

NLWJC - KAGAN

EMAILS RECEIVED

ARMS - BOX 093 - FOLDER -005

[04/09/1999-04/12/1999]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 9-APR-1999 09:00:18.00

SUBJECT: data collection language for Daschle bill

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

Here is the language that we (NEC, OMB, CEA, Commerce, EEOC, Labor, and the VP's office) and the women's groups have signed off on. Unless you have a problem with it, I am going to give it to Daschle's office and let them know they can put this in the bill. Thanks, Mary

Revised Pay Information Provision (S.71 in 105th)

Sec. 4 COLLECTION OF PAY INFORMATION BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Section 709 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following new subsection:

□(1) The Commission shall, not more than 18 months following the enactment into law of this subsection:

A. Complete a survey of data that is currently available to the federal government relating to employee pay information for use in the enforcement of the federal laws prohibiting pay discrimination and, and in consultation with other relevant federal agencies, identify additional data collections that will enhance enforcement of these laws, and

B. After consideration of this study and consultation with other relevant federal agencies, by regulation provide for the collection of pay information data from employers described by the sex, race, and national origin of employees.

(2) In implementing Section (1), the primary factor the Commission shall consider is the most effective and efficient means for enhancing the enforcement of the federal laws prohibiting pay discrimination. The Commission shall also consider other factors including: imposition of burden on employers; the frequency of reports including which employers should be required to prepare reports; appropriate protections for maintaining data confidentiality; and the most effective format of the report for data collection.

(3) There are authorized to be appropriated up to \$2 million to implement this section.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME: 9-APR-1999 10:08:58.00

SUBJECT: LRM MNB41 - - EDUCATION Conference Document on HR800 Education Flexibility

TO: Constance J. Bowers (CN=Constance J. Bowers/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Janet R. Forsgren (CN=Janet R. Forsgren/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Charles M. Brain (CN=Charles M. Brain/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Daniel I. Werfel (CN=Daniel I. Werfel/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Broderick Johnson (CN=Broderick Johnson/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Brian S. Mason (CN=Brian S. Mason/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Tanya E. Martin (CN=Tanya E. Martin/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Leslie S. Mustain (CN=Leslie S. Mustain/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Barry White (CN=Barry White/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Iratha H. Waters (CN=Iratha H. Waters/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: James J. Jukes (CN=James J. Jukes/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Dario J. Gomez (CN=Dario J. Gomez/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: William H. White Jr. (CN=William H. White Jr./OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Daniel J. Chenok (CN=Daniel J. Chenok/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Sandra Yamin (CN=Sandra Yamin/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Bethany Little (CN=Bethany Little/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Jonathan H. Schnur (CN=Jonathan H. Schnur/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Wayne Upshaw (CN=Wayne Upshaw/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: ogc_legislation (ogc_legislation @ ed.gov @inet [UNKNOWN])
READ:UNKNOWN

TEXT:

Note to EOP staff: you will not receive a hard copy of this LRM. (Note: the attachment is two pages long.)

----- Forwarded by Melissa N. Benton/OMB/EOP on 04/09/99
10:07 AM -----

LRM ID: MNB41
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Friday, April 9, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Melissa N. Benton
PHONE: (202)395-7887 FAX: (202)395-6148

SUBJECT: EDUCATION Conference Document on HR800 Education Flexibility Partnership Act of 1999

DEADLINE: 10 a.m. Monday, April 12, 1999

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The attached letter from Secretary Riley is directed to the conferees on HR 800. In the letter, Sec. Riley states that he would recommend that the President disapprove the bill, if it is enacted with unacceptable provisions that are in the Senate-passed bill.

The conference report is tentatively scheduled for House consideration on Friday, April 16th.

DISTRIBUTION LIST

AGENCIES:
30-EDUCATION - Jack Kristy - (202) 401-8313

EOP:
Barbara Chow
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 Brian S. Mason
 Sandra Yamin
 Broderick Johnson
 Daniel J. Chenok
 Daniel I. Werfel
 William H. White Jr.
 Charles M. Brain
 Dario J. Gomez
 Janet R. Forsgren
 James J. Jukes
 Constance J. Bowers

LRM ID: MNB41 SUBJECT: EDUCATION Conference Document on HR800 Education
 Flexibility Partnership Act of 1999
 RESPONSE TO
 LEGISLATIVE REFERRAL
 MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melissa N. Benton Phone: 395-7887 Fax: 395-6148
 Office of Management and Budget
 Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D74]MAIL486814319.136 to ASCII,
The following is a HEX DUMP:

FF575043500C0000010A02010000000205000000932B000000020000B2D0FEBFE0191A2857FD82
4CC01EA793E3E9421D990155AAC7E84A6736AE8ABE747AF15F6425A7FAB8CFD9DDAC5248A4CAD9
C3FA3708138682CED308E6D115976D228833B8CE8E9BF7118E9A1ABE6A46D3F2F3C4043487AA29

Dear Conferee:

I am writing to express my views on the House- and Senate-passed versions of H.R. 800, the Education Flexibility Partnership Act of 1999. As you know, "ED-Flex" authority permits States to waive certain statutory and regulatory requirements that apply to Federal education programs in a manner that complements State educational reform efforts and promotes achievement to high standards by all students. The Administration has long supported the concept of expanding ED-Flex authority beyond the 12 States allowed under current law, so long as that expansion does not undermine the purposes of those Federal programs and maintains a high degree of accountability for results. I am very pleased, therefore, that both bills would expand eligibility for ED-Flex status to all the States, as well as the District of Columbia and the Commonwealth of Puerto Rico, and couple that increased flexibility with a serious attention to maintaining accountability at the State and local level. The Senate bill, however, contains certain unacceptable provisions—unrelated to the expansion of ED-Flex authority—that, if enacted, would force me to recommend to the President that he disapprove the bill. I urge the Conferees to avoid such a disappointing and unnecessary result.

Turning to the ED-Flex provisions, I am very pleased that both bills have strong provisions for ensuring State monitoring of local ED-Flex activities and termination of waivers that have inadequate or harmful results. With regard to the following provisions, I offer the following views:

- Public notice and comment. I am pleased that both the Senate and House versions contain provisions to enhance parental involvement in the ED-Flex waiver process. In order to maximize parental involvement and improve ED-Flex waivers, I support the Senate's provision on this issue, with the addition of language included in the House bill requiring the public notice to contain a description of any expected improvements in student performance and the public comments received by the State and local education agencies to be made available for public review.
- Expansion of ED-Flex Authority. With regard to the expansion of the ED-Flex authority, I support the Senate version that does not permit the State to waive its own requirements.
- Accountability Provisions. With respect to State eligibility for ED-Flex status, I support the more rigorous conditions in the House bill, as they apply to implementation of standards and assessments under Title I of the Elementary and Secondary Education Act of 1965 (ESEA). With respect to the State's application for ED-Flex status, I support the language in the Senate bill, which focuses on how ED-Flex authority will assist in implementing the State's comprehensive reform plan. Regarding the renewal of Ed-Flex authority, I support the more rigorous requirements in the House version that require the State to show measurable progress toward achieving the State's educational objectives.

Waivers Not Authorized. With respect to waivers that would not be authorized, I strongly support both the House and Senate versions regarding school eligibility for Title I Part A since both these provision target funds more directly on high poverty schools.

State Reporting. I believe that complete State reporting of ED-Flex results is important and so support the provisions of the House bill relating to annual State reporting to the Secretary about the numbers and characteristics of waivers granted.

Sunset Provision. Finally, I strongly support the provision of the House bill that would "sunset" this Act upon enactment of the upcoming reauthorization of the ESEA, because it is vitally important that continuation of ED-Flex authority be made consistent with changes to the underlying Federal programs to which it applies.

Class Size

Last fall, Congress enacted and funded, on a bipartisan basis, a down payment on the President's plan to help the Nation's school districts reduce class sizes in the early elementary grades. Regrettably, the Senate bill contains amendments to the class size reduction authority that would undermine its impact by permitting local school districts to use funds received under that initiative not to reduce class size, but to meet obligations they are already required to meet under Part B of the Individuals with Disabilities Education Act. The value of reducing class size in the early elementary grades is supported by the research, and doing so is one of the most important things we can do to honor our national commitment to ensuring equal educational opportunity for all our children. Moreover, reducing class size in the early grades allows teachers to identify, and work more effectively with, students who have learning disabilities, thereby potentially reducing those students' need for intensive special education services in the later grades. Rather than undermining the bipartisan effort to reduce class size--and setting parent against parent in school districts across the country--I would have supported a bill that extended the President's initiative, so that school districts could plan to hire additional qualified teachers, provide additional classrooms, and take the other steps necessary to reduce class size. I certainly cannot support a bill that contains these Senate amendments and would recommend that the President disapprove it, if it were presented to him.

The Office of Management and Budget advises that there is no objection to the submission of this report and that from the standpoint of the Administration's program, enactment of H.R. 800 containing the Senate's amendments relating to the class size reduction initiative would not be in accord with the President's program. [Or do we want to say that enactment without the Senate amendments would be in accord with the President's program?]

Yours sincerely,

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 9-APR-1999 11:22:58.00

SUBJECT: Possible Surgeon General's OpEd on Tobacco

TO: J. Eric Gould (CN=J. Eric Gould/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

fyi -- the Post is apparently somewhat interested in publishing this and is proposing edits to shorten it. Will keep you posted.

----- Forwarded by Cynthia A. Rice/OPD/EOP on 04/09/99 11:20 AM

Cynthia A. Rice

04/02/99 01:48:02 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP

cc: J. Eric Gould/OPD/EOP

Subject: Possible Surgeon General's OpEd on Tobacco

We discussed on Monday the SG's draft Op-Ed on tobacco.

I wanted you to know that the SG made the edits we wanted, including explicitly making a pitch for Congress to ensure settlement funds are used to prevent youth smoking, and has begun to shop the piece, starting with the Post, but don't expect any reaction until at least early next week.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 9-APR-1999 12:36:39.00

SUBJECT: Op ed

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO]) .

READ:UNKNOWN

TEXT:

----- Forwarded by Mary L. Smith/OPD/EOP on 04/09/99
12:36 PM -----

Rebecca M. Blank
04/09/99 12:31:23 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc: Cordelia W. Reimers/CEA/EOP, Nora E. Gordon/CEA/EOP
Subject: Op ed

As some of you know, Ann Lewis asked if the CEA could produce an op ed by Janet Yellen, presenting the Administration's concerns with the gender pay gap (and at least indirectly responding to the recent AEI book.) Attached is a copy. I've sent this to Ann's office for their suggestions and input, but also want you to have a chance to look at it as well. Can you get comments back to Cordelia Reimers by COB today?

Thanks much.

Message Sent

To: _____
Jennifer M. Luray/WHO/EOP
Kelley L. O'Dell/WHO/EOP
Shirley S. Sagawa/WHO/EOP
Mary L. Smith/OPD/EOP
Thomas L. Freedman/OPD/EOP

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D30]MAIL46332631Q.136 to ASCII,
The following is a HEX DUMP:

FF57504370040000010A020100000002050000009D190000000200004A54360E6E26C536BBF118

4FA70318988B8C9FDF8C9DA871C2BBED5E7CE9DD21D999DD694F1416E33508F17960CDE914B34B

Shrinking the Gender Pay Gap

Janet Yellen

Since the Equal Pay Act was signed into law by President Kennedy in 1963 women workers have made enormous strides. For example, in the Clinton Administration, women hold seven cabinet-level positions, including Secretary of State, Attorney General, and chair of the Council of Economic Advisers. Does this mean that all the barriers have been removed and women now have equal access to the good jobs and higher wages long available only to men? Unfortunately, no.

Before the Equal Pay Act, employers regularly paid women less than men doing the very same job. Since then, new cohorts of women have overtaken men in educational attainment over the last 35 years, and women are entering many high-paying formerly “male” occupations, such as law, medicine, and accounting, in large numbers. Moreover, women are taking fewer years out of the labor force for child-rearing, which means they are accumulating greater work experience. As a result, by 1998 women’s wages had risen to 76 percent of men’s.

