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THE WHITE HOUSE
WASHINGTON

June 21, 1982

MEMORANDUM FOR MICHAEL UHLMANN ✓
BOB THOMPSON
ANN FAIRBANKS

FROM: Jim Cicconi

SUBJECT: Attached

Attached is for your information.

By NARA Greg L. ... Date 3/20/97
PERSONAL AND CONFIDENTIAL

M E M O R A N D U M

DATE: June 11, 1982

TO: Honorable James A. Baker, III
Chief of Staff and Assistant to the President
The White House

FROM: William T. Coleman, Jr. 

SUBJECT: Proposed Tuition Tax Credit Bill and the
Provisions Requiring Non-Racial Discrimination

I think it is good that the Administration, in the proposed legislation, recognizes that there should be affirmative provisions in the bill denying the parents the tuition tax credit if the school discriminates on the basis of race. I would not want to be put in the position, however, of giving public endorsement to the bill for the following reasons:

1. I think there is a serious constitutional question whether any type of federal tax credit for parents whose children attend religious schools does not violate the First Amendment.

2. As a matter of federal policy, so long as there are insufficient federal funds and state funds to support a completely adequate public school system, I do

not think federal revenues should be diverted to private schools.

3. With respect to the provisions dealing with non-racial discrimination, I find the following deficiencies in the proposal as presently drafted:

a. Section 3(3), the definition of what is a "racially discriminatory policy" is not inclusive enough. (page 6) It certainly should include the types of despicable conduct which goes on at the Bob Jones University. It should, in fact, include any kind of conduct which includes the separation of the races.

b. There is no need for the provisions with respect to racial quota, etc., also set forth on page 6.

c. The fact that by Section 3(4) (on page 6) the credit is not disallowed until after the action brought is final means that the school might well be an eligible institution for four or five years, as the case wends through the courts.

d. The statute of limitations in the bill is awfully short, to wit, the complaint has to be made to

the Attorney General within 180 days and he has to bring suit within one year. (page 6)

e. It is desirable that the Attorney General be given enforcement policy, but there is no reason to make that the exclusive remedy. For example, the Attorney General has the right to bring civil and criminal antitrust suits but we all know that the private right of enforcement is also desirable to make sure that the antitrust laws are fully complied with.

f. In the memorandum, draft dated June 5, 1982, it is said that the person discriminated against would continue to have a private right of action under 42 U.S.C. 1981, but I cannot find that provision in the bill. If it is not put in the bill there is the argument that the remedy set forth in the bill in Section 4, to wit, enforcement by the Attorney General, is the exclusive remedy.

g. Section 6, which states that the tax credit is not federal financial assistance, is inconsistent with the Budget Control Act of 1974. If you look at the budget report you will see that tax credits are treated as a federal contribution. This is one of the reasons why the civil rights groups argue in the Bob Jones University case

that if Section 501(c)(3) and Section 170 are construed as permitting the tax deduction even if there is racial discrimination that such statutes are unconstitutional.

I end as I started. It is commendable that the Administration has recognized that the racial discrimination issue must be dealt with. There are, however, certain provisions trying to carry out this decision which I wish were done differently. If you wish, I could, on a confidential basis, provide the resources to have the non-discriminatory provisions written in a way which would get acceptance by those who think such provisions are exceedingly important.

Thanks for your confidence.

WTC, Jr.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

AUG 13 1982

MEMORANDUM

TO : William Barr ✓
John Chapoton
Charles T. Cooper
Jackie Levinson
Michael McConnell

FROM : Barbara Childs Wallace *BCW*
Special Assistant to the General Counsel

Attached hereto are copies of the questions from Senators Dole and Packwood regarding tuition tax credits and the revised answers drafted by Justice, Treasury, and Education. Please review these answers to ensure that they meet with your approval. If there are any changes, they should be forwarded to the General Counsel's office at Education either over the weekend (Dan Oliver's office number is 245-8940) or no later than 9:00 a.m. on Monday morning, August 16th. We will need to get one copy signed at that time for immediate transmittal to Senator Packwood and the Senate Finance Committee.

These questions and answers are also being transmitted to Naomi Sweeney at OMB for OMB's review under Circular A-19.

If there are any further questions, please contact me either at 245-8940 or at home, 229-3896.

cc: Naomi Sweeney

1. What is the Administration's current policy and practice regarding the issuance and revocation of tax-exempt status for private schools not maintaining racially nondiscriminatory policies as to students?

ANSWER:

The IRS is following the injunction in the Wright case that it cannot grant or restore tax exemptions to schools that discriminate. It is requesting information about discrimination in the application for exemption. No school outside Mississippi has failed the tests under the revenue procedures for racial discrimination.

