Federal Support for Eligible Private School Students: Elusive Equity and Ways to Capture It

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INTRODUCTION

For more than fifty years, Congress has allocated funds to states to serve eligible children through federal education programs. While education remains a state's right and responsibility, the federal government has provided funding to support programs in areas of national need. Over the years, this money has supported education for disadvantaged students, children with disabilities, professional development for teachers, new technology, and much more. Throughout this history, federal law has made some provision for the participation of students attending private schools.

The great "church-state" compromise reached in the original Elementary and Secondary Education Act (ESEA) in 1965—which paved the way for modern federal aid to K–12 education—was that eligible private school students would receive Title I *services* from their local public school districts, although their private schools would receive no direct funding themselves. The Education for All Handicapped Children Act, signed into law in 1975 and later renamed the Individuals with Disabilities Education Act (IDEA), included a similar compromise.

Over the years, the "equitable services for private school students" provisions have been tweaked by statute and regulation. They function more smoothly today than before, but significant problems persist.

This paper explains:

1. How these provisions are supposed to work;
2. The challenges on the ground in getting actual services to kids;
3. The complications that would accompany moves to have the dollars follow children to private schools; and
4. Other alternatives to the current system.

Be warned: this is exceptionally complicated material, especially because the students who generate federal funding under current formulas are not the same children who are entitled to receive services themselves. Addressing these challenges will require thoughtful consideration of policy alternatives and their implications.

TITLE I: EDUCATION FOR THE DISADVANTAGED

Background

Title I is a program to assist schools in serving educationally needy children in areas with a high concentration of low-income families. It was the cornerstone of ESEA and a key element of President Lyndon Johnson's War on Poverty. Since its inception, Title I has specified equitable participation of private school students—including those who attend religious schools. But this was not without prolonged debate and compromise. The initial draft of what became ESEA omitted private school students. In passing the bill, both private school and religious leaders

persuaded lawmakers to view the public school district as the public trustee of the funds and to charge it with providing the law's benefit to all eligible children. This is still the way that private school students participate: funds do not go to their schools. All funding intended to benefit eligible children attending private schools is entrusted to the public school district.

Each reauthorization of ESEA has brought changes that have strengthened and better defined the equitable participation of private school students in Title I, including 2015's Every Student Succeeds Act (ESSA). Unfortunately, challenges to providing equitable services to eligible children attending private schools persist.

To consider potential changes in how Title I can benefit private school students, let's first review how Title I operates. In general, the program is operated and fiscally controlled by the public school district. The district is responsible for determining a count of low-income children who live within its borders and attend private schools (regardless of where the schools are located); generating funds for services; and assessing which private school students are educationally needy and what services they will receive. The law requires that these decisions be made during consultation between public and private school officials through procedures defined in ESSA. At times, this procedure succeeds in providing equitable services, but at other times—even when there's consultation—the actual provision of equitable services for private school students remains elusive.

Title I Today

To understand just how complicated the current "equitable services" provisions are, let's walk through the process for determining which private school students are eligible for such services. Despite its complexity, it's important to appreciate what must be untangled if policymakers are going to change it.

First, the proportional share of funds at the district level that must be used to serve eligible private school students is determined by counting children from low-income families who reside in Title I attendance areas. "Low-income" is generally defined as eligibility for the National School Lunch Program (NSLP). However, most private schools do not participate in the NSLP, so five other means are outlined in law for gathering the data that makes it possible to count the low-income children attending private schools.[1]

A low-income status is not, however, sufficient to qualify a child for generating Title I funds. Low-income children attending private schools must also live in participating Title I attendance areas in order to be counted for the purpose of generating funds. To designate Title I attendance areas, the public school district first designates any school attendance area with 75 percent or higher poverty, regardless of grade levels. Then the district designates additional school attendance areas in rank order of poverty—but here it has the option to skip grade spans. For example, it can choose not to serve high schools or middle schools with less than 75 percent low-income children. Through this process, the district identifies its participating Title I attendance areas.

