# WITHDRAWAL SHEET
## Ronald Reagan Library

**Collection:** BARR, WILLIAM: Files

**Archivist:** cas

**File Folder:** [Tuition Tax Credits] [~~10 of 14~~] ~~OA 9094~~ Bill: Anti-Discrimination Issues (2) Box 8

**Date:** 9/18/98

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 1. memo | re tuition tax credit bills with wide support 4 p. | 5/25/82 | P5 A,B 10/5/00 |

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

**Freedom of Information Act - [5 U.S.C. 552(b)]**
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 21, 1982

FOR: EDWIN MEESE III
EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Anti-Discrimination Language in Tuition Tax Credit Bill

I. The Problem

Some pro-credit groups (mainly Evangelicals) are strongly insisting that we include provisions in the legislation which would

(1) clarify the scope of the anti-discrimination language itself (by addressing such matters as "intent vs. effects", non-retroactivity, quotas, etc.); and

(2) delineate the method by which the anti-discrimination provision is to be enforced (by addressing such matters as forum, burden of proof, elements of discrimination, etc.).

Their overarching concern is to protect against future IRS harassment. If the legislation does not address at least some of their concerns, many of these groups will vocally attack the Administration and/or withdraw support from the bill.

Most civil rights groups are opposed to tuition tax credits on principle and will attack our legislation no matter how carefully and fairly we draft the anti-discrimination provisions. Nevertheless, the more we move to accommodate the Evangelicals by including the provisions they seek (even the eminently reasonable ones), the more we give civil rights groups ammunition to attack the bill and the opportunity to shift the focus of debate from the concept of credits to the issue of "racism".

Catholic schools, because less susceptible to charges of racism, are somewhat less preoccupied with the details of the definition of discrimination and the enforcement mechanism. However, they want to keep the pro-credit coalition intact and are worried that, if the bill fails to address the Evangelicals' legitimate concerns, the Evangelicals might withdraw support. On the other hand, they do not want to raise additional obstacles to the bill by making it any more controversial with civil rights groups than necessary.

Producing language that will satisfy these diverse factional interests is very nearly an impossible task. Nevertheless, the one thing we know for sure is that our tuition tax credit bill will die aborning if we stick with the language contained in the Bob Jones bill.

II. Legal Issues

The following are the most significant points of contention:

A. Party plaintiff

Private plaintiff (personal cause of action) vs. government plaintiff (DOJ or IRS).

B. Elements of proof

Existence of racially discriminatory policy based upon specific acts vs. inference of discrimination from statistical and other circumstantial data.

C. Burden of Proof

Plaintiff (private or government) vs. School.

D. Forum

Administrative proceeding (IRS) vs. court adjudication.

E. Venue

Tax Court vs. U.S. District Court where school located vs. concurrent in Washington, D.C. or local district court.

F. Government Information-Gathering

Limit IRS to judicial discovery vs. traditional, more intensive IRS investigative powers.

G. Remedy

Loss of tax-exempt status (1 or more years?) vs. private damages vs. both.

H. Effect of Appeal

Eligibility lost as soon as district court judgment entered vs. retained eligibility until final appeal concluded.

## III. Statutory Scheme - Basic Options

We have considered a large number of statutory alternatives, ranging from a simple process of institutional self-certification akin to that which prevailed in the early-mid 1970's, to a detailed scheme in which all or most of the sensitive issues are specifically addressed. Taking all relevant factors into account, we think the critical policy choice is whether enforcement ought to be carried primarily by government or by private parties. Depending on how that question is determined, there are a number of different alternatives that can be pursued under either rubric.

### Private Enforcement

Pro

1. Minimizes fears of IRS harassment so prominent among Evangelicals.
2. Government avoids having to involve itself in a continuing series of disputes in which it is accused of harassment if it sues or of indifference to civil rights if it does not.
3. If private action provides for attorneys' fees, government involvement adds only marginal benefit to plaintiff's case.

Con

1. Will be attacked by civil rights groups as sign of insufficient commitment.
2. No effective check on the nature or number of complaints that can be brought.
3. As many private schools have limited resources, threat of private actions could become harassment tool.

### Government Enforcement

Pro

1. Where basic civil rights are in issue, government should take lead role.
2. Could permit negotiated settlements prior to filing of court actions.
3. Will be able to screen complaints which rest on little more than ideological hostility.
4. Gives government opportunity to guide development of the law in a consistent manner.
5. Will be strongly preferred by civil rights groups.

Con

1. DOJ or IRS will become embroiled in highly contentious disputes, in which it stands to lose no matter whom it sides with.
2. Evangelicals will argue that administrations hostile to private education (e.g., Carter's) will throw resources of government against them.

4. Could produce a large and inconsistent body of law defining racial discrimination by private schools.

5. Odd to have penalties such as fines or loss of tax status determined in private actions.

6. Could end up involving the government in any event -- e.g., courts invite IRS or DOJ to intervene.

3. Intervention by government tends to create a presumption of wrong-doing in the court of public opinion.

4. Difficult to avoid detailed regulations/guidelines (a) as a guide to prosecution, (b) as a means for negotiating settlements.

(d) DEFINITIONS.

(1) ELIGIBLE EDUCATIONAL INSTITUTION.

(A) The term 'eligible educational institution' means an elementary or secondary school as defined in section 198(a)(7) of the Elementary and Secondary Education Act of 1965, as in effect on January 1, 1983, which is a privately operated, not-for-profit, day or residential school which

(i) is exempt from taxation under 501(a) as an organization described in section 501(c)(3), and

(ii) has not during the calendar year for which a tax credit is claimed or the two immediately preceding calendar years been declared, in an action brought by the United States pursuant to this section, to follow a 'racially discriminatory policy'.

(B) (i) For purposes of this Act, an intitution follows a 'racially discriminatory policy' if: (a) it refuses to admit applicants as students on account of race; (b) it excludes students, on account of race, from the rights, privileges, programs, and activities generally made available to students by that institution; or (c) it discriminates against students, on account of race, in administering its scholarship, loan, athletic or other programs.

