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Introduction

More than seven years have elapsed since the enactment into law of the Nation's most ambitious and far-reaching experiment in Federal assistance to programs of elementary and secondary education. Designed to provide financial support for educational programs "which contribute particularly to meeting the special educational needs of educationally deprived children," [1] title I of the Elementary and Secondary Education Act of 1965 was launched with the hope that it would raise the educational horizons and academic achievement levels of millions of poverty stricken children whose educational opportunity was stunted by impoverished homes, inferior schools and, frequently, by racial and economic isolation from the mainstream of American life. At the end of its third year of operation, however, some observers of the title I experiment had come to question whether its performance was fulfiilling its promise and, despite support of many notable projects, measurable gains in the achievement levels of children served by title I on a broad basis remained elusive.

Acting against this background and influenced, in part at least, by this mood of disenchantment, the Congress enacted Public Law 91-230, the Elementary and Secondary Education Amendments of 1969,[2] which extends the life of the Elementary and Secondary Education Act, including title I, through fiscal year 1973, expands the reach of that Act, and at the same time, through a series of amendments both to title I itself and to the laws generally governing Federal education programs, pointedly tries to increase the chances for improved results.

One of the major innovations of the 1969 Amendments, the so-called

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[1] 20 U.S.C. 241a (1970).

[2] 84 Stat. 122 (1970).

"Murphy Amendment" after Senator George Murphy, its sponsor, superimposed upon the existing scheme a new program designed to concentrate title I funds on those school districts, primarily in urban and rural areas, with the highest concentrations of poverty stricken children.[3] This article summarizes the features of this new program and inquires as to its promise in bettering the experiment in Federally assisted compensatory education. While the changes made in and of themselves are far from earthshaking, the implications of this latest episode in the battle against educational deprivation which began in 1965 should be the basis for serious consideration and concern by those who are engaged in that battle and those who are interested in its outcome.

Title I in Brief

The Statutory Scheme

Title I of the Elementary and Secondary Education Act of 1965 authorizes the United States Commissioner of Education to make Federal payments to state educational agencies to be used by them for making grants to local educational agencies—generally speaking, local public school boards—for providing special services to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low income families.[4] The basic approach is not to provide Federal assistance for education generally, but to focus upon the educational needs of a particular category of children, namely those who are educationally deprived. Distribution of Federal assistance by the state educational agencies to their constituent local educational agencies is governed by a complex statutory formula for the computation, by the Commissioner, of the maximum grant which each local educational agency is eligible to receive for a fiscal year.

The Commissioner determines this maximum grant on the basis of the number of children, aged five to seventeen, in the school district of the local agency who are in one of the three following categories:

1. Those in families having an annual income of less than a statutorily prescribed low-income factor ($3,000 in fiscal year 1972, subject to adjustment based upon appropriation availability);
2. Those in families receiving an annual income in excess of the low income factor from payments under the program of aid to families with dependent children (AFDC); and

[3] P.L. 91-230, § 113(b), 84 Stat. 127, 20 U.S.C. 241d-11, 12; 115 Cong. Rec. 19497-501 (July 15, 1969).

[4] Elementary and Secondary Education Act of 1965, §§ 101, 102, 141(a)(1), 20 U.S.C. 241a, 241b, 241e(a)(1).

3. Those living in institutions for neglected or delinquent children or being supported in publicly-financed foster homes.

The total number of such children in the school district is then multiplied by fifty percent of the average per pupil expenditure in the state or, if greater, in the United States. This amount is the local agency's maximum grant.[5]

An eligible local educational agency (LEA) may obtain a grant only if it submits a project application to its state educational agency (SEA). That agency may approve or disapprove the local agency's project application on the basis of criteria set forth in title I, but may not approve a grant in excess of the maximum amount which the local agency is eligible to receive,[6] determined in accordance with the formula described above. In formulating its project for state agency approval, the local educational agency may choose from a wide variety of possible project activities. These are not laid out in the statute but may be found in a profuse "laundry list" set forth in the legislative reports which accompanied passage of the 1965 Act.[7]

Before a state educational agency may approve the application of a local educational agency for a grant, it must determine that the local agency's application satisfies certain statutory requirements with respect to such matters as participation in the program of non-public school children, control of funds, evaluation, submission of reports, dissemination, and special conditions relating to construction of facilities.[8] Of foremost importance, the SEA must determine that the programs or projects to be carried out by the local educational agency are "designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families" and that such programs or projects are "of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs. . . ." [9]

To participate in the title I program, a state must submit to the Commissioner, through its state educational agency, an application which provides the basic undertaking for the conduct of the title I programs in the state.

The state must undertake (a) to approve only those LEA applications

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[5] ESEA, § 103(a)(2), 103(c), 20 U.S.C. 241c(a)(2), 241c(c). Thus, if there are 1000 children in categories (1), (2), and (3) listed above and the applicable per pupil expenditure were $500, the maximum grant would be $250,000 (1,000 × .50 × $500).

[6] ESEA, § 141(a), § 143(a), 20 U.S.C. §§ 241e(a), 241g(a).

[7] *See*, Sen. Rept. No. 146, 89th Cong., 1st Sess. (1965).

[8] ESEA, § 141, 20 U.S.C. 241e.

[9] ESEA, § 141(a)(1), 20 U.S.C. 241e(a)(1).

which meet the requirements of title I, and (b) to enforce the obligations imposed upon local agencies until title I.[10]

In sum, Federal financial assistance under title I of the Elementary and Secondary Education Act is made available through grants to local educational agencies made by state educational agencies with funds provided by the Commissioner of Education. The local public agencies develop programs or projects for the use of the grant funds for which they are eligible and submit applications to their state educational agencies which, in turn, approve or disapprove these project applications subject to the criteria set forth in the statute and regulations.

Title I in Operation

The statutory scheme, described in cursory fashion above, has been the vehicle for the distribution of some $7 billion to local educational agencies throughout the United States.[11] In its third year of operation, Fiscal Year 1968, title I was found to be furnishing full or partial support for more than 30,000 separate projects in approximately 17,000 local school districts.[12] In that year, of the $1.057 billion spent by school districts from title I funds, about $853 million was used for instructional programs and student services; $117 million was spent for plant maintenance and operation, fixed charges, and administrative costs related to title I programs; $57 million for construction and building equipment; and $14.5 million for instructional equipment.[13] Of the instructional programs, basic skill development, particularly in reading and in mathematics, appears to be the most widespread use to which title I funds are put.[14]

The relevant market is huge. It has been estimated that there may be as many as 16.8 million school children aged 5–17 who are "educationally deprived." [15] Of these, approximately 14.2 million are economically deprived (from families having an income of less than $6,000).[16] An additional

[10] ESEA, § 142(a)(1), 20 U.S.C. 241f(a)(1). The complex set of rules under which entitlements are prorated downward when appropriations are insufficient to pay entitlements in full (ESEA § 144) is discussed *infra* text preceding note 69.

[11] Title I also provides for special grants to state agencies for the education of handicapped and institutionalized neglected and delinquent children and the migratory children of migratory agricultural workers, and for payments to the Secretary of the Interior for schools on reservations served by the Bureau of Indian Affairs. ESEA §§ 103(a)(1)(A), 103(a)(5)(6)(7).

[12] USDHEW, Education of the Disadvantaged 1968 (1970) (hereinafter "Belmont Report") 4.

[13] *Id.* at 86.

[14] *Id.* at 89. About 37% of title I funds in 1968 were spent for such purposes.

[15] *Id.* at 7.

[16] *Id.* at 7. Title I theoretically focuses on only a portion of this group since the low-income cut-off is $3,000 (for fiscal years prior to 1973). It is estimated that 4.4 million children are from families below the $3,000 annual income level. *Id.* at 7. On the other hand, as indicated above, once title I funds are distributed and allocated to project areas they may be used to serve educationally deprived children regardless of family income levels.

2.6 million are from families with higher income levels but with impaired academic potential.[17] Of the 14.2 million economically deprived children, approximately 4.1 million also suffer from educational disability and are thus "multiply disadvantaged." [18]

Despite the general aura of gloom which surrounds it, the relative effectiveness of the title I experiment is hard to pin down. In the first place, the law itself does not specify any objective measures of success. A school district's eligibility for assistance is based on the number of children described in the formula who are determined to be within its confines, not on the number of children who demonstrate a measurable increase in educational achievement. Moreover, the uses to which title I monies may be put are various and permit no single criterion for evaluation of their educational impact. A substantial portion of title I funds are used to provide so-called "life support" services for economically deprived children—food, clothing, health services, and the like.[19] For these children such services must first be afforded if educational inputs are to have any meaning. No matter how stimulating, instruction is likely to have little impact on the child who regularly goes without breakfast. The immediate results of such services can be demonstrated: a certain number of children have received a certain number of meals; establishing a direct relationship to educational gain is more difficult.

A significant number of title I projects are in the area of "cultural enrichment" programs, designed to furnish exposure to art, literature and the like, which the child has missed in his home environment, and the lack of which may impair his educational advancement. Again, the application of educational measures to such programs is difficult, and, in any event, there does not appear to be a systematically collected body of data which tells us whether these programs are producing achievement gains or not.

It is only in the area of the provision of instructional services that some vague and tentative conclusions have been drawn as to the effectiveness of title I, and here, the results, while disappointing, are not conclusive.

In the 1967–1968 school year, approximately $241 million was channeled under title I into special remedial reading programs which reached about 3.5 million children.[20] However, relative gains in reading achievement as a result of these efforts could be gauged with respect to only 11,490 pupils for whom pre-test and post-test scores were available.[21] Most of these pupils lived in large urban school districts and apparently took their

[17] *Id.* at 7.

[18] *Ibid.*

[19] In fiscal year 1968, about 10 percent ($106 million) of title I funds were spent for such services. *Id.* at 93, table VI-2.

[20] *Id.* at 89, 125.

[21] *Id.* at 125.

schooling in racially isolated situations. To the extent that these data are revealing as to title I pay-offs, they are disappointing. Without setting forth detailed tables, the Belmont report concluded that "compensatory reading programs did not seem to overcome the reading deficiencies that stem from poverty." [22]

The pupils who had large gains in reading achievement were less socially disadvantaged than those who did not gain. The high gainers were in schools with relatively lower concentrations of children from low-income families. Conversely, "participating pupils in schools with heavy concentrations of pupils with extremely low socio-economic backgrounds consistently gained less in reading achievement than participating pupils in schools whose student bodies had higher socio-economic backgrounds." [23] Thus, socio-economic condition rather than exposure to compensatory education seemed a more salient factor in achievement. Significantly, the report concluded, "there was no consistent relationship between the total hours per year that a pupil spent in compensatory reading activities and his reading achievement gain." [24] At the same time, the Belmont report indicated that, on the average, the number of dollars per pupil being poured into reading projects supported by title I ($68) was too low to provide a reasonable basis for an expectation that they would produce measurable educational gains.[25] Whether this explanation is an adequate answer to the conclusions as to achievement gains for the 11,490 pupils described above cannot be established. As we shall see, however, that explanation has provided a rationale for Congress' most recent effort to bolster title I as reflected in P.L. 91-230.

The point that title I funds have not been sufficiently concentrated to permit a fair test of the program has also been made, from a somewhat different perspective, by observers who believe that assistance under title I is diluted and mistargeted through widespread failure of State agencies and school districts to observe program requirements which are designed to achieve concentration. For example, the program is designed to provide only for the "special educational needs" of educationally deprived children; it presupposes that the *general* educational needs of those children will be met out of state and local funds, with title I dollars financing the extras—the incremental services needed to permit the target children to enhance their achievement levels.[26] It has been suggested that in many

[22] *Id.* at 127.

