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REVENUE PROCEDURE ON RACIAL AND ETHNIC DISCRIMINATION IN SCHOOLS

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Thank you very much, George. My colleague here is Milton Cerny. If you've gotten a letter ruling or a determination letter from the National Office of IRS on EO matters in recent years, it probably has Milt Cerny's name on it. Milt has a great deal of continuity in the Service. He's been either with Chief Counsel or the Exempt Organizations Branch since 1960, and has probably as much depth and understanding of the functions of technical exempt organizations matters as anyone in the Service. Milt will join me in responding to some questions after I make a few comments to try to set the stage for them.

Before I start that, a couple of coincidences. Last fall I went over to Lake Geneva, Wisconsin. Some people in this audience were there as well. I had a very bad allergy attack the day that I was to address the conference. And I had another one this morning. And, to paraphrase Justice Douglas' famous comment in one of the school prayer cases, this coincidence presupposes something higher at work. When we get to the questions about this noncontroversial subject, I want again to set the stage as I did in Wisconsin: before I came to address that audience I looked for an appropriate analogy in the Bible. And I decided that the parable of the tax collector was not appropriate; we should look instead to the Book of Daniel. Moreover, I suggest you remember what happened to Daniel's persecutors when we get to the question and answer session.

On a more serious note, let me make a couple of random comments first. As with the Church consultation in Wisconsin, I appreciate the chance to share my views and those of the agency that I represent with you, to hear your views and opinions, to take back to my colleagues at the agency some of your apprehensions, your concerns, your outright disagreements. That's what we consider this opportunity to be all about. And if my appearance here, and Al Lurie's this morning, can serve any purpose, I hope it will be that it reassures you that there are people administering the exempt organization employee plans area, who are responsive and who are going to try to be sensitive to your concerns. I've been in the exempt organization enforcement business about ten years now, and I can't imagine a more dynamic and controversial field.

Perhaps Al didn't mention to you this morning that there were two overriding congressional purposes in putting exempt organizations under the Assistant Commissioner who is to administer the new pension law. The first one was to assure that the exempt organizations field got the kind of priority it has not had in the Service in the past. The second was to assure that people who are familiar with and specialize in this field of law are in the major policy-making and decision-making positions. That has come about. Under the reorganization we not only have a Commissioner with extensive experience in and familiarity with the exempt

organizations field, but there are individuals such as Al Lurie, Joe Tedesco, Howard Schoenfeld, and others who have spent many years dealing with this complex set of laws.

The sensitive questions that arise when you talk about religious organizations and their relationship to government make this last point even more important, and a number of us in the agency who are dealing with these matters on a daily basis have had experience over the years with this fine constitutional line that separates churches and the government. The last point here, and I think it's a major one, is that the Service, and particularly the organization now administering this area for the Service, perceives its role as a neutral and a supportive one. I can't emphasize that too much. We have, we feel, a fundamental obligation to administer this area of the law with the same impartial service and encouragement that we would give to any exempt organization.

I thought I would do two things here very quickly, within about 12 or 15 minutes. I'd like to give you an overview and a little background on the adoption of Rev. Proc. 75-50 and Rev. Rul. 75-231. The latter is the ruling extending the policy against discrimination on the basis of race to church-related, private schools. The Revenue Procedure contains the guidelines and enunciates the procedures the Service will follow in administering the policy against discrimination.

A number of events converged in 1974 to cause us to commence within the agency a serious reexamination and reevaluation of our existing policy towards private schools, not only to see if it complied with the law as we understood it, but whether it was sufficiently detailed and unambiguous to be clear to the people in the community and to our own agents in the field. In late 1973, through 1974 and into early 1975, the Civil Rights Commission in its study of the administration of programs designed to halt discrimination in all federal agencies, did a major study of the Internal Revenue Service. Specifically, the Commission conducted an evaluation of our enforcement of our own private school guidelines adopted in 1970 and 1971. During the same period, the Supreme Court of the United States issued its opinion in *Norwood v. Harrison.* The District Court in Mississippi, on remand from the Supreme Court, held new proceedings to determine whether certain schools in Mississippi had a discriminatory policy and, therefore, could not be provided with free school textbooks by the state. The District Court opinion was issued July 12, 1974.