Because of the Wright injunction, the IRS has written Bob Jones University and Goldsboro Christian Schools stating that it cannot grant those schools exemptions. This removed the mootness issue from the cases before the Supreme Court.

Because this Administration does not believe that there is authority under current law for the IRS to deny exemption, the IRS is not revoking any existing exemptions. If a school that applies for an initial exemption were to fail the standard for racial discrimination in the revenue procedures, the IRS would hold it in suspense until the Bob Jones decision provided guidance in this area. In this way the IRS is following the

Wright injunction by not granting an exemption, but it is also not denying or revoking an exemption.

Note:

Under section 7428, a school may bring a declaratory judgment proceeding in the Tax Court challenging the denial of an exemption. This same provision allows a proceeding to be brought if the Secretary has not acted on an application for exemption within 270 days. If a school's application were to be held in suspense long enough, the school could bring a declaratory judgment proceeding in the Tax Court asking to be declared tax-exempt. The IRS response would probably be to request a stay until the Bob Jones decision has been rendered, but the IRS has not made a final decision as to its position if this were to occur.

2. Pending the Supreme Court decision in Bob Jones and Goldsboro, is the IRS granting tax exemption under Section 501(c)(3) for new schools applying for tax exemption which discriminate based on race? Similarly, is the IRS now auditing schools which are already exempt to determine if they discriminate based on race? Please give information about the level of enforcement effort in these areas.

ANSWER:

See answer to No. 1.

[Ask the IRS regarding the auditing question.]

3. For the period between the enactment of this bill and a decision by the Supreme Court in Bob Jones, would tax credits be allowable for tuition payments to private schools failing to qualify for exemption because of failure to maintain and publicize a racially nondiscriminatory policy, as required in Rev. Proc. 75-50?

ANSWER:

After the bill is enacted, there would be two cases in which tuition tax credits would be disallowed because of racial discrimination. One would be a case in which the Attorney General is successful in seeking a declaratory judgment that the school has followed a racially discriminatory policy and has, pursuant to such policy, discriminated against the person filing the petition. This action does not depend upon the Bob Jones case and could be brought between the date of enactment and a decision by the Supreme Court. Obviously, tuition tax credits would not be allowable where a judgment had been won by the Attorney General.

The ultimate allowance of tuition tax credits for discriminatory schools where there is no declaratory judgment proceeding depends upon the Bob Jones decision. If these

schools are held to be tax-exempt under the Bob Jones decision and there is no legislation that is passed by the Congress, tuition tax credits would be allowable in those cases.

There are three situations with possible disallowances in the interim before the Bob Jones decision:

1. The school applies for its initial exemption and fails to meet the standards of Revenue Procedure 75-50 for racial discrimination. ~~(No school outside Mississippi has failed to meet these standards to date.)~~ These cases would be held in suspense until a decision were rendered in Bob Jones. If a case is held in suspense for more than 270 days, the school could bring a declaratory judgment proceeding in the Tax Court asking the Court to declare it tax-exempt (section 7428). If the Tax Court rendered its opinion before the Bob Jones decision, the allowance or disallowance of tuition tax credits would depend upon the Tax Court decision.
2. A school that has already been given its exemption fails to meet the revenue procedures. The possible revocation of the exemption would be held in suspense until the Bob Jones decision, but in the interim the school continues to be exempt and credits may be claimed. If the Bob Jones decision would cause the school to lose its exemption,

presumably the credits could be disallowed retroactively for open years.

3. Unincorporated church schools do not have to apply for exemption; they are automatically tax-exempt as churches. These schools, like the schools in case 2, continue to be exempt and tuition tax credits could be claimed with respect to them. Again, if the Bob Jones decision were to render these schools nonexempt, tuition tax credits could be disallowed retroactively for open years.

4. Assuming that the Supreme Court affirms the Bob Jones and Goldsboro cases, and decides that federal tax-exemption cannot be granted to private schools maintaining racially discriminatory policies, would the enactment of this bill have any effect on the procedures and standards applicable in determining whether a school qualifies for tax-exemption?

ANSWER:

No. This bill has no effect on the law under section 501(c)(3).

5. Assuming that this bill is enacted, and that the Bob Jones and Goldsboro cases are affirmed, would the IRS be required to deny tax-exempt status, and thereby deny tuition tax credits, for a school that fails to maintain a racially nondiscriminatory policy as to students?

ANSWER:

If the Bob Jones case is affirmed and holds that the IRS is required to deny tax exemption to a school that racially discriminates, then the IRS will do so. Under the bill, no tax credits are allowable if a school is not exempt under section 501(c)(3).

