The original documents are located in Box 2, folder "1974/08/21 HR69 Education Amendments of 1974 (2)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

August 16, 1974

MEMORANDUM FOR: MR. WARREN HENDRIKS

FROM: WILLIAM E. TIMMONS

SUBJECT: Action Memorandum - Log No. 515
Enrolled Bill H. R. 69 - Education
Amendments of 1974.

The Office of Legislative Affairs concurs in the attached proposal and has no additional recommendations.

Attachment

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 515

Date: August 15, 1974 Time: 6:00 p.m.

FOR ACTION: James Cavanaugh
Fred Buzhardt
✓ Bill Timmons

cc (for information): Warren K. Hendriks
Jerry Jones
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: Monday, August 19, 1974 Time: 2:00 p.m.

SUBJECT: Enrolled Bill H.R. 69 - Education Amendments of 1974

ACTION REQUESTED:

____ For Necessary Action
XX For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
____ For Your Comments
____ Draft Remarks

REMARKS:

Please return to Kathy Tindle - West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 15 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 69 - Education Amendments of 1974
Sponsor - Rep. Perkins (D) Kentucky

Last Day for Action

August 21, 1974 - Wednesday

Purpose

Extends and makes major revisions in the Elementary and Secondary Education Act (ESEA), portions of the Impact Aid Act (P.L. 81-874), and other education programs, and provides certain limits on busing for purposes of school desegregation.

Agency Recommendations

Office of Management and Budget	Approval
Department of Health, Education, and Welfare	Approval (Signing statement attached)
Civil Service Commission	Approval
Department of the Interior	Approval
Department of Justice	Defers to HEW
Department of Commerce	No objection
Veterans Administration	No objection

Discussion

H.R. 69 is an omnibus education bill, amending and extending the Elementary and Secondary Education Act of 1965, and numerous other education authorities, many of which expired on June 30, 1973. (By law, the appropriation authorizations were automatically extended for one year and are now subject to the continuing resolution.)

The enrolled bill is the congressional response to several major Administration legislative initiatives for reform of education programs--including the "Better Schools Act"--as well as to President Nixon's repeated calls for anti-busing legislation. In its enrolled form, it constitutes a series of compromises and agreements on all of the major concerns about the Federal role in elementary and secondary education.

The Better Schools Act proposed the consolidation of many separate elementary and secondary education grant programs into five general purpose groupings: Education of the disadvantaged, education of the handicapped, vocational education, assistance for schools enrolling children who live on Federal property (Impact Aid); and supporting materials and services. Its key objectives were (1) reform of the distribution of funds for disadvantaged students to achieve greater equity, (2) categorical grant consolidation, (3) decentralization of decisionmaking to State and local education agencies, and (4) reform of the Impact Aid program to phase out special support for school districts with children whose parents live or work on Federal property ("B" children).

HEW also submitted to Congress the "Desegregation Assistance Act," designed to replace the expiring Emergency School Aid Act. Under the proposal, instead of a State apportionment program, assistance would be targeted to school districts to aid desegregation and elimination of minority group isolation in districts still in the process of court ordered desegregation or which have undertaken voluntary elimination of racial isolation.

The third major initiative was proposed legislation to consolidate numerous discretionary authorities for assisting State and local school agency programs to educate the handicapped, into four broad new authorities.

Although the enrolled bill contains provisions which deal with each of these issues, it also contains a broad panoply of other matters. The following are summary highlights of the bill.

MAJOR PROVISIONS OF THE BILL

Busing Provisions

The Administration in 1972 proposed the Equal Educational Opportunities Act which required courts and Federal agencies to give priority, in formulating a remedy for denial of equal opportunity, to seven specified alternatives to forced busing, making busing a last resort. H.R. 69 contains this feature and several other measures to limit busing which are not in present law, including:

-- prohibiting the use of all Federal funds (except Impact Aid) for busing activities.

-- allowing the courts to terminate busing orders on a finding that the school district has and will continue to comply with the Fifth and Fourteenth Amendments.

-- prohibiting any new order to bus past the next nearest school.

-- prohibiting orders to bus except at the start of an academic year.

-- prohibiting busing across district lines or altering district lines unless, as a result of discriminatory actions in both school districts, the lines caused segregation.

-- providing school districts a reasonable time to develop voluntary plans before a court order can be executed.

However, the enrolled bill would severely restrict the basis for reopening existing busing orders by omitting the Administration-supported "Esch" provision allowing a reopening of a court busing order upon a simple request by a State or school district. The bill would substitute reopening by parents, States, or school districts upon a showing that the busing is a risk to the health of the children or significantly impinges on their educational process.

The bill and accompanying conference report underscore the intent of the conferees that all of the remedies--including the busing remedy--must meet the test of compliance with the Fifth and Fourteenth Amendments. This provision and the reference in the conference report do not appear to alter the constitutional test which these alternative remedies would

have had to meet in any event. The Justice Department in its views letter states that "It is therefore unclear what precise effect will be given to...these provisions."

Thus, the net effect of the bill is to provide less drastic alternatives--holding busing as a last resort--for those school districts (mostly in the North) where desegregation is still to be ordered but to almost preclude school districts now under court-ordered busing (mostly in the South) from the same more moderate treatment through the reopening of existing orders.

Title I (Education of the Disadvantaged)

Under current law, Title I of ESEA authorizes aid to States and local school districts for the education of disadvantaged stud nts on the assumption that economic deprivation and educational disadvantage are related. The 1975 Budget included $1.9 billion for this program. Title I funds--the largest single Federal education appropriation--are distributed through a formula on the basis of the number of children in the most recent census who come from families which fail a very strict test of poverty. (Under current law, only those children from families with an annual earned income of $2,000 or less can qualify.) The population data become quickly outdated and the income cutoff in present law is rigid in nature. Moreover, welfare benefits paid to families of potentially eligible children are not taken into account in determining eligibility. By not considering unearned income (welfare, etc.) many truly disadvantaged children are not counted. Finally, the distribution fails to take into account the significantly varying amounts spent in the various States for education. For example, the cost of educating one child in New York State annually is twice that of Mississippi.

As part of the Better Schools Act, the Administration proposed that the basic Title I formula be modified to provide for using the poverty criteria in the 1970 decennial census, which include such variables in the poverty level as family size, sex of family head, and farm-nonfarm status. A concentration of funds both among school districts and at the school level was proposed to assure the establishment of more effective programs. Three-fourths of the funds were to be used for basic mathematics and language arts instruction.

With regard to Title I, H.R. 69 contains the following features:

-- The formula for Part A of Title I (basic grants) would authorize grants on the basis of entitlements, subject to the availability of appropriations. Using the latest decennial census, the formula would count children in families whose income is below the "Orshansky" poverty level, plus 2/3 of the children in welfare families with incomes over the Orshansky level. (The "Orshansky" index--which the Administration endorsed--is generally recognized as a valid measure of relative poverty, and includes variables such as family size and urban-rural factors.) This figure would then be multiplied by 40 percent of the State's average per pupil expenditure, subject to a minimum of 40 percent of 80 percent of the national average and a maximum of 40 percent of 120 percent of the national figure. The Administration had proposed a similar approach.

-- Local educational agencies (LEAs) would generally be held harmless against losses due to the application of this formula with a minimum of 85 percent of the previous year's appropriation, but with the possibility that the "hold-harmless" may be as much as 90 percent. The Administration proposed no "hold-harmless" features.

-- Title I, Part B payments, which are incentive grants whose purpose is to encourage States to increase their spending for elementary-secondary education, would be extended. The Administration was opposed to this provision as being unnecessary, given the new formula changes.

-- Title I, Part C payments are grants for districts with highest concentration of low-income families. This Part would be extended through fiscal year 1975 under a separate formula and with a separate authorization of $75 million. The Administration was opposed to this provision.

-- A new "excess cost" provision is intended to reemphasize that Title I funds are to be used to supplement and not supplant State and local funds. Under this provision, which the Administration had opposed, the definition of "excess costs" would include those costs for Title I programs and projects of an LEA which exceed its average per pupil expenditure. However, excluded from this calculation would

be expenditures for State and local special programs for educationally deprived, bilingual, or handicapped children which are offered on a comparable basis in both Title I and non-Title I areas. This would be difficult to calculate and administer.

In summary, the net effect of the enrolled bill on Federal financial assistance for educating the disadvantaged would be to substantially improve the formula but extend separate unnecessary authorities and complicate administration.

Impact Aid

This program was established more than 20 years ago to provide support to school districts to offset revenue lost due to the presence of nontaxable Federal land within the district.

Current law provides for eligibility for funding for three classes of children under this program:

-- "A" category: those children whose parents both live and work on Federal property

-- "B" category: those children whose parents either live or work on Federal property

-- "C" category: those children whose parents either live or work in public housing

The determination of which categories will be funded and at what levels has been made through appropriations language. While "A" and "B" category children have traditionally received funds, funding has never been provided for "C" category children.

The Administration had proposed complete reform of the Impact Aid program to remove the basic inequities by eliminating the entitlements and payment rates for the "B" children (whose parents either live or work on Federal property) since the great bulk of these children live on private, taxable land. Based upon this proposed reform, the fiscal year 1975 budget did not include $265 million which would be necessary if funding for the "B" children were provided on the same scale as that provided in the fiscal year 1974 appropriation.

With regard to Impact Aid, H.R. 69 would:

-- mandate participation in the funding formula for the first time of those children whose families reside in public housing ("C" category). The bill would also mandate for the first time that the portion of Impact Aid attributable to the public housing component of the formula must be used only for compensatory education for the disadvantaged. It does, however, limit funding of the entitlement on behalf of such children to 25 percent.

-- provide that children of uniformed military personnel only who are handicapped or who have learning disabilities are to be counted at 1-1/2 times the normal entitlement under Impact Aid. HEW states that, because the military transfers personnel with handicapped children into posts within school districts which have strong programs for the handicapped, this provision "...is a means of providing an incentive for school districts to provide services for such children and a means of compensating those districts which are presently providing such services...."

-- specify for the first time in the history of this program different payment rates for the various categories of federally-connected children to recognize the varying degrees of financial impact they have on school districts. A provision which would eliminate eligibility of out-of-State "A" and "B" children is aimed at the Washington, D.C. metropolitan area.

-- provide that an LEA shall each year receive not less than 90 percent of its previous year's allocation in those districts where a lessening of Federal activity on a military installation announced after April 16, 1973 has resulted in a reduction of 10 percent or more of federally-connected children.

The bill's Impact Aid amendments would be effective in fiscal year 1976, thereby requiring funding and operations through fiscal year 1975 under current law.

Consolidation of Categorical Grant Programs

Present law has many special categorical grant programs which prohibit State and local agencies from moving appropriated funds from one use to another and contain restrictive specifications in regard to programming local educational efforts. The Administration's Better Schools Act proposed the repeal of several statutes, and the consolidation of numerous grant programs into a system designed to lessen Federal controls and provide State and local education officials with flexibility in meeting their needs.