In a related development, the Supreme Court issued its decision in the *Bob Jones University* matter upholding the Anti-Injunction Act. Finally, ERISA had been enacted and was signed into law by the President on Labor Day, 1974.

A task force was formed within the Service, primarily made up of exempt organizations personnel. It had the specific charge to reexamine Rev. Rul. 71-447 which announces the basic policy against discrimination in education, and Rev. Proc. 72-54, which was the basic revenue procedure governing at that time; to review our training manuals; and to evaluate our compliance program. In other words, the task force was asked to examine the entire field to see if we were doing everything we should be doing to administer the law properly.

Rev. Proc. 75-50 and Rev. Rul. 75-231 were two products of that task force's work. Milt Cerny is chairman of that task force now and was a member of it at the outset. Responsibility for those two documents, however, does not belong solely to

the task force. They received the same exhaustive review and development that such documents receive routinely in the Service.

Let's talk about Rev. Proc. 75-50 for a moment. If you examine it side-by-side with Rev. Proc. 72-54, you'll see that it's a much longer, more detailed and more comprehensive document. The primary justification for Rev. Proc. 75-50 was the need to conform IRS determination letter and examination activity procedures respecting private schools to a uniform nationwide standard. The Service has been since 1971 subject to the injunction issued in *Green v. Connally,* as far as Mississippi schools are concerned. That injunction, by the way, still continues. For Mississippi schools, the Court was fairly specific, setting out the kind of information a school had to provide at the time it applied for exemption, and what it had to do to maintain its exemption. That standard was applicable only to the Mississippi schools, and schools in the rest of the United States were subject to Rev. Proc. 72-54. It was a difficult situation that presented problems of even and equal tax administration.

The second justification was to increase our ability to give substance and meaning to the ruling policy against discrimination in education. We simply felt the need to articulate for our agents in the field unequivocal, unambiguous guidelines for measuring compliance. And the third reason, no less important than the others, was to eliminate where possible ambiguities and uncertainties as to how schools are supposed to comply with the policy. You'll find Rev. Proc. 75-50 to be very detailed; for example, it even sets standards on type size and column inches for the publication of the policy. We hope it represents an unambiguous statement of policy with which schools can comply with a minimum of uncertainty.

We consider Rev. Ruling 75-231 to be a natural and logical extension of the public policy that supports Rev. Rul. 71-447. This ruling applies, of course, to private schools with church ties. Our goal was to state unequivocally that the public policy against discrimination in education based on race, color, national or ethnic origin is so fundamental to national values that even a church may not engage in it and retain a favored tax status. I might note that there are more church-related private schools than nonchurch-related private schools.

I tried to distill three or four things out of Rev. Proc. 75-50 that we consider to be of the greatest importance. I'll try to summarize them for you. I emphasize that this is just a summary.

First, we think there is an obligation for a school to adopt and carry out a clear, unequivocal admissions policy that does not discriminate against any youngster on the basis of race, color or national or ethnic origin. That's the fundamental premise in this revenue procedure. You'll find it stated in Section 3.02, and I can assure you we'll use that as our guiding light throughout this program.

The second element is effective communication of that policy to the community that the school serves. We are aware this is an area of some ambiguity and uncertainty. It is the area where most of the problems will arise. We suggest alternatives to general publication in the revenue procedure for three types of schools, including church-related schools that draw at least 75% of their enrollment from a particular denomination. Although those alternatives are in there, we state in the revenue procedure that we strongly encourage schools to publish under the basic provisions, that is, those provisions that we feel are most clearly designed to inform the community served by the schools about their nondiscriminatory policy. Our

fundamental goal is to help schools, to help churches, to help the sponsoring denominations, to comply with these regulations and procedures.

A third element is that all school programs, and this runs the gamut from athletics to band financial assistance programs, must be operated on a nondiscriminatory basis. This element we consider to be fundamental and our agents will have audit guidelines that will help them evaluate whether a school is being operated in a manner consistent with a nondiscriminatory policy.