6. S. 2673 vests exclusive enforcement responsibility for certain of the bill's nondiscrimination rules with the Attorney General. Will approval of this bill imply any Congressional view on the issue of whether a private individual has standing to challenge the tax-exempt status of an institution? This issue may be reviewed by the Supreme Court in the Wright case.

ANSWER:

We do not believe that the bill has any implications about private rights of action in challenging the tax-exempt status of an institution. The bill does not affect the law under section 501(c)(3). Further, the new proceeding by the Attorney General is not a suit to deny tax exemption, but rather is a suit wholly concerning the disallowance of tuition tax credits on a ground separate and apart from tax exemption.

The government's position in the Wright case is clear and a matter of public record in its application for Supreme Court review in this most important case. A private individual should not be able to challenge the tax-exempt status of an institution. ~~If the bill contains any implications about the result to be reached in that case, however, it is inadvertent.~~

7. Under the bill, if the Attorney General prevails in a declaratory judgment proceeding, credits are disallowed for three years beginning with the calendar year the lawsuit is commenced. If litigation lasts longer than three years, and the school's practices do not change, is it intended that credits would begin to be allowable merely because the three-year period has elapsed? (Question A.) Similarly, if the school continues to maintain a discriminatory policy, will the Attorney General be required to bring a new lawsuit every three years? (Question B.) If so, will the subsequent lawsuit be authorized only upon the receipt of a petition by a victim of discrimination? (Question C.)

ANSWER:

A. Yes. The three-year penalty is imposed for a proven act of discrimination and a proven racially discriminatory policy. For the penalty to extend for an indefinite period of years would discourage the school's use of the judicial process, i.e., its right to appeal. If the school persists in discriminating, it would be relatively easy for a complainant to file another complaint, considering that one has already been filed. The litigation burden will always fall on the Attorney General, not the complainant.

B. Yes. A new lawsuit must be filed in order to prove judicially that the school is still pursuing a racially discriminatory policy.

C. Yes.

8. The bill "authorizes" declaratory judgment proceedings when a petition is filed by an alleged victim of racial discrimination. If the Attorney General determines that the claim has merit, will he be required to bring a lawsuit, or is this enforcement procedure wholly discretionary?

ANSWER:

The Attorney General always has discretion in civil rights and other kinds of cases as to whether to bring a lawsuit.

Also, under the bill the Attorney General must give a school the opportunity to settle a case before a complaint is filed.

It is intended that if the Attorney General believes that the private complaint is meritorious and he cannot settle the case, he will bring a declaratory judgment proceeding against the school.

The declaratory judgment proceeding and the bill itself is intended to force schools to abandon racially discriminatory policies. If the Attorney General can settle a suit by having a school revise its policy, we believe that that result is as desirable and as effective as a final court judgment.

9. Will the Attorney General's lawsuit be concerned only with the specific act of discrimination alleged in the petition, or is the petition a triggering device, authorizing the Attorney General and the court to review the school's racial policies in general?

ANSWER:

The Attorney General must seek a declaratory judgment that the school has followed a racially discriminatory policy and that the school has, under that policy, discriminated against the person filing the petition. Although the Attorney General may investigate the school's policies after a petition has been filed with him, if the school's policies are discriminatory but the Attorney General concludes that no act of discrimination has in fact occurred, he cannot bring a declaratory judgment proceeding.

10. When the Attorney General permits the school to comment on allegations of racial discrimination during the period before filing suit, will the individual petitioner also be permitted to participate?

ANSWER:

The individual petitioner will have the first opportunity to provide information to the Attorney General as to the substance of his complaint. During the course of the investigation, the Attorney General could be expected to talk to both the school and the petitioner numerous times, depending on the complexity of the complaint.

11. Will the Attorney General be permitted to maintain the confidentiality of the individual petitioner?

ANSWER:

No. The Attorney General must promptly give a school written notification of the petition and the allegations against the school. Since the Attorney General would seek a judgment that the school has discriminated against the person filing the petition, the school must know the specific instance of discrimination that is being alleged in order for it to defend itself.

12. If a school agrees to admit an individual, who petitioned claiming that he was refused admission on account of race, would the school's correction of the specific act alleged in the petition render the Attorney General's lawsuit moot, or could the Attorney General and the court proceed to review the school's racial policies generally?