With respect to this aspect of the reform of education authorities, H.R. 69 would:

-- consolidate several existing categorical programs into two groupings: Libraries and Learning Resources and Educational Support and Innovation. These two consolidations could only occur if all the existing programs are funded at the fiscal year 1974 or fiscal year 1973 level--whichever is higher--beginning in fiscal year 1976 and at the level of the previous year's consolidated programs thereafter. They must also be forward funded (i.e., appropriated in the current year to support the succeeding year's program). If these conditions are met, 50 percent of the appropriated funds could be consolidated in fiscal year 1976 with full consolidation achieved in fiscal year 1977.

-- create, starting in fiscal year 1976, a new "Special Projects Act," with an annual authorization of $200 million. This Act would contain two parts: a Commissioner's discretionary fund (50 percent of the appropriation total) and a formula grant portion containing six program categories (the other 50 percent of the appropriation). Among the new categorical programs authorized under the bill would be: consumer education, metric education, career education, gifted and talented children, community schools, and the Women's Educational Equity Act..

The $100 million authorized as the Commissioner's discretionary fund would be subject to the submission of a spending plan which could be disapproved within 60 days by either the House or Senate education authorizing committees. If either committee vetoes the plan, the Commissioner would be required to submit another plan within 15 days which would also be

subject to a one-committee veto. The Justice Department's views letter states: "This Department has frequently advised that 'Committee veto' provisions violate the Constitution." As to whether the Commissioner of Education could simply not act under this provision and have the balance of the Act stand (that is, whether the provision is "severable"), Justice is not certain and defers due to a lack of time.

While HEW states, "The provisions are clearly severable from the rest of the bill and could be ignored by the Executive Branch without fear of invalidating the desirable aspects of the bill," HEW does not propose that these provisions be ignored. They are, in their draft signing statement, suggesting that you refer these provisions to the Attorney General for his advice.

Education of the Handicapped Act

The present Education of the Handicapped Act (EHA) contains a State formula grant program (Part B) and several categorical discretionary authorities. The Administration had proposed folding Part B of the Act into the basic consolidation portion of the Better Schools Act, and also proposed a separate bill amending EHA to collapse the remaining discretionary programs into four broad new authorities which would help teachers identify learning problems; would provide teachers with special skills to overcome barriers to teaching; and would accelerate progress in aiding severely handicapped children.

H.R. 69 would:

-- extend the Part B State formula grants through fiscal year 1977. In fiscal year 1975 only, the grant funds (subject to the availability of appropriations) are to be distributed among States on the basis of the number of all children aged 3-21 multiplied by $8.75, with an authorization of $647 million. These funds may be used for the early identification and assessment of children needing services. The insertion of this formula and the high authorization level is an effort to compromise with a separate piece of legislation (H.R. 70) which would mandate a Federal payment of $600 per handicapped child or $4 billion per year to provide operational support. In fiscal year 1976, the current

formula would again take effect, and the authorization would be $100 million, rising to $110 million in fiscal year 1977. The fiscal year 1974 authorization level is $220 million and the 1974 appropriation was $47.5 million.

OTHER PROGRAM PROVISIONS

Bilingual Education--Under current law, Federal policy with regard to the education of bilingual children is one of providing financial assistance to LEAs to develop and carry out new and imaginative elementary and secondary school programs designed to meet the special needs of these children. The Administration proposed a one-year simple extension of this authority. However, H.R. 69 would move this program in the direction of expansion of the types of programs authorized and the Federal role in supporting them.

The enrolled bill would declare that it is "the policy of the United States, in order to establish equal educational opportunity for all children" to encourage bilingual programs and provide assistance for that purpose. In so stating the policy, the Federal role is defined in terms of equality of opportunity--a function of Title VI of the Civil Rights Act of 1964--which could bring the Federal program into a new service mode.

H.R. 69 also creates a new separate authorization to provide technical assistance to States to assist them in establishing new programs. Current law has no comparable provision.

Finally, the bill would provide a four-year authorization of nearly $619 million, which exceeds the previous four-year authorization span by almost $170 million. For the first year, the authorization level is the same as for fiscal year 1974, $142 million.

Adult Education--The Administration proposed a simple one-year extension of current law which expired at the end of fiscal year 1973. H.R. 69 would provide for a four-year extension at about the current authorization level. It contains a "hold-harmless" provision that assures all States at least 90 percent of the amount they received in fiscal year 1973.

In lieu of the current legislation's provision for a 20 percent Commissioner's set-aside for special projects and teacher training grants, the bill would establish a new 15 percent set-aside from State funds for innovative programs and teacher training.

Vocational Education Act--Current law authorizes a Vocational Education program at $885 million per year for which appropriations of $546 million are requested in fiscal year 1975.

H.R. 69 provides for two new categorical authorities not contained in current law, both of which deal with bilingual education. Specifically, the bill would provide for a new program of research in bilingual vocational education, with a one-time fiscal year 1975 authorization of $17.5 million. The other new authority would provide for a regular program of vocational education for bilingual students, also with a $17.5 million authorization.

Indian Education--The bill would extend Parts A and B of the current Indian Education Act through fiscal year 1978. These parts support special projects for Indian education, as well as programs for Indian children in public schools. This authority is outside the basic Indian Education program of the Bureau of Indian Affairs which is financed at $219 million in the 1975 budget. The bill would also increase from 5 percent to 10 percent the set-aside for the support of Indian-controlled schools, and would authorize a new separate program with an authorization amount of $2 million for fiscal years 1975-78 for teacher training. In addition, 200 fellowships would be authorized under Part B of the Indian Education Act for graduate and professional study by Indian students. The Administration has opposed separate fellowship programs for ethnic groups, choosing to rely instead on general aid to needy students.

Emergency School Aid Act--Current law provides for a national program to assist local education agencies with special needs attendant to desegregation and overcoming minority group isolation in schools. The funds are distributed under a allocation formula.

The Administration's proposed Desegregation Assistance Act would have provided a fully discretionary project grant program to assist school districts in the process of desegregation. H.R. 69 would extend the current act through fiscal year 1976.

National Reading Improvement Program--Within the Office of Education, there is currently a $12 million demonstration effort, the Right to Read program, which provides assistance to State and local agencies to help them achieve the goal of universal reading ability for all citizens. The enrolled bill would authorize a cumulative total of $413.5 million for fiscal years 1975-78 for a new Reading Improvement Program, with separate categorical authorizations for in-school demonstration reading improvement projects, special emphasis projects, reading training on public television, the purchase of books, and the establishment of reading academies. In fiscal year 1976, if the appropriations for the reading improvement projects exceed $30 million, the excess is to be a formula grant distributed to the States based on the school-age population.

Higher Education Amendments

-- Veterans cost-of-instruction payments: Under current law, colleges are eligible for assistance if the number of veterans enrolled is increased by 10 percent over the previous year. H.R. 69 would make schools eligible for a payment if 10 percent of its undergraduate students are veterans, provided that such number constitute at least the same percent of the student body as in the preceding year.

-- Community College and Occupational Education: Current law provides for grants to States to begin planning for community colleges. The current authorization expired on June 30, 1974. The enrolled bill would extend it through fiscal year 1975. The Administration has never requested funds for this purpose.

-- "CLEO" program: Under current law this program provides tuition, fees and stipends to minority law students. The bill would extend the "CLEO" program for three years. The Administration had proposed a one-year extension.

Other Provisions

-- The bill would extend the present Ethnic Heritage Studies categorical grant program authorization through fiscal year 1978. The Administration had requested no extension.

-- The President would be authorized to call and conduct a White House Conference on Education in 1977. The Administration had not sought this authority.

MAJOR ADMINISTRATIVE PROVISIONS

The enrolled bill contains an administrative consolidation feature which would permit single State plans for all elementary-secondary programs and uniform appeal procedures. It would, however, also provide numerous new restrictions on the Executive in the administration of education programs, none of which are contained in current law. They include the following:

-- Within 60 days of enactment of any education law, a schedule for the issuance of rules, regulations and guidelines would be required to be submitted to the authorizing committees; such schedule would have to provide that all rules and regulations be promulgated within 6 months.

-- Any HEW education regulation, rule, standard, or requirement would be required to be submitted in advance to the Congress for a 45-day period, during which the Congress could indicate disapproval by Concurrent Resolution. As in the case of the Special Projects Act spending plan discussed above, Justice has substantial constitutional difficulties with this provision and is uncertain on severability; HEW thinks the issue should be referred to the Attorney General for his advice.

-- The bill would limit the functions of OE Regional Offices and prohibit any decentralization to these offices after the retroactive date of June 1, 1973, except as provided by law and enacted after this bill. HEW believes that this provision is ameliorated to some extent by the authority given regional offices to provide "technical assistance" in Section 503 of the bill. They interpret this to mean helping to prepare, process and initially review grant applications but not approval of grants or contracts.

-- The bill also contains a provision whereby if the Commissioner determines that the present 30-day comment period for the review of draft regulations will cause extreme hardship for the intended beneficiaries of any program, he shall notify the authorizing committees. If neither committee disagrees within 10 days, the Commissioner may waive the 30-day comment period. The Justice Department states that it has traditionally viewed "committee veto" provisions as violating the Constitution.

BUDGET IMPACT

Authorization Levels--Assuming full entitlement for the indefinite authorizations, the total appropriation authority would be $29 billion through fiscal year 1978. On this same basis, fiscal year 1975 authorizations are $7.2 billion--$2 billion less than the $9.2 billion level in fiscal year 1974. Authorization levels affect and attract appropriations only when there is a strong interest in funding the programs in question. The gap between total authorized amounts and actual appropriations is illustrated by the current Title I authorities of $4.2 billion and the appropriations against it of $1.7 billion.

Possible Effect Upon Budget--The following table illustrates the authorization levels in current law and H.R. 69, together with HEW and OMB estimates of outlay increases over the President's Budget ceilings for fiscal years 1975 and 1976. OMB believes the Congress will in fact appropriate about $500 million more than the President's Budget in fiscal year 1975 and about $750 million more than that amount in fiscal year 1976.

The major assumptions under which the HEW $247 million impact estimate is derived for 1975 are as follows:

-- an increase of $50 million--to $97.5 million--in support of the State grant program under the education of the handicapped which, under the Mathias amendment, is authorized at $647 million.

-- no new funds added to the total for Parts B and C of Title I, ESEA, which are separately authorized.

-- provide for an increase of $300 million in budget authority in fiscal year 1975 for the "B" category children under the Impact Aid program.

-- no funds for the two new authorizations for bilingual vocational education and research.

-- no additional funding for the Reading Improvement Program authority of $53 million in 1975.

The following assumptions are contained in the HEW estimated 1976 increase of $262 million:

-- an increase of $76.4 million under Consolidation to increase only to the mandated funding levels prescribed in the bill.