[23] *Ibid.*

[24] *Id.* at 128. See also Hearings before the Senate Select Comm. on Equal Educational Opportunity, *Equal Educational Opportunity,* 91st Cong. 2nd Sess. 93-94, 103, 104 (Dr. James Coleman) (hereinafter cited as "Senate Hearings").

[25] Belmont Report at 85, 88. In the case of mathematics projects, the average cost per pupil was $23.09, *Ibid.*

[26] See 45 C.F.R. § 116. 17(g) (1970).

states title I funds are widely used to provide "general aid" thus diluting the impact of title I and obviating concentration of services under the program.[27] Accordingly, it is fatuous to judge the compensatory education experiment in terms of the higher achievement levels it was supposed to produce until the experiment is made to work in the fashion contemplated. In short, under this thesis, assuming *arguendo* that title I has not worked, it is because it has never been tried.

Other Factors

The title I context must also include reports of evidence that student achievement levels do not respond appreciably to changes in school "inputs" and that the characteristics of school facilities and curriculums may have considerably less effect on academic performance (as measured by standard achievement tests) than the socio-economic level of the student's family or that of his classmates.[28]

In the light of data of this nature, one approach to equality of educational opportunity has focused on the need for placing educationally deprived students in classrooms in which more advantaged, middle class children predominate. This strategy, which is generally regarded as coextensive with racial integration of the schools, has been posed as an alternative to the compensatory education strategy exemplified by title I. Indeed the alleged "failure" of compensatory education projects has been cited in support of the proposition that only through integration can the goals of the latter strategy be achieved.[29]

While there is apparently evidence that the education of disadvantaged children in predominantly middle-class schoolrooms has a positive relationship to improved achievement levels, there appears to be no fixed view as to the degree to which the educational gap is bridged or the effect of other factors in producing the change. A quite recent reanalysis of the 1966 Coleman Report (the fountainhead study in this area) reaffirms the basic findings of that report but points out the modesty of the gains to be expected from integration. The focus of this latest study appears to be that

[27] Washington Research Project and NAACP Legal Defense Fund, Inc., *Title I of ESEA: Is It Helping Poor Children?* (1969 ed.); for a view of problems incident to the administration of title I at the state level, see Murphy, "Title I of ESEA: The Politics of Implementing Federal Educational Reform," 41 Harv. Ed. Review 35 (1971). A number of suits have been brought in Federal courts challenging the administration of title I programs, *inter alia,* or the ground that funds are not being properly concentrated. See, *e.g., Babbidge v. Richardson,* Civ. Action No. 4410, (D.R.I. 1971).

[28] U.S. Office of Education, *Equality of Educational Opportunity* (known as the "Coleman Report") (mimeo summary report) 29 (1966); Mosteller and Moynihan, "A Pathbreaking Report" in *On Equality of Education Opportunity* (Papers deriving from the Harvard University Faculty Seminar on the Coleman Report) (Mosteller & Moynihan ed.) 15, 39 (1972); Senate Hearings, *supra,* note 24, at 91–92, 95–96, 102–03, 744–45.

[29] U.S. Civil Rights Commission, *Racial Isolation in the Public Schools,* ch. 4 (1967).

both enhanced school inputs and classroom groupings to achieve maximum educational impact are likely to be less effective educational change agents than substantial alteration of the economic status and life style of families of educationally deprived and poor children.[30]

A summary of the context in which the 1969 amendments to title I were passed would be incomplete without reference to one body of current educational thought which would lead one to the premise that compensatory education is much constrained because the public school system within which it operates is structurally incapable of educating children, be they deprived or not.[31]

In his vivid and often moving portrayal of the ills of American education, Charles Silberman has characterized the business in which the public schools are engaged as "education for docility." [32] Silberman regards the schools as failing in their task of moving the poor and the disadvantaged into the mainstream of American economic and social life.[33] Despite improvement in the post-war period, "On almost any measure, the schools are still failing to provide the kind of education Negroes, Indians, Puerto Ricans, Mexican Americans, Appalachian Whites—indeed, the poor of every color, race, and ethnic background—need and deserve." [34] But Silberman's approach is not to suggest, therefore, that vast infusions of funds, particularly earmarked for services to children of these groups, is the only answer or even an important one.

> [T]he failures of the urban and rural slum schools are in large part an exaggerated version of the failures of American schools as a whole—a failure, in Comenius' phrase, to educate all men to full humanity; ... the remedy for the defects of slum schools is the remedy for defects of all schools: namely, to transform them into free, open, humane and joyous institutions.[35]

Beyond this, there is the conclusion that the slum schools are failing, in a way that middle class schools are not, "to teach the intellectual skills and

[30] Mosteller and Moynihan, *supra,* note 28, at 24–25, 37, 43; *see* generally Cohen, Pettigrew, and Riley, "Race and the Outcomes of Schooling" in *On Equality of Education Opportunity, supra,* note 28, at 343; Armor, "School and Family Effects on Black and White Achievement" in *id.* at 198, 226; Feinberg, "All in the Family?" Wash. *Post,* March 12, 1972, p. 1, col. 5; Senate Hearings *supra,* note 24, at 95–96 (Coleman: gap between average Negro and average white will be narrowed only by about 20 to 25% by the Negro's increased achievement due to integration); Silberman, *Crisis in the Classroom* 74–75 (1970).

[31] See generally Herndon, "The Way It Spozed to Be"; Kozol, "Death at an Early Age" in R. and B. Gross, *Radical School Reform* (1969).

[32] *Crisis in the Classroom* Ch. 4 (1970).

[33] In Silberman's view, "The public school never has done much of a job of educating youngsters from the lower class or from immigrant homes." (*Id.* at 54.) Silberman himself notes some exceptions to this broad indictment. *Ibid.*

[34] *Id.* at 62.

[35] *Id.* at 62; see also Senate Hearings at 209–211.

academic knowledge that students need if they are able to earn a decent living and to participate in the social and political life of the community." [36]

Recognizing the existence of data and reports which suggest that "variations in school inputs seem to have little effect on students' academic achievement" and evidence regarding the so-called "failure of compensatory education," Silberman nevertheless maintains that the school can and must make a difference.[37] In a myriad of ways, however, the capacity of the school to affect the achievement of educationally deprived children is impaired by an all-pervasive "mindlessness." [38] A primary factor is the role of the "self-fulfilling prophecy"—"the modesty of expectations" with which teachers and school administrators regard inner-city children produces, or contributes to, the very shortfall in achievement which is predicted.[39]

Success is possible and Silberman points to some examples of it, but in schools characterized by humaneness, openness, informality and, above all, the communication of positive and reinforcing expectations. If one technique or approach appears promising to Silberman, at least at the elementary level, it is the adaptation on American shores of the informal school concept practiced in English infant schools.[40]

It is beyond the scope of this paper to evaluate Mr. Silberman's analysis of the plight of education or his prescription for remedying it. The foregoing encapsulation may perhaps be criticized as excessively uncharitable to school systems which are trying, against monumental odds, to meet the needs of urban education and as placing too much reliance on the ephemeral interplay of expectations and attitudes. However, the Silberman point of view provides a frame of reference which looks beyond the mere redistribution of dollars or of school children in attempting to deal with the complexities of American education. That analysis has meaning for the title I experiment and must be regarded as part of the total context in which Congress altered title I in the 1969 Elementary and Secondary Education Amendments. If Silberman's thesis is correct, then the mere addition of marginal sums for compensatory education in urban poverty areas is foreordained to miss the point, unless it stimulates or is accompanied by a profound shifting of gears in the process of public schooling.

The paragraphs above indicate that serious questions have been raised as to whether, without drastic changes in the family inputs which educationally deprived children typically bring to school or substantial reform in the process of formal education, or both, increasing the dollars available

[36] *Ibid.*

[37] *Id.* at 73, 74, 79, 94–95.

[38] *Id.* at 81.

[39] *Id.* at 83–94.

[40] *Id.* at 94–112, 207–322; see also Featherstone, "The British Infant Schools," in R. and B. Gross, *Radical School Reform* 195 (1969).

for compensatory education will generally have a marked effect on the educational achievement of millions of the Nation's educationally deprived children on a continental scale. These matters would seem to transcend the issue of how to make title I work through finer tuning. In P.L. 91-230, however, Congress extended the basic federal program of assistance to compensatory education; if it did take into account the above-described considerations, it regarded them (wisely in the author's view) as insufficiently compelling to justify the abandonment of title I; it presumably operated on the premise that compensatory education was "up against" more than what was originally anticipated and that changes in the program would increase its effectiveness. Our inquiry therefore must proceed on that basis, putting to one side the type of broad-based questions raised above, and immersing ourselves in the details of the innovations which Congress selected to make title I operate with creater impact.

At least three major innovations stand out:

First, P.L. 91-230 codified the principle of "comparability." State and local funds must be used in a school district receiving title I assistance so as to provide, in areas in the district being served by title I, services which, taken as a whole, are at least *comparable* to the services being provided in areas in the district not receiving title I funds.[41] The effect of this principle can vary substantially depending on the manner in which the basic elements are defined. The general idea, however, is that the "title I" child should receive his "regular" or "foundation" services from state or local sources on a basis comparable to his non-disadvantaged peers in another area in the school district, leaving title I to provide the "extras."

Prior to the enactment of P.L. 91-230, considerable dispute existed as to whether the "comparability" requirement was already inherent in the existing statutory scheme of title I. A regulation of the Commissioner suggested as much, but its reach and validity were clouded.[42] P.L. 91-230 clarified matters by adding to title I a restriction that a state agency not approve an LEA's application unless it was satisfied that:

> State and local funds will be used in the district of such agency to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such district which are not receiving funds under this title . . .

However, it added a proviso that noncompliance with the clause would not affect the payment of title I funds until fiscal year 1973 subject to the requirement, applicable to earlier fiscal years, that a local educational agency report its efforts to comply. While the proviso deferred the bite of

[41] P.L. 91-230, § 109; Elementary and Secondary Education Act, § 141(a)(3)(c).

[42] 45 C.F.R. § 116.17(h) (1970).

the amendment, the approach of the Congress was to confirm the viability of the principle and have school districts point toward adherence to it.[43]

Second, another significant initiative launched by Public Law 91-230 concerns parental participation and involvement at the state or local level in the planning, development, and operation of Federally assisted education programs. The theory underlying this approach is that the probability of success in such programs is maximized where concerned parents are given a vital role to play respecting their functions in a manner which brings to bear their special awareness of the needs of target children. To this end, P.L. 91-230 placed in the General Education Provisions Act—an across-the-board set of prescriptions applicable to all OE administered programs—a requirement that the Commissioner promulgate regulations designed to encourage parental participation where he finds it would increase a program's effectiveness.[44] More particularly, in the case of programs providing for payments to LEA's, including, of course, title I, the application for payments must contain policies and procedures to insure the involvement of parents of target children in the planning, development, and operation of projects to be assisted. Parents must be given an opportunity to comment on an application and must be assured of adequate dissemination of program plans and evaluations. Title I itself contains a new requirement that applications and related documents, and evaluation and other reports be public information.[45]

The *third* innovation is the Murphy Amendment.