The fourth element, and the last one that I will mention, is a very tight and comprehensive system of recordkeeping. I would urge you to read this section carefully. A little background will be useful here. We published a proposed revenue procedure in February 1975. This was unusual since we ordinarily do not publish revenue procedures in advance. We did in this case because of the great interest in the subject. If you compare Rev. Proc. 75-50 with the proposed versions, you will see that we made some major changes. We recognize that recordkeeping can be burdensome. We tightened this up, we hope, to where it is both tolerable for you and adequate from an enforcement viewpoint. For example, if your school maintains records for other agencies, whether local, state, or federal, respecting the racial composition of the student body, such records will ordinarily suffice for Service purposes. We are urging our people to use common sense, to remember that our overall mission is one of service, and to help you and your administrators comply with this important national policy.

For your information, our audit program of private schools for the next few years will be increased and will include some church-related schools. We solicit your cooperation and say in return that our primary function is to assist you in complying with the law and not to penalize you for noncompliance, except where everything else fails. I can't state our overall philosophy any straighter than that.

I have a couple of random comments that I might make here. After discussions with George Reed over the past month or so, I am satisfied that your own enforcement activity, and your own moral authority, is going to be more effective and persuasive than anything the Service or any other government agency can do. And I would suggest, as we move into the administration of this area, that we will increasingly look to you to help us do our job better. A quick reminder that organizations that would be integrated auxiliaries (that is, subordinate organizations under a church group ruling that will not meet the integrated auxiliaries definition in the proposed regulations) have had their filing requirement extended until the final regulations are published. There is going to be a hearing on those regulations on June 7. We received about as many comments as we did on Rev. Proc. 75-50. There's a great deal of interest here.

George, I don't know that I should get into the integrated auxiliary issue. I had a comment or two, but I think I'll reserve them.

Thank you very much.

QUESTIONS FOLLOWING SPEECH OF CHARLES RUMPH

Q. My name is Jim Flynn, from the Diocese of Evansville, Indiana. Several years ago, after efforts to obtain public support for nonpublic education in my diocese, a group of individuals got together and formed a foundation with its own corporate status, and its own 501(c)(3) status for the dual purpose of showing to the community at large the value of Catholic schools and generating enough income to assist those who could not otherwise afford to go to Catholic schools to do so by grants in aid. When I received from the United States Catholic Conference the materials concerning these revenue procedures, I communicated them to this organization, which is separate from the diocese and maybe this raises the question you wanted to get into about the integrated auxiliary because as I read the procedures, that organization was required as a fundraising and grants in aid type of organization to maintain the recordkeeping requirements. The question is: Am I correct in that assumption? I've had a little difficulty getting any kind of a response out of the diocese. Am I correct in that assumption that this separate organization must comply with the record keeping requirements, number one, and number two, does the publication of this policy also apply to the efforts of this organization to those whom it seeks to receive funds from? That is to say, must we also disclose and keep records of the nondiscrimination policy to the people we solicit gifts from?

A. Let me begin by saying, regarding this particular foundation and scholarships, there is a provision in the procedure that deals with the granting of scholarships on a nondiscriminatory basis as long as it doesn't vary from that school's nondiscriminatory activity. So, when we speak here about discrimination, those scholarships would have to be made on that particular basis.
Now, as far as the question about the recordkeeping procedures, these procedures, of course, are directed primarily at schools, rather than at separate scholarship funds or foundations that are set up to aid schools or charitable organizations. So I think, as far as the record keeping procedure of that Rev. Proc. is concerned, it would not be applicable to your foundation.
I really think that is the answer there, and if your foundation is a private foundation, and under 4945 it has to establish and get approved in advance its guidelines for distributing grants from the foundation, that, of course, is where the Service would have its say so about such things as discrimination.

Q. Do the nondiscrimination guidelines in the procedure have to be followed by seminaries, as opposed to normal parochial schools? You may get into seminaries that are dedicated for some ethnic purpose. It seems to be a specialized case and is not dealt with in any of the literature.