Budget Impact of H.R. 69
($ in millions)

	1/ Curr. Auth. Level	2/ HR 69 Auth. Level	FY 75 Pres. Budg.	HEW Estimate Budget Impact in Outlays 1975	HEW Estimate Budget Impact in Outlays 1976	OMB Estimate Budget Impact in Outlays 1975	OMB Estimate Budget Impact in Outlays 1976 6/
Title I, ESEA	4,173	3,502	1,885	-0-	-0-	+75	+125
Impact Aid	1,194	1,073	340	+209	+81	+209	+300
Consolidation	1,164	745 3/	311	-0-	+60	-0-	+60
Handicapped	493	790	147	+35	+50	+200	+100
Vocational Education	-0-(new)	35	-0-	-0-	-0-	+15	+15
Reading Improvement	-0-(new)	53	12 4/	-0-	-0-	+25	+50
Special Projects Act	505	200 3/	21	-0-	+10	-0-	+75
Adult Education	236	150	63	-0-	+5	-0-	+5
Studies	-0-	7	-0-	+2	+5	+2	+5
Bilingual Education	450(71-74)	619(75-78)	70	-0-	-0-	+10	+20
Emergency School Aid Act	990	1,000	75	-0-	+50	-0-	-0-
Indian Education	313	315	42	-0-	-0-	+2	+10
Other	21	13	-0-	+1	+1	-0-	-0-
Total 5/	9,224	7,180	2,966	+247	+262	+538	+765

1/ FY 1974 only, unless otherwise indicated.

2/ FY 1975 only, unless otherwise indicated.

3/ FY 1976 figures, first year of the consolidation.

4/ Right to Read appropriation request.

5/ Reflects one-year total, even for those programs whose authorizations are listed in fiscal year clusters.

6/ The 1976 increases are taken against the President's 1976 Budget as the base.

-- an increase of $20.5 million to $41 million under the Special Projects Act against a new authorization of $200 million.

-- no increase above the current $97.5 million 1975 level for education of the handicapped.

-- an increase of $10 million over the 1975 level of $63 million in adult education.

-- an increase of $19.9 million for new statistical efforts and new studies.

These assumptions fail to take into account the following factors which are in the OMB basis for estimating:

-- the necessity to hold districts harmless and to provide funds for "B" and "C" students under the Impact Aid program. (HEW maintains that they will ignore this provision.)

-- the probable increases in fiscal year 1976 for Title I, ESEA; handicapped; and the Reading Improvement Program.

-- conservative estimates of funding for the new program authorizations for which HEW estimated no impact.

ARGUMENTS FOR APPROVAL

1. The anti-busing provisions of H.R. 69 are a temperate compromise and one which is probably the best which could be hoped for at this time. The enrolled bill would set forth certain practices already declared by the courts to be constitutional or statutory violations of equal educational opportunity, and also stipulate a priority ranked set of alternative remedies to segregation, holding busing as a last resort. HEW states that while the Administration would have preferred a stronger provision to allow courts to "reopen" existing busing orders, the floor discussion and the votes in both Houses of Congress make it clear that the "reopener" feature of this bill is probably the strongest that might be expected from this Congress.

2. The reform of the existing Title I (disadvantaged) formula would provide for the distribution of funds in a manner more nearly reflecting the need toward which the program is addressed. The new formula does this by: authorizing the use of more

recent data and adopting a more realistic definition of relative poverty; assisting those States whose educational resources are limited and providing a reasonable ceiling on the degree to which the formula rewards higher expenditure States. HEW states that the improvements made in the formula greatly outweigh the negative aspects of this part of the bill, such as the special grant programs under Parts B and C of Title I, described above.

3. The consolidation features of the enrolled bill, along with the provision for the submission of a single, unified State plan for State-administered programs, are genuine improvements in the administration of Federal education programs. HEW believes that given the congressional reluctance to eliminate categorical programs and to consolidate funding authorities, the adoption of these provisions represents a significant opportunity to advance toward this long sought goal.

4. The Impact Aid provisions represent the first significant congressional step toward reform of this program. The bill differentiates for fund allocation purposes between classes of families with different impact on the tax-expenditure burden of a school district. HEW describes this change as significant and expresses concern that failure to enact this bill will result in continuation of current law for three more years.

5. With regard to budget impact, HEW states that they "...do not believe that the authorization levels which are contained in H.R. 69 pose any threat of increased fiscal outlays by the Federal Government which would not exist if the bill were not enacted." There are severe pressures in the Congress to have the Federal Government: (a) increase its share of public school costs from less than 10 percent to 30 percent; (b) continue to provide Impact Aid; and (c) pay for the extra costs of educating handicapped (and those of limited English-speaking ability) children. These pressures can best be fought in the appropriations process. While the Congress may enact substantial increases for these purposes, the authorizations in this bill are far less than those being threatened in other bills now pending in the Congress and could be used to stave off even greater pressure for increased Federal assistance.

6. Any administrative problems inherent in H.R. 69 are ameliorated by several other features of the bill.

-- In commenting on the congressional review of executive actions, for example, HEW expresses concern with respect to the constitutional validity of such provisions, but notes that the Nixon Administration, as well as previous ones, had accepted legislation of this nature on a number of occasions in the past and has complied with the requirements. Moreover, the Department states that these provisions "are clearly severable from the rest of the bill and could be ignored by the Executive Branch without fear of invalidating the desirable aspects of the bill."

-- With respect to the provisions prohibiting decentralization of functions to the regional offices without congressional approval, HEW believes that section 503 of the bill makes this less objectionable because it would allow regional offices to do everything other than grant and contract approval under a "technical assistance" authority.

7. With regard to an expanded Federal role, the obligation of State and local educational agencies to provide equal educational opportunities to both children with limited English-speaking ability and handicapped children has been clearly established by: (a) executive branch interpretation of the Civil Rights Act; (b) litigation including the recent Supreme Court case of Lau v. Nichols; (c) legislation in some States; and, (d) section 504 of the Vocational Rehabilitation Act of 1973 which requires that handicapped persons not be discriminated against under federally assisted programs. Since this obligation has been imposed partly as a result of Federal action and with full Federal support, it is appropriate that the bill provide authority for the Federal Government to assist State and local agencies to meet those responsibilities.

8. Strong congressional support for this bill is evidenced by a Senate vote of 81-15 on the conference report, and passage in the House by a margin of 323-83 -- votes which would make it difficult to sustain a veto.

9. This bill is the result of very extensive negotiations between the top officials at HEW and congressional leaders of both parties such as Congressmen Perkins and Quie and Senators Pell and Javits. Many provisions with more serious problems than those remaining were deleted. To veto the bill would severely disrupt substantial good feeling that has developed as a result of these negotiations.

ARGUMENTS FOR DISAPPROVAL

1. In its busing provisions, while the bill does provide less drastic alternatives (holding busing as a last resort) for those school districts which the law may require to be desegregated, it almost precludes districts already under forced busing orders from seeking the same more moderate remedies by imposing a very difficult reopener test. This is a substantial equity problem (mostly for Southern communities) which is really not mitigated by the recent Supreme Court decision in the Detroit case.

2. Although the bill makes significant changes in the Title I formula for the distribution of funds for the education of disadvantaged children, it also provides for the continuation of two additional categorical programs in this area; authorizes an "excess cost" provision which would be extremely difficult to determine and would threaten to disrupt Title I administration; and contains a hold-harmless provision which significantly blunts the reforms of the formula.

3. Concerning consolidation, while the significant movement in some provisions of H.R. 69 toward the Administration's goal of consolidating elementary, secondary and adult education programs, this progress is vitiated to a large extent by: the needless earmarking of funding levels; the numerous new categorical assistance programs; and the new "Special Projects Act," which has been described as an "incubator" for several new categorical programs, such as consumer education, metric education, career education, programs for gifted and talented children, community schools, and the Women's Educational Equity Act.

4. The Impact Aid program is distorted and perpetuated as a vehicle for compensatory education assistance. Although H.R. 69 begins to eliminate some of the inequities of the Impact Aid program which the Administration had proposed

with regard to revising the entitlements and payment rates for the "B" children (whose parents either live or work on Federal property), these reforms are considerably offset by other changes in the program, such as:

-- the mandatory funding of public housing ("C") children for the first time, which is estimated to cost approximately $70 million when it becomes effective in fiscal year 1976; moreover, the general support purpose of impact aid is distorted by requiring that these funds be used for compensatory education. This also duplicates the purposes of Title I and could distort the new formula basis for the distribution of these funds;

-- numerous "hold-harmless" provisions which effectively delay many of the reforms;

-- extension of Impact Aid for three years instead of one year as the Administration had proposed;

-- a program of assistance for handicapped children of military personnel;

-- delay of the introduction of the new reforms until fiscal year 1976, thereby allowing current law to operate during fiscal year 1975.

5. The budgetary impact of H.R. 69 is significant. While HEW is prepared to limit their supplemental request to levels which would result in increased outlays over the fiscal year 1975 budget of $37 million and an increase of $130 million in fiscal year 1976, these increases are based upon assumptions which understate what the Congress will probably appropriate under the new authorities. We believe the probable outlay increases will be about $500 million in fiscal year 1975 and approximately $750 million in fiscal year 1976.

You have indicated that you believe inflation is public enemy number one and you have under review various possible budget reductions. H.R. 69 is a prime example of authorization bills which promise programs and produce pressure for funding them.

6. The bill mandates restrictive administrative structures and procedures, including the statutory creation of numerous new bureaucracies, contains an outright prohibition of decentralization of decisionmaking to regional offices except

as provided by law, and adds cumbersome, time-consuming and restrictive administrative procedures. Especially objectionable features are:

-- submission of timetables for, and one-Committee vetoes of, the implementation of HEW education regulations, provisions with which Justice has substantial constitutional difficulties;

-- the requirement for an annual report to Congress on the organization of the Office of Education, and its personnel needs and assignments. This will mandate a formal direct submission by the agency to Congress of matters which should properly be handled as part of the budget cycle;

-- the requirement that would limit the functions of the OE regional offices and retroactively prohibit decentralization of activities to these offices except as provided by law.

7. Finally, H.R. 69 continues the expansion of the Federal role toward greater funding participation in, and a wider scope of program responsibility for, elementary and secondary education; especially in the areas of education for the handicapped, including children of limited English-speaking ability (bilingual). While there is little question concerning the duty of State and local education agencies to provide equal educational opportunities for these children, the bill provides a possible legislative base for Federal financing of the extra costs to provide that educational opportunity. H.R. 69 contains a program for education of the handicapped which is authorized at $647 million--a one-year ballooning of authority in fiscal year 1975 only. In the context of (a) severe pressure to have the Federal Government assume the financing for the extra cost of educating these children and (b) a major bill (S. 6/H.R. 70) pending in the Congress to do just that, accepting this bill could be the first step in a major new departure in Federal responsibility for the obligation of financing the extra costs which are now a part of State and local governments. HEW argues that they will try to limit the Federal role to support by, and not substitution of, Federal dollars, but that boundary has been very difficult to hold.

RECOMMENDATIONS

HEW, in arguing for approval of the enrolled bill, states that, compared to present law and in light of the reluctance of the Congress to accept many of the Administration's reforms, H.R. 69 is acceptable.