While 76 cents on the dollar represents progress, the earnings gap remains much too high. Research on the causes of the remaining gender pay gap were summarized in a recent report by the Council of Economic Advisers. The evidence suggests that about 60 percent can be explained by continuing differences in accumulated years of full-time work experience between

men and women, in the broad occupations and industries in which women and men are concentrated, and in union status. After adjusting for these differences -- some of which may themselves be due to differential treatment of women versus men -- the pay ratio rises to about 90 percent, leaving an ongoing 10 percent unexplained gap between men and women's pay.

Interestingly, the evidence suggests that most of the unexplained pay gap is currently concentrated among women with children. Younger childless women receive pay almost at par with younger men. But mothers' wages are an estimated 10 percent lower than those of childless women with the same levels of education and workforce experience.

Some have argued that the prevalence of lower pay for mothers results from the inherent difficulty women face in combining careers with childrearing and is not a problem requiring a public policy response. After all, if women choose to have children, they must bear the consequences. But the impact of family and children on women's careers and earnings is not an unalterable consequence of biology. Rather, it results from current social arrangements and workplace practices that make it difficult to combine career and family.

These behaviors can change, and indeed are changing: fathers can spend more time in household and child-rearing tasks, and employers can offer family-friendly scheduling and benefits policies. Policies to reduce the gender gap further must focus on making it easier for parents -- both women and men -- to combine work and family. For instance, government can help assure that family and medical leave is available to workers, and can increase the

availability of safe and affordable child care.

Gender discrimination in the labor market has not disappeared, as the 24,500 gender-discrimination complaints filed with the Equal Employment Opportunity Commission in 1998 attest. And research consistently finds evidence of ongoing discrimination in the labor market and differential treatment of women on the job.

In many workplaces discrimination may take more subtle forms today than in the past. A recent report on female faculty at MIT indicated that even this group of highly skilled, high-achieving women faced discrimination, which the report defined as “a pattern of powerful but unrecognized assumptions and attitudes that work systematically against women faculty even in the light of obvious good will.” This is a familiar story for women who regularly feel that they are treated less seriously, excluded from key decision-making, or passed over for a project assignment without even being asked (“we know she won’t want to do this given her family demands”).

Working toward gender pay equity means fighting workplace discrimination of all types, and strongly enforcing the Equal Pay Act. But it also means promoting policies that allow workers to be both good parents and effective employees. Raising our children to be well-functioning adults may be the most important thing many of us will do in our lives, and this task is vitally important to the future of our nation. We must find ways to support rather than penalize workers who are also active and involved parents.

Janet Yellen is chair of the Council of Economic Advisers, and a parent.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 9-APR-1999 13:04:07.00

SUBJECT:

TO: ELENA (Pager) #KAGAN (ELENA (Pager) #KAGAN [UNKNOWN])

READ:UNKNOWN

TEXT:

NEC Labelling Mtg. is starting in 211 & NEC Medicare mtg. is starting in
Roosevelt Room

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Cathy R. Mays (CN=Cathy R. Mays/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 9-APR-1999 13:19:53.00

SUBJECT: Team Leaders Meeting

TO: Nicole R. Rabner (CN=Nicole R. Rabner/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Paul J. Weinstein Jr. (CN=Paul J. Weinstein Jr./OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Karin Kullman (CN=Karin Kullman/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Eugenia Chough (CN=Eugenia Chough/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Essence P. Washington (CN=Essence P. Washington/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Teresa M. Jones (CN=Teresa M. Jones/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Bethany Little (CN=Bethany Little/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

There will be a DPC Team Leaders Meeting on Monday, April 12, at 9:30 a.m. in Bruce's office.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 9-APR-1999 14:09:49.00

SUBJECT: Re: LRM MNB41 - - EDUCATION Conference Document on HR800 Education Flexibi

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP @ EOP [OMB])

READ:UNKNOWN

TO: Broderick Johnson (CN=Broderick Johnson/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP @ EOP [OMB])

READ:UNKNOWN

TEXT:

Is there a reason we say "disapprove" rather than veto?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Nicole R. Rabner (CN=Nicole R. Rabner/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 9-APR-1999 15:54:08.00

SUBJECT: Monday child care event

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

As I mentioned in the staff meeting, the First Lady is doing a child care event on Monday morning to push our child care initiative and make two announcements: (1) release a new Consumer Product Safety Commission checklist for parents and child care providers of "hidden hazards" to look for in child care settings, based on a study done by the Commission; and (2) announce new efforts by Lifetime Television to amplify parents' voices on their child care struggles. The Commission leaked its report to USA Today and reports that it may make the front page. Also, FYI, Senator Dodd is likely to join HRC for the event.

On the legislative front, Janet Murguia reported that the House will not vote on a motion to instruct the conference committee on child care. Gephardt and others want to do Medicare.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Bethany Little (CN=Bethany Little/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:12-APR-1999 09:05:16.00

SUBJECT: Civil Rights Meeting

TO: Edward W. Correia (CN=Edward W. Correia/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Tanya E. Martin (CN=Tanya E. Martin/OU=OPD/O=EOP [OPD])

READ:UNKNOWN

TO: Peter Rundlet (CN=Peter Rundlet/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Jonathan H. Schnur (CN=Jonathan H. Schnur/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

A meeting to discuss civil rights guidance for charter schools and the editorial written on Bill Lan Lee and charter schools has been scheduled for Tuesday, April 13 at 11:00 am. It will be in Room 211. Thanks!

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Andrea Kane (CN=Andrea Kane/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:12-APR-1999 12:22:45.00

SUBJECT: NYC shelter policy

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN.

CC: Nicole R. Rabner (CN=Nicole R. Rabner/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

Here's what I was able to find out about Mayor Guiliani's plans to apply welfare reform requirements to shelter residents. We'll monitor for future developments and keep you updated.

Based on a 1981 court case, shelter has been provided in New York as a legal right to anyone who is homeless, with few conditions attached. State rules adopted in 1995 allow shelter to be treated as a form of public assistance, and shelter residents would therefore be subject to the same requirements (including workfare) as other welfare recipients. Other areas in NY state have implemented these rules, but NYC has delayed doing so due to pending court cases. Several recent legal decisions have come out against homeless advocates, and it appears that that City staff is now developing a plan to implement these requirements. However, the Human Resources Administration staff I spoke with maintain that the Mayor has not yet made an official announcement, and the AP story on 2/20/99 confirms that the City has not yet set a date to start following the state rules.

While it's hard to pin down the details of the rules while they are still being developed, the 2/20/99 NYT story indicates the new rules would make workfare and other welfare reform requirements a condition of eligibility for approximately 4,600 families and 7,000 single adults in the NYC shelter system. It also indicates that shelter operators would be required to expel homeless individuals or families who were cut off from public assistance (to prevent individuals who had been sanctioned under PA from turning to the shelter system as an alternative). Since about half of the single adults and most of the families in shelters are on public assistance and therefore already subject to NYC's welfare reform rules, these are not necessarily new requirements on most of the individuals, but would mean that individuals who did not comply with the requirements would now risk losing shelter in addition to cash assistance. The Mayor and city officials maintain that extending the requirements to shelter would help move people to self-sufficiency, while advocates and critics voice concerns that this would take away a critical safety net and force children into the child welfare system. It is not clear at this point how the requirements would apply to individuals who might not otherwise be subject to the requirements through the welfare system, i.e. children in homeless families, individuals with mental or physical disabilities, substance abusers or illegal immigrants.

The AP and NYT stories from 2/20/99 are attached

The NYT story mentions that there was to be a hearing on 3/11 on applying the requirements to homeless adults. I did a Lex/Nex search on NY papers beginning on 3/11 and found no coverage of the hearing or related issues.

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ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

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AP Online

February 20, 1999; Saturday 18:13 Eastern Time

SECTION: Domestic, non-Washington, general news item

LENGTH: 237 words

HEADLINE: NYC Makes Homeless Work for Shelter

BYLINE: CHELSEA J. CARTER

DATELINE: NEW YORKBODY:

Homeless people who sleep in city shelters will have to work at city jobs or be expelled, Mayor Rudolph Giuliani said Saturday.

Critics of making workfare a condition to sleep in shelters say the move would force thousands into the streets.

Under workfare, those who receive public aid are required to work at city jobs, including cleaning parks and performing clerical tasks, in exchange for their benefits.

The workfare condition would require city-funded homeless shelters to expel any homeless adult or family cut from public assistance for failing to comply, and as a result require officials to report any child to child protective services in jeopardy of ending up on the street.

Giuliani said officials try to reincorporate homeless people into the work force. "Maybe that will do more for them ultimately than all the fancy government programs that were keeping people dependent for 30, 40 and 50 years," he said.

About 4,600 families and 7,100 single adults use the city's homeless shelters at any given time.

Although the mayor has not set a date to implement the plan, critics blasted the plan, saying it would destroy families and the little stability that homeless people have.

"It's sick. The thought that because you are cut off public assistance, you would then lose your place to sleep too is sick," said Mike Polenber of the Coalition for the Homeless in New York City.

10TH STORY of Level 1 printed in FULL format.

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The New York Times

February 20, 1999, Saturday, Late Edition - Final

SECTION: Section A; Page 1; Column 5; Metropolitan Desk

LENGTH: 1264 words

HEADLINE: New York City Plans to Extend Workfare to Homeless Shelters

BYLINE: By NINA BERNSTEIN

BODY:

Backed by state regulations, the Giuliani administration is preparing to make workfare and other requirements a condition of shelter for the 4,600 families and 7,000 single adults in New York City's homeless shelter system, said city officials with knowledge of the plans.

The change would make the city's homeless shelters subject to the same system of rules, work requirements and sanctions that its welfare offices have used to move more than 400,000 people off public assistance.

Until now, shelter has been considered a form of aid separate from cash relief. Under a 1981 court decree, the city has provided shelter as a legal right to anyone who is truly homeless, virtually without conditions.

But state rules adopted in 1995, treat shelter as simply another part of public assistance, and to keep a bed, shelter residents must meet the same eligibility standards as any welfare recipients. The city has held off putting the new rules into effect because of legal challenges.

Although the city says the rules are intended to push people to self-reliance, advocates for the homeless contend that the changes threaten to send hundreds of homeless children and adults onto the streets.

Elsewhere in the country, the effects of welfare cutbacks on shelters are indirect because most shelter systems are supported by a patchwork of private charities and limited public financing, and residents enjoy no legal right to shelter. No other city in the nation has as comprehensive a publicly funded shelter system as New York's.

Around the state, where the rules are already in place, some shelters have been forced to close because the regulations made their budgets plummet with the welfare rolls, pushing some people onto the street.

New York City has not set a firm date to start following the state rules, but three of four court decisions on the matter have gone against advocates for the homeless, and the city has been quietly making preparations for systemwide change.

The rules require nonprofit agencies operating shelters under contract to the city to expel any homeless adult or family cut from public assistance. If children are in jeopardy, the agencies are required to make a referral to child protective services for possible foster care placement. Although about half the single adults and most of the families in the city's homeless shelters are already on public assistance, all would be newly vulnerable to expulsion under the regulations.

Last month, the city began requiring all men who apply for emergency shelter at the central intake center on East 30th Street in Manhattan to undergo "finger-imaging" by the state computer system used in welfare offices for identification, said Jack Madden, a spokesman for the State Office of Temporary and Disability Assistance.

A team from the city's welfare agency has been inspecting all shelters under contract to the city, including programs for the mentally ill, and asking how many residents are capable of work and which programs could be equivalent to a 35-hour work week, said providers whose shelters were inspected in recent weeks.

A plan to create a job center especially for the homeless, where shelter residents could be required to report in order to keep their beds, has been under discussion for months, said Debra Sproles, a spokeswoman for the city's welfare agency, the Human Resources Administration. She said that the location under discussion is a vacant welfare center at East 131st Street and Franklin D. Roosevelt Drive, but she declined to provide details.

Under the city's workfare program, welfare recipients are required to work at city jobs, including cleaning parks and performing clerical tasks, in exchange for benefits.

Federal law, fully in effect, requires only half the welfare caseload to be employed at any one time. But Mayor Rudolph W. Giuliani has vowed to have every recipient of aid doing 20 hours of work, plus 15 hours of work-related activities like education or drug treatment, by 2000. Under current welfare rules, single adults who miss a single hour of work can see their entire case closed. Last year, 69 percent of these home-relief clients in the work program were sanctioned

and removed from the rolls, for several months at least, city records show.