ANSWER:

The Attorney General ~~is authorized to discontinue the suit~~
If ~~he~~ determines that the school has abandoned its racially discriminatory policy, However, if he determines that the school intends to maintain its racially discriminatory policy, and the specific act complained of had been reversed solely for the purpose of avoiding litigation, he would be ~~authorized~~ ^{expected} to continue the litigation. Even under those facts, the requirements of Section 7408(a) would be met, i.e., the Attorney General would allege that the "educational institution has followed a racially discriminatory policy and has, pursuant to such policy, discriminated against the person filing the petition."

it is intended that he discontinue the suit.

13. If a school with a racially discriminatory policy under investigation by the Attorney General dropped the policy, would the Attorney General seek any sanction based on the period of time that the school had a racially discriminatory policy in effect?

ANSWER:

The primary purpose of this bill is to dissuade private ~~schools from discriminating.~~ ^{schools from} Nonetheless, even if the Attorney General determines that the school has dropped its racially discriminatory policy, it is still within the Attorney General's discretion whether to seek a sanction against the school, assuming that there also was a specific act of discrimination alleged by the complainant.

14. How will the IRS collect tuition tax benefits given in prior years to parents with children in a school with a racially discriminatory policy? Would an amount such as provided in section 7428 be provided?

ANSWER:

[IRS will answer.]

16. The bill requires a school's annual certification regarding its nondiscrimination policy to be made under penalty of perjury. What purpose does this requirement serve, and how will it be enforced?

ANSWER:

Initially, the statements will hopefully influence the schools, for pecuniary reasons, to abolish any discriminatory policies they may have previously maintained.

The annual statement is then a threshold test for claiming a tuition tax credit. Schools that cannot attest under the penalties of perjury that they have not discriminated during the calendar year will not have tuition expenses for which a credit can be claimed.

Returns claiming the credit will be checked at IRS Service Centers for a copy of the statement. If the statement is not attached to the return, the return will be pulled and the credit will be disallowed.

The annual statement will also provide the Attorney General with additional weapons for prosecuting a discriminatory school. If the school has been filing annual statements, the Attorney General might have grounds for bringing a perjury prosecution, even if there has not been a private petition that

would allow him to bring a declaratory judgment proceeding. In addition, if there is a final court adjudication of discrimination by the school, the Attorney General may monitor the annual statements filed thereafter to see whether they are perjurious if the school has not changed its practices.

17. Will the school's annual statement regarding its nondiscriminatory policy be simply a conclusory statement, or would the Secretary, or the Attorney General, be authorized to require that the sworn statements describe the school's policies or practices in detail?

ANSWER:

It is intended that the annual statements track the language of the statute without further details. The school would declare that it has not followed a racially discriminatory policy during the calendar year and would indicate whether a declaratory judgment proceeding has been brought against it during that calendar year or either of the two preceding calendar years.

18. Will a school be required under this bill to publicize that it has a racially nondiscriminatory policy?

ANSWER:

The bill does not directly require a school to publicize that it has a nondiscriminatory policy in order for credits to be allowed, although the school will have to file an annual statement with the IRS and parents under the penalties of perjury that it has not followed a discriminatory policy during the calendar year.

Current IRS procedures in granting section 501(c)(3) exemptions to schools require schools to publicize annually that they do not have a discriminatory policy. Since a school must be exempt under section 501(c)(3) for a credit to be allowed, those schools that apply to the IRS for exemption must conform to IRS requirements.

Note:

Unincorporated church schools do not have to apply for exemption, so they do not have to publicize their policies as do separately incorporated schools, which must apply for exemption. However, they still must file the annual statement under this bill.

19. Under the bill, would religious schools be permitted to limit attendance to adherents of a particular religion? What sorts of religious limitations will be impermissible, if any?

ANSWER:

Yes -- so long as "adherents" to that particular religion are not limited to a particular race. In other words, a school may not use religion as a cover for discriminating on the basis of race.

20. If a church school teaches a religious doctrine of racial separation, but does not practice segregation or exclusion on racial grounds, would it qualify for creditable tuition payments?

ANSWER:

Yes.

21. If a secular school teaches a secular doctrine of racial separation, but does not practice segregation or exclusion on racial grounds, would it qualify for creditable tuition payments?

ANSWER:

Yes.

22. Will the Justice Department participate in the Bob Jones University and Goldsboro Christian Schools cases before the Supreme Court? What position will the Justice Department take?

ANSWER:

[IRS or DOJ must answer this.]

1. What is the Administration's current policy and practice regarding the issuance and revocation of tax-exempt status for private schools not maintaining racially nondiscriminatory policies as to students?

ANSWER:

The IRS is following the injunction in the Wright case that it cannot grant or restore tax exemptions to schools that discriminate. It is requesting information about discrimination in the application for exemption. No school outside Mississippi has failed the tests under the revenue procedures for racial discrimination.