> "...when the positive aspects of the bill--the substantial title I reform, the 'real' beginning of grants consolidation, a start toward impact aid reform, and the furtherance of our equal educational opportunities goals--are compared with those aspects which we consider to be less favorable--the retention of part B of title I, the public housing portion of P.L. 874, the limitations on decentralization, and the creation of a new authorization for State handicapped programs--our overall conclusion must be that the bill is a significant step forward in our quest for improved administration of Federal education programs and for more effective and equitable distribution of Federal aid for education."

Justice comments on a number of provisions of H.R. 69 with which it has substantial constitutional difficulties. These include

-- Section 402, which requires the Commissioner of Education to submit to the Senate and House authorizing committees an annual spending plan under the "Special Projects Act." Funds may be expended unless within 60 days either Committee adopts a resolution disapproving the plan.

-- Section 509, which provides for disapproval by concurrent resolution of certain rules and regulations. Justice expresses the view that review of Executive action by concurrent resolution is not permitted by the Constitution.

Section 516 provides that where the President fails to fill a vacancy in the membership of a Presidential advisory council, then the Secretary of HEW shall immediately make the appointment. Justice believes that, although "this provision may operate as an undesirable restriction on the President's discretion, it is not at all clear that it may be objected to on constitutional grounds...."

With respect to Title II of H.R. 69, the "Equal Educational Opportunities Act of 1974," Justice believes that the provision which defines certain practices as denial of equal educational opportunities essentially incorporates various practices already declared by the courts to be constitutional or statutory violations. Accordingly, the Department supports this provision.

Justice also notes that many sections of Title II are based in whole or in part upon provisions proposed by President Nixon in the "Equal Educational Opportunities Act of 1972." The Department expresses concern, however, with regard to Section 203(b) which, according to the legislative history, was added in order to protect against holdings of unconstitutionality. Justice indicates that it is unclear as to what precise effect this proviso will have upon other sections in Title II.

CSC, while expressing concern and finding objectionable several personnel provisions of the enrolled bill, recommends approval insofar as the personnel provisions are concerned.

The Veterans Administration and Commerce have no objection to enactment, although Commerce states that its Bureau of the Census believes that it would be technically impossible to carry out within the required one year, section 822(a), which directs the Secretary of Commerce to develop current data on the school-age population with respect to the Title I formula.

OMB RECOMMENDATION

The enrolled bill contains provisions that both move the Federal Government toward the improvement in the operation of Federal education programs and provide obstacles to the full achievement of these reforms.

With respect to revision of the Title I distribution formula, the anti-busing provisions, consolidation of categorical grant programs, and some of the reforms of the Impact Aid program, we believe that H.R. 69 represents a significant

step forward in the overall Federal posture with regard to education programs. Therefore, on balance, we recommend its approval, with a signing statement indicating those areas which you consider troublesome.

HEW has prepared a signing statement and submitted it with its views letter on the enrolled bill. We are working with White House staff on the development of a revised draft.

Director

Enclosures

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

AUG 2 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in response to your request for a report on H.R. 69, an enrolled bill "To extend and amend the Elementary and Secondary Education Act of 1965, and for other purposes."

Because of the length of H.R. 69 and the complexity of the various issues involved in the bill, this report will be organized into the following categories which represent the major aspects of the bill: Title I, ESEA; Impact Aid; Consolidation; General Education Provisions; Miscellaneous Amendments; Cross Cutting Provisions; and Equal Educational Opportunity. We shall attempt to frame the discussion of each of those issues within the context of previous Presidential and Secretarial communications concerning those issues and we shall also discuss the inclusion, modification, or rejection by the Congress of each of those provisions in the bill concerning which the Administration has heretofore expressed serious reservations.

To assist in focusing on the framework of the Administration's goals and requests and the final Congressional response, I have included three tables. The first (at Tab A) summarizes goals and requests in the President's Message of January 24, 1974, the Secretary's letter to Senator Williams of March 5, 1974, and the President's Statement of May 22, 1974, and compares the outcome of these issues in H.R. 69. The second table (at Tab B) compares the FY 74 authorization for the programs contained in H.R. 69 with the four year projection of the amounts authorized in the bill. At Tab C, is a table showing our cost estimates of this bill and its impact on the President's budget.

Title I, ESEA

Revision of Title I Formula. One of the most significant and desirable provisions in the bill is the reform and updating of the title I formula in section 101. By accepting a title I formula which provides for the counting of children from families below the level of poverty

used in the 1970 Census plus two-thirds of the number of children from families receiving an income above that level from AFDC payments, the bill would provide for the distribution of title I funds in a manner which will more nearly reflect the need toward which the program is addressed. The bill would also lower the Federal percentage used in determining authorizations from 50 to 40 percent of State average per pupil expenditures. The floor and ceiling of 80 and 120 percent respectively, of the national average per pupil expenditure used in the formula would assist those States whose educational resources are limited and would provide a reasonable limit on the degree to which the formula rewards higher expenditure States. These modifications of the formula are in line with previous Administration proposals, and, as the President and the Secretary have already indicated, they are clearly desirable.

Private School Children. Another amendment to the title I program which is desirable is the "bypass" provision in section 101(a)(6) which permits the Commissioner to provide services directly to children enrolled in private schools where State law prohibits the provision of, or there is a substantial failure to provide, services to such children. Although the implementation of this provision may cause some administrative difficulties for the Department, the provision would provide a useful means of resolving long-standing problems in our attempts to ensure the equitable participation of children from nonpublic schools. Further, these provisions will allow us remedies for a failure of a State agency to provide equal opportunity to private school children at something less than the drastic cut-off of funds solution now available in current law.

Special Grants. Those aspects of the title I amendments which are less desirable include the extension of special incentive grants under part B and special grants for urban and rural areas under part C, although the extension of part C will be for only one year, after which time the program will cease to exist. As extended, those parts would be improved somewhat by H.R. 69: (1) a strict limitation of $50 million would be placed on the amount of funds which may be used for part B; and (2) the allocation of part C funds would be more concentrated on those school districts with the highest numbers of eligible children.

In summary, the improvements made in the title I legislation by this bill greatly outweigh the few negative aspects of these provisions. The total result would be a greatly improved title I program that essentially follows the outlines of the House version of H.R. 69 to which the President and the Secretary gave their support earlier this year.

Impact Aid

Reforms of P.L. 874. Although this bill does not contain the comprehensive reform of the Impact Aid Program which this Administration, as well as previous Administrations, has been advocating for a number of years, it does take the first significant congressional steps toward reform of the program. The major points of reform include (1) the

elimination of entitlements on behalf of children whose parents work on Federal property in another State, (2) a differential payment rate which recognizes the varying degree of financial impact which various categories of Federally connected children have on a school district, and (3) the establishment of priority funding for those school districts with high concentrations of children residing on Federal property and whose parents work on Federal property (so-called "a" children). The Administration has strongly supported the reforms described under (1) and (3) above.

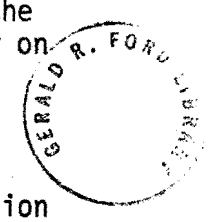
Payment Provisions. Under this bill those districts with a high concentration of "a" children (25 percent or more) would receive 100 percent of the entitlements generated by such children and this portion of the program could be funded alone without any need for "point of order" language. From the remainder of the funds appropriated for P.L. 874, all districts would then receive 25 percent of their entitlements and any remaining funds would be distributed in accordance with a descending payment schedule varying from 65 percent for military "a" children down to 28 percent of the entitlements on behalf of children with a parent employed on Federal property situated outside of the county in which the school district is located. The other categories of children would be paid for at rates falling between those two figures depending upon the degree of financial impact such children have on the school district.

Handicapped Children. Two amendments have been adopted to P.L. 874 which were not included in the Department's objectives for this program. The first sponsored by Mr. Quie provides for payment on behalf of handicapped children at a rate equal to one and one-half times that paid on account of normal children. This provision was primarily motivated by a Department of Defense decision which eliminated educational assistance for the handicapped under the CHAMPUS program (Civilian Health and Medical Program of the Uniformed Services). As a result of that decision, the public schools in areas heavily impacted with military dependents will be presented with the problem of providing special education to large numbers of handicapped children for which they are largely unprepared. Furthermore, those school districts with better than average handicapped programs usually receive a disproportionately large number of such children because of the compassionate transfer and assignment policies of the military. Although the increased payment rate for handicapped children may result in increased costs for the P.L. 874 program, it is a means of providing an incentive for school districts to provide services for such children and a means of compensating those districts which are presently providing such services and which may, for that reason, experience a greater influx of such children from the military.

Public Housing Children. The second undesirable provision relates to funding for children residing in Federally supported low-rent housing projects. We can see little justification for additional Federal funding for such children merely because they reside in such projects. However, two

amendments were added to the bill which would ameliorate somewhat the impact of funding for such children. Under the bill that funding will be provided only at 25 percent of the entitlement on behalf of such children, and such funds received by a school district will be required to be used for special projects to meet the needs of educationally deprived children. This provision would provide for the additional concentration of funds in school districts heavily impacted with low-income children in a manner similar to that proposed under the Better Schools Act.

Summary of Impact Aid Provisions. In summarizing the effects of the impact aid amendments contained in this bill, it is apparent that the movement towards reform, while not massive, is significant. In the first place, the total entitlements of school districts have been reduced by over $100 million (from $1,038 million under present law to $937 under H.R. 69 for fiscal year 1976). Secondly, the types of amendments contained in the bill at least indicate that the Congress has finally begun to have some of the same concerns which the Administration has expressed for the past five years. Finally, it may be ventured that failure of this reform to be enacted will result in continuation of current law for three more years -- a move Mrs. Mink attempted to carry out by having the House conferees instructed. Notably, the defeat of Mrs. Mink's motion to instruct the conferees was the first defeat ever suffered by the Impact Aid lobby on the House floor.



Consolidation

Consolidation of State-administered Programs. The House provision on consolidation of State-administered Federal education programs has been adopted in title IV of the bill. This is the provision which the President and the Secretary indicated earlier this year would be an acceptable first step as a means of making more rational the Federal education grant process. Under the consolidation provision contained in the bill, two broad program areas are established: (1) Library and Learning Resources and (2) Educational Innovation and Support. The first of these consolidations would include activities previously funded under title II, and the testing, counseling, and guidance portion of title III of ESEA, and title III of NDEA. The second would include activities formerly authorized by title III and title V of ESEA, and section 807 (Dropout Prevention) and 808 (School Nutrition and Health Services) of that Act.

Implementation of Consolidation. The foregoing consolidation would not go into effect unless (1) the programs were forward funded and (2) the amount appropriated was equal to at least 100 percent of the amount appropriated for each consolidated program. These funding levels would operate independently for each consolidated area. During the first year in which the consolidation is funded, old program activities would

receive 50 percent of the amount appropriated for the consolidated activities. The consolidation would be fully implemented in the second year, provided that the conditions discussed above are met. In the President's response to the Secretary's memorandum of June 24, 1974, he indicated this compromise was acceptable and such was conveyed to the Congress.