A. All I can say is that it is an integraged auxiliary of a church.
I think the three examples that were set forth in the Revenue Ruling are dealing with the question of secular education. With respect to the seminaries, those schools that are dedicated for preparing people for the ministry, it

is my recollection in the developing of that revenue ruling that we were not covering that situation. I think here we enter into the area of separation of church and state and the right of religious organizations to establish what the requirements for their particular religion are. This, of course, has to be distinguished from Situation 3 that certain tenets may in some way foster segregation, but there again it is a secular school we're speaking of, teaching secular subjects.

Q. By seminary I mean not only a school of theology, but intermediate schools where they would be giving prospective candidates for the clergy secular education in addition to clerical training, but the purpose of the school is pointed toward theology, so they would not all be covered by that.

Q. Would this be a minor seminary you are talking about?

A. A minor seminary, intermediate and major. Minor is a high school, intermediate is a college, and the major is a theological school, it's all pointed in one direction, they get both secular and religious training but it's different than a parochial school because it's pointed in a different direction. Frankly, I don't think we've faced that particular problem yet, it's not unique to your organization here, there are many Bible colleges throughout the country that offer degrees plus teaching people to enter a particular ministry. And I really don't think we've resolved that issue yet.

Q. This is Tom Rayer. Gentlemen, this goes toward the interpreting of the regulations which are in process of being written. But the Catholic Church throughout the United States in many areas operates through predominantly religious orders and communities of men and women, schools which perhaps would be termed mission schools that are dedicated to the education of certain minorities, blacks, Chicanos, Indians, and other people like that. These orders have traditionally for generations dedicated and given priority to this particular ethnic aspect of our culture. And in these schools, I think you will find for the most part, they do not have directly discriminatory admission policies in the sense that persons of other races and ethnic background are excluded, but you will find a pattern of priorities established to where these schools predominantly cater to that particular ethnic or racial group. Now, to what extent would your regulations feel that those schools have discriminatory or nondiscriminatory policies?

A. Well, quite obviously, we can't answer specifically. I'm not sure what kind of school you're describing, but I gather it would be similar to an ordinary secondary high school or junior high school that would serve a particular ethnic neighborhood.

Q. Yes, I would be talking about the typical situation that you would have in certain areas of the South and Southwest and out in the East where you have a parochial grammar school as such, which is established by a religious order of nuns who have given their entire purpose to educating let's say Mexicans or blacks. And this is what they've been doing for a hundred years. They've gone into these predominantly black communities and offered an education which heretofore was not available to them.

A. Well, I should be surprised if there would be an exclusionary policy imposed by that order. I would assume that there is no specific exclusionary policy, but as a de facto proposition many of these schools have an all black or all Mexican student enrollment. Well, the Rev. Proc. anticipates just that kind of situation in that third example about publication, the third alternative to publication, where it recognizes that there may be a community where there is no minority, or conversely, as you say, where there is no majority group represented. All that we will be looking for is a good faith effort to recruit minorities, if you will. This really characterizes the dilemma, I said minority, and I mean majority here, but I can tell you that in the Service we wrestled with both ends of that question. We did discuss the situation you're talking about, as well as the one present in those parts of the country where there are minority groups. We're really looking for good faith attempts to be open and not to discriminate on the basis of race, color or national origin.

Q. I'm Timothy Galvin of the diocese of Gary, Indiana. I'd like to inquire as to whether or not there is any provision in the law or in the regulations, either now in force or contemplated, which extends this question as to the discrimination as to sex, and I don't ask this to be facetious. It's a very practical question that arises out of the fact that I happen to be the attorney for a trust, a testamentary trust, and the final distribution of which will probably be made in the near future, and it involves six figure money. The trust was created by a woman who provided for a number of things to be done with the trust estate, and after those were all accomplished, that the balance of it should be distributed to a Catholic university for the establishment of scholarships. That university at the time the will was made was a boys' school. Since that time it has become coeducational. And in the wording of the will the testatrix referred to the distribution of these scholarships to young men in several instances. Now the school has both young men and young women as students. The question has arisen as to whether or not it would be illegal discrimination if the wording of the will was applied literally and these scholarships confined only to the male students at this university. Has this question arisen? We've tried to find something on it, but haven't been able to.