Because of the Wright injunction, the IRS has written Bob Jones University and Goldsboro Christian Schools stating that it cannot grant those schools exemptions. This removed the mootness issue from the cases before the Supreme Court.

Because this Administration does not believe that ^{the IRS has} ~~there is~~ authority under current law ~~for the IRS~~ to deny exemption, the IRS is not revoking any existing exemptions. If a school that applies for an initial exemption were to fail the standard for racial discrimination in the revenue procedures, the IRS would hold it in suspense until the Bob Jones decision provided guidance in this area. In this way the IRS is following the

Wright injunction by not granting an exemption, but it is also not denying or revoking an exemption.

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Note:

Under section 7428, a school may bring a declaratory judgment proceeding in the Tax Court challenging the denial of an exemption. This same provision allows a proceeding to be brought if the Secretary has not acted on an application for exemption within 270 days. If a school's application were to be held in suspense long enough, the school could bring a declaratory judgment proceeding in the Tax Court asking to be declared tax-exempt. The IRS response would probably be to request a stay until the Bob Jones decision has been rendered, but the IRS has not made a final decision as to its position if this were to occur.

" A "

2. Pending the Supreme Court decision in Bob Jones and Goldsboro, is the IRS granting tax exemption under Section 501(c)(3) for new schools applying for tax exemption which discriminate based on race? Similarly, is the IRS now auditing schools which are already exempt to determine if they discriminate based on race? Please give information about the level of enforcement effort in these areas.

ANSWER:

See answer to No. 1.

[Ask the IRS regarding the auditing question.]

3. For the period between the enactment of this bill and a decision by the Supreme Court in Bob Jones, would tax credits be allowable for tuition payments to private schools failing to qualify for exemption because of failure to maintain and publicize a racially nondiscriminatory policy, as required in Rev. Proc. 75-50?

ANSWER:

After the bill is enacted, there would be two cases in which tuition tax credits would be disallowed because of racial discrimination. One would be a case in which the Attorney General is successful in seeking a declaratory judgment that the school has followed a racially discriminatory policy and has, pursuant to such policy, discriminated against the person filing the petition. This action does not depend upon the Bob Jones case and could be brought between the date of enactment and a decision by the Supreme Court. Obviously, tuition tax credits would not be allowable where a judgment had been won by the Attorney General.

The ultimate allowance of tuition tax credits for discriminatory schools where there is no declaratory judgment proceeding depends upon the Bob Jones decision. If these

schools are held to be tax-exempt under the Bob Jones decision *denying tax exemptions to such schools is not* and ~~there is no~~ legislation ~~that is~~ passed by the Congress,

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There are three situations ~~with possible disallowances in~~
~~the~~ interim before the Bob Jones decision:

1. The school applies for its initial exemption and fails to meet the standards of Revenue Procedure 75-50 for racial discrimination. ~~(No school outside Mississippi has failed to meet these standards to date.)~~ These cases would be held in suspense until a decision were rendered in Bob Jones. If a case is held in suspense for more than 270 days, the school could bring a declaratory judgment proceeding in the Tax Court asking the Court to declare it tax-exempt (section 7428). If the Tax Court rendered its opinion before the Bob Jones decision, the allowance or disallowance of tuition tax credits would depend upon the Tax Court decision.
2. A school that has already been given its exemption fails to meet the revenue procedures. The possible revocation of the exemption would be held in suspense until the Bob Jones decision, but in the interim the school continues to be exempt and credits may be claimed. If the Bob Jones decision would cause the school to lose its exemption,

presumably the credits could be disallowed retroactively for open years.

3. Unincorporated church schools do not have to apply for exemption; they are automatically tax-exempt as churches. These schools, like the schools in case 2, continue to be exempt and tuition tax credits could be claimed with respect to them. Again, if the Bob Jones decision were to render these schools nonexempt, tuition tax credits could be disallowed retroactively for open years.

4. Assuming that the Supreme Court affirms the Bob Jones and Goldsboro cases, and decides that federal tax-exemption cannot be granted to private schools maintaining racially discriminatory policies, would the enactment of this bill have any effect on the procedures and standards applicable in determining whether a school qualifies for tax-exemption?

ANSWER:

No. This bill has no effect on the law under section 501(c)(3).

5. Assuming that this bill is enacted, and that the Bob Jones and Goldsboro cases are affirmed, would the IRS be required to deny tax-exempt status, and thereby deny tuition tax credits, for a school that fails to maintain a racially nondiscriminatory policy as to students?