This week, the State Court of Appeals dismissed a motion by advocates seeking a further appeal of the rules as applied to homeless families. A court hearing is to be held on March 11 on whether applying the regulations to homeless adults violates a 1981 court decree in which the city guaranteed a mattress, clean sheets and soap to every homeless man, a legal right to shelter later expanded to women and families.

"We believe these regulations will help families move toward independent living," Susan Wiviott, a spokeswoman for the city's Department of Homeless Services, said yesterday. "We're working out how to implement the regulations best."

Since the 1980's, a variety of mechanisms have made entry into the shelter system harder and discharge easier, but requiring those seeking shelter to meet the same eligibility rules as welfare recipients would dwarf past changes, providers said.

Asked about the preparations this week, Jason Turner, the city's welfare commissioner, would only say, through a spokeswoman, that there had not been a shift in homeless policy.

But at conferences and in meetings with shelter providers, Mr. Turner has expressed concern that some who were cut from the welfare rolls have been able to go to shelters and food pantries without restriction, sidestepping sanctions intended to push them to self-sufficiency.

"We need to create, if you will, a personal crisis in individuals' lives" that cannot be avoided by alternative programs, he said in a speech at a Rockefeller Foundation forum attended by many shelter providers last fall.

Ms. Wiviott said that the city has agreed to give Steven Banks, director of the Legal Aid Society's Homeless Rights Project, a five-day warning before beginning to apply the state regulations to any homeless families.

Mr. Banks has vowed to mount a new legal challenge on the basis of a 1985 court ruling that children cannot be placed in foster care for lack of housing.

"It's a sea change," Mr. Banks said. "All along shelter was supposed to be the safety net for people who had fallen through the cracks of other bureaucracies."

Exactly how the city would apply public assistance requirements to the entire homeless shelter

population remains unclear. Children in homeless families, the mentally ill, the physically impaired, substance abusers and illegal immigrants are the most at risk from the regulations, said many of the shelter providers at the private, nonprofit agencies that operate most of the system's beds under contract to the city. Many said they had only recently learned the implications of the regulations.

Frederick Shack, the president of the Tier II Coalition Inc., an organization of 42 nonprofit agencies running shelters under contract to the city, said that at any given time, at least 10 percent of sheltered families had been mistakenly cited for noncompliance with public assistance regulations, and many others arrived with cases that had been wrongly closed.

"To heap loss of emergency shelter on top of the scramble for survival of a family facing loss of income and child care and other public assistance-related benefits will surely prove dangerous and expensive," he said last month in a letter to the State Office of Temporary and Disability Assistance.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:12-APR-1999 13:54:04.00

SUBJECT: Analysis of ED-Flex Targeting & Accountability

TO: Broderick Johnson (CN=Broderick Johnson/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

CC: Leslie S. Mustain (CN=Leslie S. Mustain/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TEXT:

Below is an analysis that Leslie prepared describing in some depth the ED-flex targeting and accountability provisions in the House and Senate bills as well as the House offer. The Administration position is reflected in the Ed flex letter now circulating for clearance this afternoon.

----- Forwarded by Barbara Chow/OMB/EOP on 04/12/99 12:41 PM -----

Leslie S. Mustain

04/08/99 01:48:36 PM

Record Type: Record

To: Barbara Chow/OMB/EOP@EOP

cc: Barry White/OMB/EOP@EOP, Wayne Upshaw/OMB/EOP@EOP, Iratha H. Waters/OMB/EOP@EOP

Subject: Analysis of ED-Flex Targeting & Accountability

In response to your request, attached is an analysis of the Targeting and Accountability provisions in the House and Senate versions of the proposed ED-Flex legislation. Please let me know if you need additional information, a different format, etc.

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

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ANALYSIS OF ED-FLEX BILL -- TARGETING AND ACCOUNTABILITY PROVISIONS

Targeting Provisions in ED-Flex Proposed Bills

House and Senate Provisions: The House bill would permit waivers "to allow schools to participate in part A of title I...if the percentage of children from low-income families in the attendance area of such school or who actually attend such school is within 5 percentage points of the lowest percentage of such children for any school in the local educational agency that meets the requirements of section 1113 of the Act." The Senate bill expressly prohibits waivers relating to "serving eligible school attendance areas in rank order under section 1113(a)(3) of the [ESEA]."

Analysis:

- Section 1113(a)(3) of the ESEA currently states that if, in allocating Title I-Part A funds, there are insufficient funds to serve all eligible school attendance areas, an LEA must annually rank the eligible schools in which the concentration of children from low-income families exceeds 75 percent from highest to lowest according to the percentage of children from low-income families. Then the LEAs must serve eligible schools in rank order.
- Current ED-Flex authority is silent on granting waivers regarding Title I eligibility and ED has approved waivers of the rank-order requirements for eligibility in the past.
- The Senate provision explicitly prohibits any waivers of the Title I rank-order requirements. Title I eligibility must remain targeted on high poverty schools.
- The effect of the proposed House provision is to allow waivers to permit additional schools to be eligible for Title I funds if they are marginally below the necessary poverty level. Although this would make some additional schools eligible for Title I funds, and thus is not as targeted as the Senate provision or the actual Title I statute, it is acceptable because it is better than current law and still targets on high-poverty schools (they have to be within 5 of the lowest poverty level).
- Because current ED-Flex authority is silent on this issue, both of these new provisions are more restrictive than current law. The Senate version would forbid any waivers affecting Title I eligibility and the House version would at least minimize the damage a waiver could do to Title I targeting, keeping Title I funds focused on high-poverty schools.

Administration's Position: Support both of these provisions. Both of them target Title I funds on high-poverty schools more directly than our current waiver authority.

Accountability Provisions in ED-Flex Proposed Bills

House and Senate Provisions:

State Eligibility: The House bill requires the State to have already "developed and implemented content standards and interim assessments and made substantial progress...toward developing and implementing performance standards and final aligned assessments, and toward having local educational agencies in the State produce [school performance] profiles." The House bill refers to disaggregation of data only by reference, not as an explicit requirement. The Senate bill requires only "substantial progress... toward developing and implementing the standards and assessments, and toward having local educational agencies in the State produce the profiles." The Senate bill would require the State to have implemented the requirements in section 1111(b) of the ESEA relating to the disaggregation of data.

The House bill requires an eligible State to hold LEAs and schools accountable for meeting the educational goals described in their local applications for a waiver. The Senate bill requires States to hold LEAs and schools accountable for meeting educational goals in the abstract and "for engaging in the technical assistance and corrective actions consistent with section 1116 of the [ESEA], for the local educational agencies and schools that do not make adequate yearly progress."

Analysis: Both bills make eligibility turn on the extent of implementation of Title I accountability systems, and both bills offer an alternative to States of either essentially complete or partial implementation:

- Under the essentially complete option, the Senate version is somewhat stronger because it explicitly requires the State to have implemented the requirements in section 1111(b) relating to the disaggregation of data whereas the House version does not specifically mention disaggregation of data, but does reference it.
- With respect to the partial implementation alternative, the House bill appears to be the more rigorous since it requires States to have implemented content standards and interim assessments and made substantial progress toward developing and implementing the next steps of performance standards, assessments and school performance profiles. The Senate version only requires substantial progress be made in all of these areas.
- With respect to holding LEAs and schools accountable for meeting educational goals, the House version is more rigorous in that it requires that the specific goals in the waiver application be met.

Overall, the House accountability provisions for State eligibility are stronger.

Administration's Position. We prefer the more rigorous requirements in the House version as they apply to implementation of standards and assessments under Title I of the ESEA and for holding LEAs and schools accountable for meeting educational goals.

State Application. The House bill requires the State's ED-Flex plan to include a "description of specific educational objectives the State intends to meet under [the] plan" and a description of how the State "will measure the progress of local educational agencies in meeting [those] specific goals." The Senate bill instead requires the State to include in its flexibility plan a description of how the plan is "consistent with and will assist in implementing the State comprehensive reform plan" and if a State doesn't have such a plan, "a description of how the educational flexibility plan is coordinated with activities described in section 1111(b) of the [ESEA]." The Senate bill also requires a description of how the SEA will evaluate the performance of students in LEAs and schools affected by waivers "consistent with the requirements of title I of the [ESEA]."

Analysis: Both bills have pretty rigorous application standards:

- The Senate version requires the State applications to reference State comprehensive plans or Section 1111(b) of ESEA (Title I standards and assessments).
- The House bill, but not the Senate, requires States to describe specific educational objectives in their applications. Although it does not make reference to the State comprehensive plan, the requirement that the applications specify the specific objectives does have merit in that it would facilitate monitoring and accountability by the State and others such as the Federal government and interest groups.
- The House version appears more focused on local requirements and specifically on progress. It requires States to measure local progress by using the local applicants' objectives, as defined by the section of the bill requiring local applicants to set specific and measurable goals for schools and groups of students affected by waivers. The Senate version requires States to evaluate the performance of local applicants and students affected by waivers in general, not defined by local applications.

Administration Position: We prefer the Senate version that requires the State applications to reference State comprehensive plans and have made reference to that in our letter. [We prefer the House version of the latter provision that requires a focus on local progress rather than just on performance, but we are silent on that in the letter. The House Majority Staff Offer indicates that the House version will be the one supported.]

Renewal of ED Flex Status. To determine whether a State's ED Flex status under the new law should be extended, the House bill would require the Secretary to determine whether the SEA

has made “measurable” progress toward achieving the objectives described in the application and whether the SEA can demonstrate that its LEAs and schools have made “measurable” progress in achieving the results describe in the application. The Senate bill would require that the Secretary review generally the progress (absent the word “measurable”) of the SEA, LEA, or school towards meeting the goals set in the applications.

Analysis: The House version is more rigorous and it requires measurable progress.

Administration Position. We support the House version and want the words “measurable progress” to remain in the provision.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:12-APR-1999 14:11:29.00

SUBJECT:

TO: ELENA (Pager) #KAGAN (ELENA (Pager) #KAGAN [UNKNOWN])

READ:UNKNOWN

TEXT:

FYI- 2:00 Education Mtg. is starting now in Bruce's office

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:12-APR-1999 14:51:30.00

SUBJECT: LRM MNB44 - - LABOR Qs and As on S385 Safety Advancement for Employees (SA

TO: Janet R. Forsgren (CN=Janet R. Forsgren/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Peter Rundlet (CN=Peter Rundlet/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Caroline R. Fredrickson (CN=Caroline R. Fredrickson/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Sandra Yamin (CN=Sandra Yamin/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Cordelia W. Reimers (CN=Cordelia W. Reimers/OU=CEA/O=EOP@EOP [CEA])

READ:UNKNOWN

TO: Karen Tramontano (CN=Karen Tramontano/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Lisa B. Fairhall (CN=Lisa B. Fairhall/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

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READ:UNKNOWN

TO: Robert G. Damus (CN=Robert G. Damus/OU=OMB/O=EOP@EOP [OMB])

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TO: Richard J. Turman (CN=Richard J. Turman/OU=OMB/O=EOP@EOP [OMB])

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TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])

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TO: Barry White (CN=Barry White/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

LRM JUSTICE (LRM JUSTICE [UNKNOWN])
READ:UNKNOWN

LRM HHS (LRM HHS [UNKNOWN])
READ:UNKNOWN

LRM National Labor Relations Board (LRM National Labor Relations Board [UNKNOWN])
READ:UNKNOWN

LRM COMMERCE (LRM COMMERCE [UNKNOWN])
READ:UNKNOWN

LRM Small Business Administration (LRM Small Business Administration [UNKNOWN])
READ:UNKNOWN

LRM Office of Personnel Management (LRM Office of Personnel Management [UNKNOWN])
READ:UNKNOWN

TEXT:

Note to EOP staff: you will not receive a hard copy of this LRM.

The attachment is 11 pages long.