(ii) A 'racially discriminatory policy' does not include: (a) using a bona fide plan to increase enrollment of a disadvantaged minority group, provided that no institution shall

be required to use such a plan to be eligible under this section; (b) granting any privilege, preference or priority to members of, or adherents to, a particular religious organization or belief, or limiting admission to such members or adherents, provided that no such privilege, preference, priority or limitation is based upon race or upon a belief that requires discrimination on the basis of race; (c) failing to pursue or achieve any racial quota, proportion or representation in the student body.

(iii) The term 'race' shall include color or national origin.

(C) (i) To enforce this section, the Attorney General, upon petition by a person who has been discriminated against under a policy as described in paragraph (B)(i) of this subsection, is authorized, upon finding good cause, to bring an action against an institution in the federal district court in the district in which such institution is located, seeking declaratory judgment that the institution is following a 'racially discriminatory policy' and has discriminated against the person filing the petition under such policy.

(ii) The petition must be filed with the Attorney General within one year of the act of racial discrimination alleged to have been committed against the person filing the petition. Upon receipt of the petition, the Attorney General shall promptly notify the affected institution of such petition and the allegations contained therein. Before any action may be filed, the Attorney General shall give the institution a fair opportunity to comment on all allegations made against it. An

action may be filed by the Attorney General no later than two years after receiving the petition.

(iii) An institution is ineligible during the entire calendar year in which a judicial judgment that the institution follows a 'racially discriminatory policy' becomes final and during the two immediately succeeding calendar years.

(iv) A judicial judgment that an institution follows a 'racially discriminatory policy' as described in paragraph (B)(i) of this subsection shall not become final until all parties to the action have exhausted all appellate review.

PRIVATE ENFORCEMENT OPTION

(d) DEFINITIONS.

(1) ELIGIBLE EDUCATIONAL INSTITUTION.

(A) The term 'eligible educational institution' means an elementary or secondary school as defined in section 198(a)(7) of the Elementary and Secondary Education Act of 1965, as in effect on January 1, 1983, which is a privately operated, not-for-profit, day or residential school which

(i) is exempt from taxation under 501(a) as an organization described in section 501(c)(3), and

(ii) has not during the calendar year for which a tax credit is claimed or the two immediately preceding calendar years been declared, in an action brought pursuant to subsection (C) of this section, to follow a 'racially discriminatory policy'.

(B) (i) For purposes of this Act, an institution follows a 'racially discriminatory policy' if: (a) it refuses to admit applicants as students on account of race; (b) it excludes students, on account of race, from the rights, privileges, programs, and activities generally made available to students by that institution; or (c) it discriminates against students, on account of race, in administering its scholarship, loan, athletic or other programs.

(ii) A 'racially discriminatory policy' does not include: (a) using a bona fide plan to increase enrollment of a disadvantaged minority group, provided that no institution shall

be required to use such a plan to be eligible under this section; (b) granting any privilege, preference or priority to members of, or adherents to, a particular religious organization or belief, or limiting admission to such members or adherents, provided that no such privilege, preference, priority or limitation is based upon race or upon a belief that requires discrimination on the basis of race; (c) failing to pursue or achieve any racial quota, proportion or representation in the student body.

(iii) The term 'race' shall include color or national origin.

(C) A person who has been discriminated against by an institution under a policy described in paragraph (B)(i) of this section, may file suit against such institution in the federal district court in the district in which such institution is located, seeking declaratory judgment that such institution is following a 'racially discriminatory policy' and, under such policy, has discriminated against said person. Such suit must be filed within one year of the act of racial discrimination alleged therein to have been committed against the person filing the suit.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 21, 1982

FOR: EDWIN MEESE III
EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Anti-Discrimination Language in Tuition Tax Credit Bill

I. The Problem

Some pro-credit groups (mainly Evangelicals) are strongly insisting that we include provisions in the legislation which would

(1) clarify the scope of the anti-discrimination language itself (by addressing such matters as "intent vs. effects", non-retroactivity, quotas, etc.); and

(2) delineate the method by which the anti-discrimination provision is to be enforced (by addressing such matters as forum, burden of proof, elements of discrimination, etc.).

Their overarching concern is to protect against future IRS harassment. If the legislation does not address at least some of their concerns, many of these groups will vocally attack the Administration and/or withdraw support from the bill.

Most civil rights groups are opposed to tuition tax credits on principle and will attack our legislation no matter how carefully and fairly we draft the anti-discrimination provisions. Nevertheless, the more we move to accommodate the Evangelicals by including the provisions they seek (even the eminently reasonable ones), the more we give civil rights groups ammunition to attack the bill and the opportunity to shift the focus of debate from the concept of credits to the issue of "racism".

Catholic schools, because less susceptible to charges of racism, are somewhat less preoccupied with the details of the definition of discrimination and the enforcement mechanism. However, they want to keep the pro-credit coalition intact and are worried that, if the bill fails to address the Evangelicals' legitimate concerns, the Evangelicals might withdraw support. On the other hand, they do not want to raise additional obstacles to the bill by making it any more controversial with civil rights groups than necessary.

Producing language that will satisfy these diverse factional interests is very nearly an impossible task. Nevertheless, the one thing we know for sure is that our tuition tax credit bill will die aborning if we stick with the language contained in the Bob Jones bill.

II. Legal Issues

The following are the most significant points of contention:

A. Party plaintiff

Private plaintiff (personal cause of action) vs. government plaintiff (DOJ or IRS).

B. Elements of proof

Existence of racially discriminatory policy based upon specific acts vs. inference of discrimination from statistical and other circumstantial data.

C. Burden of Proof

Plaintiff (private or government) vs. School.

D. Forum

Administrative proceeding (IRS) vs. court adjudication.

E. Venue

Tax Court vs. U.S. District Court where school located vs. concurrent in Washington, D.C. or local district court.