Special Projects Act. The Special Projects Act was adopted in section 402 of the bill. In his education message of January 24, 1974, the President indicated his favorable outlook toward the Senate's "further consolidation of various discretionary and categorical programs into a special projects authority, with provisions for gifted and talented children." A number of amendments were made to the Special Projects Act by the Conference which we believe greatly improve it. Under the Act, 50 percent of the amount appropriated would be available on a non-categorical basis to carry out special projects (1) to experiment with new education and administrative methods, techniques, and practices; (2) to meet special or unique education needs or problems; and (3) to place special emphasis on national education priorities. The other 50 percent of the amount appropriated however, is an undesirable feature in that it would be designated for certain activities specified in the Act, including education in the use of the metric system of measurement, gifted and talented children, community schools, career education, consumer's education, women's equity in education, and arts in education. The conferees made it clear on both the House and Senate floors that these categorical programs are to terminate at the end of three years, at which time funding for them must come out of the non-categorical funds appropriated for the Special Projects Act, without any specific protection for continued funding.

Summary of Consolidation Provisions. We believe that the consolidation provisions, along with the provision for the submission of a single, unified State plan for State-administered programs, are a genuine step forward in the administration of Federal education programs. Although some of these provisions, especially the 50 percent reservation of funds for specific programs under the Special Projects Act, are not all that we would desire, they are an acceptable first step in our attempt to return decision-making authority to State and local officials and to eliminate the narrow categorical approach to Federal aid to education. Given the Congressional reluctance to eliminate categorical programs and to consolidate funding authorities, the adoption of these provisions represents a unique opportunity to accomplish this long sought after goal, an opportunity which may not again be available in the foreseeable future.

General Education Provisions

Title V of the bill contains a number of amendments to the General Education Provisions Act (GEPA) relating, in the main, to application procedures for assistance under Federal education programs, the functions and authority of officers of the Education Division, the structure of the

Division, the promulgation of rules and regulations by the Division, and the rights of students and their parents with regard to access to and privacy of student records.

Mandated Bureaucracies. As you know, both the President and the Secretary expressed serious objections to the excessive mandating of new bureaucracies and restrictions on the management and administration of the Education Division which were contained in the Senate bill. Fortunately, most of those provisions have been either deleted or substantially modified in the bill as finally passed. Although the bill would mandate a number of offices in the Education Division (for example, an Office of Bilingual Education and an Office of Libraries and Learning Resources), the positioning of those offices within the bureaucracy and the GS level of the head of each office would be left to the discretion of the Department. The Senate provision calling for the creation of an Executive Deputy Commissioner of Education was also deleted from the bill, as was the provision prohibiting the transfer of any authority vested in the Assistant Secretary or in any agency, officer, council, commission, or board to any other agency or to any official in any other agency except as expressly authorized by statute. We believe that with the above described changes, this aspect of the bill is now acceptable to the Department.

Other Administrative Provisions. Other provisions which we found objectionable and which were deleted from the final version include (1) the ceiling which would have been placed on the authorization of appropriations for salaries and expenses of the Education Division, (2) a requirement that a copy of rules and regulations be mailed to current program recipients before those rules or regulations could become effective, and (3) the mandatory creation of a Federal Interagency Committee on Education within OE. The Senate provision requiring the establishment of a National Center for Educational Statistics (NCES) is included in the bill, but it has been modified to locate the Center within the Office of the Assistant Secretary for Education rather than as a separate agency in the Education Division. Also, the provision for the National Board for Educational Statistics, which would have provided overall policy guidance for NCES, has been eliminated.

Single State Plan. A provision in the bill which we believe could result in greatly improved administration of Federal education programs is section 511 which requires each State to submit to the Commissioner a general application covering all programs in which Federal funds are available for assistance to local educational agencies through, or under the supervision of, the State educational agency of that State. The submission of such an application would cover all the State-administered programs (ESEA, NDEA, the Adult Education Act, and the Vocational Education Act) and would be in lieu of State plan requirements in each individual program.

This provision will greatly simplify the procedures through which a State must go in order to participate in Federal programs. It is consistent with proposals the Administration has made for the improved administration of OE grant programs.

Decentralization. A very undesirable provision in the bill would prohibit the delegation of any function which was not so delegated prior to June 1, 1973, unless the delegation of such function to the regional offices is expressly authorized by law enacted after the enactment of this bill. This provision limits our ability to place in the regional office those functions which we believe are best carried out at a location as close as possible to the persons, agencies, or institutions which our various programs are designed to assist.

However, there are some ameliorating factors in the decentralization provision which serve to make it less objectionable than a strict prohibition against regional administration. For the first time, the Congress has recognized in legislation the existence of and need for regional offices in relation to Federal education programs. Section 503 of the bill amends section 403 of GEPA to require the establishment of regional offices which shall be responsible for disseminating information concerning activities of the Education Division and providing "technical assistance to State and local educational agencies, institutions of higher education, and other educational agencies, institutions, and organizations . . . . " The term "technical assistance" is not defined, but it is broad enough to encompass most of the activities currently carried out by regional offices, such as assistance in preparation of grant and contract applications, preparation and processing of student aid applications, and initial review of proposals. Importantly, the term "technical assistance" would clearly include those activities necessary to implement the consolidation provisions of the bill. Additionally, the term could include the function of making recommendations on grants; however, final approval authority would have to remain in the Office of Education in accordance with the provision of this bill.

Rules and Regulations. A number of amendments were adopted in section 509 of the bill with respect to the issuance of rules and regulations governing education programs. The Senate provision requiring a 30-day public comment period before any such rules or regulations could become effective was adopted, but a provision was added at our request to conform this requirement to the standards set forth in the Administrative Procedure Act. This provision is acceptable since the Department has been issuing regulations in accordance with the requirements of the APA since 1971.

Privacy of Student Records. One controversial amendment contained in the bill is the so-called Buckley amendment which, among other things, would require the withholding of Federal funds from educational agencies, institutions, and schools which fail to make student records available to parents and which allow unauthorized persons to have access to such

records. An amendment to this provision was adopted at our request which would authorize access to such records by certain Federal and State authorities as may be necessary to audit and evaluate Federal education programs and to enforce Federal legal requirements The Buckley amendment also contains a prohibition against the withholding of Federal funds from any educational agency, institution, or school which fails to make available personally identifiable information concerning students or their parents where to do so would result in an invasion of privacy. This provision has also been amended to preserve the Department's ability to conduct audits, evaluations and enforce legal requirements.

The Buckley amendment addresses the very real problem of providing adequate safeguards for individual records. We would have preferred that Congress had dealt with the problem in a more careful and thorough manner, with full hearings and debate. As modified in the Conference, however, the amendment maintains our ability to insist on accountability for Federal funds.

Miscellaneous Amendments

Adult Education. Sections 601 through 609 of the bill include a number of amendments to the Adult Education Act, the most significant of which is the elimination of the Commissioner's 20 percent discretionary fund, which in effect eliminates another categorical program. The bill also includes a requirement for adult education programs to be coordinated with manpower development and training programs and adult reading programs. Except for a provision which would hold each State harmless at 90 percent of its previous year's allocation, these amendments are consistent with the goals of the Department.

Bilingual Education. Section 105 of the bill amends title VII of the Elementary and Secondary Education Act which authorizes the Commissioner to provide financial assistance to local educational agencies to develop and carry out programs designed to meet the educational needs of children of limited English-speaking ability. Under this authority, OE will be able to continue its efforts to increase the capacity of school districts to meet the needs of such children.

The current title VII authorizes demonstration activities in the field of bilingual education. The amendments contained in this bill would broaden the types of activities authorized under that title in a manner consistent with the "capacity building" role which our recent testimony on the subject of bilingual education indicated was the proper function of the Federal government with respect to this problem. Specifically, the bill would expand the amount and types of training activities carried out under title VII. Although we objected to some of the earmarks for specific training activities, as finally written, the bill comes very close to achieving our objectives with regard to bilingual education.

As addressed later in this letter (on page 13) we do not consider that the new bilingual education provisions represent any change in existing law with regard to Federal policy. We feel that the bilingual provisions are clearly acceptable in that they would provide the Department sufficient flexibility to develop new and effective means of assisting local education agencies in carrying out their responsibilities for assuring equal educational opportunity to children with limited English-speaking ability (as mandated by the Supreme Court in Lau v. Nichols).

Emergency School Aid. We are disappointed that the Congress did not consider any of the modifications to this program suggested in our proposed Desegregation Assistance Act. Section 641 of this bill will simply extend the current ESAA for three years. That Act was improved, however, by the elimination of authority for educational parks and a specific set-aside for metropolitan area projects.

Vocational Education. Section 841 of the bill contains relatively few amendments to the Vocational Education Act. A number of new earmarks have been established (e.g. bilingual vocational education grants and a research and demonstration program in bilingual vocational education), but the duration of those programs has been limited to one year and the amount of the authorization has been greatly reduced from the original Senate version. While we do not favor the new set-asides created in this bill, the House has agreed to begin consideration of the issue of vocational education consolidation, and hearings on that subject have begun.

These hearings and the subsequent development of legislation will provide an opportunity to achieve a meaningful consolidation of this program along with the elimination of not only these set-asides but also other unduly narrow categorical aspects of the vocational education program.

Assistance for State School Finance Equalization Programs. The final version of the bill does not include the Senate proposal for a $225 million program of incentive grants to States for the development of equalization plans in accordance with Federal guidelines. Instead, section 842 of the bill contains a program of assistance to States to develop equalization plans which are consistent with the Fourteenth Amendment and which attempt to achieve equality of educational opportunity, as defined by the Commissioner and approved by the Congress. We believe this program would be consistent with our goal of increasing the capacity of States to deal with the school finance problem and to assure equality of opportunity among their school districts.

Higher Education. The significant higher education provisions which are set forth in section 831 through 837 of the bill are as follows:

(1) A number of amendments to the Veteran's Cost of Instruction program were adopted relating to minimum and maximum payments and minimum

number of students required for eligibility. The net effect of these amendments would be to increase slightly the cost of this program. Since we do not favor the continuation or funding of the program in the first place, this action is undesirable.

(2) The Teacher Corps program would be amended to permit the support of retraining for teachers and teachers' aides. This amendment is in accord with the Administration's position and would assist in achieving the goals of the Department for this program.

(3) The Department's proposed bill on legal education opportunities for the disadvantaged has been incorporated into this bill.

(4) The Senate provision establishing a $15 million program of political internships has been deleted from the bill.

Education of the Handicapped. Sections 611 through 621 of the bill include the following major amendments to the Education of the Handicapped Act.

(1) The bill would extend Part B of the Act through fiscal year 1977, but in 1975, instead of the Part B distribution formula, each State would be entitled to a special one-time grant in an amount determined by multiplying the total number of children ages 3-21 in the State by $8.75. These are not, however, genuine "entitlements" but rather a formula base authorization such as those contained in other controllable programs. Budget and appropriations action are likely to hold the actual spending level considerably below this level. The maximum total authorization for those grants would be approximately $647 million, compared to the present authorization for Part B of $220 million. We think this present authorization level will, for all practical purposes, remain the effective ceiling whatever the fate of the present bill. It is noteworthy that the problems created by this new authorization would be of one year's duration in any case as authorizations for Part B in fiscal years 1976 and 1977 would be reduced to $100 million and $120 million, respectively.