The Murphy Amendment (Play Within A Play)

Summary

Public Law 91-230 added to title I of the Elementary and Secondary Education Act a new part C, entitled "Special Grants for Urban and Rural Schools Serving Areas with the Highest Concentrations of Children from Low-Income Families." [46] Under this, each local educational agency eligible for a basic grant under part A of title I, which sets forth the criteria for eligibility and entitlements, is also eligible to receive an *additional* grant under the new part for a fiscal year if it meets either of the two following conditions:

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[43] Regulations clarifying and amplifying this requirement have been issued by the Commissioner of Education, 45 C.F.R. § 116.26, 36 Fed. Reg. 20016 (October 14, 1971).

[44] GEPA, § 415, 20 U.S.C. § 1231d (Supp. 1970).

[45] ESEA, § 141(a)(8), 20 U.S.C. § 241e(a)(8). For the prior parental participation requirement, *see* 45 C.F.R. § 116.18(f) (1970).

[46] Public Law 91-230, § 113. Elementary and Secondary Education Act §§ 131-132, 20 U.S.C. § 241d-11-241d-12 (Supp. 1971).

1. For the fiscal year in question the number of children in the school district of that agency who are counted for purposes of the formula for determining the maximum amount of the agency's basic grant (viz., the number of children in families with less than the low-income factor; in families receiving payments from AFDC in excess of that factor; or in institutions for neglected or delinquent children)[47] is at least *twenty* percent of the *total* number of children, aged five to seventeen, in the school district for that year; or

2. for the fiscal year in question the number of children in the school district who are counted for the purposes of determining the agency's basic grant is at *5,000* and amounts to at least five percent of the total number of children, aged five to seventeen, inclusive, in that school district.[48]

In brief, a school district qualifies for additional funds under part C if at least twenty percent of its school age population consists of "title I formula" children or if it has at least 5,000 such children who constitute five percent of its school age population. It can be seen that the first category will typically include a rural district with a relatively small school-age population and a relatively high proportion of children from low-income families. The second category (5,000 or over) will embrace urban school districts with substantial numbers of educationally deprived children who are typically concentrated in the central city but who may not constitute a large proportion of the total school age population of the school district. The two categories are essential in order that the part achieve its purpose. Part C was drawn to provide extra title I monies for both "urban areas where large numbers of low-income families are concentrated in small neighborhoods and... rural areas where the lack of local resources have prevented schools from modernizing...." [49]

The maximum grant for which a local educational agency is eligible under the new part C for fiscal years 1971 through 1973 is forty percent of the amount that the agency is eligible to receive under part A for the fiscal year in question.[50]

Thus, a local educational agency which is eligible for a maximum grant of $100,000 under part A for fiscal year 1972 and is eligible for a part C grant would be entitled to an additional $40,000 under that part. The amount of the additional grant does not vary with the degree to which the particular agency falls within the criteria for receiving part C assistance. Whether it has 5,000 title I children or 20,000, it is entitled to a flat forty

[47] See text *supra* following note 4.

[48] ESEA, § 131(a)(1), 20 U.S.C. § 241d-11(a)(1).

[49] S. Rep. No. 634, 91st Cong., 2d Sess. 18 (1970) hereinafter "Sen. Rept." 115 Cong. Rec. 19497-98 (July 15, 1969; Sen. Murphy).

[50] ESEA, § 131(b)(1) and (2); 20 U.S.C. 241d-11(b)(1) and (2). (For fiscal year 1970 the figure was 30 percent; the new part together with the other programs under title I expires at the end of fiscal year 1973.)

percent of its part A grant. Of course, the larger the population of children from low-income families the larger will be the agency's part A grant which is the base for computation of the part C entitlement.

Grants under the new part are also subject to a further limitation, the effect of which is to restrict the total entitlements to all local educational agencies under § 131(a)(1) of the new part to fifteen percent of the amount by which all entitlements under title I (parts A, B, C, and D) exceed $1,396,975,000—the fiscal year 1970 appropriation for title I.[51] In light of this limitation and other provisions of the part, the additional assistance to local agencies becomes available only if and to the extent that appropriations under title I for a fiscal year exceed $1,396,975,000.[52] Although the new part was technically in effect during fiscal year 1970, the title I appropriation for that year did, of course, not exceed that amount.

For fiscal year 1971, the title I appropriation was $1.5 billion,[53] slightly in excess of the $1.396 billion figure, and part C was therefore in effect for that year but at a level which precluded substantial funding. For fiscal year 1972, the title I appropriation is $1.56 billion.[54]

In order to provide a measure of equity in view of the sharp cutoff between districts which are eligible for additional grants and districts which are not, the new part contains a rather curious provision. A local agency which is not eligible for the additional assistance under the twenty percent—5,000/five percent rule, but misses such eligibility by a relatively small number of title I children, may still be entitled to a part C grant if the appropriate state educational agency determines that such agency has an "urgent need" for the financial assistance.[55] A five percent set-aside is effectively established by the statute for these "equitable grants" for fiscal years 1971–73.[56]

The statutory formulation of the purposes for which funds may be used under the new part C lies at the heart of the scheme. Like the formula, it is designed to effect a greater "concentration" of title I funds within schools and school districts than is required under part A.[57] Funds available for grants under the new part may be used only "for programs and projects designed to meet the special educational needs of educationally deprived children in *preschool* programs and in *elementary schools* serving areas

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[51] ESEA, § 131(b)(1); 20 U.S.C. 241d-11(b)(1); Office of Education Appropriation Act, 1970, P.L. 91–204.

[52] ESEA, § 144(3); 20 U.S.C. 241h(3).

[53] Office of Education Appropriation Act, 1971, P.L. 91–380.

[54] Office of Education Appropriation Act, 1972, P.L. 92–48. An additional amount of $32.5 million is not relevant to the part C program. P.L. 92–184 (1971).

[55] ESEA, § 131(a)(2), 20 U.S.C. 241d-11(a)(2).

[56] ESEA, § 131(b)(2), 20 U.S.C. 241d-11(b)(2).

[57] *See infra,* note 103.

with the *highest* concentrations of children from low-income families." [58] Grants may be made for secondary school programs only upon a special finding as to the urgency of need and the relative effectiveness of the use of funds in such schools.[59]

Beyond this, broad powers are granted to the Commissioner of Education to administer the part C program. To receive funds under the part from its state educational agency, a local educational agency must develop and set forth in its application a comprehensive plan for meeting the special educational needs of children to be served under part C, including policies and procedures for effective use of funds and procedures for evaluation of the stated objectives of a program or project under that part.[60] While part C grants are, as in the case of other title I grants, made by state educational agencies upon application by local educational agencies, a local educational agency receiving assistance under part C must subscribe to such special procedures, policies and assurances as the Commissioner may require by regulation for the use of funds available under part C.[61]

Thus, the new part C is designed to provide extra title I assistance to school districts with the highest numbers or proportions of disadvantaged children. The existence of such numbers or proportions is deemed in and of itself a complicating factor. The education of a disadvantaged child in a "ghetto" where most of his peers are educationally deprived may require greater effort and expense than the education of such a child in an area where only a few of his schoolmates are in need of special services.[62] Indeed, this theory underlies title I administration quite apart from the Murphy amendment, since only school attendance areas with higher than average concentrations of children from low-income families qualify for part A assistance.[63] The new part C attempts to accentuate this preference for concentration by singling out only the most poverty impacted LEA's for assistance and by requiring that in those LEA's funds may be used to serve only those school attendance areas with the *highest* concentrations of educationally deprived children and normally only in preschool and in elementary school programs.

Limitations on Entitlements and Appropriations

In turning to specific elements of this seemingly sensible approach to the unfinished business of title I, one must at the outset consider several

[58] ESEA, § 132(a), 20 U.S.C. § 241d-12(a) (emphasis added).
[59] *Ibid.*
[60] ESEA, § 141(a)(13), 20 U.S.C. 241e(a)(13).
[61] *Ibid.*, ESEA, § 132 (b), U.S.C. 241d-12(b).
[62] Sen. Rept. at 18.
[63] 45 C.F.R. § 116.17(d).

provisions of the legislation which may substantially restrict it. Congress has placed two limitations or ceilings, (a) on the aggregate amounts for which local school districts are eligible under part C, and (b) upon the amount of the total title I appropriation which may be allocated for part C purposes. The effect of these limitations, neither of which were contained in the original version of the amendment,[64] is to severely limit the amount of funds available under part C. For fiscal year 1971 only $15.4 million was available for distribution throughout the United States.[65] Many individual school districts received paltry sums, some in amounts less than $10.00.

Fifteen percent limitation on entitlements. Section 131(b)(1) of the new part C provides:

> the aggregate of the amounts for which all local educational agencies are eligible under this paragraph for any fiscal year shall not exceed the amount determined in the following manner:
>
> (i) compute the total amount for which all State and local educational agencies are eligible under this title for that fiscal year;
>
> (ii) subtract from such total, a sum equal to the figure set forth in paragraph (3) of section 144; and
>
> (iii) if that portion of such total which is attributable to amounts for which local educational agencies are eligible under this paragraph constitutes more than 15 per centum of the remainder of such total, reduce such portion until it constitutes 15 per centum of such remainder, through ratable reductions of the maximum grants for which local educational agencies are eligible under this paragraph.[66]

The purpose of this elaborate formula is to place a ceiling on total entitlements established under paragraph (1) of section 131(a) of the new part C, the paragraph which circumscribes the basic $5,000/twenty percent eligibility standard. This ceiling is to be determined by first deducting $1,396,975,000 from the total entitlements for the fiscal year in question for all state and local educational agencies under *all* parts of title I. If the portion of the total entitlements attributable to section 131(a)(1) of part C is more than fifteen percent of the remainder of such total entitlements after deduction of the $1,396,975,000, then the entitlements under paragraph (1) of section 131(a) must be ratably reduced until they are brought to this fifteen percent level.[67]

In effect, the above-described provision states that only fifteen percent of the *excess* of entitlements over and above the base figure may be devoted to part C. Part C entitlements are, thus, not permitted to rise to their

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[64] 115 Cong. Rec. 19501 (July 15, 1969).

[65] U.S. Office of Education, ESEA Title I Allotments for Fiscal Year 1971.

[66] 20 U.S.C. 241d-11(b)(1).

[67] Sen. Rept. at 19.

natural level. Were it not for this limitation, the potential gross part C entitlement would be substantially larger, thus providing each district with a greater maximum grant as a starting point for allocation of appropriations under § 144. The fifteen percent limitation requires a pro-rata shaving of each district's maximum potential grant.

The Senate committee report on the bill which became P.L. 91-230 provides some hypothetical computations which suggest that the fifteen percent ceiling may have a significant effect in modifying the impact of the new part C. Thus, in providing projected figures for fiscal year 1971, the Report indicates that the original total estimated aggregate entitlement under title I in the amount of $4,422,699,000 was reduced by adjusting part C authorizations to $453,858,000, fifteen percent of the remainder resulting from the deduction of $1,396,975,000 from $4,422,-699,000. (S. Rep. at 22, Table 1-A). On this basis, the total authorization was reduced from the original figure to $4,197,638,000 or by $225,061,000. Thus, before application of the limitation, LEA's were eligible under part C for a maximum of $679 million. The part C authorization was then reduced from $679 million to about $453 million. Thus, approximately one-third of the part C entitlement was trimmed in the example in order to meet the fifteen percent entitlement limitation.