F. Government Information-Gathering

Limit IRS to judicial discovery vs. traditional, more intensive IRS investigative powers.

G. Remedy

Loss of tax-exempt status (1 or more years?) vs. private damages vs. both.

H. Effect of Appeal

Eligibility lost as soon as district court judgment entered vs. retained eligibility until final appeal concluded.

## III. Statutory Scheme - Basic Options

We have considered a large number of statutory alternatives, ranging from a simple process of institutional self-certification akin to that which prevailed in the early-mid 1970's, to a detailed scheme in which all or most of the sensitive issues are specifically addressed. Taking all relevant factors into account, we think the critical policy choice is whether enforcement ought to be carried primarily by government or by private parties. Depending on how that question is determined, there are a number of different alternatives that can be pursued under either rubric.

### Private Enforcement

**Pro**

1. Minimizes fears of IRS harassment so prominent among Evangelicals.

2. Government avoids having to involve itself in a continuing series of disputes in which it is accused of harassment if it sues or of indifference to civil rights if it does not.

3. If private action provides for attorneys' fees, government involvement adds only marginal benefit to plaintiff's case.

**Con**

1. Will be attacked by civil rights groups as sign of insufficient commitment.

2. No effective check on the nature or number of complaints that can be brought.

3. As many private schools have limited resources, threat of private actions could become harassment tool.

### Government Enforcement

**Pro**

1. Where basic civil rights are in issue, government should take lead role.

2. Could permit negotiated settlements prior to filing of court actions.

3. Will be able to screen complaints which rest on little more than ideological hostility.

4. Gives government opportunity to guide development of the law in a consistent manner.

5. Will be strongly preferred by civil rights groups.

**Con**

1. DOJ or IRS will become embroiled in highly contentious disputes, in which it stands to lose no matter whom it sides with.

2. Evangelicals will argue that administrations hostile to private education (e.g., Carter's) will throw resources of government against them.

4. Could produce a large and inconsistent body of law defining racial discrimination by private schools.

5. Odd to have penalties such as fines or loss of tax status determined in private actions.

6. Could end up involving the government in any event -- e.g., courts invite IRS or DOJ to intervene.

3. Intervention by government tends to create a presumption of wrong-doing in the court of public opinion.

4. Difficult to avoid detailed regulations/guidelines (a) as a guide to prosecution, (b) as a means for negotiating settlements.

IV. Options

Enclosed are two options -- one for private enforcement; one for enforcement by DOJ. Both have the strengths and weaknesses discussed above. Both provide adequate protection against racial discrimination. Both, in my view, fully meet the major objections raised by private schools.

Also enclosed is a memorandum and two options prepared by Morton Blackwell in consultation with certain private school representatives. In my opinion, either of my two proposals provides greater protection to private schools than their own two, while at the same time raising fewer "red flags" to civil ights groups.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 24, 1982

FOR: MICHAEL UHLMANN

FROM: GARY L. BAUER

SUBJECT: Evangelical Input re: Tuition Tax Credits

As you know, on Friday, May 21, Morton Blackwell in the Office of Public Liaison initiated a conference call to discuss some of the options we have been considering on tuition tax credits. Participants were Morton Blackwell, Phillip J. Murren, a partner in the firm of Ball and Skelly, and Grover Rees, Assistant Law Professor at the University of Texas, and myself.

I made clear during the conversation that we were discussing only unofficial options and that no decisions had been made on final language. We urged the participants to keep in mind the delicate political problems the Administration faced in crafting the final legislative language.

Phillip Murren made clear he would like to have another opportunity to talk about the language before we officially send it to Congress.

Of the three options we discussed, they were decidedly unenthusiastic about a private enforcement option or the use of a civil right statute already on the books -- 42 U.S.C. 1981. They felt very good about the proposed government right of action but did suggest some changes in our approach.

I have attached a new version of the government right of action reflecting the suggestions made on Friday. Of all the suggestions, four seemed to be of most concern. They are:

1. Drop the use of the word "eligible" in front of educational institution since it indicates that it is institutions rather than individuals who are receiving the aid.

2. Do not refer to the Elementary and Secondary Education Act of 1965 in defining education institution. Too many of the new private schools are having accreditation fights with state authorities. We don't want this bill to be a factor in those conflicts.

3. Make sure IRS had no implied authority to enforce the act.

4. Make sure that the legislation contemplates that something more than just one act of discrimination is needed to stop the credits from going to parents. In this case that "something more" is a "racially discriminatory policy."

I believe we can acquiese in these changes without adding to the criticism we will receive from opponents of tuition tax credits.

cc: Edwin L. Harper
Bill Barr

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 24, 1982

FOR: EDWIN MEESE, III
EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Evangelicals' Comments on Our Suggested Tuition Tax Credit Language

Late on Friday (May 21) Morton Blackwell and Gary Bauer reviewed our two versions of anti-discrimination language with two Evangelical lawyers, Grover Rees and Philip Murren, an assistant to Bill Ball.

These lawyers said that they did not like the private enforcement option. They indicated the Government enforcement option was a positive approach and a "sign of good faith on the part of the Administration".

They had seven specific comments concerning the language of the Government enforcement option. Attached is a copy of the Government enforcement option with interlineations reflecting their comments.

(1) Delete the word "eligible" in describing educational institutions. This would make it clear that the parents rather than the schools are the intended beneficiaries.

Comment: Deletion does not appear to pose a problem.

(2) Delete the requirement for state accreditation.

Comment: This must be given some thought. Deletion of accreditation may give rise to a cottage industry overnight.

(3) Substitute "uses race as a criterion" instead of "on account of race". They were tentative about this, but thought that the former phrase was clearer than the latter.

Comment: Stick with "on account of race". This is the traditional language and usually conveys "intent". Use of totally new language would invite judicial activism.

(4) Strike clause (B)(i)(c) as redundant.