----- Forwarded by Melissa N. Benton/OMB/EOP on 04/12/99

02:45 PM -----

LRM ID: MNB44

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Monday, April 12, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative
Reference

OMB CONTACT: Melissa N. Benton

PHONE: (202)395-7887 FAX: (202)395-6148

SUBJECT: LABOR Qs and As on S385 Safety Advancement for Employees
(SAFE) Act of 1999

DEADLINE: 11 a.m. Wednesday, April 14, 1999

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS:

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 Courtney B. Timberlake
 Janet R. Forsgren
 LRM ID: MNB44 SUBJECT: LABOR Qs and As on S385 Safety Advancement for
 Employees (SAFE) Act of 1999
 RESPONSE TO
 LEGISLATIVE REFERRAL
 MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melissa N. Benton Phone: 395-7887 Fax: 395-6148
 Office of Management and Budget
 Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D73]MAIL41635061D.136 to ASCII,
The following is a HEX DUMP:

FF575043720F0000010A0201000000020500000036A500000002000084FC690C3AABB478B677A1

The Honorable Michael B. Enzi
Subcommittee on Employment, Safety and Training
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, DC 20510-3202

Dear Senator Enzi:

Thank you for the opportunity to testify before the Subcommittee regarding S.385, the SAFE Act. OSHA is committed to working collaboratively with labor and industry to seek the most effective ways to keep America's workplaces safe and healthy.

I enclose OSHA's responses to the questions posed by the Subcommittee members in your March 24, 1999 letter. I hope that these responses will be helpful in clarifying OSHA's views. I look forward to continuing our discussion about how best to improve workplace safety and health.

Sincerely,

Charles N. Jeffress
Assistant Secretary

Enclosure

Enclosure

1. *Please explain your hearing testimony which strongly suggests that you believe that government employees (e.g. OSHA compliance officers) have more integrity when it comes to protecting worker safety and health than private consultants who are bound by the strict codes of ethics of their profession. Evidence of such a belief is reflected in the following statements of your testimony:*

“[T]he private sector is driven by the market, not a mandate to protect employee safety and health.”

“The consultant would feel pressured to sell penalty exemptions without rigorously inspecting workplaces in order to create business.”

My testimony should not be interpreted to mean that I believe OSHA compliance officers have more integrity than private consultants. We believe that private consultants, as a whole, provide a valuable resource to employers and execute their responsibilities in a highly professional manner. We encourage employers to use private sector consultants to help them improve the safety and health conditions of their workplaces whenever possible.

The issue here is not one of integrity; it is an issue of neutrality and accountability. The issue is the avoidance of conflicts of interest.

OSHA inspectors, as Federal employees, are governed by the Standards of Ethical Conduct for Employees of the Executive Branch. These Standards, among other things, bar Federal employees from engaging in activities that impair their ability to perform their official duties impartially or result in conflicting financial relationships. Violations of the standards may result in civil and criminal sanctions. A Federal employee who accepted money from an employer whose facility he or she inspected would be guilty of violating the criminal conflict of interest laws even if the inspection was conducted with the utmost of professionalism.

OSHA has similar concerns about the need to ensure the impartiality of consultants as the Congress has for Federal employees. These private consultants, who are paid by an employer and whose work under the legislation would result in penalty exemptions for that employer, may not remain neutral and objectively perform their duties. The legislation would create an inherent conflict of interest. For example, they risk alienation of future income if they issue strict interpretations of compliance.

We encourage the use of professional safety and health consultants. However, even though professionals may be covered by their professions' ethical codes, the rules applicable to Federal employees are designed to ensure their neutrality and to hold them accountable if they do not remain neutral. We are, therefore, opposed to the use of paid consultants whose services, as envisioned by your legislation, may result in penalty exemptions because of the consultants'

inherent conflicts of interest.

2. *Your testimony states that OSHA can discipline OSHA inspectors who are not performing "to our standards," yet cannot adequately discipline "unconscientious consultants" who could inflict harm on "thousands of working Americans." (P.7) Please explain why a consultant would not be deterred from such behavior by criminal penalties under Section 17(g) of the OSH Act for making "any false statement, representation, or certification," and would not be deterred by the revocation of a license by the professional certifying body for such behavior?*

OSHA does not believe that the OSH Act's current provisions would effectively combat fraudulent behavior by private consultants, because resource constraints, combined with high burdens of proof and classification of the crime involved as a misdemeanor, make it extremely unlikely that unconscientious consultants will be detected, prosecuted, and convicted.

First of all, the burden of proof is high. Section 17(g) states that a defendant's falsification must be "knowing," presenting U.S. Attorneys with complex issues of proof regarding state of mind. As Section 17(g) is a criminal provision, the defendant's state of mind must be proven beyond a reasonable doubt. Second, even if a defendant is found guilty, a conviction under Section 17(g) is only a misdemeanor and, thus, provides an insufficient deterrent. Finally, the percentage of private consultants engaging in criminal activity would undoubtedly be small. Given the large number of private consultants that would seek certification under this bill, however (OSHA estimates the number of private consultants to be in the tens of thousands), it is unrealistic to expect that OSHA would be able to detect a significant proportion of the violations. In fact, very few cases have been prosecuted under Section 17(g), precisely because the threat of criminal prosecution is too remote to serve as an effective deterrent.

Nor do we believe that the license revocation provision in the bill serves as an adequate deterrent.

OSHA retains a level of authority over its own inspectors because of the employer-employee relationship. OSHA has implemented regular training and yearly evaluations of its inspectors, and can terminate an inspector's employment or take other appropriate personnel action when the inspector's work is subpar. Therefore, OSHA has the means to ensure that its inspectors are fairly and conscientiously applying its standards. On the other hand, OSHA could not discipline or dismiss consultants who have demonstrated a lack of ability in applying OSHA standards. As explained above, OSHA would also be unable to hold private consultants to the ethical standards addressed by the Standards of Ethical Conduct for Employees of the Executive Branch. Nor is it reasonable to assume that OSHA could exert sufficient influence over a licensing body to persuade it to initiate license revocation proceedings.

While undoubtedly only a few consultants might make false statements and certifications, it is far more likely that consultants seeking to continue a cooperative consultant relationship will temper their advice in accord with the employer's opinion. S. 385 does not address the impact that this relationship between the employer and the private consultant will have over the consultant's independent exercise of judgement.

Many standards promulgated pursuant to the OSH Act require OSHA inspectors to independently assess an employer's compliance with a standard. Under OSHA's construction standard, for example, an OSHA inspector is required to determine, pursuant to 29 C.F.R. §1926.20(b) (Accident prevention responsibilities), whether an employer has instituted regular and frequent inspections of a job site and, pursuant to § 1926.21(b)(2) (Employer responsibilities), whether employees have been instructed in the recognition and avoidance of unsafe hazards. OSHA inspectors also assess whether an employer falls within an exception to a requirement. Pursuant to § 1910.120(a)(1) (Hazardous waste operations and emergency response), for example, if an OSHA inspector concludes that there is no reasonable possibility that the employer's operation will expose employees to safety or health hazards resulting from hazardous waste, the employer will not be required to implement the provisions of the hazardous waste standard. Obviously, an OSHA inspector's determination of such issues involves the exercise of professional judgment (derived, in part, from institutional compliance knowledge) and potentially has a significant effect on the employer's operations.

3. *Please explain how the following statement in your testimony could be considered accurate given the following language taken expressly from S.385:*

Jeffress Testimony: "[U]nder the language of the legislation, it is entirely possible that an employer and consultant would agree to an Action Plan in which the employer is not required to come into full compliance with the OSH Act for many years."

S.385: "(4) Reinspection.-- At a time agreed to by the employer and the consultant, the consultant may reinspect the workplace of the employer to verify that the required elements in the consultation report have been satisfied. If such requirements have been satisfied, the employer shall be provided with a certificate of compliance for that workplace by the qualified consultant."

The language of the reinspection section of S.385 allows the employer and consultant to agree to conduct a reinspection at any time or not at all. This legislation sets no deadline regarding when reinspection activity must be conducted. Under this provision, it would be possible for an employer and a consultant to agree to reinspect in two weeks or in two years. Moreover, the provision contains permissive, not mandatory, language. The bill states that the consultant *may* reinspect, not that he or she must reinspect. OSHA is concerned that, in practice, this permissive language would permit a consultant to determine that an employer has met the terms of the Action Plan without reinspecting the worksite at all.

4. *I agree that all employers should be encouraged to have safety and health programs in place. But as a former small business owner, I am concerned that OSHA's draft safety and health program rule that requires a program "appropriate" to conditions in the workplace, an employer to evaluate the effectiveness of the program "as often as necessary," and "where appropriate," to initiate corrective action. I am concerned that these requirements are overly broad, overly vague, and at their core, are totally unachievable.*

My feeling is that OSHA may do what it likes to an employer who intentionally shirks his safety responsibility. But I have serious concerns when good faith employers— and particularly small businesses— feel that OSHA is a foe rather than an ally in promoting safety.

What guarantees can you give that enforcement of this rule would not be a kick in the teeth to good faith employers? What guarantees are there that OSHA's enforcement would remain flexible and fair?

OSHA has drafted the requirements in the present version of the proposed rule in very broad language to provide employers with great flexibility to develop and implement safety and health programs. OSHA, however, also was concerned that the program evaluation provisions in earlier drafts of the proposed rule did not give employers sufficient notice of its requirements. In its current draft of the proposed rule, therefore, OSHA sets forth specific parameters for program evaluation, directing employers to evaluate the program's effectiveness at least once within twelve months of the rule's compliance deadline, and thereafter (1) whenever the employer has reason to believe that all or part of the program is ineffective, (2) whenever there is a major change in the operations, and (3) at least once every three years. In addition to making the rule more specific, OSHA plans to provide many forms of nonmandatory compliance assistance materials, such as model programs and decision logics, and to work with trade associations and unions to help employers know what they have to do to comply with the rule.

Under the enforcement policy envisioned by OSHA in the current version of its draft policy directive, it is difficult to see how good faith employers could be issued serious citations or penalties for violating the proposed rule. A failure to comply with a requirement of the proposed Safety and Health Program rule will be treated as an "other than serious violation," and no penalty will be assessed as long as the employees are not exposed to a pattern of serious hazards. An employer will be cited for a serious violation of the proposed rule and a penalty will be assessed, if (1) the violation involves the failure to implement a safety and health program or a core element of a program, and (2) as a result of that violation, his or her employees are exposed to a pattern of serious hazards.

Finally, the Agency is also developing a comprehensive training program to assure that compliance officers understand there are many ways for employers to implement safety and health programs and that it would be improper to narrowly interpret the proposal's broad language to transform it through the enforcement process into a specification rule. The Agency will also publish a statement of its enforcement policy simultaneously with any final regulation to guide employers and compliance officers alike.

5. I have additional concerns about the draft enforcement policy of this rule, which also contains "performance-based" language similar to the draft rule. OSHA's draft enforcement policy states that employers will be cited for a serious violation when employees are exposed to a "pattern of serious hazards." Please explain what you mean by the term "pattern of serious hazards," which is undefined anywhere in the draft rule or enforcement policy. Does it mean

two violations? Three violations? And what must the violations be?

Additionally, could you have a "pattern" just by having one substantive violation of an OSHA rule or regulation? Could OSHA "piggyback" one citation of a substantive OSHA standard onto another citation for not including that same substantive OSHA standard into the safety and health program? For example, could an OSHA inspector issue a citation to an employer for a particular violation of the lockout/tagout rule, and then issue another citation for not including that same, particular section of the lockout/tagout rule in the safety and health program?

The current draft enforcement policy for this proposed rule follows the "New OSHA" policy of distinguishing between employers who make a good faith effort to comply with the rule and those who do not. Thus,

A failure to comply with a requirement of the safety and health program rule will be treated as an "other than serious violation" and no penalty will be assessed as long as the employees are not exposed to a pattern of serious hazards.

However, an employer will be cited for a serious violation and a penalty will be assessed if:

- (i) the violation involves the failure to implement a safety and health program or a core element of a program, and
- (ii) as a result of that violation, his or her employees are exposed to a pattern of serious hazards.