A. Yes, we've had several ruling requests with respect to wills of this type. Our general position that we're taking in this area is to approve these trusts so long as that trust and the educational institution are privately administered and controlled and the granting of the scholarships would not significantly derogate from the school's racially nondiscriminatory policy. If you offered a scholarship only to a male student attending Harvard or Notre Dame, large private universities that have a racially nondiscriminatory policy towards students, that particular trust would qualify for exemption. With respect to the general question, whether programs favoring a particular sex are discriminatory for the purpose of Section 501(c)(3) of the Code, all I can say is that this issue has been raised. We are aware of the Title IX requirements of the Education Amendment Act of 1972 and the United States Commission on Civil Rights' position regarding the effect of this provision on tax exempt status. We feel, at this time, there is no clear judicial precedent that would

support a contrary conclusion, and the Service continues to believe that sexual discrimination in education has not yet come to be incompatible with charitable exempt status as a matter of any well established Federal public policy. As you know, there were several judicial opinions handed down in other areas of 501, I think one dealt with a junior chamber of commerce and another was a veterans group, holding that discrimination against women was not a basis for denial of exempt status. We feel at this time there just isn't enough legal authority for us to extend our policy on racially discriminatory policies in schools to situations where there is discrimination against women. However, we continue to study and evaluate our position in this area. I might add to that, from my experience in state government, that states might not necessarily take the same position that the IRS does on such a matter. In fact, it was my experience that the state courts of California would completely reexamine issues raised like this, that is, the Probate Court would make an inquiry on constitutional grounds, whether the trust complied with independent constitutional standards, regardless of what the Service did.

Q. My name is Jim Serritella, I'm from Chicago, Illinois. In connection with integrated auxiliaries, those of us that filed comments on the proposed definition, and asked for an opportunity to make an oral presentation, are we going to get individual replies? We have not as yet heard anything from IRS on our requests. We did file comments within the alloted time.

A. As far as I know, the replies are now being collated and I believe a list of people who will be making oral comments is being drafted. I would suggest that you address a letter to the Legislation and Reguations Division of the Chief Counsel's Office. He has jurisdiction over setting up the meeting and scheduling the participants.

Q. Mr. Reed: I would like to take advantage of the floor for a minute to ask one question. Are any particular forms contemplated which would implement this particular Rev. Proc.?

A. At the moment, it looks like there will be two different treatments for a school, depending if it has an individual ruling or not. I would assume most Catholic schools would not have an individual ruling letter, and your certification then will be on a separate form which is being prepared right now at the Service. Schools that have ruling letters will find on the Form 990 itself a new insert line for certification that they have complied with the pertinent provisions of the Revenue Procedure.

Q. I'm William J. O'Connor from the Diocese of Gary. Just so you fellows don't go back to your superiors with the idea that we all here are overjoyed with your regulations, I want to say on my behalf and I'm sure on behalf of some of the others here, that some of us find it rather repulsive that the Catholic Church has to go around spending money and advertising in the newspapers that they're against discrimination. Now, you stated several sources in the history leading to the enactment of this regulation. I didn't hear any statutory source for your authority, which may well be the general authority that IRS has under the statute. I also heard you refer to private schools with

church ties, church-related private schools. None of these seem to me to cover some of our schools, which we take the position are the Catholic Church. They're part of the mission of the Catholic Church and the Supreme Court has so held. So I would like you to tell us what the specific authority is, statutory or otherwise, other than what you've already given, for the IRS to make such rulings which require the expenditure of, some fellow put out a figure one time of millions of dollars, by different church organizations in the United States. We'd like to see, at least I would, a little more justification for that than you've given so far.

