



UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

May 25, 2006

The President
The White House
Washington, DC 20500

Dear Mr. President:

I write concerning recent Government Accountability Office ("GAO") responses to inquiries from members of the United States Senate about the U.S. Department of Education (the "Department").

On October 14, 2004, Senator Frank R. Lautenberg and Senator Edward M. Kennedy wrote a letter (the "2004 Request") to GAO asking GAO to consider the Department's hiring of Ketchum, Inc. ("Ketchum") to conduct a media analysis and to produce and to distribute a video news release ("VNR") about the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002) ("NCLB"). Senators Lautenberg and Kennedy followed that request with another letter on January 10, 2005 (the "2005 Request"), asking GAO to review the Department's arrangements with Ketchum and Armstrong Williams concerning NCLB. The letters dated September 30, 2005, from GAO responded to the 2004 Request and the 2005 Request. GAO maintains that the Department violated the Antideficiency Act. The Department disputes this contention.

1. The Video News Releases and Media Analysis

As noted above, in correspondence dated September 30, 2005, GAO indicated that the use of video news releases by the Department to inform the public about the provisions of NCLB violated the Antideficiency Act, 31 U.S.C. §1341. See Department of Education-No Child Left Behind Act Video News Release and Media Analysis, B-304228, September 30, 2005. For the following reasons, the Department disagrees with that opinion.

Previously, on May 19, 2004, GAO determined that the Department of Health and Human Services' ("HHS") use of VNRs violated a government-wide restriction on publicity and propaganda. That restriction states that "[n]o part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." GAO reasoned that HHS's use of VNRs constituted "covert propaganda" because HHS failed to disclose to the ultimate viewing audience that the government helped fashion the message. In the September 30, 2005, letter replying to the 2004 Request, GAO's General Counsel concluded that the Department had violated the Antideficiency Act because the Department's VNRs were not materially different from those produced by HHS.

The Department wishes to underscore that the view taken by GAO concerning the HHS VNR conflicts with an opinion from the Office of Legal Counsel (OLC) of the U.S. Department of Justice issued on July 30, 2004, to the General Counsel of HHS. Contrary to the GAO General Counsel's May 19, 2004, determination, OLC concluded that the expenditure of appropriated funds to produce and distribute the HHS informational VNR did not violate the prohibition on propaganda. Pursuant to the OLC opinion, the use of appropriated funds for purely informational video news releases does not violate the "covert propaganda" restriction. Moreover, the Department ceased developing such VNRs long before the GAO opinion was issued--before the recent change in the law.¹ As such, under the law in existence at the time, the Department respectfully disagrees with GAO's conclusion that the Department's use of appropriated funds for the disputed VNRs violated the Antideficiency Act.

2. The Ketchum, Inc. Subcontract with Graham Williams Group

On September 30, 2005, in a separate letter, GAO wrote to Senators Lautenberg and Kennedy that the Department violated the Antideficiency Act by directing Ketchum to issue a subcontract to the Graham Williams Group (GWG) for purposes of conducting a minority outreach advertising campaign to inform the minority community about the provisions of NCLB. The letter reasoned that the Antideficiency Act was violated because the Department obligated funds for the purpose of having Mr. Williams promote NCLB without requiring him to disclose that he was under contract with the Department. See Department of Education--Contract to Obtain Services of Armstrong Williams, B-305368, September 30, 2005.

We have no intention of defending poorly written contracts that were ineffectively administered. Indeed, the contracts contain language that viewed in isolation could raise questions about the scope of the contract activities. However, the GAO letter ignores the Ketchum/Williams cost proposal and Williams' invoices to Ketchum. They clearly show that the Department did not pay Williams to "promote" NCLB. Neither the cost proposal and budget nor the invoices of Williams or Ketchum show any breakdown or allocation of costs for promotion. Instead, the record, including the proposed budget and invoices, demonstrates that all of the funds paid to Ketchum under its subcontract with Williams were used for the production and airing of paid advertisements on "The Right Side" program.

The September 30 letter expresses the view that the absence of detail in the invoices, coupled with Mr. Williams' outside activities performed during the period of contract performance, indicates that he could have been paid to promote NCLB. In other words, that letter views any promotional activities as part of a total package of "Professional Services." In our view,

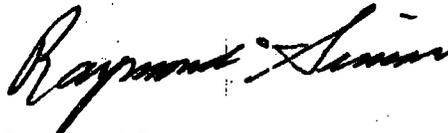
¹ Section 6076 of the fiscal year 2005 emergency supplemental appropriations legislation, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13 (May 11, 2005) provides as follows:

Unless otherwise authorized by existing law, none of the funds provided in this Act or any other Act, may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency.

however, Mr. Williams' invoices are not vague or lacking in detail—they specifically reference either "Ad cost" or the "Ad Campaign." While the Department has acknowledged serious concerns about the formation and administration of the contracts, the invoices, coupled with the budget included in the proposals for Work Requests 9 and 16, demonstrate that appropriated funds were expended exclusively for the purpose of purchasing the production and airing of paid advertisements and not, as GAO contends, to pay Mr. Williams to promote NCLB.² The letter from GAO concluded that the use of appropriated funds for "commentary" (as distinct from paid advertisements) violated the Antideficiency Act but did not identify any such funds. In our view, there were no such funds. Accordingly, the Department respectfully disagrees with the conclusion that the subcontract with Armstrong Williams violated the Antideficiency Act. Taxpayers are entitled to expect the highest standards from the Department, and the Department has implemented additional procedural protections to strengthen its contracting operations.

Please note that the Department intends to submit identical letters to the President of the Senate and the Speaker of the House of Representatives, as well as to the Comptroller General.

Sincerely,



Raymond Simon

² Moreover, GAO's General Counsel, while relying on statements made in Williams' monthly reports to show that he allegedly promoted NCLB under the contract, was unable to locate any instances when Mr. Williams actually did so, with the exception of one newspaper column that had been attached to one of Williams' reports. During its own inquiry, the Department reviewed available transcripts of programs listed by Williams in his monthly reports that represented that Williams had promoted NCLB. Like GAO, the Department was unable to locate any additional instances where Williams promoted NCLB during his appearances on the programs listed. Indeed, all the transcripts reviewed by the Department revealed that when Mr. Williams was a guest on a television show, the subjects discussed were unrelated to education and there was no mention of NCLB. Further, in a statement to the Federal Communications Commission ("FCC"), Williams represented, through counsel, that the media interviews and activities listed in the monthly reports were placed there in error by his staff and that such activities were not deliverables under the contract. These statements by Williams were included in the Department's response to GAO.



UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

May 25, 2006

Honorable Richard B. Cheney
President of the Senate
Washington, DC 20510

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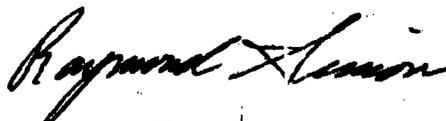
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Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, DC 20515

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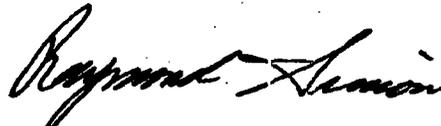
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