OSHA's current working definition of a "pattern of serious hazards," for purposes of the draft safety and health program rule, is: 1) A number of covered hazards of the same or similar type or covered hazards resulting from the same or similar deficiencies in the safety and health program; or 2) a variety of covered hazards resulting from various deficiencies in the program and representing a general failure to control hazards. Thus, a violation of a particular OSHA standard or the General Duty Clause does not automatically constitute a violation of the safety and health program rule. A single violation of an OSHA standard would not constitute a "pattern" and OSHA would not "piggyback" one citation for violation of a substantive standard (e.g. the lockout/tagout rule) onto another citation for not including that same OSHA standard in the safety and health program.

Questions from Senator Tim Hutchinson:

1. *How many charges are brought by OSHA against employers in a typical year?*

Please see chart below.

2. *Does OSHA categorize the investigation of these charges by size of employer?*

For each inspection, OSHA identifies the number of employees in the establishment being inspected, the total number of employees covered by the inspection and the total number of employees who are employed by the employer. This last figure is especially important, because it affects the amount of penalty reduction given to the employer if citations are proposed. An employer with between 1 and 25 employees normally receives a 60 percent reduction in the penalty; an employer with 26 to 100 employees receives a 40 percent reduction; and an employer with 101 to 250 employees normally receives a 20 percent reduction. (There is no reduction on account of size for employers with more than 250 employees, but all employers are eligible for additional reductions of up to 35 percent for good faith and past history.)

3. *How many of these charges are against employers with 100 or less employees?*

Please see chart below.

4. *How many of these charges are against employers with 50 or less employees?*

Please see chart below.

5. *How many of these charges are against employers with more than 50 but less than 100 employees?*

Establishment Size By Number of Employees Controlled Nationwide	Total Inspections Conducted FY98	Total Violations Cited FY98
Totals ¹ – all Federal OSHA Inspections Nationwide	34,443	76,980
Employers With 100 or Fewer Employees Nationwide	22,959	51,765
Employers With 50 Or Fewer Employees Nationwide	18,764	42,589
Employers With Between 50 and 100 Employees Nationwide	4,195	9,176

¹Totals include numbers of inspections conducted and violations cited for all employers, including those employing more than 100 employees.

6. *How many of these charges are contested and then considered by the Occupational Safety and Health Review Commission?*

In 1998, 2,061 Federal OSHA inspections resulting in citations were contested. Of the contested cases, 1,081 involved employers with 100 or fewer employees nationwide, 815 involved employers with 50 or fewer employees nationwide, and 266 involved employers with between 50 and 100 employees nationwide. Most cases are settled or withdrawn before the Review Commission issues a final decision. Review Commission judges adjudicated 158 cases, following a full hearing, during FY 1998.

7. *How much in fines did OSHA collect in 1998?*

In FY 1998, OSHA collected \$54,626,890 in penalties, which were deposited into the U.S. Treasury.

8. *How much in fines did OSHA assess in 1998?*

In FY 1998, OSHA assessed \$61,281,264 in penalties.

9. *Please state any and all benefits that OSHA realizes when employers within the scope of its jurisdiction employ third-party safety consultants.*

In the abstract, apart from S. 385, if an employer successfully uses the knowledge gained from the private consultant, everyone benefits: the company becomes a safer and healthier workplace and can be more profitable as a result; the employees work in a safer environment; and OSHA may deploy its resources to other, more hazardous workplaces. It is more difficult to gauge the benefits OSHA as an agency might gain. Certainly, if an industry sector experiences measurable improvement in illness and injury rates as a result of widespread use of consultants, OSHA would eventually be able to redirect its compliance resources elsewhere.

Under the scheme provided in S.385, however, we believe any benefits to OSHA's worker protection program would be far outweighed by the regulatory confusion which would be created and by the significant resource drain which implementing the bill would entail.

10. *In your testimony, you stated that you believed that collusion would result from the use of third-party safety consultants by employers within the scope of OSHA's jurisdiction. Accordingly, please state: (1) what percentage or likelihood do you suspect this would happen in the workplace?; and (2) given that percentage and the fact that whatever system we employ to govern workplace safety cannot possibly be perfect, don't you feel the advantages far outweigh the disadvantages?*

OSHA believes that the number of private consultants engaging in criminal activity would

undoubtedly be small. OSHA is concerned about the potential for a consultant's independent judgment to be undermined by his or her consideration of a future financial relationship with the employer being evaluated. OSHA also is concerned that the legislation would create an incentive for employers to "forum shop" to find a friendly consultant. Clearly, as indicated in the response to question 9, private consultants have a legitimate role to play in advancing safety and health, and many safety conscious employers are using them. However, tying a private consultation to a penalty exemption goes too far. In short, OSHA believes that the benefits would not outweigh the disadvantages of allowing private individuals to grant penalty exemptions.

11. *Please describe in detail the efforts, if any, made to recruit individuals who are experts in the industry in which they will inspect or regulate.*

The Department of Labor/OSHA is a competitive agency, which means that our vacancies are announced under open, competitive merit staffing procedures. Our vacancies are routinely listed on the Internet under the Office of Personnel Management's (OPM's) website and are listed under the Department of Labor's website. In addition, OSHA has developed a mailing list consisting of professional organizations, colleges and universities, and labor organizations/trade unions, to which many of our key vacancies are referred. We also advertise many of our key vacancies in professional magazines and publications. OSHA does not recruit individuals in specific industries. See our responses to questions 12 and 13 for additional information.

12. *How many years of education are required to become an OSHA inspector?*

OSHA vacancies are primarily comprise compliance officer (inspector) positions. The generic term "OSHA compliance officer" encompasses several job series, including industrial hygienists, safety engineers and safety and occupational health specialists. The minimum qualifications for these series of jobs are:

Industrial Hygienist - Successful completion of a full four-year course of study in an accredited college or university creditable towards a bachelor's or higher degree in industrial hygiene, or a branch of engineering, physical science, or life science. This study must have included, or have been supplemented by twelve (12) semester hours of course work in chemistry, including organic chemistry, and eighteen (18) additional semester hours of courses in any combination of the following fields: chemistry, physics, engineering, health physics, environmental health, biostatistics, biology, physiology, toxicology, epidemiology, or industrial hygiene.

Safety Engineer - A degree in professional engineering from a school of engineering with at least one curriculum accredited by the Accreditation Board for Engineering and Technology (ABET).

Safety and Occupational Health Specialist - Successful completion of a full 4-year course above high school leading to a bachelor's degree in safety and occupational health fields (safety,

occupational health, industrial hygiene), or bachelor's or higher degree in other related fields that included or was supplemented by at least 24 semester hours of study from among the following disciplines: safety, occupational health, industrial hygiene, occupational medicine, toxicology, public health, mathematics, physics, chemistry, biological sciences, engineering, and industrial psychology.

13. *Would you agree that experience in, understanding of, and familiarity with a particular industry allows an inspector to better identify safety and health risks and potential violations?*

OSHA agrees that familiarity with a particular industry allows inspectors to better identify health and safety risks and potential violations, and many journeyman level OSHA inspectors are experts in specific areas such as maritime and construction. However, all OSHA inspectors have the necessary education and/or experience to conduct inspections and perform duties to enforce Federal safety and health standards, and to provide technical assistance and consultation to employers and employees to ensure the safety and health of the American worker.

Questions from Senator Chuck Hagel:

1. *Nebraska's employers have expressed considerable concern about OSHA's proposal to require "employee participation" as a core element of a safety and health program. In particular, employers are worried that, in complying with OSHA's requirement they may be forced to violate the National Labor Relations Act. What can you tell us that will ease or refute their concerns?*

Employee participation in employer-sponsored health and safety programs is not inherently unlawful under the NLRA. Many employers, in a variety of industries, have successfully implemented safety and health programs with employee involvement, which indicates that worker participation in employer-sponsored workplace safety and health programs can be structured in ways which comply with the requirements of the NLRA.

In unionized workplaces, labor-management health and safety committees constituted under collective bargaining agreements are, of course, lawful under the NLRA. Moreover, even in nonunion workplaces, NLRB decisions make clear that an employer may communicate about health or safety issues with individual employees, or groups of employees, or with all of its employees, so long as no employee is put in the position of representing other workers, which might bring the group within the NLRA definition of a labor organization. Communicating individually with employees or holding all-employee safety sessions would appear to be a practical means of compliance for small employers, especially those with 20 or fewer workers, which constitute 85% of covered employers.

Delegating an employee the responsibility for monitoring a particular hazard or for implementing certain precautions or safety procedures in the workplace, with no expectation the employee will

represent other workers, would appear to be an ordinary job assignment and not an unfair labor practice. It is clear that “brainstorming” groups or information gathering committees, whose job is to assemble ideas or factual information which will be forwarded to management for decisionmaking, do not involve “dealing with” and are similarly lawful under the NLRA. Periodic safety conferences at which employees discuss and develop suggestions to be submitted to management or to a union-management safety committee have specifically been upheld by the NLRB.

2. *(A) What specific criteria do you expect employers and OSHA inspectors to use to measure the “effectiveness” of their safety and health program? (B) the number of injuries? (C) the number of accidents?*

The effectiveness of the program will be determined by each employer’s ability to establish and maintain a safety and health program to systematically achieve compliance with OSHA standards and the General Duty Clause. The program must be appropriate to conditions in the workplace, such as the hazards to which employees are exposed and the number of employees there. The purpose of this rulemaking is to reduce the number of job-related fatalities, injuries and illnesses, as well as a number of “near misses,” by requiring employers to establish a workplace safety and health program. The success of such a program may be judged in part by the extent of reduction in the number and seriousness of workplace hazards. The proposed draft was devised broadly and flexibly to allow employers in diverse situations to comply with its requirements as appropriate to the hazards, size, and other conditions of their own workplaces. The proposed draft simply requires employers to implement good consensus management practices on safety and health. As an integral part of applying the rule, the Agency will provide checklists, model programs, decision logics, and other materials to help employers determine how to comply and what constitutes compliance with its requirements.

3. *OSHA acknowledges the low incidence rates by small businesses as indicated by the Bureau of Labor Statistics. OSHA’s explanation for these low numbers rests on one study which found that under-reporting as a reason for the low numbers. How did the study come to the conclusion that under-reporting is indeed occurring at small businesses regarding injuries and illnesses? Furthermore, how is this proposed rule going to prevent the injuries and illnesses of these unreported cases?*

BLS data show that establishments with 10 or fewer employees have less than half the average illness and injury rate. Small businesses with 11 to 49 employees have 85 percent of the average injury and illness rates, and small business with 50 to 249 employees have a higher injury and illness rate than the average for all establishments. Thus the phenomenon of very low reported injury and illness rates is limited to firms with fewer than 10 employees that OSHA does not inspect unless there is a complaint.

In an effort to understand why smaller firms might have lower injury and illness incidence rates, the authors of one study examined whether smaller firms differed from larger firms in workforce

composition, in working conditions for specific industries and occupations, in labor turnover rates, and in access to preventive safety training and safety monitoring. The authors were unable to attribute differences in reported injury and illness rates to differences in any of these factors by employment size. Therefore, they concluded small employers as a group may routinely underreport workplace injuries, perhaps because their recordkeeping systems are inadequate:

With the rejection of alternative explanations, there is a strong likelihood of underreporting as the explanation, and we estimate that the annual [BLS] survey substantially undercounts injuries in small establishments (Oleinick et al., "Establishment Size and Risk of Occupational Injury," Am. J. Ind. Med., 28(1): 2-3 (1995))

NIOSH reached an essentially identical position: "recent literature comparing Annual Survey data and workers compensation data questions the validity of the estimated rates for small employers obtained through the BLS Annual Survey " (NIOSH comments on OSHA's Proposed Recordkeeping Rule, June 28, 1996, Docket, Exh.15-407, p. 2).

The proposed rule seeks to reduce all non-minor illnesses and injuries, whether reported or unreported, by requiring employers to conduct self inspections of their facilities. Such self inspection can find hazards that accident investigations alone would not reveal.

4. In estimating the costs of creating and maintaining records of the results of hazard identification and assessment, OSHA used the average national wage rate of clerical personnel. Is this an accurate reflection for small businesses where almost all the work involved in setting up a safety and health program will be performed by a manager whose time value is much more than that of an average clerical personnel?