ANSWER:

Yes. If the Bob Jones case is affirmed and holds that the IRS is required to deny tax exemption to a school that racially discriminates, then the IRS will do so. Under the bill, no tax credits are allowable if a school is not exempt under section 501(c)(3).

6. S. 2673 vests exclusive enforcement responsibility for certain of the bill's nondiscrimination rules with the Attorney General. Will approval of this bill imply any Congressional view on the issue of whether a private individual has standing to challenge the tax-exempt status of an institution? This issue may be reviewed by the Supreme Court in the Wright case.

ANSWER:

We do not believe that the bill has any implications about private rights of action in challenging the tax-exempt status of an institution. The bill does not affect the law under section 501(c)(3). Further, the new proceeding by the Attorney General is not a suit to deny tax exemption, but rather is a suit ~~wholly~~ concerning ^{only} the disallowance of tuition tax credits on a ground separate and apart from tax exemption. ✓

The government's position in the Wright case is clear and a matter of public record in its ^{brief to the} ~~application for~~ Supreme Court ~~review~~ in this most important case. A private individual should not be able to challenge the tax-exempt status of an institution, ^{and this} ~~If the bill contains~~ ^{no} ~~any~~ implications ^{to the contrary.} ~~about the result to be reached in that case, however, it is inadvertent.~~

7. Under the bill, if the Attorney General prevails in a declaratory judgment proceeding, credits are disallowed for three years beginning with the calendar year the lawsuit is commenced. If litigation lasts longer than three years, and the school's practices do not change, is it intended that credits would begin to be allowable merely because the three-year period has elapsed? (Question A.) Similarly, if the school continues to maintain a discriminatory policy, will the Attorney General be required to bring a new lawsuit every three years? (Question B.) If so, will the subsequent lawsuit be authorized only upon the receipt of a petition by a victim of discrimination? (Question C.)

ANSWER:

7. A. Yes. The three-year penalty is imposed for a proven act of discrimination and a proven racially discriminatory policy. For the penalty to extend for an indefinite period of years would discourage the school's use of the judicial process, i.e., its right to appeal. If the school persists in discriminating, it would be relatively easy for a complainant to file another complaint, considering that one has already been filed. The litigation burden will always fall on the Attorney General, not the complainant.

B. Yes. A new lawsuit must be filed in order to prove judicially that the school is still pursuing a racially discriminatory policy.

C. Yes.

8. The bill "authorizes" declaratory judgment proceedings when a petition is filed by an alleged victim of racial discrimination. If the Attorney General determines that the claim has merit, will he be required to bring a lawsuit, or is this enforcement procedure wholly discretionary?

ANSWER:

The Attorney General always has discretion in civil rights and other kinds of cases as to whether to bring a lawsuit. Also, under the bill the Attorney General must give a school the opportunity to settle a case before a complaint is filed.

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must revise
if "shall"
is incorp'd
in bill.*
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~~private complaint is meritorious~~ and he cannot settle the ~~claim~~ *cause,"*
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school.

The declaratory judgment proceeding and the bill itself ~~is~~ *are* intended to force schools to abandon racially discriminatory policies. If the Attorney General can settle a suit by having a school revise its policy, we believe that that result is as desirable and as effective as a final court judgment.

9. Will the Attorney General's lawsuit be concerned only with the specific act of discrimination alleged in the petition, or is the petition a triggering device, authorizing the Attorney General and the court to review the school's racial policies in general?

ANSWER:

The Attorney General must seek a declaratory judgment that the school has followed a racially discriminatory policy and that the school has, under that policy, discriminated against the person filing the petition. Although the Attorney General may investigate the school's policies after a petition has been filed with him, if the school's policies are discriminatory but the Attorney General concludes that no act of discrimination has in fact occurred, he cannot bring a declaratory judgment proceeding.

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10. When the Attorney General permits the school to comment on allegations of racial discrimination during the period before filing suit, will the individual petitioner also be permitted to participate?

ANSWER:

The individual petitioner will have the first opportunity to provide information to the Attorney General as to the substance of his complaint. During the course of the investigation, the Attorney General could be expected to talk to both the school and the petitioner numerous times, depending on the complexity of the complaint.

11. Will the Attorney General be permitted to maintain the confidentiality of the individual petitioner?

ANSWER:

No. The Attorney General must promptly give a school written notification of the petition and the allegations against the school. Since the Attorney General would seek a judgment that the school has discriminated against the person filing the petition, the school must know the specific instance of discrimination that is being alleged in order for it to defend itself.