Comment: Deletion is no problem from a legal standpoint. Retaining the clause, however, makes the bill look more rigorous from a civil rights standpoint.

(5) Drop altogether clause (B)(ii)(b) -- the provision permitting preference to members of a religious organization, provided preferences are not based on race.

Comment: Evangelicals originally wanted a provision permitting religious preferences. In the Bob Jones bill, we included a proviso to ensure that religion would not be used as a cloak. Apparently, the Evangelicals would rather drop the whole provision than retain the proviso. It is unclear how civil rights groups would react; it may be a touchy subject.

(6) In paragraph (C)(i) make it clearer that the court must find both (1) that the school follows a racially discriminatory policy and (2) that the person filing the petition has actually been discriminated against pursuant to such policy.

Comment: I have no problem with this suggestion, but think it can be done more artfully (without raising a 'red flag'). E.g.:

". . . declaratory judgment that the institution is following a 'racially discriminatory policy' and has, pursuant to such policy, discriminated against the person filing the petition."

(7) Include a provision making it clearer that IRS has no enforcement responsibility or power.

Comment: Of the seven comments, this was the one most stressed by the Evangelicals. From a legal standpoint, I do not think an explicit limitation on IRS is necessary. We should get Treasury's and Justice's views on this.

GOVERNMENT ENFORCEMENT OPTION

(d) DEFINITIONS.

(1) ~~ELIGIBLE~~ EDUCATIONAL INSTITUTION.

(A) The term '~~eligible~~ educational institution' means an elementary or secondary school ~~as defined in section 198(a)(7) of the Elementary and Secondary Education Act of 1965, as in effect on January 1, 1983,~~ which is a privately operated, not-for-profit, day or residential school which

(i) is exempt from taxation under 501(a) as an organization described in section 501(c)(3), and

(ii) has not during the calendar year for which a tax credit is claimed or the two immediately preceding calendar years been declared, in an action brought by the United States pursuant to this section, to follow a 'racially discriminatory policy'.

(B) (i) For purposes of this Act, an intitution follows a 'racially discriminatory policy' if: (a) it ~~refuses to~~ (uses race as a criterion in -ting) admit applicants as students ~~on account of race~~; (b) it (uses race as a criterion in -ing) excludes students, ~~on account of race,~~ from the rights, privileges, programs, and activities generally made available to students by that institution; ~~or (c) it discriminates against students, on account of race, in administering its scholarship, loan, athletic or other programs~~.

(ii) A 'racially discriminatory policy' does not include: (a) using a bona fide plan to increase enrollment of a disadvantaged minority group, provided that no institution shall

be required to use such a plan to be eligible under this section; ~~(b) granting any privilege, preference or priority to members of, or adherents to, a particular religious organization or belief, or limiting admission to such members or adherents, provided that no such privilege, preference, priority or limitation is based upon race or upon a belief that requires discrimination on the basis of race;~~ (b) failing to pursue or achieve any racial quota, proportion or representation in the student body.

(iii) The term 'race' shall include color or national origin.

(C) (i) ~~To enforce this section,~~ Notwithstanding any other provision of law, this section shall be enforced only by the Attorney General, who may, upon petition by a person who has been discriminated against under a policy as described in paragraph (B)(i) of this subsection, ~~is authorized~~ and, upon finding good cause, ~~to~~ bring an action against an institution in the federal district court in the district in which such institution is located, seeking declaratory judgment that the institution both (1) ~~is~~ following ~~a~~ (2) 'racially discriminatory policy' and has discriminated against the person filing the petition under such policy.

(ii) The petition must be filed with the Attorney General within one year of the act of racial discrimination alleged to have been committed against the person filing the petition. Upon receipt of the petition, the Attorney General shall promptly notify the affected institution of such petition and the allegations contained therein. Before any action may be filed, the Attorney General shall give the institution a fair opportunity to comment on all allegations made against it. An

action may be filed by the Attorney General no later than two years after receiving the petition.

(iii) An institution is ineligible during the entire calendar year in which a judicial judgment that the institution follows a 'racially discriminatory policy' becomes final and during the two immediately succeeding calendar years.

(iv) A judicial judgment that an institution follows a 'racially discriminatory policy' as described in paragraph (B)(i) of this subsection shall not become final until all parties to the action have exhausted all appellate review.

May 25, 1982

TUITION TAX CREDIT BILLS WITH WIDE SUPPORT

Attached are two additional options on a tuition tax credit bill.

Option C is a letter and draft bill received last week from William Ball.

Option M is a draft bill including a modified version of the "Government Enforcement Option: submitted to Mr. Meese on Friday by OPD.

Both Option C and Option M would have support of the Catholic school community and the majority of the Protestant Christian School Movement, according to the best estimate at the Office of Public Liaison.

A small but militant minority of fundamentalist school leaders will not support any tuition tax credit bill which applies anti-discrimination requirements to private schools. As you can see from Mr. Ball's draft bill (Option C), he and the major segment of the Christian school movement which rely on him are prepared to support effective anti-discrimination provisions, provided the opportunities for I.R.S. abuse are eliminated.

OPTION M

Option M is clearly the best vehicle. It is a version of OPD's "Government Enforcement Option" modified in a few places in response to suggestions by law professor Grover Rees and private school attorney Ball.

Jack Burgess, White House liaison to the Catholic groups, has reviewed Option M with Catholic school leaders, whom he believes will support it.

The changes from the Government Enforcement Option to Option M are these:

1. Deletion of the term "eligible" from linkage with the definition of educational institution. Ball and Rees argue that the term "eligible" provides a hook on which to hang an argument that the aid is to the institution and not to the individuals getting the tax credit.

2. deletion of reference to the Elementary and Secondary

for the purpose of tuition tax credits. There are major battles going on in several states between Christian schools and state credentialing authorities. Application of the above mentioned Act would give states the authority to cut off tuition tax credits to Christian schools of which they disapproved. For that reason, any definition of this sort would cause much of the Christian school community to oppose a tuition tax credit bill.