The proposed safety and health program rule exempts employers with fewer than ten employees--approximately 75% of all covered workplaces--from hazard identification, assessment, and control documentation requirements. Therefore, nearly three quarters of all workplaces do not have to create and maintain any records pursuant to the proposed rule. Of those larger workplaces that are not included in the exemption, many have already implemented similar hazard assessment programs. Furthermore, larger workplaces that do not have programs in place are likely to have clerical staff available to create and maintain records pursuant to the proposed rule, and will not have to use managerial hours in order to comply.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Michelle Peterson (CN=Michelle Peterson/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:12-APR-1999 15:05:41.00

SUBJECT: bioterrorism

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

Counsel's Office has some concerns with the DOJ/NSC proposal re the bioterrorism portion of the crime bill, and the draft memo. Who in DPC is taking the lead role on this?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Caroline R. Fredrickson (CN=Caroline R. Fredrickson/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:12-APR-1999 15:38:23.00

SUBJECT: labor nominees/guestworkers

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Virginia N. Rustique (CN=Virginia N. Rustique/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Tracey E. Thornton (CN=Tracey E. Thornton/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

Coverdell's staff called the Labor Committee to find out if there are any pending labor nominees. Last year, at the end of the session, he held up the noms over guestworker issues. Apparently, he plans to do it again this year. This year, there are many nominees that could be affected [of course, in this Congress, they might never move anyway]. I know we have not had a discussion on this one for a while but I wanted to mention that it once again looms its ugly head. I don't know if we can get out of this box -- or whether it's worth it considering the odds of moving labor noms -- but I'd appreciate your guidance.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:12-APR-1999 15:40:03.00

SUBJECT: Update on status of EEOC federal sector rule

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Charles F. Ruff (CN=Charles F. Ruff/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Edward W. Correia (CN=Edward W. Correia/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Leslie Bernstein (CN=Leslie Bernstein/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

Here is an update, prepared by OIRA, on the status of the EEOC Federal Sector rule which is currently in final clearance at OMB. The two major issues, which are detailed below, center on:

- (1) the EEOC administrative judge (AJ) issuing a ruling and the agency only having the ability to accept or reject the AJ's decision but not to modify it. In this way, agencies will take final action on complaints referred to AJs by issuing a final order, but they will not introduce new evidence or write a new decision in the case.
- (2) the ability of obtaining interim relief after the AJ's decision but before the end of the administrative process.

OMB plans on meeting with EEOC later this week to go over its concerns, and thereafter plans on contacting the agencies about the rule and requesting that their general counsels or deputy secretaries contact OMB if they still have major concerns. I will also send around a copy of the proposed rule and all of the agency comments. Please let me know if you need anything else.

While the agencies may raise other issues, here is OMB's analysis of the major outstanding issues:

Overview of the Rule

EEOC's objective in issuing this final rule is to streamline, and make more fair, the process by which a federal employee pursues a discrimination complaint. The most significant provisions of the rule eliminate an agency's ability to reverse or amend decisions of the EEOC Administrative Judge (AJ). Under the current process, a complainant/employee can opt for a hearing with an AJ. The agency can then reverse or amend the AJ decision. The only options for the complainant/employee at that point is to accept the agency decision or appeal to the EEOC's Office of Federal Operations (OFO). The final rule would provide that in cases in which the agency does not agree with the decision of the AJ: (a) the agency issues a final order notifying the complainant that it will not fully implement the AJ decision; (b) the agency automatically files an appeal with the EEOC on behalf of that employee; and (c) in cases involving removals or separation of the employee, the agency would provide interim relief (i.e., retroactive restoration) consistent with the finding of the AJ pending a final decision from the AJ.

Other significant provisions of the rule: (a) require all agencies to make available an alternative dispute resolution (ADR) program for the pre-complaint process; (b) provide EEOC AJs with the authority to award attorney's fees and costs to winning complainants for services rendered prior to the filing of the formal complaint (e.g., during the counseling and ADR phases).

Views of the Stakeholders

During EEOC's development of the proposed rule, and following publication of the NPRM on 2/20/98, approximately 30 different Federal agencies expressed significant concerns with many of the provisions in the rule. The agencies are primarily concerned with the elimination of an agency's right to reverse or amend an AJ's decision. Agency arguments range from legal (EEOC lacks the authority to eliminate this agency action) to policy (the AJ's lack the expertise to adjudicate these claims and agency amendments or reversals are a proper check and balance).

On the other side of the spectrum, OIRA has met with a Federal employees union and a member of the plaintiff's bar who feel that EEOC's proposed changes to the complaint process do not go far enough in limiting agency control in adjudicating cases in which the agency is accused of discrimination.

OIRA Analysis

OIRA agrees with EEOC that the current process of allowing the agency (or the "defendant" in discrimination cases) to amend or reverse the decision of the EEOC AJ may be legitimately perceived as inherently unfair. OIRA is further impressed by data provided by EEOC which demonstrates that agencies reverse a significant majority of AJ findings of discrimination, and that in a majority of those cases that are appealed to the EEOC, the result is a reversal of those agency decisions on appeal from the employee. However, OIRA does have some concerns with the provisions that would implement this change to the process.

The agency issues a final order notifying the complainant that it will not fully implement the AJ decision. As stated above, OIRA believes that this change will improve the fairness of the current process. Further, OIRA, upon consultation with DOJ, agrees with EEOC that a "final agency order" meets the legal requirement in Section 717(c) of Title VII that the agencies have some "final" action they can take following an AJ decision.

If the agency disagrees with the AJ, the rule as drafted would require the agency to automatically file an appeal with the EEOC on behalf of that employee. OIRA has two main concerns with this provision:

Assume that the AJ rules in favor of the agency, finding that no discrimination occurred. However, the agency now wants to amend or not fully implement that decision because its review did uncover discrimination. Why would there necessitate an appeal to the Commission? EEOC's reg strategy appears to assume a certain outcome which may not in fact always occur.

A separate provision in the rule contains the requirement for the agency to provide notice to the complainant with all final orders of a complainants right to appeal to EEOC. EEOC has not demonstrated that this notice requirement would be insufficient to allow an employee to exercise a right of appeal. A process in which the employee has the burden to file an appeal following an agency order may be more consistent with other processes of jurisprudence in the U.S.

- In cases involving removals or separation, the agency would provide interim relief (i.e., retroactive restoration) consistent with the finding of the AJ. OIRA has several concerns with this provision:

This provision was not proposed or addressed at the NPRM stage. OIRA is believes that this substantial change to the process should go through a notice and comment process before becoming effective.

Section 717(c) of Title VII requires some kind of "final" agency action following an AJ decision.

An interim relief provision would basically render the "final" action by agencies as moot, and thus it is no longer clear that EEOC has fulfilled the Section 717(c) requirement.

OIRA is sympathetic to the concerns voiced by agencies that this provision could create significant disruption in an agency's workforce when considering that that 33% of agency reversals are upheld on appeal to the EEOC, and that it traditionally takes a long period of time for EEOC to issue a final decision on appeal.

Based on the above concerns, it is not clear why more traditional remedies of back pay and damages would not be sufficient to make an employee whole.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sandra Yamin (CN=Sandra Yamin/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:12-APR-1999 16:44:35.00

SUBJECT: Draft -- H.R. 800 -- ED Flex Letter to the conferees -- Final Clearance

TO: Jonathan H. Schnur (CN=Jonathan H. Schnur/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: William H. White Jr. (CN=William H. White Jr./OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Charles M. Brain (CN=Charles M. Brain/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Tanya E. Martin (CN=Tanya E. Martin/OU=OPD/O=EOP@EOP [OPD])

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TO: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Bethany Little (CN=Bethany Little/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Broderick Johnson (CN=Broderick Johnson/OU=WHO/O=EOP@EOP [WHO])

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TO: Lawrence J. Stein (CN=Lawrence J. Stein/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC: Dario J. Gomez (CN=Dario J. Gomez/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC: Mindy E. Myers (CN=Mindy E. Myers/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TEXT:

Attached for your clearance is the draft letter from Sec Riley directed to the conferees on H.R. 800 ED Flex Partnership Act of 1999. In the draft, Sec Riley states, "The Senate bill, however, contains unacceptable provisions regarding the class size reduction authority that are unrelated to the expansion of ED-Flex authority and, if adopted, would force me to recommend to the President that he veto the bill." The conference report is scheduled for House consideration on Friday, April 16th. We would like to get this letter out today. Please respond to me with your comments and/or sign-off as soon as possible. My apologies for the short

turnaround. Thank you.

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D3]MAIL416652611.136 to ASCII,
The following is a HEX DUMP:

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Dear Conferee:

I am writing to express my views on the House-and Senate-passed versions of H.R. 800, the Education Flexibility Partnership Act of 1999. As you know, "ED-Flex" authority permits States to waive certain statutory and regulatory requirements that apply to Federal education programs in a manner that complements State educational reform efforts and promotes achievement to high standards by all students. The Administration has long supported the concept of expanding ED-Flex authority beyond the 12 States allowed under current law, so long as that expansion does not undermine the purposes of those Federal programs and maintains a high degree of accountability for results. I am very pleased, therefore, that both bills would expand eligibility for ED-Flex status to all the States, as well as the District of Columbia and the Commonwealth of Puerto Rico, and couple that increased flexibility with a serious attention to maintaining accountability at the State and local level. The Senate bill, however, contains unacceptable provisions regarding the class size reduction authority that are unrelated to the expansion of ED-Flex authority and, if enacted adopted, would force me to recommend to the President that he veto the bill. I urge the Conferees to avoid such a disappointing and unnecessary result.

Turning to the ED-Flex provisions, I am very pleased that both bills have strong provisions for ensuring State monitoring of local ED-Flex activities and termination of waivers that have inadequate or harmful results. With regard to the following provisions, I offer the following views:

Public notice and comment. I am pleased that both the Senate and House versions contain provisions to enhance parental involvement in the ED-Flex waiver process. In order to maximize parental involvement and improve ED-Flex waivers, I support the Senate's provision on this issue, with the addition of language included in the House bill requiring the public notice to contain a description of any expected improvements in student performance and the public comments received by the State and local education agencies to be made available for public review.

Expansion of ED-Flex Authority. With regard to the expansion of the ED-Flex authority, I support the Senate version of the bill, which would make very clear that a State may not waive Federal requirements applicable to ~~the State as a whole~~ itself.

Accountability Provisions. With respect to State eligibility for ED-Flex status, I support the more rigorous conditions in the House bill, as they apply to implementation of standards and assessments under Title I of the Elementary and Secondary Education Act of 1965 (ESEA). With respect to the State's application for ED-Flex status, I support the language in the Senate bill, which focuses on how ED-Flex authority will assist in implementing the State's comprehensive reform plan. Regarding the renewal of Ed-Flex authority, I support the more rigorous requirements in the House version that require the State to show measurable progress toward achieving the State's educational objectives.

Targeting Provisions. With respect to waivers that would not be authorized, I strongly support both the House and Senate versions regarding school eligibility for Title I Part A since both these ~~provision~~ *provisions* target funds more directly on to high poverty schools.

State Reporting. I believe that complete State reporting of ED-Flex results is important and so support the provisions of the House bill relating to annual State reporting to the Secretary about the numbers and characteristics of waivers granted.

Sunset Provision. Finally, I strongly support the provision of the House bill that would "sunset" this Act upon enactment of the upcoming reauthorization of the ESEA, because it is vitally important that continuation of ED-Flex authority be made consistent with changes to the underlying Federal programs to which it applies.

Class Size

Last fall, Congress enacted and funded, on a bipartisan basis, a down payment on the President's plan to help the Nation's school districts reduce class sizes in the early elementary grades. Regrettably, the Senate bill contains amendments to the class size reduction authority that would undermine its impact by permitting local school districts to use funds received under that initiative not to reduce class size, but to meet obligations they are already required to meet under Part B of the Individuals with Disabilities Education Act. The value of reducing class size in the early elementary grades is supported by the research, and doing so is one of the most important things we can do to honor our national commitment to ensuring equal educational opportunity for all our children. Moreover, reducing class size in the early grades allows teachers to identify, and work more effectively with, students who have learning disabilities, thereby potentially reducing those students' need for intensive special education services in the later grades. Rather than undermining the bipartisan effort to reduce class size--and setting parent against parent in school districts across the country--I would have supported a bill that extended the President's initiative, so that school districts could plan to hire additional qualified teachers, provide additional classrooms, and take the other steps necessary to reduce class size. I certainly cannot support a bill that contains these Senate amendments and would recommend that the President veto it, if it were presented to him.