12. If a school agrees to admit an individual, who petitioned claiming that he was refused admission on account of race, would the school's correction of the specific act alleged in the petition render the Attorney General's lawsuit moot, or could the Attorney General and the court proceed to review the school's racial policies generally?

ANSWER:

~~The Attorney General is authorized to discontinue the suit~~
~~if he determines that the school has abandoned its racially~~
~~discriminatory policy,~~ ^{the suit would be discontinued.} However, if he determines that the school intends to maintain its racially discriminatory policy, and the specific act ^{of discrimination} ~~complained of~~ ^{was} ~~had been~~ reversed solely for the purpose of avoiding litigation, he would be ^{expected} ~~authorized~~ ^{required?} to continue the litigation. ^{Under such circumstances,} ~~Even under those facts,~~ the ^{elements} ~~requirements~~ of ^a ~~Section 7408(a)~~ ^{claim} ~~would be met, i.e., the Attorney General would allege~~ that the "educational institution has followed a racially discriminatory policy and has, pursuant to such policy, discriminated against the person filing the petition" -- ⁹⁰ would be met.

QUESTION (13):

If a school with a racially discriminatory policy under investigation by the Attorney General dropped the policy, would the Attorney General seek any sanction based on the period of time that the school had a racially discriminatory policy in effect?

ANSWER:

Accordingly,
If a school under investigation by the Attorney General drops its racially discriminatory policy, it is intended that the Attorney General would not seek any sanction based upon the time during which the school discriminated. The purpose of the declaratory judgment proceeding is to encourage schools to abandon discriminatory policies. In our view, a settlement by the school is as effective in this regard as a declaratory judgment.

QUESTION (14):

How will the IRS collect tuition tax benefits given in prior years to parents with children in a school with a racially discriminatory policy? Would an amount such as provided in Section 7428 be provided?

ANSWER:

If tuition tax credits are disallowed because a declaratory judgment against a school has become final, deficiencies with interest would be assessed against parents ~~who~~ who claimed tax credits with respect to tuition paid to the school during the three-year period of disallowance. The bill keeps the statute of limitations open with respect to these tuition tax credits, and the Internal Revenue Service may assess a deficiency with respect to them within three years after a judgment declaring a school to be discriminatory becomes final.

The bill does not amend section 7428 to allow a protected amount of credit to be claimed during the three year period. Upon a final adjudication of discrimination, tax credits for the three year period would be disallowed in full.

15. If a school is under investigation by the Attorney General, and makes a slight modification in its racially discriminatory policy, how would it affect action by the Attorney General?

ANSWER:

~~Again, whether and how to proceed is up to the discretion of the Attorney General. If there still is a racially discriminatory policy, in existence, the Attorney General may determine that it is advisable to continue investigating and filing a complaint against the school.~~

If the school determines that the school under investigation continues to adhere to the ~~discriminatory~~ racially discriminatory policy,

it is intended that the investigation, and subsequent litigation, will continue.

16. The bill requires a school's annual certification regarding its nondiscrimination policy to be made under penalty of perjury. What purpose does this requirement serve, and how will it be enforced?

ANSWER:

Initially, the statements will hopefully influence the schools, for pecuniary reasons, to abolish any discriminatory policies they may have previously maintained.

The annual statement is then a threshold test for claiming a tuition tax credit. Schools that cannot attest under the penalties of perjury that they have not discriminated during the calendar year will not ~~have tuition expenses for which a credit~~^{qualify} ~~can be claimed~~.

Returns claiming the credit will be checked at IRS Service Centers for a copy of the statement. If the statement is not attached to the return, the return will be pulled and the credit will be disallowed.

The annual statement will also provide the Attorney General with additional weapons for prosecuting a discriminatory school. If the school has been filing annual statements, the Attorney General might have grounds for bringing a perjury prosecution, even if there has not been a private petition that

would allow him to bring a declaratory judgment proceeding. In addition, if there is a final court adjudication of discrimination by the school, the Attorney General may monitor the annual statements filed thereafter to see whether they are perjurious if the school has not changed its practices.

The Secretary of the Treasury can also alert the Justice Department to a statement that it has reason to believe is perjurious.

17. Will the school's annual statement regarding its nondiscriminatory policy be simply a conclusory statement, or would the Secretary, or the Attorney General, be authorized to require that the sworn statements describe the school's policies or practices in detail?

ANSWER:

It is intended that the annual statements track the language of the statute without further details. The school would declare that it has not followed a racially discriminatory policy during the calendar year and would indicate whether a declaratory judgment proceeding has been brought against it during that calendar year or either of the two preceding calendar years.