3. deletion of (B) (i) (c). This is redundant of (B) (i) (b).

4. deletion of (B) (ii) (b). Ball and Rees felt this protection for religious schools was not necessary, given the rest of the text. They believe this explicit exemption would only raise red flags among foes of tuition tax credit.

5. changes in subsection (C) which make more clear the role of the Attorney General in enforcing anti-discrimination under this section. This would prevent the I.R.S. from using its general powers under the act to harass private schools with a view toward finding a plaintiff who might then apply to the Attorney General for relief. In this respect, Option M affords the same protection as Options A, B, and C.

   The major Protestant activists in the Christian school movement will vigorously oppose any bill which does not preclude the use of tuition tax credit as a vehicle for harassment by I.R.S. zealots burning with desire to impose affirmative action requirements on private schools.

6. an addition to subsection C to provide that the three years during which parents may not claim tuition tax credits for payments to a discriminating school begin upon judicial determination that a school is racially discriminatory.

OPTION C

This draft bill by Mr. Ball is close to other options under consideration. Its protections against I.R.S. abuse, like those in Options A and B, are more explicit and complex than those in Option M. Most Catholic school leaders, as well as most Protestant school leaders, will support Option C, say Jack Burgess and Morton Blackwell at OPL.

PRIVATE ENFORCEMENT OPTION

Christian school activists prefer the Government Enforcement Option to this option because a Private Enforcement Option would put their schools at the mercy of harassing suits by Legal Services Corporation activists or other advocacy groups hostile to private education. They prefer to have an additional screen,even a screen provided by the Civil Rights Division of the Justice Department.

THE 42 USC 1981 TRIGGER OPTION

While this option has the advantage of simplicity, it would be opposed by most Protestant school activists on the ground that it affords no protections against I.R.S. enforcement of affirmative action requirements against private schools. Moreover, the actual effect of 42 USC 1981 is still too unclear to be relied upon as a trigger by the gun-shy Christian School Movement.

TAX STATUS LINKAGE

It is interesting to note that every option at hand, including Option C which was drafted by Mr. Ball, includes the requirement that schools for payment to which tax credit is claimed must be exempt from taxation under section 501 (a) as organizations described under section 501 (c) (3). Thus if Bob Jones University loses its tax status case in the Federal courts, not only segregated schools but schools with inter-racial dating bans could not qualify as recipients for payments for which tuition tax credit is claimed.

CONCLUSION

We are very close to agreement on a tuition tax credit bill which will be enthusiastically greeted by all supporters of the idea except a small sector which will oppose any anti-discrimination requirement. Option M comes the closest to the simplicity and effectiveness desired by those most interested in anti-discrimination and by those most interested in preventing government harassment of private schools.

One note of caution must be sounded. With so many draft bills and fractions of draft bills on hand, we must be careful not

to presume that the Catholic or the Protestant supporters of tuition tax credit will fight hard for any bill they have not reviewed in its entirety in advance of its submission to the Congress.

We would poorly serve the President if we blindly launched a proposal not knowing exactly how it would be greeted by those to whom the President has promised a tuition tax credit bill.

BALL & SKELLY
ATTORNEYS AT LAW
511 N. SECOND STREET
P. O. BOX 1108
HARRISBURG, PENNSYLVANIA 17108

WILLIAM BENTLEY BALL
JOSEPH G. SKELLY
PHILIP J. MURREN
RICHARD E. CONNELL
KATHLEEN A. O'MALLEY

TELEPHONE
AREA CODE 717
232-8731

# A RATIONAL TUITION TAX CREDIT BILL

As we write, major national campaigns for "a tuition tax credit bill" have been initiated by the Reagan Administration, U.S. Catholic Conference, and by other groups. Further, the tuition tax credit concept is under furious attack by a large coalition of religious and educational groups.

What is fascinating, in this whole picture is this fact: "the" tuition tax credit bill does not exist. Several bills have been introduced, and many drafts are floating about. But there is no one measure which is the common subject of the Reagan and U.S. Catholic Conference campaigns, or the common object of attack.

On the side of proponents of tuition tax credit legislation is the following major division:

(a) U.S. Catholic Conference and CAPE apparently fear that, unless IRS is given broad powers under the legislation, the tuition tax credit legislation will end up as a support for segregationist academies.

(b) Those fundamentalist Christian organizations which favor tuition tax credits fear that the legislation may contain IRS, federal or state governmental controls which will far outweigh the benefit of any tax break for parents.

Politically, it is clear that passage of any tuition tax credit bill will be very ditficult; secondly, that if fundamentalist Christians oppose a certain bill that bill will not pass. We think that there is no need, however, for conflict among any who support the tuition tax credit concept.

Two sorts of harmful provisions need pointing out: (a) provisions which would, expressly or impliedly, give the state educational bureaucracies any powers over private schools, (b) provisions which would, expressly or impliedly, give IRS powers of surveillance, investigation, or affirmative action impositions with respect to private schools (here, in particular, with respect to religious schools since religious schools are ministries with unique constitutional status). As to the state bureaucracies, this tax measure should in no sense be the occasion for awarding them any powers over private schools. As to IRS, the record of that agency's attempted transgressions against private education under its Proposed Revenue Procedures of 1978 and 1979, stands as a warning for all the future. A tax credit bill must not, and need not, be the occasion for any such powers being awarded to IRS.

The legislation which is needed must be protective of two kinds of civil rights: racial civil rights and religious civil rights. To accomplish these, it must assure that racial havens will not be conduits for tax credits, and that neither IRS or any other federal or state agency will be allowed powers to entangle themselves in the affairs of religious schools.

The enclosed bill fully responds to those concerns:

1. It requires every school (for payment of tuition to which a tax credit is claimed) to file with IRS a sworn statement that it does not discriminate on account of race. Enforcement: the signer is liable in a criminal perjury action for a knowingly false statement. This is not only a completely effective enforcement provision but one which has the needed deterrent effect. It can be expected that few if any school administrators will venture to submit a sworn statement which they know to be false.