(2) Additional requirements for States desiring to receive Part B grants would be imposed. These requirements relate to procedures for the identification of handicapped children and the development of a timetable for implementation of a plan to provide equal educational opportunity to all handicapped children not later than one year after enactment of the bill. The new requirements also include the development of procedural safeguards with respect to the identification, placement, and evaluation of handicapped children and procedures to ensure that such children are placed in the mainstream of education as soon as practicable.

On balance, I believe we should regard the new funding authorization, although in itself undesirable, as a "backfire" provision which could help us resist much stronger Congressional initiatives for Federal intervention

in the education of the handicapped. The H.R. 69 handicapped education provisions continue the Federal role presently envisioned in part B of current law, i.e. as one of building the capacity of the States for "the initiation, expansion and improvement" of educational programs for the handicapped, rather than service support per se. Additionally, H.R. 69 follows a temporary ESAA-type approach of providing immediate and short-term assistance to help States under recent court or legislative mandates to provide required levels of services for handicapped children. Finally, the provisions would give higher credibility to current Federal efforts on behalf of the handicapped as an alternative to a massive Federal service support role seen in the excess costs proposals of S. 6 and H.R. 70 (at an estimated $4-6 billion per year).

Sex Discrimination in Collegiate Athletics. The bill contains a provision relating to the application of title IX of the Education Amendment of 1972 to intercollegiate athletics. As modified in the Conference, that provision is consistent with our proposed regulations on title IX and is fully acceptable.

National Reading Improvement Program. Title VII of the bill contains authority for the Commissioner to make grants to State and local educational agencies for programs and projects which show promise of overcoming reading deficiencies. In 1976, or when appropriations exceed $30 million, the program would be operated through State educational agencies on a formula basis. A number of earmarks as well as the mandated Reading Office in OE required by the Senate bill have been eliminated, and the excessive authorizations in the Senate bill have been reduced to a reasonable level, $53 million in FY 75. While the addition of this program is not one of our goals, the Reading Improvement Act, in the form finally approved by the Conference, does carry out many of the objectives of our Right to Read initiative and furthers our goals of focusing attention and emphasis upon the developing of basic skills.

Cross Cutting Provisions

Authorization Levels. The overall authorization for all programs covered by H.R. 69 for 1975 would be decreased from approximately $9.2 billion, currently authorized for such programs for FY 1974, to $7.2 billion. Authorizations for all programs under H.R. 69 except Bilingual Education, Education of the Handicapped, and Reading Improvement would be the same as or less than comparable authorizations under current law. While the bill contains a significant increase in the amount authorized for those three programs, that increase should be viewed in light of the unrealistic authorization to appropriation ratios (usually 4:1) which have historically prevailed in Federal education programs.

As you know, there is significant pressure being generated by the States for increased Federal assistance to pay for excess costs of educating certain disadvantaged groups. Short of drastic reduction in the authorization/appropriations gap nothing that could be enacted in

education authorizing legislation would serve to stave off this pressure for increased Federal assistance. While we have opposed measures such as S.6 and H.R. 70 which would provide very high authorizations for the Federal government to pay for the excess costs of educating handicapped children, the real battle will be fought over the appropriations bills, not over authorizing legislation. We therefore do not believe that the authorization levels which are contained in H.R. 69 pose any threat of increased fiscal outlays by the Federal government which would not exist if this bill were not enacted.

Hold Harmless Provisions. Although the bill would accomplish reforms of the title I and Impact Aid funding process, there are a number of hold harmless provisions which are designed by the Congress to ameliorate the adverse effects of those reforms with respect to any school district.

Section 144 of title I as revised by this bill would require each LEA to be allocated at least 85 percent of the amount it received in the previous year, and section 101(a)(10) of the bill authorizes a separate appropriation of $15.7 million to be used at the discretion of the Commissioner to assist those LEA's whose total allocation under part A of title I would be 90 percent or less than its allocation in the previous year. This latter provision is not actually a hold harmless, but a separate authorization of funds for the Commissioner to use at his discretion in "hardship" cases, which need not necessarily be funded.

Under the bill, any school district which received P.L. 874 payments of not less than 10 percent of its current expenditures in fiscal year 1973 would be held harmless at 90 percent of the amount of P.L. 874 payments it received in the previous fiscal year. Any other district would be held harmless at 80 percent of its previous year's allocation. The bill also contains a hold harmless at 90 percent of its previous year's level for any school district (1) which, during FY 1974 or FY 1975 or the period July 1, 1973, through June 30, 1975, experiences a decrease of 10 percent or more in the number of Federally connected children because of a reduction in or cessation of Federal activity affecting military installations, or (2) in which 10 percent or more of the children in average daily attendance are "out of state" or "out of county" Federally connected children.

These hold harmless provisions do detract from the impact of the reforms of title I and P.L. 874, but it should also be noted that the hold harmless amounts in each case will be reduced by 10 or 20 percent each year; thus in most cases the hold harmless level should be lower than entitlement or allocation levels within one or two years. The result should not be too far from the Administration proposal for reform of this program, which would have eliminated entitlements for "b" children, would have authorized additional payments to ensure that no school district would suffer a loss of more than five percent of its total operating budget in the first year, or more than 10 percent in the second year, because of any reduction in Impact Aid payments.

Role of the Federal Government. In both the Education of the Handicapped Act amendments and in the new Bilingual Education Act, the bill reflects a concern that full or equal educational opportunities be provided to those children who are the targets of those Acts. Although this is an undertaking which has not previously been made explicit in program legislation in either of those areas, it does not represent a new policy on behalf of the Federal government, nor would it result in a new Federal role in education.

Measures to assure equal educational opportunities for children of limited English-speaking ability have existed for more than four years, and our interpretation of the Civil Rights Act as requiring local educational agencies to provide such opportunities was recently underscored by the Supreme Court in the case of Lau v. Nichols. With respect to handicapped children, litigation and State legislation designed to obtain those opportunities for such children has been widespread. Furthermore, section 504 of the Vocational Rehabilitation Act of 1973 requires that handicapped persons not be denied the benefits of, or be subjected to discrimination under, any program receiving Federal financial assistance.

The obligation of State and local educational agencies to provide equal educational opportunities to both children of limited English-speaking ability and handicapped children has been clearly established before this legislation was developed, and Federal support of that principle was also established independently of this legislation. Therefore, this bill does not represent a change in the role of the Federal government with respect to such children.

The bill does, however, recognize the responsibility of local educational agencies to provide equal opportunities to those children; and since this responsibility has been imposed partly as a result of Federal action and with full Federal support, it is appropriate that the bill provide authority for the Federal government to assist such agencies in developing the capacity to meet those responsibilities.

Unconstitutional Congressional Review of Executive Action. Another aspect of the bill about which we remain concerned is the inclusion of a number of provisions requiring Congressional review of administrative action by the Department. For example, under the Special Projects Act, the Commissioner would be required to submit to the authorizing committees a spending plan in accordance with which he has determined to expend funds to be appropriated under that Act in the succeeding fiscal year. Funds thereafter so appropriated are to be expended in accordance with that plan unless within 60 days after the submission of the plan either of the authorizing committees adopts a resolution disapproving such plan. If such a resolution is adopted by either committee, the

Commissioner would be required within 15 days to submit to the committees a new plan, which will be subject to the same review procedures.

A further Congressional review procedure would be established with respect to the issuance of rules and regulations by the Commissioner. Such rules and regulations would have to be submitted to the Congress not later than 45 days before they are to become effective, during which period of time the Congress may, by concurrent resolution, find that the rule or regulation is inconsistent with the Act from which it derives its authority, and may thereupon disapprove such rule or regulation. In any period of adjournment for more than 30 days, either of the authorizing committees may suspend the effective date of the rule or regulation until not later than 20 days after the end of such adjournment. Whenever a resolution of disapproval is enacted by the Congress, the issuing agency may thereafter issue a modified rule or regulation covering the same or similar material, but such reissuance must indicate how the modification differs from the original and how it disposes of the findings of Congress contained in the resolution of disapproval.

In the two provisions discussed above, the Congressional disapproval prerogative would be exercised in one case by concurrent resolution of both Houses of Congress and in the other case by resolution of either of the authorizing committees. We believe that both of these provisions violate the principle of separation of powers and are clearly unconstitutional. That constitutional infirmity is the same whether the authority to disapprove executive action is purportedly vested in the entire Congress through concurrent resolution (which does not require Presidential approval) or in a single Committee.

The legislative function which the Constitution vests in the Congress is the authority to adopt bills, which, unless vetoed by the President, become law. Once a bill is enacted, the authority then devolves upon the President and the executive branch to carry out that law. Nothing in the constitution would permit the Congress to retain the authority to review particular actions undertaken by the executive in administering an Act. The only authority which the Constitution grants to the Congress in this regard is to pass another Act (subject to Presidential veto) to correct interpretations of law by the executive with which the Congress disagrees or to establish particular standards, rules, and regulations which would supercede those developed by the executive which the Congress dislikes. However, to permit executive action to be overridden by a simple resolution of Congress or a single committee of Congress would be to vest in that body authority which the Constitution did not anticipate.

While we seriously question the Constitutional validity of such provisions, it might be noted that this Administration, as well as previous Administrations, has accepted legislation of this nature on a number of occasions in the past and has complied with the requirements thereof up to the present time. For example, under the Basic Educational Opportunity Grant program, the annual schedule of expected family contributions

must be submitted for Congressional approval, and may be disapproved by a resolution of either the House or Senate. More recently, the President approved the Congressional Budget and Impoundment Control Act of 1974 which authorizes the deferral of budget authority by the Executive Branch subject to the disapproval of either House of Congress.

Nothwithstanding the Constitutional defect of these provisions, we do not believe that a veto of the bill is warranted on the basis of such provisions. The provisions are clearly severable from the rest of the bill and could be ignored by the Executive Branch without fear of invalidating the desirable aspects of the bill. Furthermore, we do not expect the Congress to exercise this authority with any degree of frequency, because to do so would only delay the implementation of programs and the distribution of funds. Indeed, the pressure from Congress is expected to be in the opposite direction, that is, to promulgate necessary spending plans, regulations, and guidelines as quickly as possible in order to assure that the benefits of this bill are distributed without delay.

Advance Funding. The bill mandates advance funding for the consolidation of innovation and support services and library resources. This would begin to implement the President's proposals to forward fund these programs and Title I, Education of the Handicapped Act, and the Vocational Education Act when consolidated. In this regard, the President stated in his May 22, 1974, Press Release: "I have urged in the strongest terms the necessity of advance funding for consolidated programs...".

Equal Educational Opportunity

In the President's radio message on education earlier this year, he indicated his desire for effective anti-busing amendments to be adopted as part of these education amendments. Specifically, he urged the adoption of the House amendments with regard to busing. To a large extent those provisions are contained in this bill in a form which will provide an effective curb on the ability of Federal agencies and courts to require the excessive busing of children as a means of desegregating schools.