The low-income private school children counted through one of the aforementioned five methods are then address-matched to determine how many of them reside in participating Title I attendance areas. Low-income children residing in Title I attendance areas are the ones who actually generate Title I funds for the districts in which they live.

The district may use a single per-pupil allocation for all eligible children, in which case the number of low-income private school students residing in Title I attendance areas is multiplied by that allocation to determine the funds available for Title I services to eligible private school students. Many districts use different per-pupil allocations, however, based on the poverty of the Title I attendance areas. In this situation, the low-income private school child will generate a per-pupil allocation based on the Title I school attendance area in which he or she resides, and this total will provide the funds to serve educationally needy private school students who reside in Title I attendance areas.

These calculations can be computed for each individual private school with low-income children and an education program using those funds can be planned during consultation. Alternatively, the funds from all of the private schools (or specific groups of the private schools, such as Catholic schools) can be pooled to serve the educationally needy children in all of the private schools in the pool. Whether to pool or not pool funds is decided via the consultation process. Final decisions rest with the public school district, but they can only be made after due consideration is given to the opinions and requests of the private school officials. It goes without saying that federal laws do not self-implement, so the consultation process, no matter how many safeguards are built into the law, remains fraught with problems when actually implemented.

Once the funding amount has been determined, consultation between public and private school officials determines how “educational need” will be defined. That determination is done via multiple measures that, per the law, must be objective, educationally related, and age appropriate. Poverty is not a criterion for educational need. In determining which children are educationally needy, the criteria selected during consultation should reflect the situation of the private school children, which may be different from the criteria used to determine the educational need of public school students.

The students in the private schools who meet the criterion of educational need must reside in Title I attendance areas. Those who are both educationally needy and reside in Title I attendance areas are then ranked from educationally neediest to least needy. When funds are insufficient to serve all educationally needy children, the neediest students are served first. This is true whether the funding was kept at the level of the specific private school whose students generated those funds or pooled among a group of private schools.

In sum, low-income private school students who reside in participating public school Title I attendance areas generate funds and educationally needy private school students who reside in these areas receive services. It is likely that many of the children that generate funds due to poverty are not the same as those who receive the services due to educational need.

Title I Implementation Issues

The consultation process is the cornerstone of the provision of equitable services to eligible private school students. Each ESEA reauthorization has added additional safeguards to the consultation process to protect the rights of private school students. Yet even with these improvements, basic implementation challenges remain.

First, the consultation process, regardless of safeguards put in the law, is only as effective as the public school officials implementing it want it to be. There are many ways to circumvent the spirit of the law that can result in an inequitable program for private school students. If, for example, meetings are called by the public school district with little notice for private school officials to prepare for—or even attend—the meeting, the process is not going to be helpful. If district officials arrive at the consultation meeting having already decided what the program will look like—the grades to be served, curriculum to be used, teachers to be deployed, timing of services, and so on—then the process will not lead to equitable services. If district officials politely listen to the private school officials and later take a completely different action than was discussed, there is little recourse for the private school officials unless they want to delay services to their students. And if the district drags its feet and does not start the process, then the services themselves don't start—and the students are not equitably served.

A second issue is that effective consultation also depends on private school officials understanding the rights of their students to receive equitable services. Over the past decade, the number of private school officials in a job that is dedicated exclusively to ensuring the equitable participation of their students in federal education programs has diminished. Increasingly, the private school official who comes to a consultation is a school principal without the training and expertise to effectively navigate the complexities of federal law and regulation.

There are two additional issues to consider. First, until passage of ESSA, if the funds allocated to private school students were not spent by the district to serve private school students, then the district could spend those funds—an obvious disincentive to fulfill the letter and spirit of the consultation. Language in ESSA no longer permits this practice. Time will tell if this language resolves the problem. Second, the recourse for private school officials who believe their students are not receiving equitable services is to file a formal complaint. In order to do so, students first must be denied equitable services. The complaint first goes to the state, which must respond within forty-five days. After this, the private school officials have thirty days to appeal the complaint to the US Department of Education, which then has ninety days to resolve the complaint. If, for example, services should have started in September but had not begun in November, the private school officials could file a complaint with the state. The state must respond by mid-December. By early January, the complaint could be appealed to the federal government—but probably would not be resolved until April. In the meantime, educationally needy children would have to do without services through nearly the entire school year.