The function of this fifteen percent ceiling on entitlements under part C is not explained by the Senate committee report on P.L. 91-230, which merely recites the determination of the committee to impose the limitation.[68] It can be surmised, perhaps, that a major factor was the desire of the committee to limit the degree to which the new part C will skewer each state's share of the total title I appropriation from the share that would obtain if part C had never been enacted. The effect of the new part is to favor states with large urban centers or with large concentrations of rural poor and to redistribute title I funds to such states. The differences between the state by state distribution pattern which would obtain if all entitlements were computed on the basis of the part A formula and the pattern which emerges when part C urban and rural districts are given special consideration was of signal concern to the legislators of the Murphy Amendment. By limiting the amount of the part C "maximums," the Congress attempted to limit the scope of this difference.

Fifteen percent limitation on allocation. Appropriations for title I have never come close to satisfying fully all the entitlements under title I. The statute contains an elaborate mechanism for allocating an appropriation which is not large enough to meet all requirements among various elements of the title I program, and, indeed, competition for a favored position in this hierarchy is one of the basic facts of life in the annual title I

[68] *Ibid.*

legislative battle. Generally speaking, each local agency's maximum grant or "entitlement" is reduced on a pro-rata basis in accordance with the amount available, after taking into account certain state programs (for the handicapped, etc.) which are funded in full.[69]

Part C has been fitted into this scheme, but again with a limitation. The law provides the following rule with respect to the allocation of a title I appropriation, which is less than sufficient to meet all entitlements:

> that part of such sums for any fiscal year which is in excess of $1,396,975,000 shall be allocated on the basis of computations in accordance with remaining entitlements under section 103(a)(2), and entitlements under sections 121 and 131, as ratably reduced, but in no case shall allocations on the basis of computations in accordance with section 131 exceed 15 per centum of such excess.[70]

In short, only fifteen percent of the portion of an appropriation in excess of the fiscal year 1970 appropriation level may be allocated to part C.[71] Thus, where the appropriation exceeds the 1970 jump-off level by a relatively small amount, there is little left for part C. For fiscal year 1971, the appropriation for title I was $1.5 billion or $103,025,000 over the base. Fifteen percent of $103,025,000 is $15.4 million. Thus, only $15 million was available for the basic part C for fiscal year 1971 compared to a gross entitlement of about $346 million.[72] Thus, the combined effect of the limitations for fiscal year 1971 at the appropriation level for that year was to reduce a program potentially in the range of $350 million to a $15 million dollar program.

Counting the Number of Title I Children

Under the new part C, a local educational agency is eligible for an additional grant if "the total number of children described in clauses (A), (B), or (C) of section 103(a)(2)" in the school district is twenty percent of all children in the district or is at least 5,000 and five percent of all the children.[73]

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[69] *Id.* § 144(a)(1) and (2), 20 U.S.C. 241h(1)(2).

[70] *Id.* § 144(a)(3), 20 U.S.C. 241h(3).

[71] For example, let us assume that the total title I aggregate entitlement was $4 billion (after taking into account the fifteen percent adjustment), of which $450,000,000 was attributable to part C and $50,000,000 to part B and that the appropriation is $2,000,000,000. $1,396,975,000 is first deducted from the appropriation and applied to title I purposes other than parts B and C. The remaining $603,025,000 could be prorated over the entitlements under part A which had not been satisfied by the $1,396,975,000 (let us assume $2.1 billion) plus the amounts attributable to parts B and C, except that no more than 15 percent of the $603,025,000 or $90.4 million would be devoted to part C.

[72] Office of Education, ESEA Title I Allotments for Fiscal Year 1971. Only two states, New York and California, received aggregate part C allocations in excess of $1,000,000. *Ibid.*

[73] ESEA, § 131(a)(1), 20 U.S.C. § 241d-11(a)(1).

The lines of demarcation are sharp, and, accordingly, a premium is placed upon the precise determination of the number of children described in the formula. The major difficulty arises in establishing a completely reliable basis for determining the number of children described in clauses (A), (B), or (C) of § 103(a)(2) in a district, and to a lesser extent the total number of children in the district.

As indicated, clauses (A), (B) and (C) of § 103(a)(2) describe the three basic categories of children who are counted in determining basic eligibility under part A of title I.[74] Clause (A) covers children who are in families having an annual income of less than the low-income factor (now, for practical purposes, $2,000); clause (B) covers those who are in families receiving an annual income in excess of the low-income factor from payments under the program of aid to families with dependent children under a state plan approved under title IV of the Social Security Act, and clause (C) covers those who are living in institutions for neglected or delinquent children, with certain exceptions, and those being supported in foster homes with public funds.

Nationwide data with respect to the number of children in families with incomes below a certain level is not collected annually on a basis which would permit its use in computing the title I formula.[75] Instead, the practice has been to rely upon census data collected every ten years to determine numbers of children from families with incomes less than the low-income factor—a practice which the statute itself recognizes by directing resort for this purpose to "the most recent satisfactory data available from the Department of Commerce." [76] Throughout the life of title I, 1960 census data has been utilized for the "clause (A)" count so that the school children being counted for title I eligibility are now virtually all out of the school system and many are now no doubt paying Federal taxes to support the program. As far as part C is concerned, it is difficult to conclude that such data afford a reliable basis for establishing that part's sharp cut-off between eligibility and ineligibility. Nevertheless, these are the only data upon which a formula of the sort set forth in part C could be based and that part specifically authorizes use of such data.[77]

Another problem is related to the requirement of part C that the relevant number of children be determined on a *school district* basis. The census provides statistics on the number of children in low income families on a county rather than a school district basis.[78]

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[74] ESEA, § 103(a)(2), 20 U.S.C. § 241c(a)(2); see *supra* p. 172.

[75] Information available from Office of Education.

[76] ESEA, § 103(d), 20 U.S.C. 241c(d).

[77] ESEA, § 131(d)(2), 20 U.S.C. 241d-11(d)(2). ("Determinations under [section 131] may be made on the basis of data furnished in accordance with section 103(d).")

[78] Information available from Office of Education.

Under the regular, part A, title I program, the difficulty in establishing the eligibility of a school district which is in a county containing more than one such district is handled by authorizing the Commissioner to establish an overall maximum grant for the county which is then allocated among the appropriate school districts by the state educational agency. Section 103(a)(2) of title I specifically authorizes the Commissioner to determine the maximum grant for an LEA under part A on the basis of the aggregate maximum amount of the grants for all the local agencies in the county in which the school district of the LEA in question is located. Such *county* "aggregate maximum amount" is determined by multiplying the number of clause (A), (B), and (C) children in the *county* by fifty percent of the applicable per pupil expenditure.[79] This *county* aggregate maximum grant is then allocated among individual local educational agencies in the county *by the state educational agency* upon "such equitable basis" as it may determine in accordance with basic criteria prescribed by the Commissioner. Under the regulations of the Commissioner, these allocations are to be made on the basis of those available data which the state agency considers best reflect the distribution of children from low-income families among school districts, after assigning the children in institutions to the districts in which they reside.[80]

This scheme cannot be replicated under the new part C because § 131 of that part defines eligibility in terms of a "school district" and does not, as does § 103(a)(2) in the case of basic grants, permit the Commissioner to establish "county maximums" which may then be further divided by the state educational agency.[81] Indeed, the differentiation of one school district from another lies at the heart of the part C proposal.

But how does one compute school district entitlements in the absence of school district figures? One possibility is by reference to the data used by the state educational agency in allocating county aggregate maximum grants among several school districts in a county. Each state supplies the Commissioner with the school district entitlements which have resulted from this process. By hypothesis, this figure is the product of the number of "title I" children conceived to be in the district times the Federal percentage of the applicable per-pupil expenditure. By dividing the latter factor into the maximum grant, one may derive a number representing title I children in the district for use in computing part C entitlements.

For example, assume County A contains School Districts X and Y. County A's aggregate maximum as determined by the Commissioner for fiscal year 1970 is $2,000,000, computed by multiplying the 8,000 clause

[79] ESEA, § 103(a)(2) (second sentence), 20 U.S.C. 241c(a)(2).

[80] 45 C.F.R. § 116.4 (1970). A school district may use current AFDC data for this purpose if they reflect the "current distribution" of children from low-income families; if not, such data may be used in combination with other available data. *Id.* § 116.4(c) and (d).

[81] ESEA, § 131(a), 20 U.S.C. 241d-11(a).

A, B, and C children in the county by $250 (50 percent of $500, the applicable per pupil expenditure). The state allocates $1,500,000 to school district X and $500,000 to school district Y. If $1,500,000 is divided by $250, the result is 6,000 or a putative number of Title I children deemed to be in district X; by the same token the remaining 2,000 children would be attributed to district Y.

This type of derived computation appears to be contemplated for use in establishing part C grants. Section 131(d)(1) provides:

> In making determinations under this section the Commissioner is authorized, in accordance with regulations prescribed by him, to use the most recent satisfactory data made available to him by the appropriate State educational agency. If satisfactory data for determining the number of children described in clause (A), (B) or (C) of section 103(a)(2) in a school district for the purpose of subsection (a) are not otherwise available to the Commissioner, such determination may be made on the basis of data furnished to him by a State educational agency with respect to the amount of the maximum grant under part A of this title allocated by such State agency to the local educational agency for such district in the State for the purpose of the second sentence of section 103(a)(2), for the fiscal year preceding the fiscal year for which such determination is made.[82]

The reference in the second sentence to state-furnished data under § 103(a)(2) is, of course, to the school district entitlement allocations from county maximum grants; the type of arithmetic described above is the only way these figures can be translated into a number of children described in clause (A), (B), or (C) of § 103(d)(2).

Thus, the precise count upon which part C eligibility is based is essentially a derived figure, the reliability of which depends upon the quality of the system of allocation used by the SEA. It assumes that what the SEA has done has been to allocate children on an equitable basis. While, of course, this system leaves something to be desired, it is the only method available for using the existing title I formula to build a new program such as part C.

Equitable Grants

Paragraph (2) of Section 131(a) provides:

> Each local educational agency which is eligible for a grant under paragraph (2) of section 103(a) and which (A) is not eligible for a grant under paragraph (1) of this subsection, but (B) would be eligible for a grant under such paragraph (1) if there were in the school district of such agency a relatively small increase in the number of children, aged five to seventeen,

[82] 20 U.S.C. 241d-11(d)(1). This method probably has the effect of encouraging an SEA to concentrate its part A money so as to maximize part C assistance.

> inclusive, described in clause (A), (B), or (C) of section 103(a)(2) shall be entitled to a grant under this paragraph (2) if the State educational agency of the State in which such agency is located determines (in accordance with criteria established by regulation of the Commissioner) that such agency has an urgent need for financial assistance to meet the special educational needs of the educationally deprived children in the school district of such agency.[83]

The purpose of this paragraph is to provide a basis for granting funds to needy school districts which miss being eligible under the strict formula of paragraph (1) of section 131(a) by a relatively small margin. In the case of any formula which involves an arbitrary numerical cutoff, it is always difficult to justify the noneligibility of those who fall just outside the threshold. What is the difference between the district with 5000 eligible title I children which meets the criteria of section 131(a)(1) and is therefore eligible under part C and the district with 4999 such children which is ineligible? [84]

To confront this type of objection, the Congress, in enacting the Murphy Amendment, sought a provision which would permit it to do "equity" in such situations while retaining the basic cutoff—hence, the characterization, "equitable grants," used here.[85]

The above paragraph also enhanced the political attractiveness of the Murphy Amendment by extending it, in theory at least, to every school district in the country with poor children and an urgent need for funds. In short, § 131(a)(2) rather consciously blurs the sharp line of demarcation drawn in § 131(a)(1).[86]

The price of this innovation, however, is to magnify the complexity of part C and to increase the Commissioner's otherwise considerable administrative burdens under that part.