The Office of Management and Budget advises that there is no objection to the submission of this report and that from the standpoint of the Administration's program, enactment of H.R. 800 containing the Senate's amendments relating to the class size reduction initiative would not be in accord with the President's program.

Yours sincerely,

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Robert J. Pellicci (CN=Robert J. Pellicci/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:12-APR-1999 17:07:56.00

SUBJECT: LRM MDH50 - - HEALTH & HUMAN SERVICES Testimony on Welfare Reform Implemen

TO: Nicole R. Rabner (CN=Nicole R. Rabner/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Sandra Yamin (CN=Sandra Yamin/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Brian S. Mason (CN=Brian S. Mason/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Barry T. Clendenin (CN=Barry T. Clendenin/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Robert G. Damus (CN=Robert G. Damus/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Natasha F. Bilimoria (CN=Natasha F. Bilimoria/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Richard B. Bavier (CN=Richard B. Bavier/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Eugenia Chough (CN=Eugenia Chough/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Michele Ahern (CN=Michele Ahern/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Maureen H. Walsh (CN=Maureen H. Walsh/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Barry White (CN=Barry White/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Neera Tanden (CN=Neera Tanden/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Crystal J. Roach (CN=Crystal J. Roach/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Elizabeth Gore (CN=Elizabeth Gore/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Mark E. Miller (CN=Mark E. Miller/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Jeffrey A. Farkas (CN=Jeffrey A. Farkas/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Peter Rundlet (CN=Peter Rundlet/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Lori Schack (CN=Lori Schack/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: J. Eric Gould (CN=J. Eric Gould/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Andrea Kane (CN=Andrea Kane/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Anil Kakani (CN=Anil Kakani/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Jack A. Smalligan (CN=Jack A. Smalligan/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: KAGAN_E@a1@CD@LNGTWY (KAGAN_E@a1@CD@LNGTWY [UNKNOWN]) (OPD)
READ:UNKNOWN

CC: James J. Jukes (CN=James J. Jukes/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Melinda D. Haskins (CN=Melinda D. Haskins/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Janet R. Forsgren (CN=Janet R. Forsgren/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

LRM AGRICULTURE-CR (LRM AGRICULTURE-CR [UNKNOWN])
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LRM JUSTICE (LRM JUSTICE [UNKNOWN])
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LRM LABOR (LRM LABOR [UNKNOWN])
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LRM Social Security Administration (LRM Social Security Administration [UNKNOWN])
READ:UNKNOWN

LRM TREASURY (LRM TREASURY [UNKNOWN])
READ:UNKNOWN

TEXT:

NOTE: COMMENTS ARE TO BE SENT TO MELINDA HASKINS.

ALSO NOTE THAT EOP STAFF WILL NOT RECEIVE A FAX COPY OF THE ATTACHED MATERIALS.

----- Forwarded by Robert J. Pellicci/OMB/EOP on 04/12/99

04:55 PM -----

LRM ID: MDH50

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Washington, D.C. 20503-0001

Monday, April 12, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Melinda D. Haskins
PHONE: (202)395-3923 FAX: (202)395-6148

SUBJECT: HEALTH & HUMAN SERVICES Testimony on Welfare Reform Implementation

DEADLINE: 1 p.m. Tuesday, April 13, 1999

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The attached HHS (Golden) testimony will be delivered at a April 14th hearing before the Senate Committee on Indian Affairs on welfare reform implementation.

THIS DEADLINE IS FIRM. IF WE DO NOT HEAR FROM YOU BY THE COMMENT DEADLINE, WE WILL ASSUME THAT YOU HAVE NO OBJECTION.

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Crystal J. Roach

LRM ID: MDH50 SUBJECT: HEALTH & HUMAN SERVICES Testimony on Welfare Reform Implementation
RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melinda D. Haskins Phone: 395-3923 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

HHS (GOLDEN) TESTIMONY FOLLOWS ---

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:
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Good morning Mr. Chairman and members of the Committee. I am pleased to be here today to discuss welfare reform, especially as it relates to tribal families. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) focuses on work and critical supports for work (in particular child care and child support). It offers tribes a range of important new choices in designing welfare, child care and child support programs that will provide the maximum opportunities to tribal families. We have sought to work closely with tribes as they implement these provisions in the full spirit of government-to-government relationships.

At the federal, state, tribal and community level, new relationships are being forged. Early findings of research conducted by Dr. Eddie Brown with the Washington University School of Social Work and funded by the Administration for Children and Families indicate that “communication, coordination, and collaboration among tribes, between tribes and states and tribes and the federal government has increased.” Governments are collaborating with businesses, community organizations, transportation providers, the media and religious leaders to help move families to work. At the federal level, we are focused on helping tribes, states and communities move families to work, be

accountable for results, and develop and share information about effective practices.

Together as partners, we must build upon these early efforts to find effective ways to improve the lives of children and families.

Today, I would like to provide an overview of the changes made by welfare reform, child support and child care as they affect tribes and discuss the work we are doing to ensure that welfare reform is successful for tribes and tribal families. While it is too early in the implementation of these programs to provide information on outcomes and results for tribal families, I would also like to use this opportunity to share some promising activities we are hearing about.

Statutory Changes

As I indicated, PRWORA made a number of significant changes that directly affect tribes and tribal families.

First, under welfare reform the Temporary Assistance for Needy Families (TANF) program replaces the former Aid to Families with Dependent Children (AFDC) program and provides States and tribes with unprecedented flexibility to design welfare programs to meet the particular needs of families in moving to work and self-sufficiency. Tribal governments, at their option, may receive direct federal funding to independently design, administer, and operate the TANF program or may choose to allow States to continue providing these services to tribal families.

In addition to the creation of TANF under this reform legislation, the former Tribal JOBS program was replaced with the Native Employment Works (NEW) program. The NEW program provides funding for Tribes and inter-tribal consortia to design and administer tribal work activities that meet the unique employment and training needs of their populations while allowing states to provide all the other TANF services.

States and tribes that administer their own TANF or NEW programs have the flexibility to design their programs, define who will be eligible, establish what benefits and services will be available, and develop their own strategies for achieving program goals, including

how to help recipients become self-sufficient. Further, PRWORA provided tribes with expanded child care funding and broader authority to administer the child support program. Therefore, tribes can enter into new partnerships with states to ensure that tribal families receive the support services necessary to become self-sufficient.

How Statutory Changes are Affecting Tribal Programs

TRIBAL ADMINISTERED TANF AND NEW PROGRAMS

The new law specifically allows tribes to administer the TANF program and in such cases federal TANF funds are allocated directly to the tribe. While the law requires that tribes meet certain goals in these programs, it also allows them to negotiate applicable work participation rates with the Secretary, taking into account the limited resources and employment opportunities available in the tribal community.

Since the President signed PRWORA in 1996, we have provided considerable assistance to the tribes and have approved 19 tribal TANF programs. These TANF programs involve 62 Indian Tribes and Alaska Native Villages, and operate in 12 states. The programs are serving approximately 3,500 families, or over 13,500 individuals. There are an additional seven plans pending which would involve an additional 78 tribes and villages and affect over 35,000 more people.

Supported by HHS policy, all 12 states in which tribes are operating their own TANF program are providing some form of funding assistance to the tribes, similar to the maintenance of effort dollars supporting State programs. Nine states are providing matching funds (Oregon, Arizona, California, Wyoming, Washington, Alaska, Idaho, Minnesota and Montana). The remaining three states are providing other resources such as computers, staff training, and connection to their state reporting systems. In addition, several states have out-stationed state employees to these tribal TANF programs to assist in eligibility assessments of TANF applicants for other state services.

Tribes are afforded even greater flexibility than states in designing their programs and like states are making varied choices to meet their own unique circumstances. Time limits on benefit receipt vary: 17 plans allow for 60 months of benefits, with the remaining two providing 84 months. Under the work requirements, participation rates and the number of hours of work required per week also vary from plan to plan. Four tribes adopted the same participation rates the law requires of states (25 percent in the first year, increasing to 50 percent by the fifth year for all families and 75 percent in the first year, increasing to 90 percent in the third year for two-parent families). These tribes also adopted the same minimum work requirements States are subject to meet. The remaining tribes exercised their option to negotiate different rates of participation and work hours and adopted a fairly wide range of rates.

Tribes have developed a variety of service strategies that respond to the unique circumstances of each community. One tribe used casino revenues to build an “Independent Life Skills Center,” to house the Tribal TANF program. This center also provides classrooms, a computer learning lab, a secure records facility, office space, and a children’s play area for use by TANF recipients. Another tribe, with joint funding provided by the TANF program and the Bureau of Indian Affairs, provides a “One-Stop” and a “point of contact” service center for applicants requesting assistance and maintains a

toll free 24-hour voice mail service which can be utilized by TANF recipients and service providers alike in serving recipients living in remote areas.

Under the NEW program, the statute restricts eligibility to tribes and Alaska Native organizations that were operating JOBS programs in FY 1995. Currently, all 78 eligible tribal grantees are operating NEW programs. Total funding for these programs is \$7.6 million per year with a significant variation in the size of the individual grants (ranging from just over \$5,000 to \$1.7 million).

STATE ADMINISTERED TANF PROGRAMS

In the remaining areas of the country, tribal families are served by state TANF programs.

In these areas, tribal communities and tribal members are subject to the same responsibilities and eligible for the same opportunities that a state elects for its population at large. As we learn more about the effect these service design choices are having on tribal families, we certainly will share this information with the Committee. This type of outcome data is particularly important in light of the unique challenges to self-sufficiency

faced by tribal families related to high unemployment and lack of transportation and child care assistance.

As a start in gathering this critical data, in FY 1997, ACF approved a five-year research and evaluation project entitled "Welfare to Work: Monitoring the Impact of Welfare Reform on American Indian Families with Children." The overall purposes of this longitudinal study are to monitor and document the implementation, and assess the impact, of welfare reform on American Indian families and reservations in Arizona resulting from the state and tribal responses to TANF. Extensive demographic, contextual, socio-economic and case-level data will be compiled from a variety of sources, including administrative records, tribal documents, interviews and site visits.

One of the preliminary findings of the study is that many tribes while interested in self-administration of the program, are unsure about the best strategy to follow. They are interested in learning from the experiences of other tribes in order to examine their options and make informed choices.

On another front, a component of HHS's evaluation of the Department of Labor's Welfare to Work Grant program will examine what activities and services tribes provide, and how various tribal programs are coordinated at the local level.

CHILD SUPPORT ENFORCEMENT AND CHILD CARE

Child support enforcement is an essential part of welfare reform efforts. The child support program locates non-custodial parents, establishes paternity, establishes and enforces support orders, and collects child support payments from those who are legally obligated to pay. Payment of child support can help a family to leave welfare or combined with other income, reduce the need for single parent families and their children rely on welfare in the first place.

Welfare reform enables tribes to operate their own child support enforcement programs for the first time. PRWORA authorizes direct funding of tribal child support programs, and with respect to tribes that do not seek this opportunity, includes improvements to facilitate tribal-state agreements that provide for cooperative delivery of child support

services in Indian country. This added flexibility provides significant opportunities for tribes and for Indian children and families: tribal governments can choose to plan and implement child support programs that meet the unique needs of tribal communities and improve the delivery of child support services in Indian country.

As I will discuss later in my testimony, we are reviewing the results of an extensive consultation process which will lead to regulations that implement direct tribal child support funding. In the meanwhile, although tribes are not yet operating programs under the broad direct funding approach the law now allows, we are seeing some promising results from early state-tribal cooperative agreements and tribal demonstration grants.

– Cooperative Agreements. Tribes such as the Navajo Nation and the Sisseton-Wahpeton Sioux Tribe are entering cooperative agreements with their states, enabling them to carry out tribal child support enforcement and receive funding and other support through the states' programs. As a result of their cooperative agreements with the State of New Mexico and Arizona, the Navajo Nation has seen a big shift in child support collections. The Navajo Nation began child support enforcement in New Mexico in 1994. Before then, there had been almost no child support collection on the Navajo Reservation in New Mexico. In 1998, there was \$500,000 in child support collections under the tribe's child support program in New Mexico.