SPECIAL EDUCATION:
THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Background

The Individuals with Disabilities Education Act (IDEA) is unique among federal education programs in that it is both a civil rights measure and an education program. As a civil rights law, IDEA guarantees that any child suspected of having a disability will be evaluated ("child find") and, if found to have a disability, will be provided with a "free appropriate public education" (FAPE). These civil rights guarantees apply equally to both public and private school students, as well as to preschoolers.

IDEA Today

For private school students suspected of having a disability, Part B of IDEA requires that the district where the private school is located conduct "child find," an assessment meant to determine whether or not a child has a disability as defined under IDEA. Under IDEA, a "child with a disability" must be diagnosed with a specific disability *and* be in need of special education and related services. Merely having a diagnosis that fits into one of the IDEA disability categories—Attention Deficit Disorder, for example—without needing the interventions of special education and related services would mean the student is *not* considered a "child with a disability" under IDEA.

The child find process makes this determination and is carried out by the public school district in which the private school is located. Child find must be completed within sixty days of signed parental consent, unless the state has a different timeline in place. But it gets more complicated: if the private school student is found to have a disability by the district where the private school is located, and the child also resides in that district, then the district must make an offer of FAPE. If the private school child is found to have a disability by the district in which the private school is located, but resides in a different district, then the parent must request an offer of FAPE from the district in which the child resides. The offer of FAPE requires that the district provide any and all special education and related services as determined through the child find evaluation, regardless of cost. Note, though, that FAPE is something provided by the public school system, not by the private school that the child attends.

There are instances when a child is defined with one or more disabilities that the public school district does not have the capacity to handle. In these cases, the provision of FAPE is accomplished by the public school district paying the cost of attendance at a private special education facility. These children are referred to under IDEA as "publicly placed private school students." Note, however, that such private school placements are determined by the public school system—generally in consultation with parents. In nearly all instances, the private school in which the child is placed via this process would not be the same school that the child was previously attending, since the placement is nearly always in a special education school or facility.

If the parents of a private school child decline the offer of FAPE—whether that offer is given by the district in which the private school is located or the district in which they reside—and instead opt to have the child continue attending the private school, this is considered a refusal of an offer of FAPE. At this point, the public school district has fulfilled its civil rights obligations to the private school child. Under IDEA, this student is considered a "parentally placed private school child."

As a parentally placed private school child, he or she generates a proportional share of federal funds available under IDEA. However, in the absence of a state program providing additional funding, the IDEA funds are unlikely to cover the costs of all special education and related services for the child. IDEA originally had the goal of providing approximately 40 percent of the cost of special education, but it has struggled to reach even 20 percent of the cost. Currently, the parentally placed private school child only generates about 18 percent of the cost of special education and related services. Clearly, this will not go far in providing the needed services.

As with Title I, public and private school officials discuss the funding available and the needs of the students during the consultation process. They determine collaboratively which children will receive services when funding is insufficient to serve all students who have been found to have disabilities. Most likely, not all students with disabilities attending private schools will receive services under IDEA; many that do will receive only some of the services indicated as needed by the child find assessment.

IDEA Implementation Issues

IDEA implementation for parentally placed private school students remains one of the biggest issues for these students, their parents, and the private school officials who represent them. After the passage of the No Child Left Behind Act (NCLB), amendments to IDEA vastly increased the requirements for consultation—modeling those requirements after NCLB. While the new language resulted in some improvements to the consultation process, the US Department of Education interpreted IDEA differently from the similar language in NCLB, and it did not result in the same benefits.

For example, districts appear to have no obligation to consult with individual private school representatives. Instead, they can make blanket decisions about services to all children with special needs who attend private schools within district boundaries. This results in services being workable for some students in some schools and wholly unworkable for other students in other schools. Properly done, special education is the antithesis of "one-size-fits-all," yet that's how it's often approached for parentally placed private school students. Further exacerbating the problem, the decision about services is usually made independently by the public school district and not in consideration of the particular needs of the individual children to be served. The result, in practice, has been that the most common service actually received by private school pupils is speech therapy. Other disabilities are generally not even considered for service. But, as noted in Title I, if the process under the law is conscientiously followed, students end up benefitting.