The equal educational opportunity provisions in this bill, including the anti-busing provisions, will provide the courts with a rational scheme which sets forth not only those factors which amount to a denial of equal educational opportunity but also the appropriate means of remedying such denials. The most important aspects of those remedies are (1) a limitation on forced busing beyond the school next closest to the residence of a student, (2) a prohibition against the use of Federal funds for the transportation of students, (3) a prohibition against the mid-year implementation of forced busing orders, (4) a provision authorizing the termination of court orders requiring transportation when a school district is found to be in full compliance with the requirements of the Constitution, and (5) a prohibition against the implementation of any forced busing order which would pose a risk to the health of a student or significantly impinge on his or her educational progress.

The reopening provision in the House bill, which would have permitted school districts to have existing title VI plans and court orders reopened to conform to the standards established by this bill, was not adopted. Instead, the bill expands the reopening provision in present law to allow school districts, as well as parents, to seek to reopen any plan or order involving transportation of students where such transportation imposes a risk to the health of a student or significantly impinges on his or her educational progress. While the Administration would have preferred a stronger reopener, the discussion and the votes in the Congress make it clear that the reopener as it is in this bill is the strongest that we could hope for out of this Congress.

The provisions described above do not go as far as the President indicated he desired, but I believe that, when considered in conjunction with the recent Supreme Court decision in the Detroit case, this bill will allow us substantially to strengthen the limitations on the amount of busing which children of the country can be forced to undergo in the name of desegregation. This bill firmly establishes the position of the Congress in opposition to excessive transportation of students without reducing the ability of the courts to effectively enforce the requirements of the Constitution and the ability of this Department to enforce the requirements of title VI of the Civil Rights Act. Under the provisions of this Act, parents may be assured that their children will not be bused far away from their own neighborhood through the overzealous implementation of desegregation requirements by Federal courts and officials.

Conclusion

Any ultimate conclusions concerning the desirability of the enactment of H.R. 69 must obviously be of a mixed nature. However, when the positive aspects of the bill--the substantial title I reform, the "real" beginning of grants consolidation, a start toward impact aid reform, and the furtherance of our equal educational opportunities goals--are compared with those aspects which we consider to be less favorable--the retention of part B of title I, the public housing portion of P.L. 874, the limitations on decentralization, and the creation of a new authorization for State handicapped programs--our overall conclusion must be that the bill is a significant step forward in our quest for improved administration of Federal education programs and for more effective and equitable distribution of Federal aid for education.

The alternative to this bill is not a new bill but a continuing resolution until sometime next year. Therefore, we must compare this bill against current law not against some imagined new bill. Viewing from this aspect, we consider H.R. 69 to be superior to current law most particularly with regard to the equity of Title I allocations.

While I have trouble with many features of this bill, I believe sufficient progress (and progress which, in my opinion, would not be retrievable if the bill were vetoed and the veto upheld) toward the President's goals have been made to justify the President's signing this bill.

We therefore recommend that the bill be approved.

Sincerely,

Frank C. Carlucci
Under Secretary

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

August 7, 1974

Honorable Roy L. Ash
Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Dear Mr. Ash:

This is in reply to your request for the views and recommendations of the Civil Service Commission on enrolled bill H.R. 69, a bill "To extend and amend the Elementary and Secondary Education Act of 1965, and for other purposes."

Our comments are limited to the personnel provisions of H.R. 69. While we find some of these provisions objectionable, we are not recommending disapproval of this legislation.

Section 105(a)(1) of the enrolled bill would amend title VII of the Elementary and Secondary Education Act to provide for obtaining the temporary or intermittent services of employees for the National Advisory Council on Bilingual Education in accordance with section 445 of the General Education Provisions Act. Under section 445, these employees would be appointed and compensated in accordance with section 3109 of title 5, United States Code.

Various sections of this bill would set up new offices and programs--an Office of Career Education (section 406), an Office of Consumer Affairs (section 407), and a National Center for Educational Statistics (section 501)--all with directors appointed, expressly or implicitly, in accordance with the provisions of title 5, United States Code. This is appropriate.

Section 502(a)(1) would amend the General Education Provisions Act by adding a new section 408 which would, among other things, authorize each administrative head of an education agency to appoint and compensate personnel in accordance with the regular appointment and pay provisions of title 5, United States Code. This provision is appropriate.

Section 517(a)(1) of the enrolled bill would amend section 445 of the General Education Provisions Act by adding thereto a new subsection(d). This new subsection would provide that no employee of an advisory council is to be compensated at a higher rate of pay than that employee would receive were he subject to the customary compensation provisions of title 5, United States Code. However, executive directors of Presidential advisory councils would be paid at the rate of GS-18, while executive directors of all other statutory advisory councils would be paid at the rate for GS-15 (there is no indication of which of the ten rates of the GS-15 rate range is intended). Furthermore, subject to regulations of the Assistant Secretary for Education, other employees of advisory councils would be compensated "at such rates as may be necessary to enable such advisory councils to accomplish their purposes."

This new subsection would clearly have the effect of removing the executive directors of these advisory councils from the General Schedule classification and pay system, and we find it objectionable. We can see no reason why the positions of these executive directors should not be classified to appropriate General Schedule grade levels in the same way other Government positions are, and paid accordingly.

We find subsection (d) very ambiguous with respect to the other employees of advisory councils. Employees appointed under section 445 of the General Education Provisions Act <u>are</u> presently subject to the General Schedule system, and this new subsection would not specifically exempt them. Although the subsection can be read as removing these employees from the General Schedule, we note that the Conference Committee in discussing this subsection (page 188 of Senate Report No. 93-1026) states "[i]f those positions must be classified, they should be classified by the executive directors, whose decision should be subject to review by the Civil Service Commission."

We are not prepared at this time to make a final determination (under 5 U.S.C. 5103) on the effect of this subsection on the applicability of the General Schedule system to employees appointed under section 445. However, we can see no reason why the employees of these advisory councils should not clearly be subject to the same classification and pay system applicable to other Government employees.

Section 612 of H.R. 69 would amend section 603 of the Education of the Handicapped Act by providing that the Bureau for the Education and Training of the Handicapped be headed by a Deputy Commissioner placed in grade 18 of the General Schedule. Five other positions in that Bureau would be placed in GS-16 of the General Schedule. These positions would be in addition to the positions authorized under section 5108 of title 5, United States Code, and would not affect other positions in the Office of Education under 5108 of title 5 or under other law.

Legislating grade levels in this way compromises the concept of "equal pay for equal work" and causes problems in managing the assignment of supergrade spaces in terms of governmentwide program priorities.

Section 804(c)(5) authorizes a National Conference Committee (organized to provide guidance and planning for the 1977 White House Conference on Education) to appoint a Conference Director and other necessary personnel without regard to the provisions in title 5, United States Code governing appointments in the competitive services. However, in the absence of a specific exception, these employees would be subject to the General Schedule provisions of title 5. Because of the temporary nature of the National Conference Committee, we do not object to excepting its employees from the competitive appointment provisions of title 5. Duration of employment would presumably not be longer than several years.

In view of this comprehensive nature of this legislation and its major significance, our objections to some of its personnel provisions should not stand in the way of final approval. Therefore, insofar as the personnel provisions are concerned, the Commission recommends that the President sign enrolled bill H.R. 69.

By direction of the Commission:

Sincerely yours,

Robert E. Hampton
Chairman

by Jayne B Spain
Acting Chairman

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 14 1974

Dear Mr. Ash:

This responds to your request for the views of this Department on enrolled bill H.R. 69, the "Education Amendments of 1974."

We recommend that this enrolled bill be approved by the President.

As enrolled, H.R. 69 extends and amends the Elementary and Secondary Education Act of 1965 (ESEA) to consolidate certain education programs of the Department of Health, Education, and Welfare (HEW), revise funding allocation criteria for certain HEW education programs, and extend the authorization period for such funding. This Department has not heretofore commented on H.R. 69; however, as enrolled the bill affects our programs for Indians and the Territories.

Section 103(a)(2) of the amendments to ESEA provides for a set-aside of 1 percent of the funds appropriated for grants to local education agencies under Title I of the Act. This amount would be divided by the Commissioner of Education among the Secretary of the Interior (on behalf of Indians), Guam, American Samoa, and the Trust Territory of the Pacific Islands. Previously this set-aside had amounted to 3 percent (although including Puerto Rico), and the alteration could have resulted in a significant reduction of such funding previously available to the territorial areas and the Bureau of Indian Affairs (BIA). However, the amended language of section 103(a)(1) of the ESEA authorizes the appropriation of additional funds sufficient to "assure at least the same level of funding" as in fiscal year 1973 for such areas and the BIA.

Section 105 of the enrolled bill includes a revised section 722 of the ESEA which authorizes the provision by HEW of bilingual education program funds for children in BIA schools and requires the Secretary of the Interior to submit a report to the Congress by November 1 of each year on the use of such funds and an assessment of the extent to which the needs of Indian children are being met by such funds. We have no objection to the requirements of this section.

Sincerely yours,

Raymond V. Butler

Acting Deputy Commissioner of Indian Affairs

Honorable Roy L. Ash
Director
Office of Management and Budget
Washington, D. C. 20503

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

AUG 8 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Ash:

This is in response to your request, on an urgent basis, for the views of this Department on the July 23rd conference report on H.R. 69, the Education Amendments of 1974. Our attention has been directed to Title II and to Sections 402, 509 and 516.

I

As to Title II, the "Equal Educational Opportunities Act of 1974," Sections 207, 210 and 214 affect the authority of the Attorney General to initiate, and intervene in, lawsuits concerning denials of equal educational opportunity. These sections would simplify the procedures for our participation in this field of litigation and would make easier uniform, nationwide enforcement. (Compare, e.g., 42 U.S.C. 2000c-6(a) which now imposes particular requirements on our instituting such litigation).

Section 204, in six subsections, defines certain practices as denial of equal educational opportunities. These provisions essentially incorporate various practices already declared by the courts to be constitutional or statutory violations (e.g., compare Lau v. Nichols, 414 U.S. 563 (1974) with Section 204(f)). For this reason, the Department supports Section 204.

The other provisions of Title II include many sections which are based in whole or part upon provisions proposed by the President in the "Equal Educational Opportunities Act of 1972." E.g., Sections 204 and 214. However, all provisions in the title must be read in conjunction with the proviso stated in Sec. 203(b). The legislative history of the act indicates that this proviso was added in order to protect against holdings of unconstitutionality. It is therefore unclear what precise effect will be given to sections 215, 216, 257 and 258.

II

Section 402 provides that the Commissioner of Education may make contracts to carry out certain special projects. The Commissioner is required to submit to designated House and Senate Committees a plan for the expenditure of funds for this purpose describing contracts in excess of $100,000. Funds may be expended unless within 60 days either Committee adopts a resolution disapproving the plan.