2. It provides administrative simplicity:

(a) The taxpayer simply claims the tuition credit on his annual tax form (naming the school). (b) If IRS finds that the school is not one which has filed the above sworn

statement, the credit is denied. If some complainant tells IRS that the statement is false, IRS is empowered to bring a declaratory judgment action in federal court against the school. This is infinitely preferable to imposing of the clumsy and complex IRS administrative machinery upon private schools - with interminable proceedings and all manner of surveillance, entanglement and other unconstitutional activity.

3. IRS is denied any power to require affirmative action programs or to conduct investigations of religious schools.

The above three features render the bill completely "safe" from the points of view both of non-racial discrimination and religious liberty. Further, it is easy to administer. And it gives the state public education bureaucracies no powers (as indeed it should not) in reference to this tax matter.

William B. Ball

May 18, 1982

A BILL

To amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Educational Opportunity and Equity Act of 1982".

SECTION 2. FINDINGS AND DECLARATION OF POLICY.

(a) The Congress finds that --

(1) diversity and freedom of choice have been major strengths of the American educational system;

(2) families should not be denied the opportunity to select for their children the formal education which they deem most beneficial to their children and which best reflects the intellectual, moral, and cultural values that they wish to instill in their children;

(3) lower income families are increasingly denied the ability to choose among diverse educational opportunities for their children;

(4) diversity and personal choice in American education can be enhanced through the income tax structure with a minimum of governmental interference in the lives of individuals and in the operation of private educational institutions.

(b) It is therefore declared to be the policy of this Act to enhance equality of educational opportunity for all American families through facilitating the attendance of their children at the elementary and secondary schools of their choice.

SECTION 3. CREDIT FOR TUITION EXPENSES.

(a) IN GENERAL. Subpart A of Part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1954 (relating to credits allowable) is amended by inserting before section 45 the following new section:

"SEC. 44H. TUITION EXPENSES.

"(a) GENERAL RULE. In the case of an individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 50 percent of the tuition expenses paid by him during the taxable year to one or more educational institutions for any of his dependents (as defined in section 152(a)(1), (2), (3), (6), or (9)) who has not yet attained the age of 20 at the close of the taxable year in which the tuition expenses are paid.

"(b) LIMITATIONS.

(1) MAXIMUM DOLLAR AMOUNT PER INDIVIDUAL. The amount of the credit allowable to a taxpayer under subsection (a) with respect to amounts paid on behalf of each dependent on whose behalf a credit claimed shall not exceed --

(A) $100 in the case of tuition expenses paid during the taxpayer's first taxable year beginning on or after January 1, 1983;

(B) $300 in the case of tuition expenses paid during the taxpayer's first taxable year beginning on or after January 1, 1984; and

(C) $500 in the case of tuition expenses paid for each taxable year of the taxpayer beginning or after January 1, 1985.

(2) MARRIED INDIVIDUALS. In the case of a husband and wife who file a joint return under Section 6013, the maximum dollar amounts specified under this subsection (b) shall apply to the joint return. In the case of a married individual filing a separate return, subsection (b) shall be applied by reducing the maximum dollar amount for each taxable year by 50 percent.

(3) PHASE-OUT OF CREDIT ABOVE CERTAIN ADJUSTED GROSS INCOME AMOUNTS. Notwithstanding any other provisions of this section, the credit allowable under this subsection (b) shall be reduced by the following percent of the amount by which the adjusted gross income of the taxpayer for the taxable year exceeds $50,000 ($25,000 in the case of a married individual filing a separate return):

(A) 0.4 percent for the first taxable year of

the taxpayer beginning on or after January 1, 1983;

(B) 1.2 percent for the first taxable year of the taxpayer beginning on or after January 1, 1984; and

(C) 2.0 percent for the first taxable year of the taxpayer ending on or after December 31, 1985.

(4) PART-TIME STUDENTS. Tuition expenses paid with respect to any individual who is not a full-time student at an eligible educational institution shall not be taken into account under subsection (a).

"(c) SPECIAL RULES.

(1) ADJUSTMENT FOR SCHOLARSHIPS AND FINANCIAL ASSISTANCE. The amounts deemed paid by the taxpayer under subsection (a) as tuition expenses shall not include any amounts which were received by the taxpayer or his dependent as

(i) a scholarship or fellowship grant (within the meaning of section 117(a)(1)) which is not includible in gross income under section 117;

(ii) an educational assistance allowance under chapter 32, 34, or 35 of title 38, United States Code; or

(iii) other financial assistance which is for educational expenses, or attributable to attendance at an educational institution, and that is exempt

from income taxation by any law of the United States (other than a gift, bequest, devise, or inheritance within the meaning of section 102(a)).

(2) DISALLOWANCE OF CREDITED EXPENSES AS DEPRECIATION. No deduction or credit shall be allowed under any other section of this chapter for any tuition expense to the extent that such expense is taken into account in determining the amount of the credit allowed under subsection (a) unless the taxpayer elects, in accordance with regulations prescribed by the Secretary, not to apply the provisions of this section to such tuition expenses for the taxable year.

(3) TAXPAYER WHO IS A DEPENDENT OF ANOTHER TAXPAYER. No credit shall be allowed to a taxpayer under subsection (a) for amounts paid during the taxable year for tuition expenses of the taxpayer if such taxpayer is a dependent of any other person for a taxable year beginning with or within the taxable year of the taxpayer.

(4) TAX CREDIT NOT ALLOWED FOR AMOUNTS PAID TO RACIALLY DISCRIMINATORY EDUCATIONAL INSTITUTIONS. No credit shall be allowed under this section for amounts paid to any educational institution which fails to file the annual statement referred to in subsection (f) of this section or which has been determined, in accordance

with the procedures prescribed in subsection (f) of this section, to have a racially discriminatory policy as to students.