— Tribal Demonstrations. Some tribes are designing child support programs with the support of our planning and demonstration grants—“Section 1115” grants, Special Improvement Project grants, and tribal planning grants. Currently, the Chickasaw Nation, Colville Confederated Tribes, Puyallup Tribe, Lac du Flambeau Band of Chippewa, Central Council of the Tlingit and Haida Indian Tribes, and the State of Wisconsin and Menominee Tribe receive this discretionary grant funding. We are learning from these projects, sharing information, and identifying issues and technical assistance needs, to help ensure that tribes are able to operate successful child support programs. Other tribes will benefit from the knowledge gained from these special grant programs.

The third programmatic area I will focus on today is child care. Child care is extremely important to the well-being of our Nation’s children and to their parents' ability to work and maintain employment. and thus a vital supportive service to welfare reform efforts. The Clinton Administration is dedicated to providing support and resources to ensure healthy, safe, affordable child care settings that are so desperately needed to help parents work and help children develop to their full potential and become ready for school.

The Child Care and Development Block Grant (CCDBG) as amended by PRWORA, assists low-income families and those transitioning off welfare to obtain child care so they can work or attend training/education. PRWORA amended the CCDBG to bring together, for the first time, four federal child care subsidy programs thereby allowing

states and tribes to design a comprehensive, integrated service delivery system to meet the needs of low-income families.

Specifically, the law requires a one to two percent tribal set-aside of the aggregate funding and allows tribes or tribal organizations to use program funds for construction or renovation purposes as long as it will not result in a decrease in the level of child care services.

The Secretary has allocated two percent of CCDBG funds for tribes, doubling the amount of child care funds made available to the tribes since FY 1996. In FY 1999 tribes received \$63 million, compared to the \$28 million received in FY 1996. In FY 1999, 254 tribal grantees, representing approximately 500 Federally recognized Indian Tribes and Alaska Native Villages, were awarded child care grants.

Tribes receive CCDBG funding either directly or through consortia arrangements. According to preliminary 1997 data, 18,755 children were served by tribal childcare grantees. The majority of these children have working parents (77 percent) or a parent(s) in training or educational programs (19 percent). The remaining 4 percent were in protective services. Their income levels vary with 63 percent at or below the poverty level; 26 percent above poverty but below 150 percent of poverty; 8 percent above 150 percent; and 3 percent above 200 percent of the poverty level.

I would point out that our efforts to increase the supply and availability of child care are ongoing. The President has unveiled a comprehensive package of child care proposals that includes significant increases in child care funding to help working families. Beyond the tax credits and school-age child care funding in the Departments of Treasury and Education, \$10.5 billion in additional funding, over 5 years, is targeted for HHS child care programs:

- _ A five year \$7.5 billion increase in the subsidy funding for child care which, when combined with funds from welfare reform, will increase the number of children receiving child care assistance by more than 1 million to a total of 2.4 million. The tribal set-aside provided under law will ensure that this increase in funding serves to benefit State and tribal child care programs alike.

- _ An Early Learning Fund proposed at \$3 billion over five years which will, for the first time, specifically devote funding to communities to enhance the quality and availability of care, with a focus on promoting school readiness for children through age five.

I'd like to now turn to ACF's outreach, consultation, and technical assistance efforts to work with tribes on these historic legislative changes

Outreach, Consultation, and Technical Assistance

In increasing the flexibility available to states and Tribes to design their own welfare reform programs, PWRORA changed the Federal role from one of policy approval to one that focuses on hands-on support through outreach, technical assistance, and the dissemination of promising practices, as well as accountability, research, and evaluation. In this concluding section, I would like to highlight what we have learned and accomplished so far through consultation, outreach, and technical assistance with our tribal partners and offer a few notes about the next steps that lie ahead.

Our goals, in keeping with this new role and with the government-to-government relationship that is central to our work with tribes, are to consult broadly and to provide information that can assist tribes in making the wide range of choices that they face about the most effective ways to assist tribal members in becoming self-sufficient. To help inform these decisions, we have been working with our tribal partners to provide information about the statute, about policy choices, and about promising practices and service delivery strategies. We have also worked to bring people together so that they can share their own expertise, talk about problems and potential solutions, and then develop strategies.

Outreach and Consultation.

In the development of the Tribal TANF Notice of Proposed Rulemaking (NPRM), which was published on July 22, 1998, we sought to undertake a broad consultation strategy prior to drafting the proposed rules. To better inform our policy-making efforts, we held dozens of conferences, consultations and meetings with representatives of tribal, state and local governments, as well as soliciting input through a letter. An extended comment period (through November 20, 1998) was provided on the proposed rule at the request of commenters and as a result a considerable number of comments were received from Tribes as well as the National Congress of American Indians. We expect to publish the final rule this fall.

We continue to look for ways to strengthen and improve our consultation process. As we work on development of regulations implementing the tribal child support program, we further intensified our outreach efforts. Six consultations were held in 1998 to obtain tribal input in developing the regulations in Alaska, Oregon, New Mexico, Minnesota, Tennessee, and Washington, D.C. Each consultation included an overview of the national CSE program, followed by tribal input on the tribal program and regulations. In addition, we established a toll-free "800" number for comments and questions, and we continue to consult with a resource group of interested and knowledgeable tribal representatives. The input we have received is extremely valuable in helping to inform our rulemaking efforts currently underway. We anticipate publication of the regulations later this year.

We are committed to continuing and improving our consultation with tribes as welfare reform evolves. In addition to our work within ACF, we are coordinating with the broader tribal consultation strategy conducted by HHS, which has included listening sessions nationwide as well as the scheduled appointment of a staff specialist in the Office of the Secretary who will focus exclusively on tribal affairs.

Technical Assistance and Information Dissemination

In addition, we have been involved in providing technical assistance on a number of fronts:

- _ With respect to TANF, we have sponsored five Promising Practices National Conferences and there was tribal representation at each. At the Phoenix conference, a representative from the Center for American Indian Studies presented on the “Reaching All Families” plenary panel as well as in the “Low Job Skills” workshop, where tribal issues were discussed.

- _ To build on this work, later in April, we are planning a 2-day workshop in Denver to bring together Region VIII States, Tribes and Tribal Community Colleges. This workshop is being designed to share information and best practices, strengthen the

Tribes' role in welfare reform, improve State/Tribal working relationships and increase collaboration/networking between and among States, Tribes, and Tribal Community Colleges.

— The Administration for Native Americans within ACF has provided resources to support technical assistance, as well. For example, ANA provided \$1.2 million for five grants to support efforts to develop and disseminate information on TANF, including convening workshops and meetings with tribes to inform them about TANF. Additional collaborative work among ACF programs is planned for the future including comprehensive strategic planning conferences addressing social services and economic development.

— The Office of Child Support Enforcement issued briefing packages on the program and legislative changes to ensure that tribes could be fully engaged in consultation meetings. The office also published and sent to all federally recognized tribes a publication, "Strengthening the Circle: Child Support for Native American Children." This publication describes the new opportunities for tribal CSE programs and intergovernmental partnerships to meet the needs of tribal children and families.

- _ In Phase II of its contract with the Native American Management Services, Inc., OCSE and NAMS are designing technical assistance plans for tribal child support demonstration grantees. At an initial meeting with grantees held recently, tribal participants identified problems and areas of need both specific to their tribes as well as problems and areas of need shared by tribes in general. This information will be used to develop technical assistance materials for tribes under cooperative agreements with States and for tribes planning on administering their own child support programs.

- _ With respect to child care, in January 1998, we awarded a three-year contract to establish and operate a Tribal Child Care Technical Assistance Center (TriTAC). TriTAC assists tribal grantees in child care capacity building efforts through the following major activities: a tribal child care home page; a toll-free information and referral line; a software package to assist with program reporting; a newsletter; and an annual tribal conference. A database of effective program strategies is also being developed.

- _ In conjunction with TriTAC, we are currently making plans to hold several training sessions across the country for tribal child care grantees. The purpose of this special training is to focus on one or two topic areas that have been identified by tribal

grantees, but not covered in depth at the National American Indian/Alaska Native Child Care Conference, or at ACF regional meetings.

Again, we look forward to building on these technical assistance strategies, and we will seek to be responsive as welfare reform evolves and the needs of tribes change over time.

CONCLUSION

Our goal in welfare reform is enabling families to move to work and to succeed at work over the long haul. To accomplish this goal, we are eager to continue working with our tribal and State partners to support their design of TANF, child care, and child support programs that will make the most difference to families. We look forward to building on the extraordinary creativity and commitment that tribal leaders have already demonstrated and on the positive first steps that we have already taken together to share information, to consult, and to provide technical assistance and support in the spirit of the government-to-government relationship with tribes. We know that in addition to working internally to coordinate our efforts with the tribes, we also must work with our

other Federal partners and the Congress to address the serious economic and social problems faced by tribes. We are committed to building on these early steps and working together to see increasing numbers of tribal members improve their lives and become self-sufficient.

Thank you Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions you or members of the committee may have.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:12-APR-1999 17:57:06.00

SUBJECT: Re: Draft -- H.R. 800 -- ED Flex Letter to the conferees -- Final Clearanc

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

Thanks--I read your weekly report and your prediction on where the civil rights groups might end up--I keep thinking there has to be a way through this--I offer my help, because I think I have some credibility with these folks--I'd like to meet with Wade (and whatever small group he thinks works) this week and see if there's any way to bridge this gap; who's got the most up to date read on the disputes between us and them?--I have to tell you, while I understand all the advocates' arguments, it seems to me that we have substantively come a very long way from simply focusing on the no social promotion rhetoric. You should know that the civil rights groups were up on the hill today to review research on testing and social promotion--so our task is getting tougher.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Dan Marcus (CN=Dan Marcus/OU=WHO/O=EOP [UNKNOWN])

CREATION DATE/TIME:12-APR-1999 19:06:34.00

SUBJECT: Helms v.Picard

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Charles F. Ruff (CN=Charles F. Ruff/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

Attached is a draft memo to the President reporting on the happy denouement.===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D32]MAIL47770461S.136 to ASCII,
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April 13, 1999

MEMORANDUM TO THE PRESIDENT

FROM: Charles F.C. Ruff

SUBJECT: Further on Helms v. Picard

After your review of our April 1 Memorandum to you on this case, in which the Fifth Circuit held unconstitutional, as applied, a provision of the Elementary and Secondary Education Act that permits local educational agencies to lend computers and other instructional materials to private sectarian schools, we have continued our efforts to resolve the disagreement between the Solicitor General and the Secretary of Education as to whether we should seek Supreme Court review of that decision. In addition, the Secretary and the Solicitor General met with the private school groups to discuss the best strategy for approaching the Supreme Court.. I am pleased to report that the Solicitor General and the Secretary have reached agreement on the following course of action, which we believe is consistent with the views you expressed in response to our earlier memo, and which the Secretary believes is consistent with the commitments he has made to the private school community:

In light of the fact that some of the state and local defendants in the case will be filing a petition for certiorari, and in light of his continuing concerns about the record in this case, the Solicitor General will not file a separate petition for certiorari on behalf of the Secretary. He will, however, file a responsive brief supporting the petition. The Solicitor General has prepared a rough draft of his brief, which both we and the Secretary are very satisfied with. The draft brief argues that programs to provide computers and other instructional materials to all students, including those in sectarian schools, are vitally important and should be permitted, so long as adequate safeguards are in place to provide reasonable assurance that they will be used for secular, not religious, purposes, and so long as the public aid is supplementary to the religious school's program. The brief recognizes that this will require the Supreme Court to re-examine and partially overrule some of its precedents -- which now forbid such aid unless it is incapable of diversion to religious purposes -- and argues that the time has come to do so. It urges the Court to grant certiorari and issue a decision that announces the new "adequate safeguards" test and remands the case to the Fifth Circuit for reconsideration, applying that new test. The remand will have the virtue of permitting the Fifth Circuit to decide the case with the benefit of the Department of Education's Guidelines, which were issued after the original decision. This improves the chances that the Fifth Circuit and the Supreme Court will find that the "adequate safeguards" test has been satisfied in this case.