A broader legal and philosophical issue with implementation is that both the courts and the US Department of Education have defined FAPE as receipt of services in a public school, not simply services provided at public expense. Defining a free appropriate public education as "appropriate services at public expense, regardless of where they are delivered," would be a game changer for private school students with disabilities.

NEW WAYS TO THINK ABOUT TITLE I AND IDEA FOR PRIVATE SCHOOL STUDENTS

For decades, one of the greatest compliance issues in federal education programs has been the provision of equitable services to private school students. In spite of the fact that language providing for equitable participation has been revised and strengthened over more than fifty years of federal law, in many instances the provision of these services to private school students in a fair, efficient, and effective manner remains elusive. Providing equitable services requires thinking about new methods for delivering them to eligible private school students. One proposal is to have the funds for Title I and IDEA follow the child to the private school itself—and then expect the private school to deliver the appropriate services directly to its own students. An analysis of how this would work for each program follows.

Title I

First, consider the challenge of trying to make Title I funds follow the private school child with only a modification to current law, rather than completely reworking what we have understood Title I to be since 1965. The funds are generated by low-income children who reside in participating Title I attendance areas—but these are not necessarily the children that benefit from Title I services. The services are intended to benefit *educationally needy* children who reside in participating Title I attendance areas, some of whom may not themselves come from low-income families. (Nor are all low-income children educationally needy.) It isn't logical to have the funds follow the children who generate the funds when those funds may not be needed for educational services, nor does it seem workable to have the funds follow one low-income child only to be diverted to serve a different child. Funds following a low-income child who is not educationally needy does not provide educational value with the federal dollars.

Another approach would be to have the funds follow the child to the private school, with the private school then commingling such funds to pay for services to its educationally needy pupils. Yet Supreme Court case law is decisive that, when private school students are aided with federal dollars, the primary beneficiary must be the child, not the private school. While the Supreme Court (*Agostini v. Felton* being the predominant case for Title I) focused on the religious nature of the school, there are also state interpretations of Blaine Amendments that bar all public aid to private and/or religious schools. A further wrinkle: under case law, control of Title I funds must be retained by the public school district, which also therefore assumes programmatic control.

A different body of case law covers circumstances where the parent makes the decision about the use of funds provided. Such decision making by parents is the cornerstone of state voucher programs and was validated by the Supreme Court in *Zelman v. Simmons-Harris*. Bear in mind, however, that many private schools do not want to be direct recipients of federal dollars, which come with significant strings attached—such as compliance with Section 504 of the Rehabilitation Act, which requires accommodations for any disabilities (but provides no funding with which to make these accommodations).

Another model to look at for possible modification of Title I is state voucher programs that provide scholarship funds that follow the child to his or her private school. It is vital to retain Title I's focus on educational need. Title I funds generated by low-income children residing in Title I attendance areas could be pooled into a scholarship organization that would grant parents vouchers for students with academic need who attend private schools. The parents would use these Title I vouchers to obtain additional education services for their children, including services provided by the private schools. By allowing parents to decide where the voucher goes—to their child's private school, the local tutoring center, a favorite teacher for after-school tutoring—the additional funds could be used in a way that adds educational value tailored to the individual child. But the funding available per individual child ($estimated at $500-$700 per child, but as low as $250 per child) would yield many fewer services than an effectively administered Title I program.

Alternatively, Title I could be changed so that funds are generated by educationally needy private school children residing in areas of concentrations of low-income families as defined by the census, which would be a reversion to the early days of Title I. The parents of the private school children generating the funds would then be able to use a voucher to obtain additional educational services for their children as described above, with the same question of how much a voucher approximating $500-$700 could buy in services.