In the first place, under § 131(a)(2), it is the state agency which determines eligibility as an initial matter. Of those LEA's which are determined to have "missed" § 131(a)(1) eligibility by a small amount, the State agency decides which have the "urgent need" described in paragraph (2).[87] The tendency of the state agency would be to establish eligibility

[83] ESEA, § 131(a)(2), 20 U.S.C. 241d-11(a)(2).

[84] This objection may have even greater validity in the instant situation where, as we have seen, the data base which is employed in determining those districts which fall within and without the cutoff is not exact.

[85] See 115 *Cong. Rec.* 19498 (July 15, 1969). (Sen. Murphy: "[Paragraph (2)] is to avoid any inequities in the operation of the formula....")

[86] The Senate committee describes § 131 (a)(2) as creating a "second type of eligibility" to cover those cases where the local agency fails by "a very small amount" to meet the number or percentage requirement of § 131(a)(1) or "where sparsity of population, distance, or unusual circumstances create an especially urgent need for additional title I funds." Sen. Rept. *supra* note 49, at 19.

[87] Sen. Rept. at 19.

for the maximum number of districts. The Commissioner's capacity to limit this process is confined to formulating the criteria which the state agency must consider in determining "urgent" need and to setting out standards for determining how close an agency must come to straight paragraph (1) eligibility before it may qualify under paragraph (2).[88]

Thus, it would appear that having in paragraph (1) of § 131(a) constructed a device for concentrating title I funds on a limited number of districts, Congress opened the gates to a much broader swath of clientele in a manner tending to defeat the original objective. However, the effect of § 131(a)(2) is severely limited by statutory limitations on the amount which may flow under its provisions.

Paragraph (2) of subsection (b) of section 131 provides that any individual grant to an LEA under section 131(a)(2) may not exceed the maximum amount for which the agency would be eligible if it were eligible under the formula of section 131(a)(1) (i.e., forty percent of its basic grant under part A).[89] More significantly, the same paragraph directs that the total amount available for "equitable" grants under section 131(a)(2), for fiscal years 1971 through 1973, shall be limited to five percent of the total amount available under paragraph (1) of section 131(a).[90]

The amount available for "equitable" grants is further restricted because the fifteen percent allocation limitation on appropriations available for part C distribution (fifteen percent of the excess appropriation over $1,396,975,000) applies to the proration, under § 144, of entitlements under both section 131(a)(1) and section 131(a)(2).[91] (The fifteen percent limitation on entitlements, it will be recalled, applies only to entitlements under section 131(a)(1) but not section 131(a)(2).) The composite effect

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[88] The regulations have attempted to establish some parameters on this score. If it is to be eligible under § 131(a)(2), a school district must "miss" qualifying under § 131(a)(1) by a margin of no more than 5 percent (45 C.F.R. 116.10(b)); more specifically, it must show that it would have been eligible under the latter provision if it had an increase in the number of its title I children equal to five percent (or less) of the number of such children (*Ibid.*). Thus, a district with 4,750 or more children (but less than 5000) would qualify for consideration under the "urgent need" test (assuming it would have missed the five percent rule of § 131(a)(1) by no more than the same tolerance); one with less title I children would not. The regulation in effect necessarily creates a new cutoff. 45 C.F.R. 116.10(b)(1), 36 F.R. 18501 (1971) (Proposed).

The following factors must be taken into account by the State in certifying whether "urgent need" exists (45 C.F.R. 116.10(b)(2): (1) the presence in the school district of substantial numbers of educationally deprived children who have recently taken residence in the district, and (2) the exertion by such agency of a local fiscal effort in relation to local revenue sources which is exceptional when compared with local fiscal efforts of other local educational agencies in the State.

[89] 20 U.S.C. 241d-12(b)(2). The regulation provides that an entitlement computed under § 131(a)(2) may not exceed 40 percent of the LEA's basic grant under part A. 45 C.F.R. 116.10(b)(2), 36 F.R. 18501 (1971).

[90] *Ibid.*

[91] See text *supra* at note 70; Sen. Rept. at 19.

of these limitations is that only a small fraction of the fifteen percent of the portion of an appropriation in which part C can share is attributable to § 131(a)(2). Thus, roughly only $700,000 out of each $100 million appropriated for title I over and above the $1,396,975,000 threshold figure can be used for "equitable grants." [92] Whatever may be its theoretical effect, the dollar realities render the "equitable grant" phase of the part C program meaningless.

Requirements to Achieve Concentration in Use of Funds

The provisions regarding the uses of funds made available pursuant to basic, part A grants under title I are also applicable to grants under the new part C, which are essentially in the nature of additional or "override" grants on the basic program.[93] However, part C contains two limitations which are applicable only to the use of funds under the additional grant program. These provisions apply to the manner in which title I funds allocated to a school district may be used *within* that district. First, an additional grant under Part C may freely be used in preschool or elementary school programs but may not be used in *secondary* school programs unless special findings are made by the school district and are approved by the state agency in accordance with Federal criteria. Second, the additional grant must be used only to serve areas with the "highest" concentrations of children from low-income families.[94]

Preference for preschool and elementary school use. Section 132(a) sets up what may be regarded as a rebuttable presumption that the funds it makes available should be used "in preschool programs [or] in elementary schools" serving the target population. Programs and projects serving secondary school pupils may be approved only if the local agency and its state educational agency make both of the following determinations:

[92] As a practical matter the $15 million is divided into 105 parts, 100 of which are attributed to § 131(a)(1) and 5 to § 131(a)(2).

[93] ESEA §§ 132(b), 141, 20 U.S.C. §§ 241d-12(b), 241e. Thus, like grants under parts A and B, part C assistance must be used for programs and projects which "are designed to meet the special educational needs of educationally deprived children" and are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs. (ESEA § 141(a)(1), 20 U.S.C. 241e(a)(1).) Part C funding, like part A assistance, is subject to the requirement that the recipient LEA make provision for special educational services and arrangements in which educationally deprived non-public school children can participate, to the extent consistent with the number of such children in the school district (*Id.* § 141(a)(2), 20 U.S.C. 241e(a)(2)). Satisfactory assurances must be provided that control of funds and title to property made available under title I is in a public agency (*Id.* § 141(a)(3), 20 U.S.C. 241e(a)(3)). Also applicable are provisions with regard to coordination of construction projects with overall State plans; restrictions on planning projects; annual evaluation of programs; reports to the State agency; the furnishing of applications and related documents to the public; dissemination and replication of promising practices; and construction standards (ESEA § 141(a)(4)-(11), 20 U.S.C. § 241e(a)(4)-(11)).

[94] ESEA § 132(a), 20 U.S.C. § 241d-12(a).

a. There is an urgent need for such programs and projects for such children in secondary schools in the area to be served by the local educational agency; and

b. there is satisfactory assurance that such programs and projects will be at least as effective in achieving the purposes of this title as the use of such funds for programs and projects for such children in elementary schools in such area.[95]

The legislative history of part C indicates that in formulating § 132(a), Congress was influenced by a belief that remedial efforts to counteract educational deprivation are relatively more effective at the earlier stages of a child's development than at the secondary school level and that emphasis should be placed on "preventive" measures at the preschool and elementary level rather than "remedial" and catch-up programs for children whose educational achievement is deficient when they reach secondary school.

> The committee believes that title I funds should be focussed on the early years of education. This requirement in part C was adopted by the committee on the basis of growing evidence which indicates that the early years of education are of paramount importance in a child's development. Reports based on the experience of classroom teachers and other observers indicate that in general it is extremely difficult to reach the level of achievement at the secondary level if the quality of education at the elementary level has been poor.
>
> Experience under other Federal programs, such as the Job Corps, attest to the difficulty and the great expense of remedial education compared to the expense of education to prevent the need for remedial education. The committee believes that a focus on educational deficiencies at the preschool and elementary years, the preventive approach, is more likely to be effective and less expensive than expenditures for compensatory education at the secondary level.[96]

The preference for preschool and elementary level programs obviously tends to encourage greater concentration of part C funds by, in the normal case, removing one segment of the total target population served by title I—the educationally deprived children in *secondary* schools. Finally, the preference may have the effect of increasing the proportion of Federal

[95] *Ibid.* This provision was, in somewhat different phraseology, contained in the original version of the amendment introduced by Senator Murphy. S. 2625, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 19501 (July 15, 1969). In at least one state, California, the State educational agency has established a general preference for elementary schools with respect to *all* title I funds. This has been done in order to achieve concentration of such funds, a major purpose of part C.

[96] Sen. Rept. at 20; see also 115 Cong. Rec. 19498 (July 15, 1969) ("difficult at best to rescue youngsters who reach the secondary grade trailing their contemporaries by a number of grades").

funds which will be used on basic instructional subjects such as remedial reading and mathematics which are stressed at the elementary levels.[97]

Criteria which the state and local educational agency must weigh in evaluating the "urgency" of the need for secondary school programs are contained in the Commissioner's part C regulation. The relevant factors include exceptionally high dropout rates in the secondary schools; the availability of employment opportunities for which educationally deprived secondary school children may be trained; and special needs for programs for delinquent and delinquency-prone children of secondary school age.[98] High dropout rates, teenage unemployment, and delinquency are not strangers to the poverty areas served by title I; a showing of one or more of the factors in the Commissioner's list would not be difficult for an LEA to produce, if it cared to take the trouble to document a case for using part C money at the secondary level. The availability of other funds for preschool and elementary school programs must also be considered.[99] This factor may attempt to prevent over-saturation of funds where adequate special services are now being provided at these levels. The adequacy of compensatory education services at the earlier levels may thus become the paramount consideration in the administration of the "secondary school" provision of part C.

Beyond this, the SEA passing upon a part C secondary project must be satisfied that the project will be at least as *effective* in achieving title I purposes as an elementary school project. Regarding this statutory criterion, the regulations do not travel much further than the statute.[100] In terms of achievement levels, the LEA might be expected to demonstrate that the secondary students served would make an advance comparable to that of elementary students in, for example, reading proficiency. But such a demonstration is impracticable; some kind of rough cost-benefit approach is probably all that can be asked.

In any event, the critical factor in determining the extent to which secondary programs will be recognized under part C is the attitude of the SEA as reflected in the degree to which it demands hard proof from the school district that wants to direct its part C money away from the elementary level. Moreover, as a practical matter, unless part C funds represent a substantial portion of its title I grant, there is little point in an LEA taking the pains to convince the SEA to apply the exception.

Level of concentration. Section 141(a)(1) of the ESEA, which generally

[97] See text *supra* at note 20.

[98] 45 C.F.R. § 116.10(e)(2)(3)(4); 36 F.R. 18501 (1971).

[99] Id. § 116.10(a)(1).

[100] The LEA must demonstrate to its State agency, "by the objectives and methods set forth in its proposal" that a secondary school program is likely to be at least as effective in meeting title I purposes as a preschool or elementary program. 45 C. F. R. § 116.10(e).

governs the use of payments under title I limits such use to programs or projects to meet the special educational needs of educationally deprived children "in school attendance areas having *high* concentrations of children from low-income families." [101] Section 132(a) of the ESEA further particularizes this limitation in the case of the new part C by requiring that payments under it may be used only for programs or projects which serve educationally deprived children in schools "serving areas with the *highest* concentrations of children from low-income families."