"(d) DEFINITIONS. For purposes of this section --

(1) EDUCATIONAL INSTITUTION. The term 'educational institution' means an elementary or secondary school which is a privately operated, not-for-profit, day or residential school which is exempt from taxation under section 501(a) as an organization described in section 501(c)(3).

(2) RACIALLY DISCRIMINATORY POLICY AS TO STUDENTS. An educational institution has a "racially discriminatory policy as to students" if it maintains a policy (whether written or as evidenced by a pattern of conduct) the purpose of which is to exclude persons from admission as students, or from participation in school programs, benefits or activities, on the basis of their race, color, or national or ethnic origin. Such term shall not be construed to require any educational organization to recruit or grant preferences to students on the basis of race, color, or national or ethnic origin, or to meet any quotas as to students.

(3) TUITION EXPENSES. The term 'tuition expenses' means tuition and fees required for the enrollment or attendance of a student at an educational institution,

including required fees for courses, and does not include any amount paid for

(A) books, supplies, and equipment for courses of instruction at the educational institution;

(B) meals, lodging, transportation, or personal living expenses; or

(C) education below the first-grade level, such as attendance at a kindergarten, nursery school, or similar institution.

"(e) TAX CREDIT NOT TO BE CONSIDERED AS FEDERAL FINANCIAL ASSISTANCE TO INSTITUTION. No educational institution which enrolls a student for whom a tax credit is claimed under the amendments made by this Act shall be considered to be a recipient of Federal financial assistance solely because a tax credit is claimed for such student under this Act.

"(f) LIMITATION ON EXAMINATION OF SCHOOLS. Any other provision of this Act notwithstanding, in determining whether a particular elementary or secondary school is an educational institution, or maintains a racially discriminatory policy as to students, the Secretary shall have authority solely:

(1) to ascertain whether the school is operated or controlled by a church, or by a convention or association of churches, and, if not, to ascertain whether the school has applied for and been accorded recognition of exemption under section 501(a) as an

organization described in section 501(c)(3);

(2) to require that the school annually submit a statement, under oath or affirmation, and subject to penalties for perjury, that the school does not exclude persons from admission as students or from participation in any school program, benefit, or activity on the basis of race, color, or national or ethnic origin, and does not have any written policy providing for such exclusion; and

(3) where there is probable cause therefor, to institute an action for declaratory judgment in the federal district court for the district in which the school is located in order to establish that the school maintains a racially discriminatory policy as to students. Where it is finally determined that a school maintains a racially discriminatory policy as to students, no credit shall be allowed under this section for amounts paid to such school for three years thereafter, and until the school demonstrates to the same court that it no longer maintains a racially discriminatory policy as to students.

No credit claimed by any taxpayer under this section shall be disallowed unless, prior to the beginning of the taxable year for which a credit is claimed, the school for payment to which the credit is claimed has either (a) failed

to file a statement in accordance with paragraph (2) of this subsection, or (b) been finally determined, in accordance with section (3) of this subsection, to maintain a racially discriminatory policy as to students."

SECTION 4. CONFORMING AMENDMENT.

The table of sections for subpart A of Part IV of subchapter A of chapter 1 of such Code is amended by inserting immediately before the item relating to section 45 the following: "Sec. 44H. Tuition expenses."

SECTION 5. EFFECTIVE DATE.

The amendments made by section 3 of this Act shall apply to taxable years beginning after December 31, 1982, for tuition expenses incurred after that date.

A BILL

To amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Educational Opportunity and Equity Act of 1982".

SECTION 2. FINDINGS AND DECLARATION OF POLICY.

(a) The Congress finds that --

(1) diversity and freedom of choice have been major strengths of the American educational system;

(2) families should not be denied the opportunity to select for their children the formal education which they deem most beneficial to their children and which best reflects the intellectual, moral, and cultural values that they wish to instill in their children;

(3) lower income families are increasingly denied the ability to choose among diverse educational opportunities for their children;

(4) diversity and personal choice in American education can be enhanced through the income tax structure with a minimum of governmental interference in the lives of individuals and in the operation of private educational institutions.

(b) It is therefore declared to be the policy of this Act to enhance equality of educational opportunity for all American families through facilitating the attendance of their children at the elementary and secondary schools of their choice.

SECTION 3. CREDIT FOR TUITION EXPENSES.

(a) IN GENERAL. Subpart A of Part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1954 (relating to credits allowable) is amended by inserting before section 45 the following new section:

"SEC. 44H. TUITION EXPENSES.

"(a) GENERAL RULE. In the case of an individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 50 percent of the tuition expenses paid by him during the taxable year to one or more educational institutions for any of his dependents (as defined in section 152(a)(1), (2), (3), (6), or (9)) who has not yet attained the age of 20 at the close of the taxable year in which the tuition expenses are paid.

"(b) LIMITATIONS.

(1) MAXIMUM DOLLAR AMOUNT PER INDIVIDUAL. The amount of the credit allowable to a taxpayer under subsection (a) with respect to amounts paid on behalf of each dependent on whose behalf a credit claimed shall not exceed --

(A) $100 in the case of tuition expenses paid during the taxpayer's first taxable year beginning on or after January 1, 1983;

(B) $300 in the case of tuition expenses paid during the taxpayer's first taxable year beginning on or after January 1, 1984; and

(C) $500 in the case of tuition expenses paid for each taxable year of the taxpayer beginning or after January 1, 1985.

(2) MARRIED INDIVIDUALS. In the case of a husband and wife who file a joint return under Section 6013, the maximum dollar amounts specified under this subsection (b) shall apply to the joint return. In the case of a married individual filing a separate return, subsection (b) shall be applied by reducing the maximum dollar amount for each taxable year by 50 percent.