In modifying Title I, consideration should also be given to programs that are effective in serving private school students. When weighing alternatives such as "voucherizing" Title I, a cost-benefit analysis is vital in light of the many effective programs currently operating in various places. Will changing the law undermine what's already working well? Will private school officials who have labored to ensure effective and equitable programs for their eligible children be undermined by policy objectives that ignore their approach? Is the better solution to provide more options for obtaining equitable services, instead of dismantling the current system without regard for programs that are making a difference for students?

IDEA

IDEA does not pose all of the challenges raised under Title I because it is an "individual" program. The biggest problem in modifying the present system is the *amount* of funding. As noted above, IDEA—federal dollars—pays only about 18 percent of the cost of special education. On average, IDEA provides approximately $900 per participating child (though amounts vary widely due to the different costs of servicing various disabilities). Having the

funds follow the private school child would raise many fewer issues than doing so with Title I dollars. The challenge for IDEA is that the funding is so limited that bringing those funds into the private school is unlikely to result in significant services for children who need them.

A bigger issue to tackle under IDEA is the interpretation that a “free appropriate public education” means an education conducted within or by the public school, not simply an education provided at public expense. If the “P" in “FAPE” were more inclusively defined, the result would be a provision of services—as a civil right—to students with disabilities attending private schools. The delivery of FAPE could not differ between public and private school students. If this were the case, then any state and local dollars should also follow the child since the provision of FAPE would be a civil right regardless of where the child was being educated. In analyzing the current interpretation, it seems that the foremost reason for limiting FAPE to services provided in the public school is so that the states and localities do not bear additional costs in providing FAPE to private school students with disabilities.

Alternative Suggestions

In addition to considering the idea of Title I and IDEA funds following the children so as to meet the needs of private school students, it is important to explore other options that could greatly benefit private school students, their families, and the schools that serve them. In the past, legislation modeled after state voucher programs made some traction: a federal system for scholarship organizations that would provide a scholarship for tuition assistance to students attending private schools who are at or below 250 percent (for example) of the poverty level. To fund the program, scholarship fund contributors receive federal tax credits equal to their contributions. With corporate tax reform on the Congressional table, it’s a suitable time to consider the ability of corporations (or, possibly, individuals) to contribute to scholarship organizations in exchange for a tax credit or deduction. This tuition assistance would greatly benefit both students and schools.

One last option to consider is modifying ESSA—which would affect Title I and other ESSA programs intended to provide equitable participation—but not IDEA. If there were a separate title devoted to equitable services to private school students, the statutory language could be written to focus services on the needs of private school students. The logistical procedures devised to implement that language could be more in line with ease-of-service delivery for private school students. In order to prevent the new private school title from going unfunded, its funding mechanism would need to be a fixed percentage of total program dollars within the various titles that it was replacing. If carefully considered and well planned, this option could resolve issues of equitable participation well into the future across all ESSA programs.

CONCLUSION

The fact that providing equitable services to eligible students remains a significant challenge after half a century highlights the importance of exploring alternatives that would benefit students, respect current case law, acknowledge the success of some private school officials in working through the present system, and have a reasonable prospect of moving through the political process. True, there are myriad challenges at present—but there is no reason to think that they are insurmountable. Creative minds could visualize a number of plausible alternative approaches. But pursuing them will take a concerted, collaborative effort to construct a model that will work effectively.

ENDNOTES

[1] The five methods that can be used to determine low-income children attending private schools are as follows:

a. Using the same measure of low income as is used to count public school children: The measure used is usually free and reduced-price lunch data. (Guidelines for free and reduced-price lunch can be found at http://www.fns.usda.gov/school-meals/income-eligibility-guidelines. They are updated every school year.) This includes the traditional collection of free and reduced-price lunch forms and the newer Community Eligibility Program.

b. Using the results of a survey that protects the identity of families of private school students, and allowing survey results to be extrapolated if complete actual data are unavailable.

c. Applying the low-income percentage of each participating public school attendance area to the number of private school children who reside in that school attendance area (proportionality).

d. Using an equated measure of low income correlated with the measure of low income used to count public school children.

e. Using comparable data, such as tuition-assistance data already collected by the private school.