Insistence upon this line of demarcation between school attendance areas with simply "high" concentrations of children from poor families and those with the "highest" concentrations reflects the concern of Congress at the manner in which local educational agencies allocate title I funds within their school districts, among school attendance areas with low-income families. "One of the criticisms most frequently stated with regard to title I is that local educational agencies too often spread title I funds too thinly to get maximum results." [102] The mechanism for correcting this under part C is the tightened requirement for intra-district selection of eligible attendance areas.

The regulations under part C have attempted to handle this problem by building upon the existing structure for intra-district allocation of title I funds among school attendance areas. To meet the requirement that only children from school attendance areas having high concentration of children from low-income families may be served by title I, regulations generally applicable to title I provide for criteria for selection of project areas by school districts eligible to receive title I assistance. Under § 116.17(d) of the title I regulation, a project area or school attendance area qualifies (1) if the estimated *percentage* of children from low-income families in the area is as high as the percentage of such children residing in all school attendance areas in the school district of the eligible LEA, or (2) if the *estimated number* of such children in the school attendance area is higher than the average number of such children in the various school attendance areas.[103] The part C regulations provide that a school

[101] 20 U.S.C. 241e(a)(1) (emphasis added).

[102] Sen. Rept. at 20.

[103] 45 C.F.R. § 116.17(d). The title I regulations contain other mechanisms designed to ensure or encourage the concentration of resources and services provided under that program. The application of an LEA for a title I grant must be concentrated on a limited number of projects and applied to a limited number of educationally deprived children "so as to give reasonable promise of promoting to a marked degree improvement in the educational attainment, motivation, behavior or attitudes of children" (45 C.F.R. § 116.18(e)). The project must be of sufficient size, scope, and quality so as to give reasonable promise of substantial progress toward meeting the needs of the educationally deprived children for whom the project is intended. (*Id.* § 116.18(a)). The project must be designed to meet the special educational needs of those educationally deprived children who have the *greatest* need for assistance (*Id.* § 116.17(f)). The project area must be sufficiently restricted in size in relation to the nature of the project as to avoid jeopardizing its effectiveness in meeting the aims and objectives of the

attendance area may be designated as one having the *"highest"* concentration of children from low-income families if "the estimated percentage of children from low-income families residing in that attendance area is higher than the average percentage of such children residing in the several school attendance areas which are eligible to be designated as project areas under § 116.17(d)." [104] The area also qualifies if "the estimated number of children from low-income families residing in that attendance area is larger than the average number of such children residing in the several school attendance areas in the district which are eligible to be designated as project areas under § 116.17(d)." [105] In short, for part C purposes, only the poorest of the poor may be selected. For example, assume that in school district A the percentage of children from low-income families is twenty, and ten school attendance areas have percentages at this level or higher (and are therefore eligible for part A assistance) and that in those ten the average percentage is thirty; only those areas with percentages above thirty qualify for part C assistance. Thus, the concentration is mandated through a mathematical formula down to the school house level.

The emphasis placed on within school district distribution of part C funds marks Congress' commitment to "concentration" as one of the major ingredients in the cure of what ails title I.

> The bill also requires local educational agencies to concentrate the use of funds available under part C on areas within the school districts having the highest concentrations of children from low income families....
>
> Commenting on the need for concentration of title I funds, the Fourth Annual Report of the National Advisory Council of the Education of Disadvantaged Children concluded: 'Success with these children (Title I), in sum, requires a concentration of services on a limited number of children.' [106]

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project (*Id.* § 116.17(c)). These requirements would be applicable to the use of funds made available under part C, as well as parts A and B (ESEA, § 132(b), 20 U.S.C. 241d-121b); part C itself may be read as an attempt to build upon and to further these provisions in advancing concentration as a primary principle in the targeting of title I funds.

[104] 45 C.F.R. § 116.10(d)(1), 36 Fed. Reg. 18501 (1971).

[105] 45 C.F.R. § 116.10(d). In measuring such concentrations, the statute does not require that the local agency employ the same data which must be used in determining entitlements under title I down to the county level. Since it relies in part on census data from 1960, adherence to this formula in allocating funds at the school attendance area level might produce misleading and anomalous results where a poverty neighborhood had changed its characteristics in the past ten years. Thus, in determining which school attendance areas have the highest concentrations of children from low-income families in a school district, it is open to the local agency to rely on current data such as welfare caseload or to employ headcounts of children from an immediately preceding school year.

[106] Sen. Rept. at 20. These thoughts were expressed at the time the Murphy Amendment was originally introduced. 115 Cong. Rec. 19498 (July 15, 1979) ("concentration of resources so as to achieve a substantial and maximum impact").

Other Provisions Regarding the Use of Funds

Comprehensive Plan. In addition to its insistence upon concentration of part C funds, the statute contains a number of other provisions aimed at increasing the likelihood that those funds will be used effectively. Prime among these is the comprehensive plan requirement.

A local educational agency must, as part of its application to the State educational agency under part C of title I, set forth a comprehensive plan for meeting the special educational needs of children to be served under part C.[107] The plan must include "provisions setting forth specific objectives of such plan and the criteria and procedures, including objective measurements of educational achievement, that will be used to evaluate at least annually the extent to which the objectives of the plan have been met."

As the statutory language indicates, the comprehensive plan requirement is not confined solely to part C funds. The plan must encompass the agency's total effort (through local, state and Federal resources) for meeting the special needs of the educationally deprived children to be served under part C. It must also include provision for "effective use" of all funds available under title I, including both parts A, B and C funds. The part C requirement thus provides a device for tightening title I requirements generally for agencies eligible to receive additional grants under part C.[108] Moreover, the requirement that the plan include provisions for "effective use" of funds gives state agencies an additional tool to resist the submission of programs and projects which will produce no tangible results and, in turn, the Commissioner's leverage to hold the States responsible for the relative success of title I is enhanced.

The regulations promulgated by the Commissioner under part C embellish upon this material. The comprehensive plan must contain a description of the programs or projects to be carried out by the LEA to

[107] ESEA § 141(a)(13), 20 U.S.C. 241e(a)(13). See also title V-C of the Elementary and Secondary Education Act, added by section 143 of the Public Law 91-230, (20 U.S.C. 867-867c) which makes provision for grants to State and local educational agencies to assist them to enhance their capabilities and to carry out comprehensive planning and evaluation.

[108] The statute presents an ambiguity on this score. While the comprehensive plan required by the Act must encompass the totality of the local educational agency's effort, need it relate to that effort only insofar as it concerns children actually served under *part* C (i.e., those in school attendance areas designated for the purposes of part C as having the highest concentrations of children from low income and therefore eligible to share in the part C pot) or must the plan relate to the needs of all educationally deprived children to be served under all the parts of title I? The statute is susceptible to the construction that only the actual children to be served under part C must figure in the plan; it can be argued, however, that title I is directed at the type of child who benefits under part C—educationally deprived children—and that the plan must relate to the range of strategies to serve all educationally deprived children in the school district.

meet the needs of the target population in sufficient specificity and detail to enable the State agency to make at least two determinations:

> 1. That the programs or projects have been adopted after *"thorough consideration of alternative strategies* for meeting such needs"; and
> 2. that the programs or projects are "likely to be sufficiently effective" in meeting those needs to result in *"measurably improving* the educational achievement of such children." [109]

The first determination affords the SEA a significant opportunity to inquire as to the scope and intensity of the educational cerebration involved in the LEA's planning. As in the case of title I generally the choice of allowable projects is with the LEA; but the Federal grantor can demand some indicia that the process of selection was not automatic and not mindless. Did the LEA carefully consider the alternatives or did it willy nilly select a project without regard to its potential contribution? The regulation does not attempt to impose a particular strategy; it does require the LEA to *consider* alternative strategies. Presumably, for this purpose, a "strategy" may constitute any of the variety of approaches, such as informal schooling, performance contracting, individualized prescribed instruction, voluntary integration, curriculum reform and the like, which are in current vogue.[110]

The second determination looks to the application of measurable criteria of educational achievement in determining the success of a project. The comparison of "before" and "after" project reading scores is an obvious example. The notion of accountability is implicit in the regulation, and the greater emphasis on results no doubt reflects the general disenchantment with the academic progress of title I recipients to date.[111] While the governing provisions of a number of Federal education programs demonstrate concern with outcomes, the orientation here on the relationship between the program or project and *measurable* gains in educational achievement is more pointed.

Part C offers to the State agencies charged with its administration a challenge to display the imagination necessary to make maximum use of this new authority in passing upon local projects; thoughtful Federal oversight of the new part can stimulate creative administration at the state level but cannot substitute for it. As in the case of title I as a whole,

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[109] 45 C.F.R. § 116.10(f)(1). The regulations require specific findings by the State agency on these points (45 C.F.R. § 116.10(g)).

[110] See e.g., Mecklenburger and Wilson, "Learning C.O.D.: Can the Schools Buy Success?," Saturday *Review*, Sept. 18, 1971, at 62 (performance contracting); Hopgood, "The Open Classroom: Protect It From Its Friends," *id.*, p. 66; Silberman, supra note 32, at 265–322 (informal education).

[111] See text *supra* at note 22.

the success or failure of part C largely depends upon state performance. However, the small dollar grants which have heretofore been associated with part C are hardly conducive to the large scale exertions which are necessary if anything is to happen.

An Overall Evaluation of the Amendment

Ends

If one accepts as a point of departure that compensatory education in racially isolated, as well as non-racially isolated, schools is worth pursuing in the context of a rational program of Federal assistance to meet the special educational needs of educationally deprived children, and it is hard to see what the alternatives are for the vast numbers of such children for whom integration is not a practicable remedy, then the objectives of the Murphy Amendment would appear to make sense.

The part C program, which that amendment grafted on to title I, rests upon a congressional finding that the difficulties which compensatory educators must overcome increase geometrically with the level of concentration of poor children in a school. There is evidence to support this.

Available data suggest that children participating in compensatory programs in schools with high concentrations of impoverished pupils tend to show gains in reading achievement in lesser numbers and to a lesser degree than their counterparts in schools where such concentrations are lower.[112] The presence in a school attendance area of large numbers or proportions of underachieving, disadvantaged children feeds upon itself and multiplies the complexity of remediating each individual child's problems. The self-fulfilling prophecy operates with exquisite vengeance in schools where poverty and failure are the rule rather than the exception.[113]

The cost per pupil of providing the necessary compensatory services tends to be higher in areas of concentrated poverty. The provision of additional teachers to reduce pupil-teacher ratios, the payment of extra com-

[112] Belmont Report, *supra* note 12, at 127. The Belmont Report drew its conclusions from data for 11,490 pupils being served in 1967–68 by title I remedial reading programs. It concluded that more of the "higher gainers" (in reading achievement) were in schools with low concentrations of severely impoverished children and that participating pupils in schools with heavy concentrations of pupils with low socio-economic backgrounds consistently gained less in reading than participating pupils in schools whose student bodies had "higher socio-economic backgrounds." *Ibid.*

[113] See generally Silberman, *supra* note 32, at 83–91. "In most slum schools, the children are treated as flower girls. One cannot spend any substantial amount of time visiting schools in ghetto or slum areas, in fact, be they black, Puerto Rican, Mexican American, or American Indian, without being struck by the modesty of the expectations teachers, supervisors, principals, and superintendents have for the students in their care." *Id.* at 84.

pensation to attract or hold teachers in poverty areas,[114] special and intensive teacher and staff training, the furnishing of vital supportive services—health care, breakfasts, clothing and the like—which the more affluent child receives from his home, are all needed and all augment the educational bill in the school attendance areas to which part C is directed. Conversely, the educational establishment is likely to be more hard-pressed financially in such areas, particularly in central cities where the tax base may be stagnating or shrinking, teacher salary levels tend to be high, and the demand for social services of all kinds, welfare, housing, police protection, is immense and ever burgeoning.[115] While title I does not, of course, pay for general educational services, which state and local sources must furnish, the capacity of a school district to provide on its own the type of special services made available under title I is limited by its financial resources.