This Department has frequently stated that "committee veto" provisions violate the Constitution. Various Attorneys General have noted that such provisions violate the principle of separation of powers between the executive and legislative branches of government by permitting congressional committees to administer programs, thus usurping power confided to the Executive branch. Moreover, while Congress may enact legislation governing the making of government contracts, it may not legally delegate to its committees the power to make contracts either directly or by conferring upon them power to disapprove a contract which an officer of the Executive branch proposes to make. E.g., 41 Op. A.G. 230 (1955).

The question remains whether the powers conferred upon the Commissioner of Education under Section 402 may be exercised, assuming both that the bill becomes law and that the Committee veto provision is unconstitutional. This depends on whether the unconstitutional provision is separable from the rest of the Act. In such cases, one must determine from the provisions of the act and its subject matter whether Congress would have intended the balance of the act to stand without the unconstitutional provision. Id. at 234; 37 Op. A.G. 56, 66 (1933). In the limited time permitted we have not been able to make such a determination and we defer to those familiar with the legislative history of the enrolled bill as to what that determination should be.

III

Section 509 of the bill provides for disapproval by concurrent resolution of certain rules, regulations and other requirements of general applicability issued by the Commissioner of Education. In some specified cases action affecting the rules and regulations may be taken by designated House and Senate Committees. The remarks in Part I, supra, apply equally here as far as Committee action is concerned. In addition, we have frequently expressed the view that review of Executive action by concurrent resolution is not permitted by the Constitution. See, for example, our letter to you of July 16, 1974 on the Mondale amendment to S. 3355. We reaffirm those views here.

IV

Section 516 of the bill provides that where the President fails to appoint a member to fill a vacancy in the membership of a Presidential advisory council, then the Secretary shall immediately appoint a member to fill such vacancy. Although this provision may operate as an undesirable restriction on the President's discretion, it is not at all clear that it may be objected to on constitutional grounds since Congress may, of course, vest the appointment of "inferior Officers, as they think proper, in the President alone * * * or in the Heads of Department." Art. II, Sec. 2. See also Minnesota Chippewa Tribe v. Carlucci, 358 F. Supp. 973 (D.D.C., 1973) (President subject to suit for failure to appoint members of the National Advisory Council on Indian Education); cf. National Treasury Employees Union v. Nixon, 492 F. 2d 587 (D.C. Cir. 1974).

Subject to the above considerations, the Department of Justice defers to the Department of Health, Education, and Welfare on the question whether the H.R. 69 should receive Executive approval.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

THE ASSISTANT SECRETARY OF COMMERCE
Washington, D.C. 20230

AUG 8 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Ash:

This is in reply to your request for the views of this Department concerning H. R. 69, an enrolled enactment, to be cited as the

"Education Amendments Act of 1974."

The principal concerns of the Department of Commerce with this enrolled enactment are the provisions of section 822, directing the Secretary of Commerce to develop current data on the school age population and section 403, relating to education for the use of the metric system of measurement.

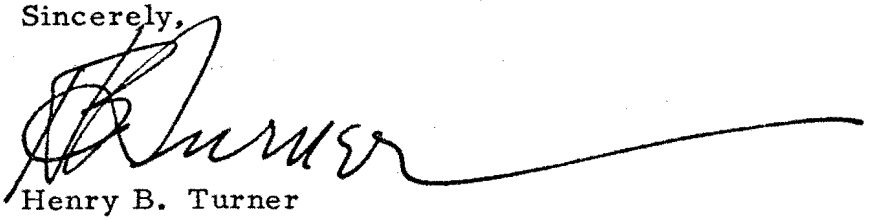
With respect to the provisions of section 822, we would point out that the program authorized in section 822(a) may pose serious problems to the Department's Bureau of the Census, not only in providing the staff resources to carry out the subsection but also in the impact which this effort may have on the basic programs of the Bureau. In any event, the Bureau of the Census' staff feels that it would be technically impossible to carry out section 822(a) within the one year time period specified in the Act and that final results of the survey might not be available until 1976 or 1977.

With respect to section 403, the Department has no objection to this section but urges that in view of the responsibilities which are proposed to be placed in the Secretary of Commerce under the pending Metric Conversion Act sponsored by the Administration, the Commissioner of Education consult and cooperate with this Department in carrying out section 403.

Subject to these comments the Department would have no objection to approval by the President of H. R. 69.

We do not anticipate that enactment of section 403 would involve any additional costs to this Department and, in any event, we would assume that such costs would be met by reimbursement from the Department of Health, Education, and Welfare. With respect to section 822, it is our understanding that if this legislation is enacted, funding for fiscal year 1975 would be sought by HEW and transferred to this Department. We currently estimate that fiscal year 1975 expenditures of this Department under this subsection would be some $2.5 million, primarily for planning the survey and that implementation in succeeding fiscal years would involve expenditures of up to $35 million, depending upon the level of accuracy sought to be achieved in the survey.

Sincerely,



Henry B. Turner
Assistant Secretary
for Administration

VETERANS ADMINISTRATION
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS
WASHINGTON, D.C. 20420
AUGUST 7 1974

The Honorable
Roy L. Ash
Director, Office of
Management and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This will respond to the request of the Assistant Director for Legislative Reference for the views and recommendations of the Veterans Administration on the enrolled enactment of H. R. 69, 93d Congress, the "Education Amendments of 1974."

As nearly as we can determine, all of the programs authorized under this measure would be administered by the Department of Health, Education, and Welfare. We, therefore, defer to the views of that Department on this measure.

We note, however, that amendments have been included which affect the Veterans Cost-of-Instruction Program, which is administered by HEW. These amendments would have the effect of (a) revising the criteria for eligibility of schools to participate in the program; (b) setting minimum and maximum limitations on payments to schools; (c) requiring 75 percent of the funds received by a school under the program to be utilized for special programs for veterans; and (d) setting a minimum enrollment of 25 for eligibility under the program.

The Veterans Administration currently has underway a new "man-on-campus" program by which Veterans

Administration employees will actually be stationed on various college campuses to assist veterans with any and all problems which they encounter with our educational program, including those relating to educational benefit checks. Our program will not supplant, but will supplement the assistance provided veterans under the Veterans Cost-of-Instruction program.

We perceive no objection to the changes noted which are included in the enrolled enactment of H. R. 69 and would interpose no objection to its approval by the President.

Sincerely,

Deputy Administrator - In the absence of

DONALD E. JOHNSON
Administrator

HEW Draft

Proposed Signing Statement for H.R. 69

I have today signed into law H.R. 69, a major piece of legislation primarily affecting Federal programs of aid for elementary and secondary education. The bill has received my approval in spite of the fact that it falls far short of accomplishing the goals which I have stated for those programs. It is, however, at least an initial step in the right direction and I have given my approval because, in the final analysis, the desirable aspects of the bill seem to outweigh those provisions which I would have preferred the Congress had treated otherwise.

As I have frequently stated, the needs which this Administration has sought to address in the area of Federal aid to education are principally (1) the need to provide State and local educational agencies with greater flexibility and decision-making authority in the use of Federal education funds and (2) the need for greater equity in the distribution of those funds. In at least three respects, this bill will move us toward the accomplishment of those goals.

First, by updating and otherwise revising the formula in title I of the Elementary and Secondary Education Act, the bill will ensure greater equity in the distribution of funds under this, the largest program of Federal assistance to State and local educational agencies. Under the amendment contained in this bill, we can be confident that funds will be concentrated in those areas where the need exists rather than where it might have existed nearly ten years ago when title I was first enacted.

Second, this bill represents the first real attempt at reform in the 24-year history of the Impact Aid program, under which school districts are compensated for the financial burdens experienced as a result of Federal activity in a given locality. Although these reforms are nowhere as near to thorough reform as my proposals would have been, they at least indicate that the Congress has begun to share some of the same concerns which this and previous administrations have expressed concerning this program. I am hopeful that the Congress will continue to look closely at this program and give serious consideration to further efforts to ensure that these funds are made available only where Federal activity actually has an adverse impact on the ability of a school district adequately to educate its children.

The third respect in which this bill will serve to accomplish our goals for education is the consolidation of a number of State-administered programs relating to library and learning resources and educational innovation and support. For the first time, the Congress has granted to State and local authorities a meaningful degree of decision-making authority with regard to the use of Federal funds, thus increasing the ability of those authorities to meet needs which are unique to their areas without being burdened by unnecessary and often irrational Federal constraints. Although I am concerned over the fact that this bill also creates a number of new categorical programs, I am generally pleased with the consolidation provisions in H.R. 69 and hope that they represent a trend for the future with regard to Federal aid to education.

Having noted those provisions in the bill which have caused me to approve it, I must also call to your attention

some of the serious defects in the bill. My greatest disappointment is in the failure of the Congress to enact the entirety of the so-called Esch Amendment with regard to busing of school children for desegregation purposes. While the bill does contain a number of the limitations on forced busing which I have proposed, the failure to include an effective reopening provision will result in a different standard being applied to those districts which are already being forced to carry out extensive busing plans as opposed to those districts which will be required to desegregate under the more rational standards set forth in this bill. I believe that all districts, in both the North and the South, should be able to adopt desegregation plans which will not result in children being bused out of their neighborhood schools to schools on the other side of town. I will continue to monitor this situation closely, especially in the light of the recent Supreme Court decision in the Detroit case; and further legislation will be requested if I determine that the provisions of this Act are not sufficient to prevent the continuation of the senseless and potentially harmful cross-town busing of children.

Another aspect of the bill which gives me grave concern is the restrictions the Congress has placed on the ability of the Executive Branch to carry out education programs. This bill contains a prohibition against the decentralization of most Federal education programs which is directly contrary to sensible Federal administration which, in my mind, would place the decision-making authority in the operation of those programs as close as possible to the intended beneficiaries.

Perhaps the most serious encroachment by the Congress on the authority of the Executive Branch to administer these programs is contained in those provisions of the bill which require decisions of the Department to be subjected to Congressional review and possible veto, in one case by concurrent resolution of both Houses, in another by a resolution of a single House, and in still another case by the resolution of a single committee of Congress. My own reading of the Constitution and the preliminary advice of Constitutional experts lead me to believe that these provisions exceed the authority of the Congress, and I shall look to the Attorney General for further advice as to whether the Department is bound by those provisions.

In spite of the serious shortcomings of this bill, my conclusion that it should be approved results in no small part from the apprehension of the havoc that might otherwise result with regard to the education of many of our children. We have operated these programs for too long under continuing resolutions and contingent extensions of authority. It is now necessary to get on with our efforts to improve the system of elementary and secondary education in our country. I can think of nothing that would interfere with that process to a greater degree than further uncertainty over the continuation of, and funding levels for, Federal education programs. I am particularly pleased that this bill provides a vehicle for advanced funding of elementary and secondary education programs. I stated in my education message of January this year I would request of the Congress advanced funding so that local school boards, administrators, and parents would know how much Federal assistance they would be receiving sufficiently

ahead of time to plan effectively and efficiently for the education of our children. Therefore, I intend to submit promptly to the Congress a supplemental appropriations request to meet my commitment.

With the improvements that this bill accomplishes with respect to some of the major programs and with the authority to provide advance funding for those programs, I am confident that the educators of our country will be better able to plan for and meet successfully the great challenges facing education today.