Tactics

Pending action on more comprehensive legislation, proponents of federal aid for private schools have taken preliminary steps through a series of tactical legislative devices. These can be illustrated by the legislative history and the text of the Vocational Education Act of 1963 (P.L. 210), and by the so-called "anti-poverty" legislation signed into law August 20, 1964 (P.L. 452).

The new vocational education law marks the first use of federal tax-raised funds for vocational education below the college level in other than tax-supported and publicly controlled schools. One provision authorizes *direct* federal tax funds for private schools, higher institutions and other agencies to pay part of the cost of research and training programs

or experimental, developmental, or pilot programs of vocational education below the college level. These project grants are to be made at federal discretion.

Another provision of this new law suggests an *indirect* approach by defining the term "vocational education" to include *contracts* for vocational education between eligible public school agencies and private agencies "to utilize existing facilities of private schools as a normal procedure." Private business schools and technical institutes were referred to specifically in statements on legislative intent involved in such contracts in a colloquy between two House Subcommittee Chairmen on December 12, 1963, but both their language and the language of the statute may be broad enough to include parochial schools. Said one of the chairmen ". . . it is the intent of this measure to grant as a normal administrative procedure the right of the States to conduct these programs in public schools *or under contract* in a manner which can most efficiently and economically respond to local needs and situations."<sup>6</sup> Thus the proponents of private school tax support are inviting local private school pressure on public school boards to divide federal funds between public and private schools by contract. A similar colloquy between two Senators was also made part of the legislative record.<sup>7</sup>

The "anti-poverty" law illustrates both the power of the proponents of federal aid for denominational schools in the House of Representatives and their resourcefulness in avoiding probable constitutional limitations. By whatever name they may be called, many of the activities

<sup>6</sup> Emphasis supplied. See Congressional Record for December 12, 1963, p. 23112-3.

<sup>7</sup> See Congressional Record for December 13, 1963, p. 23307.

to be undertaken under this legislation are formal education.

As introduced in the House, the anti-poverty bill recognized education as such. To illustrate, Title II authorized federal grants or contracts to pay for community action programs in "... such fields as education, employment, job training and counseling, health, vocational rehabilitation, housing, home management, and welfare." It provided that educational funds must be administered by local public school authorities, but that all children and youth would be eligible for the classes irrespective of their school connections. This would have been the rule whether the program was administered through a general community agency or directly from the federal director of the program to the local school in cases where such was authorized.

The private school forces fought against this arrangement vigorously in the House Education and Labor Committee, and succeeded in eliminating it. The category of "education" was eliminated entirely, along with any specific reference to public schools. Trying to make "welfare" out of "education" for obvious reasons, "education" was reworded to become "special remedial and other noncurricular educational assistance." Then the provision for public school management of federal funds for education was replaced by the following prohibition: "No grant or contract authorized under this part may provide for general aid to elementary or secondary education in any school or school system."

Under P.L. 452 as enacted, the federal director is fully authorized to pay part or all of the costs of anti-poverty programs approved by him and administered by public or private nonprofit

agencies, or combination thereof also approved by him.<sup>8</sup> Private agencies, including schools, may conduct the only "anti-poverty" program in a community, if named by the federal director to do so. This is the policy of all parts of the legislation. Except for work by trainees on "... projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship,"<sup>9</sup> or sponsorship of a project by a political party,<sup>10</sup> the personal restraint of the federal director will be the measure of federal restraint on tax support of nonprofit private institutions on any project under Titles I and II of the Act not vetoed by the governor of the state where it is located.<sup>11</sup>

### Why Should Americans Be Concerned?

It is fair to ask how the public schools would be damaged if private and sectarian schools should share tax funds with them. The dividing of tax funds would mean the splintering of elementary and secondary education into denominational and other private schools and school systems. Four decades after Holland adopted a similar program, enrollment in its public schools declined from 75 percent to 30 percent of the total student population, with only the Protestant and Roman Catholic systems growing rapidly. A larger number of denominational and private school systems and special interest schools operated by nonprofit tax-exempt organizations could be anticipated in this country. The rate of decline of public

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<sup>8</sup> P. L. 452, Title II, Sec. 205. Compare with H. R. 10440, Title II, Sec. 204 (a).

<sup>9</sup> *Ibid.*, Title I, Sec. 124.

<sup>10</sup> *Ibid.*, Sec. III.

<sup>11</sup> P. L. 452, Title II, Sec. 209.

close up, the American politician is today not nearly as corrupt or stupid as he seems in the fantasy of the frustrated whom we often allow to paint a picture of what we should go and see for ourselves.

There are many reasons ranging from selfishness to a sense of responsibility which suggest that the teacher should be inside the caucus room when the door is closed. It is not easy, but it is perhaps a primary responsibility.

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education would depend on the amount of tax funds for private schools and necessary reduction of services in the public schools.

Our elementary and secondary public schools would be left to educate children from denominations too small to operate their own schools, the unchurched, the culturally deprived, and the rejects and problem students from the private schools which can choose their own pupils. Adding tax funds and private funds for schools segregated on the basis of religion, race, social status, wealth and special interests would seriously affect the public school as an effective educational agency in thousands of American communities. Its educational programs would necessarily be lean, its students and teachers could scarcely be expected to achieve high standards, and its community support for facilities and funds would be on a charity basis from the community power structures whose members would ordinarily be patrons of their own private schools.

Most serious would be the religious, social, political and economic divisiveness that would follow. In Holland almost

the total of society is organized along the lines established in the three school systems. It is divided into Catholic, Protestant and neutral clubs, civic associations, political parties, merchants' groups, labor unions and trade associations. In this country the splintering of society would probably be even more serious because of the great size and diversity of our country and its people. The minority public school with its underprivileged clientele could no longer be an effective force for unity. It could itself become as divisive in many ways as the denominational and other private schools at a time when its great unifying function would be needed as much as at any previous time in our national history.

### The Federal Danger

The federal government is today moving into a position from which it could undermine the fiscal base of the public schools within a few years. This might be done through categorical as well as through general laws to lessen the constitutional risks. Once large federal funds have been made available to the states to match and distribute, with both private schools and public schools eligible under federal law, federal financial incentives and internal political pressures on the states promise to become irresistible in making private schools eligible for full tax support along with public schools. Thereafter, as soon as a number of states have been led to amend their state constitutions to permit state matching of federal funds for private schools, the next step could be the short one of a requirement in the federal law that private schools must be included as eligible under state law before any state can qualify to receive the federal matching funds for either public or private schools.

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