In short, educating the disadvantaged "in urban and rural schools serving areas with the highest concentrations of children from low-income families" involves special needs which the Murphy Amendment recognizes and attempts to meet by providing extra resources, beyond those available to other "title I" schools.[116] This rather modest objective would seem eminently reasonable.

Beyond this, the Murphy Amendment in part reflects at least some sort of response to the massive crisis of educating the thousands of disadvantaged children locked in the Nation's urban "ghettos." Urban education, as distinguished from the education of suburban and rural children, has come to be a discrete and specialized component of the larger field.[117] The educational problems in the Nation's major cities, characterized by poverty, racial isolation, polarization between haves and have-nots, and magnified by the sheer size of the areas and numbers of people involved, are the most complex, intractable, and well-nigh insoluble difficulties which confront us in this decade. That urban education is but one of the bundle

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[114] Section 108 of P.L. 91-230 added to title I a provision clarifying the availability of title I funds for use in making payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under title I, thus authorizing bonus pay for teachers who serve in school attendance areas with high concentrations of children from low-income families. ESEA § 141(a)(1), 20 U.S.C. § 241e(a)(1).

[115] See *Serrano* v. *Priest*, L.A. 29820, Supreme Court of California (August 30, 1971); Berke, Bailey, Campbell, and Sacks, *Federal Aid to Public Education: Who Benefits?* in Senate Select Committee on Equal Educational Opportunity, 92d Cong. 1st Sess. 13–27 (Comm. print 1971); compare 5 National Educational Finance Project, Alternative Programs for Financing Education 91–92, 98–99 (1971).

[116] See 116 Cong. Rec. 10615 (April 7, 1970) (Remarks of Cong. Quie).

[117] Riles, *Urban Education Task Force Report: Final Report of the Task Force on Urban Education to the Department of Health, Education, and Welfare* (1971); Berke, et al., *supra*, note 115, at 13–14.

of issues wrapped up in that peculiar set of interrelated miseries called "the crisis of the cities" complicates the task even further.

The Murphy Amendment, which was developed in an atmosphere of deep concern for the fiscal and educational problems of the cities, singles out for special financial assistance those school districts with more than 5,000 children from low-income families, as long as they constitute five percent of the school age population in the district.[118] In fiscal year 1971 school districts in the nation's 130 largest cities received funds from part C.[119] From the point of view of the urban educationists, however, Congress declined to treat the educational difficulties of metropolitan America separately and apart from those of rural America. It insisted on including school districts in which children from poor families constituted over twenty percent of the school age population, which are essentially school districts in rural areas. One may, incidentally, conclude from this history that separate urban education legislation which does not take into account the needs of rural poverty areas is a political unlikelihood. In any event, with this discounting, the special recognition given the educational agonies of the cities, modest as that recognition may be, is warranted.

The technique or approach by which part C operates is that of encouraging the further concentration of title I funds. Studies have indicated that title I funds are now spread too thinly to be effective and that title I does not contribute enough to the cost per pupil of providing remedial services. The 1968 Belmont Report suggests that the average $68 per pupil spent in 1967–68 for remedial reading for disadvantaged students was too small to form a sound basis for any great expectations of satisfactory results.[120] Others have echoed this lament and have urged adherence to the principle of concentrating educational services on a sufficiently limited number of children to achieve such results.[121]

On the other side of the coin, evidence indicates that where funds have been concentrated, some success has been achieved. A report on the operation of title I in California during the 1967–68 school year concludes:

> Characteristic of the most successful programs was their concentration of services on a limited number of objectives and a limited number of spe-

[118] In introducing the measure, Senator Murphy documented in detail the severity of the educational problems particular to urban areas: high proportions of disadvantaged students, high drop-out rates, migration of financially able citizens to the suburbs and industrial decentralization producing an erosion of tax base and a general deterioration of the central city's heretofore favored financial position with consequent cutbacks and in some cases total cessation of educational services. 115 *Cong. Rec.* 19498-501 (July 15, 1969).

[119] Information available from Office of Education.

[120] Belmont Report, *supra* note 12, at 85, 88.

[121] Annual Report, National Advisory Comm. for Disadvantaged Children 23 (March 1, 1971).

> cifically identified children.... The evaluation results suggest that for optimum effectiveness, the average student expenditures must be more than $300 over and above the regular school program.[122]

It is, of course, axiomatic that there is no panacea for the ills of American education; the mortality rate for different approaches to educational reform is too grim to suggest that we now embrace "concentration" as the ultimate cure.[123] Disappointing as it may be to the bevy of legislative draftsmen and regulation writers in the field, no one technique or approach in this area contains the "answer"; the success or failure of a project may depend more on the calibre and dedication of the personnel who carry it out than the sophistication of those who create the legal basis for funding it. The *dramatis personae* make or break the play. The state of our knowledge, however, is at least such as to warrent an educated guess that concentration is one of the important ingredients for improving the performance of title I.[124]

The concentration of Federal compensatory education resources on a limited number of educationally deprived children is but one facet of a set of complex considerations relating to the financing of public education in America in a manner consistent with equality of educational opportunity. The Supreme Court of California has held that where a system of financing public education in a State produces wide disparities in the amount of revenue per pupil available for education and those disparities derive from differences in the relative wealth of school districts or residents, a claim that the state system violates the Fourteenth Amendment's equal protection clause will withstand a demurrer.[125] The decision, if ultimately upheld, is momentous, and its impact in particular school districts may far transcend the contribution made by title I (with or without part C). The preponderance of public education dollars in most states comes from state and local sources. Disparities between school districts in the education revenues available per pupil are typically reflected in significantly lower per pupil expenditures in school districts with high con-

[122] California State Dept. of Education, *Evaluation of ESEA Title I Projects of California Schools,* Annual Report 1967–68, at 15; see comment of Commissioner of Education Sidney P. Marland in Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, *Emergency School Aid Act,* 1971, 92d Cong. 1st Sess. 302 (1971) ("in California, it is quite clear that there, adventurous and innovative procedures have been undertaken to concentrate their title I funds—that means denying them to some children—and to double or triple the impact on a school, and therefore a child. As a result very significant results are beginning to appear").

[123] See generally Silberman *supra* note 32, ch. 5.

[124] *See* Message from the President on Busing and Equality of Educational Opportunity, H. Doc. No. 92–195, 92d Cong. 2d Sess. 11–13 (1972).

[125] *Serrano* v. *Priest,* supra note 115; see Shanks, "Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?" 1 Journal of Law and Educ. 73 (1972).

centrations of poor families. Equalization may produce increased funds for general public education for the very children to be served by title I.[126]

Moreover, equalization holds out the possibility of enhancing the impact of title I programs. Compensatory education, it will be recalled, proceeds on the assumption that the educationally deprived child will receive an adequate foundation of "general education" services, but that even this foundation is insufficient to meet his needs; services "over and above" what he normally receives must be provided to meet his special educational needs. In practice, however, the foundation is stunted because the funds available for general education in a poor district are insufficient. While the law prohibits the supplanting of state and local funds with title I funds,[127] the practical effect of targeting Federal compensatory education dollars on districts which are on the short end of revenue disparities of the sort described in *Serrano* is that title I may be making up for educational ground lost because of the disparities. On the other hand, if "equalization" does produce an increase in the general revenues available for public general education in a poor district, the foundation on which title I must build will be increased and title I assistance may become truly compensatory. Once there are equal resources per pupil as between school districts in a state, the title I comparability principle comes into play and requires that *within* the school district children participating in projects receive services roughly comparable to those received by nonproject area children. One has the impression that perhaps this combination of concentrated compensatory services, taken with equalization and comparability, is the basis upon which success in title I may be achieved.

Means

While the objectives which part C seeks to meet may be sound, there is serious question as to whether the legislation is adequately designed to achieve them; a number of the limitations contained in the statute appear to work at cross-purposes with its intent. In short, the words do not fit the music.

While concentration is the theme of the Murphy Amendment, the formula by which it distributes funds fails to achieve considerable differentiation between part C school districts and the generality of districts receiving title I assistance. In 1971 the part C formula embraced about 4,000 of the nation's school districts or about 25 percent of those which are currently eligible for assistance under part A of title I.[128]

The inclusion of those school districts with populations of children from

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[126] *Id.* See generally Berke, et al., in Senate Select Committee on Equal Educational Opportunity, *Federal Aid to Public Education: Who Benefits?*, 92nd Cong. 1st Sess. (1971).

[127] See §§ 141(a)(3), 143(c) of ESEA.

[128] Information available from Office of Education.

low-income families equal to more than twenty percent of school enrollment has the effect of enlarging the *number* of eligible districts. The bulk of the number of LEA's embraced within part C are included by virtue of the "twenty percent" rather than the "5,000" criterion.[129] The former criterion also reduces the portion of the part C "pot" available for districts in the 5,000 or more category, thus canting the new part away from an "urban education" orientation.

While it proposed the "5,000" category, the original amendment introduced by Senator Murphy would have limited part C eligibility to districts with populations of poor children equal to twice the average proportion of children from low-income families in the school age population of the nation as a whole (roughly 32 percent).[130] The message of the amendment in that form was that a school district with about twice the national average of poor children, should, along with urban districts, have extra funds. This approach was included in the version of the Murphy Amendment reported favorably by the Senate Subcommittee on Education,[131] but was lowered during consideration of H.R. 514 by the full committee on Education and Labor, and approved by the Senate in that fashion.[132] At the same time, the full committee added the requirement that a school district with over 5,000 poor children would have to show that those children also constituted five percent of the school-age population.

Clearly, this change reflects a greater orientation toward the needs of rural, as distinguished from urban, school districts, since it includes more "rural" districts than would have been covered under the amendment as originally introduced. The effect of the change was also to direct more funds to states in the rural South and away from states in the urban, industrialized North. At the same time, the impact of part C as a vehicle of concentration of title I funds is reduced. In practice, a balance between urban and rural school districts is apparently achieved; school districts in the 130 largest cities received $7.6 million under part C in fiscal year 1971, or about 50 percent of the $15.4 million allocated under the part in that year.[133]

[129] See 116 *Cong. Rec.* 10615 (Apr. 7, 1970, remarks of Rep. Quie) ("including school districts ... where there are 20 percent or more of the children counted under title I is not exactly a concentration").

[130] 115 Cong. Rec. 19501 (July 15, 1969); S. 2625, 91st Cong. 1st Sess. (1969).

[131] S 2218, Comm. Print (1970).

[132] Sen. Rept. at 18; H.R. 514, 91st Cong. 2nd Sess. (Jan. 21, 1970). This is not to suggest that rural school districts are without need for title I assistance. On the contrary, studies have indicated that the educational achievement of minority group students in the rural South is at a particularly low level and that, consequently, improved school inputs in that area may be relatively more effective than in other areas. Mosteller and Moynihan, *supra*, note 28, at 18, 39. The point made here is that by widening the eligibility formula to embrace more small rural districts the degree of "concentration" which part C could effect was measurably diluted.