(3) PHASE-OUT OF CREDIT ABOVE CERTAIN ADJUSTED GROSS INCOME AMOUNTS. Notwithstanding any other provisions of this section, the credit allowable under this subsection (b) shall be reduced by the following percent of the amount by which the adjusted gross income of the taxpayer for the taxable year exceeds $50,000 ($25,000 in the case of a married individual filing a separate return):

(A) 0.4 percent for the first taxable year of

the taxpayer beginning on or after January 1, 1983;

(B) 1.2 percent for the first taxable year of the taxpayer beginning on or after January 1, 1984; and

(C) 2.0 percent for the first taxable year of the taxpayer ending on or after December 31, 1985.

(4) PART-TIME STUDENTS. Tuition expenses paid with respect to any individual who is not a full-time student at an eligible educational institution shall not be taken into account under subsection (a).

"(c) SPECIAL RULES.

(1) ADJUSTMENT FOR SCHOLARSHIPS AND FINANCIAL ASSISTANCE. The amounts deemed paid by the taxpayer under subsection (a) as tuition expenses shall not include any amounts which were received by the taxpayer or his dependent as

(i) a scholarship or fellowship grant (within the meaning of section 117(a)(1)) which is not includible in gross income under section 117;

(ii) an educational assistance allowance under chapter 32, 34, or 35 of title 38, United States Code; or

(iii) other financial assistance which is for educational expenses, or attributable to attendance at an educational institution, and that is exempt

from income taxation by any law of the United States (other than a gift, bequest, devise, or inheritance within the meaning of section 102(a)).

(2) DISALLOWANCE OF CREDITED EXPENSES AS DEPRECIATION. No deduction or credit shall be allowed under any other section of this chapter for any tuition expense to the extent that such expense is taken into account in determining the amount of the credit allowed under subsection (a) unless the taxpayer elects, in accordance with regulations prescribed by the Secretary, not to apply the provisions of this section to such tuition expenses for the taxable year.

(3) TAXPAYER WHO IS A DEPENDENT OF ANOTHER TAXPAYER. No credit shall be allowed to a taxpayer under subsection (a) for amounts paid during the taxable year for tuition expenses of the taxpayer if such taxpayer is a dependent of any other person for a taxable year beginning with or within the taxable year of the taxpayer.

"(d) DEFINITIONS

(1) EDUCATIONAL INSTITUTION.

(A) The term 'educational institution' means an elementary or secondary school which is a privately operated, not-for-profit, day or residential school which

(i) is exempt from taxation under 501(a) as an organization described in section 501(c)(3), and

(ii) has not during the calendar year for which a tax credit is claimed or the two immediately

preceding calendar years been declared in an action brought by the United States pursuant to this section, to follow a 'racially discriminatory policy'.

(B) (i) For purposes of this Act, an institution follows a 'racially discriminatory policy' if: (a) it refuses to admit applicants as students on account of race; or (b) it excludes students, on account of race, from the rights, privileges, programs, and activities generally made available to students by that institution.

(ii) A 'racially discriminatory policy' does not include: (a) using a bona fide plan to increase enrollment of a disadvantaged minority group, provided that no institution shall be required to use such a plan as a prerequisite or condition for payments for which deductions will be allowed under this section; or (b) failing to pursue or achieve any racial quota, proportion or representation in the student body. The proportionate racial composition of a student body shall not constitute a basis for presumption that a school pursues a 'racially discriminatory policy'.

(iii) The term 'race' shall include color or national origin.

(C) (i) Notwithstanding any other provisions of this Act, this section shall be enforced only by the Attorney General, who shall, upon petition by a person who has been discriminated against under a policy as described in paragraph (B) (i) of this subsection, and

upon finding good cause, bring an action against an institution in the federal district court in the district in which such institution is located, seeking a declaratory judgment that the institution (a) is following a 'racially discriminatory policy' and (b) has discriminated against the person filing the petition under such policy.

(ii) The petition must be filed with the Attorney General within one year of the act of racial discrimination alleged to have been committed against the person filing the petition. Upon receipt of the petition, the Attorney General shall promptly notify the affected institution of such petition and the allegations contained therein. Before any action may be filed, the Attorney General shall give the institution a fair opportunity to comment on all allegations made against it. An action may be filed by the Attorney General no later than two years after receiving the petition.

(iii) A judicial judgment that an institution follows a 'racially discriminatory policy' as described in paragraph (B) (i) of this subsection shall not become final until all parties to the action have exhausted all appellate review.

(iv) Notwithstanding anything in this section or in any other provision of law, no agency of the United States is authorized to conduct any audit or investigation of school policies or programs in order to determine whether the school has engaged in any acts which would disqualify any person from claiming the credit allowed by this section.

(vi) No credit claimed by any taxpayer under this section shall be disallowed unless, prior to the beginning of the taxable year for which a credit is claimed, the school for payment to which the credit is claimed has been finally determined, in accordance with subsection (C) (i) of this section, to maintain a 'racially discriminatory policy' as to students.

(2) TUITION EXPENSES. The term 'tuition expenses' means tuition and fees required for the enrollment or attendance of a student at an educational institution, including required fees for courses, and does not include any amount paid for

(A) books, supplies, and equipment for courses of instruction at the educational institution;

(B) meals, lodging, transportation, or personal living expenses; or

(C) education below the first-grade level, such as attendance at a kindergarten, nursery school, or similar institution.

"(e) TAX CREDIT NOT TO BE CONSIDERED AS FEDERAL FINANCIAL ASSISTANCE TO INSTITUTION. No educational institution which enrolls a student for whom a tax credit is claimed under the amendments made by this Act shall be considered to be a recipient of Federal financial assistance solely because a tax credit is claimed for such student under this Act. "

SECTION 4. CONFORMING AMENDMENT.

The table of sections for subpart A of Part IV of Subchaper A of chapter 1 of such Code is amended by

inserting immediately before the item relating to section 45 the following: "Sec. 44H Tuition expenses."

SECTION 5. EFFECTIVE DATE.

The amendments made by section 3 of this Act shall apply to taxable years beginning after December 31, 1982, for tuition expenses incurred after that date.