18. Will a school be required under this bill to publicize that it has a racially nondiscriminatory policy?

ANSWER:

The bill does not directly require a school to publicize that it has a nondiscriminatory policy in order for credits to be allowed, although the school will have to file an annual statement with the IRS and parents under the penalties of perjury that it has not followed a discriminatory policy during the calendar year.

Current IRS procedures in granting section 501(c)(3) exemptions to schools require schools to publicize annually that they do not have a discriminatory policy. Since a school must be exempt under section 501(c)(3) for a credit to be allowed, those schools that apply to the IRS for exemption must conform to IRS requirements.

Note:

Unincorporated church schools do not have to apply for exemption, so they do not have to publicize their policies as do separately incorporated schools, which must apply for exemption. However, they still must file the annual statement under this bill.

19. Under the bill, would religious schools be permitted to limit attendance to adherents of a particular religion? What sorts of religious limitations will be impermissible, if any?

ANSWER:

*the religion does not require
"adherents" to be of a particular race.*

Yes -- so long as ~~"adherents" to that particular religion~~
~~are not limited to a particular race.~~ In other words, a school may not use religion as a cover for discriminating on the basis of race.

QUESTION (20):

If a church school teaches a religious doctrine of racial separation, but does not practice segregation or exclusion on racial grounds, would it qualify for creditable tuition payments?

ANSWER:

Yes,
~~The bill concerns schools, not churches. Unincorporated church schools, if they meet all the requirements of the bill concerning the definition of an educational institution, would qualify.~~

~~The Attorney General may bring a proceeding to disallow tax credits because a school follows a racially discriminatory policy. The bill provides an explicit definition of what it means to follow a discriminatory policy. If the church school does not follow a racially discriminatory policy as defined in the bill -- that is, if the church school does not refuse students on account of race, does not discriminate in its programs, etc. -- then ~~presumably~~ the Attorney General has no cause of action against the church school, no matter what it preaches or what its tenets are.~~ *STET*

One of the requirements in the bill's definition of an educational institution is that the school (or the church in the case of an unincorporated church school) be tax exempt under section 501(c)(3). The extent to which a church school may discriminate and be exempt under section 501(c)(3) is one issue in the Bob Jones case. The bill does not affect the law under section 501(c)(3).

21. If a secular school teaches a secular doctrine of racial separation, but does not practice segregation or exclusion on racial grounds, would it qualify for creditable tuition payments?

ANSWER:

~~SE~~ ~~SE~~ Yes. See answer to Question

20.

No person may receive a tuition tax credit under this Act for any taxable year, if during such taxable year, the school denied any individual admission to or participation in any program or activity of the school, on the basis of race, color, or national origin. Any individual denied admission to or participation in any program or activity of the school on the basis of race, color, or national origin may file suit against the Commissioner of Internal Revenue in federal district court in the district in which the school is located to challenge the availability of tax credits for tuition at such school. In any such action, the school and any person receiving tax credits for tuition at such school shall be given reasonable notice and the right to intervene in the action. The Commissioner's authority to enforce this paragraph is limited to participation in such action, and compliance with the final judgment of the court.



OFFICE OF
THE UNDER SECRETARY OF EDUCATION

July 9, 1982

NOTE FOR BILL BARR

Attached are the answers on tuition tax credits you requested. We have omitted answering the first and last question per your note.

Sorry we couldn't get back to you by July 6 but as you know, some of the language was still in the process of being cleared by your folks over there.

Call if we can be of further assistance.


Gary L. Jones

Attachment

A large, handwritten signature in blue ink, possibly reading "file" followed by a stylized signature, is located at the bottom of the page.

in any school program, activity, or benefit, during the taxable year for which a credit is claimed under this section on account of that person's race, color, or national or ethnic origin."

(b)(1) CREDIT TO BE REFUNDABLE.--Subsection (b) of section 6401 of such Code (relating to amounts treated as overpayments) is amended--

(A) by striking out "and 43 (relating to earned income credit)" and inserting in lieu thereof "43 (relating to earned income credit), and 44F (relating to tuition tax credit)", and

(B) by striking out "39, and 43" and inserting in lieu thereof "39, 43, and 44F".

(2) Paragraph (2) of section 55(b) of such Code (defining regular tax) is amended by striking out "and 43" and inserting in lieu thereof", 43, and 44F".

(3) Subsection (c) of section 56 of such Code (defining regular tax deduction) is amended by striking out "and 43" and inserting in lieu thereof "43, and 44F".

(c) SEPARABILITY.--If any provision of section 44F of the Internal Revenue Code of 1954 (or any other provision of such Code relating to such section), or the application thereof to any person or circumstances, is held invalid, the remainder