[133] Information available from Office of Education.

The most significant limitation upon the operation of part C is the limitation upon entitlements and allocations of appropriations. Part C does not begin to play a role in a fiscal year unless appropriations exceed the fiscal 1970 appropriation level ($1,396,975,000). Only fifteen percent of the excess appropriation over that amount may be used. Moreover, even before the appropriation is applied to the part C entitlement, that entitlement must be shaved down from its normal level in order that aggregate entitlements under the part do not exceed fifteen percent of all title I entitlements over and above $1,396,975,000.[134]

The practical effect of these limitations is that, for each $100 million increase in the title I appropriation over the 1970 level, part C shares only to the extent of $15 million. To put the matter another way, even an increase of $500 million in the appropriation over the threshold would net part C about $75 million—well short of the amount originally estimated as reflecting the need for concentration, at least insofar as entitlement levels are concerned. Given the realities of the Federal budget and the multiplicity of competing budgetary priorities, an increase even of that magnitude was quite unlikely in 1970 when P.L. 91-230 was enacted. Events have borne this out. In fiscal year 1971, only $15.4 million was available for part C; for fiscal year 1972, the figure is about $25 million.[135] These sums are simply too small to create an impact.[136] Nor is it a sufficient answer that the overall funding levels for title I should be increased and that, therefore, evaluation of the authorizing legislation on the basis of appropriation levels is unfair. Legislation which is basically a vehicle for distribution of funds has to be designed with a view to the probable levels of appropriations during the period in which the legislation is to be operative.

The scheme reaches an apex of caprice when one considers the "equitable grants." As indicated above, only five percent of the amount available for § 131(a)(1) assistance is available for "equitable grants" under § 131(a)(2). Since that aspect of the program is also subject to the limitation that only fifteen percent of the excess appropriation (over $1,396,975,000) may be used for part C, only a minuscule part of the fifteen percent is available for equitable grants. In 1971, with an overall part C availability of about $15 million, only $700,000 was subject to use for purposes of equitable grants throughout the Nation. Since under

[134] See text *supra* at pp. 184–87.

[135] U.S. Department of Health, Education, and Welfare, Office of Education, Title I Allotments for Fiscal Year 1971. The degree to which the 15 percent limitations reduced the amounts which otherwise would have flowed to part C is not clear.

[136] Only two States, New York with $2,630,406 and California with $1,077,869, received over $1,000,000 under part C in Fiscal Year 1971. Only ten States received over $500,000. *Ibid.* Of course, these figures do not show how the $15.4 million would have been distributed if part C had not been enacted and that amount was being distributed under part A.

§ 131(a)(2), eligibility is determined by the SEA subject to broad criteria, a large number of potentially eligible school districts were invited to share in a very minute pot.

In practice little use has been made of section 131(a)(2); only 33 of the 3,954 school districts receiving part C money in fiscal year 1971 based their eligibility on that provision.

The combined effect of the part C formula, the limitations on the funds which could be allocated to the part, and the actual appropriation level resulted in fiscal year 1971 in the distribution of grants on the basis of about 4.4 cents on the entitlement dollar; in some cases, grants to individual school districts amounted to less than $10. In the light of the purpose of the amendment to permit the targeting of funds in such a manner as to have a significant impact on the individual educationally deprived child, these results seem somewhat anomalous.[137]

It is little wonder that some Congressmen representing districts fortunate enough to receive this largesse were moved to inquire whether a mistake in arithmetic had somehow been perpetrated by the Office of Education.

It is, of course, easy enough to cast aspersion on a program which produces such results. It is much harder to suggest viable alternatives in the face of the practical considerations with which Congress must contend. In essence, the type of limitations contained in part C are the product of political necessity which has a logic of its own. The basic limitation is that funds cannot begin to be allocated to part C until the 1970 appropriation level is exceeded and then only to the extent of such excess. The intent here is to prevent any district from losing title I funds. Part C distributes entitlements among school districts in the United States in a somewhat different manner than part A. If the entire title I appropriation were allocated in accordance with regular part A entitlements and part C entitlements prorated on an even basis, some non-part C districts would derive a reduced share of the portion of the appropriation below $1,396,975,000. Their 1970 level of funding would be cut back. Whatever the theoretical considerations, the revision of a formula for the distribution of Federal education dollars which results in a loss or rollback for some districts in terms of dollars they have been receiving (as distinguished from a lesser share of a future increase in an appropriation), is difficult to achieve. Redistribution of "old," as distinguished from "new," money is dimly received by the Congress.

In this light, in setting the threshold for part C operations at $1.4 bil-

[137] It is, of course, not completely fair to judge part C in these terms since it is merely an "add-on". A district with a $50,000 basic part A grant and a $2,000 part C grant adds the two together. However, part C is a discrete component of title I. It was meant to have an impact of its own. There are limitations on the use of part C funds which are not applicable to part A.

lion, Congress was probably following normal patterns. The imposition of the two fifteen percent limitations, which were designed to accentuate the basic limitations by cutting down on the degree to which part C districts would share in "new" title I dollars at the expense of non-part C districts, was perhaps more gratuitous.

Thus, the effectiveness of part C was made to depend upon a large increase in overall title I appropriations. Since such an increase was unlikely, the part C initiative was, in effect, relegated to insignificance from its inception.

If concentration had been intended to override these considerations, it would have been necessary to set aside a larger share of the excess appropriation over the 1970 appropriation level so as to give part C at least its prorata share (if not more) of that excess. Alternatively, the part should have been made inoperative until the formula produced enough of a pocketbook to make administration of the part and adherence to its difficult provisions worthwhile.

Instead, the eligibilities under the new part were broadened by dropping entry level for rural districts from 32 to twenty percent, while the portion of the appropriation which could be made available for the new entitlements was narrowed.

The use restrictions in part C are, generally speaking, reasonably designed to achieve the objective of increased concentration.[138] The limitation of programs to preschool and elementary school programs would seem to be a rational approach to the targeting of funds. The exception in favor of secondary schools, however, is so broadly defined in terms of "urgent need" and "relative effectiveness," however, that the attempt to focus part C on presecondary programs may fail because the exception becomes the rule.

A more serious shortcoming may be the failure to require actual concentration on a per pupil basis as a condition to the use of part C funds. The concentration principle is effective when it results in the delivery of discrete title I services on an intensive basis to a limited number of educationally deprived pupils. It is the increase in *per pupil* expenditure that becomes the critical consideration. Targeting funds on a limited number of schools or school attendance areas probably accomplishes little by way of concentration if, within such schools or areas, the funds are spread thinly among a large number of eligible participants without assurance that the amount spent on each pupil is sufficient to provide a basis for reasonable expectation of results.

Part C limits the types of schools and the number of school attendance areas which may participate in part C programs but it stops short of limit-

[138] See generally text *supra* at 192–98.

ing the number of students who may be served in such a way as to ensure an aggregate per pupil contribution from title I sufficiently large to provide a basis for such an expectation. While the regulations under part C attempt to focus upon this objective, they do not require any specific per pupil contribution.[139]

Beyond this, part C does not attempt to prescribe additional standards for the concentration of funds received by a school district under part A of title I, which is the major source of a school district's grant under that program. Since the amount of a school district's part C assistance has tended to be very limited, its potential leverage in achieving concentration, even assuming that the part C funds themselves will be used as contemplated in the statute, is thus likely to be quite restricted.

Epilogue

If, as the lawyers say, hard cases make bad law, then hard choices make for difficult legislation. The Murphy Amendment reflects an honest attempt by men of good will to make hard choices—to delimit the class of school districts eligible for extra title I funds in order to pinpoint those funds on the neediest of the needy; not to select between the advantaged and the disadvantaged but to differentiate between categories of educationally deprived children all desperately calling for assistance.

Secretary Richardson has described this sort of process in the allocation of scarce resources to meet human needs as "the inescapable necessity of choosing":

> Choice is the basic reality, and for us it is doubly difficult and saddening because whatever we have to give up is not something bad or trivial, but something that is only somewhat less important, if that, than what we have selected to do.[140]

If the amendment falls far short of its promise, it is not because some dark cabal set about deliberately debasing its coinage but because of the difficulty of maintaining intact the sharp lines of demarcation upon which such choice-making depends.

In execution, even though the basic thrust remained constant, the amendment resulted in a not unfamiliar pattern: the establishment of a large spectrum of eligibilities with provision for allocating such funds as

[139] In considering the adequacy of a comprehensive plan filed by a part C participant, the State educational agency must determine that the programs or projects are likely to be "sufficiently effective in meeting [the needs of the educationally deprived children] to result in measurably improving the educational achievement of such children." In making this determination, the State agency must take into account, among other factors, the "intensity" of the services to be offered. 45 C.F.R. § 116.10(f)(1), 36 Fed. Reg. 18501 (1971).

[140] Richardson, "Choice: A Cruel Necessity," Wash. *Post*, Feb. 13, 1972, p. B-1.

are appropriated to all the eligibilities on a prorata basis. Since the legislation permitted only a limited portion of incremental funds (over and above the 1970 appropriation level) to flow to the new program, only a small impact on each eligible unit could reasonably have been anticipated. In the absence of a device to scale entitlements to available resources, perhaps through some hierarchy or gradation of need, the program is foreordained to produce disappointment and yet another case of "shortfall between promise and performance",[141] while draining disproportionate quantities of another scarce resource: regulatory, administrative and oversight energies.

Having set out rather gallantly to concentrate title I funds in a meaningful fashion, the new scheme had to be adjusted so as to broaden the base of participation, to limit the disruption of existing allocation patterns, and to confine the change to the use of "new" monies—all of these traditional and perfectly understandable concerns. The result, however, is a program which distributes nominal grants to individual school districts.

For all its shortcomings, the Murphy Amendment does at least represent an attempt at a rough-hewn point of departure for seeking to concentrate not only funds but energies. If we start with the assumption that one cannot "work" simultaneously and with equal intensity on 16,000 school districts in the nation in stimulating effective programs for the disadvantaged, some method must be developed for reducing the number of districts to be the particular focus of limited energies and resources at any one time. In pointing the way to the identification of such priorities in terms of target areas, the amendment would appear to perform a valuable service.

Alice Rivlin has classified, among the alternative explanations for "our national failure to meet the needs of the disadvantaged", both a "villain theory" (those with power to solve social problems deliverately refuse to do so) and a "powerlessness theory" ("the system" and the "machine" render man powerless to effect constructive change).[142] Neither of these seems a satisfactory explanation for a phenomenon like part C of title I.

It would seem to fit rather into Mrs. Rivlin's theory of "conflicting objectives":

> We are failing to solve social problems because we do not know how to do it—the problems are genuinely hard. The difficulties do not primarily involve conflicts among different groups of people.... Rather, current social problems are difficult because they involve conflicts among objectives

[141] *Ibid.*

[142] Rivlin, "Why Can't We Get Things Done?", Washington *Post*, July 22, 1971.

that almost everyone holds. These conflicts create technical or design difficulties which override the political ones.[143]

The message of this experience then is clear. If the times thrust choice upon us as a cruel necessity, the necessity is crueler still if the choice is unsuccessful. If progress against educational deprivation is to be made, we must learn to choose effectively between good and good—between a variety of decent alternatives. Consciousness III, one supposes, will have its Murphy Amendments. We shall overcome, but only if we are able successfully to resolve the kind of conundrum which perplexing legislation of this sort presents.

[143] *Ibid.*