A. All right. If I didn't make it clear a while ago Rev. Proc. 75-50 and Revenue Ruling 75-231 simply provide guidelines and an interpretation of another Revenue Ruling, 71-447. Note that number. It was issued in 1971 and it articulates IRS policy. That policy, if you read it very carefully, finds its origins in three places. The first one is a line of judicial decisions starting with *Brown v. Board of Education,* issued in 1954 and many other subsequent cases brought to enforce rights enunciated there. The second source is the intent of Congress in the Civil Rights Act of 1964 to eliminate discrimination based on race in a number of American institutions, but specifically in the field of education. For example, if you look at the powers granted to HEW under Title VI of that Act, you will find a far more pervasive regulatory scheme than IRS exercises in its administration of the narrow area of tax exemption provisions. The third factor is Section 501(c)(3) of the Internal Revenue Code that exempts from tax, organizations organized and operated exclusively for charitable and other purposes. Education is charitable, and Rev. Rul. 71-447 draws a very careful syllogism based on that premise. Given the clear legislative and judicial policy against discrimination in education, any exempt organization, including a church, operating in violation of that public policy is acting illegally and illegal acts are not charitable. The authority holding that a charity that carries on an illegal activity is not charitable is not only persuasive but extensive as well. I appreciate the opportunity to make the point here, notwithstanding the criticism of it in recent years particularly, the IRS's principal job is to administer the laws that Congress passes. And that's what we try to do, and particularly in this area, we try very carefully to do that.

Q. Jim Robinson, of the U.S. Catholic Conference. This is somewhat a follow-up of an earlier question, and a further question occasioned by your response. The earlier Rev. Ruling came shortly after the case involving a racial question, *Brown v. Board of Education.* The Civil Rights Act of 1964, which had been on the books for a good many years before the Revenue Service decided it was required to get into the area of determining exempt status deals in Title VI with racial discrimination primarily, but also with national origin, I believe, and does not mention religious discrimination and now we have a Rev. Ruling that has added a new term called "ethnic." As I understand it, what you're saying is that you are applying a national policy against ethnic discrimination and I am a little lost as to when national origin ceases and ethnic begins, and how religion, when a particular religious group is involved, interrelate.

A. I think you'll find the descriptive "ethnic" following "national origin" in Title VI of the Civil Rights Act. It's written there as "race, color, or national or ethnic origin." We tracked that language. We were criticized (we felt unjustifiably) by the Civil Rights Commission because the Commission felt that we were not enforcing the policy against racial discrimination in the ethnic situation. For example, Mexican Americans are often classified as Caucasian, rather than Hispanic. We told them in a number of ways, a number of times, that we had always considered ethnic discrimination to be included within the meaning of racial discrimination and had, in fact, enforced it that way earlier. It was inserted into this Revenue Procedure as merely a statement of existing policy. That, Jim, is just a little bit of the background on that provision.

Q. I'm Bernard Huger. I have two questions. Here is the first one. You said that you have this policy by these revenue procedures on the basis that an organization cannot be charitable and discriminate on the basis of race. What if you have your exemption on the basis of religion, rather than charity, can you then discriminate?

A. Yes, because the public policy we are enforcing is directed at discrimination on the basis of race in education, that is, the exclusion of children from a school solely because of their race or national origin.

Q. What if you run your school for religious reasons, rather than educational reasons?

A. We covered that in the Revenue Procedure. So long as the denomination or sponsoring religious sect itself did not exclude persons on the basis of race, national or ethnic origin, it was not precluded from limiting its school enrollment to members of its own group.

Q. The other question is this. If a school is found to be in an area where there is a mixture of race living there, if their religion has a mixture of race in it, but the school somehow does not have a mixture of race, it ends up with all one type. Now, is there any affirmative action going to be required other than a publication in a newspaper or something?

A. Well, that is a very complicated question. We still retain the facts and circumstances test throughout this revenue procedure and I would suggest you might want to read very carefully *Norwood v. Harrison,* both the Supreme Court opinion and the District Court opinion. I can give you a citation on that. The District Court opinion is found in 382 F. Supp. at 921 and goes very specifically to the precise question as to what kind of affirmative steps you might have to take. But, of course, you've got to remember that in that particular case the Court was assuming that a prima facie case of racial discrimination had been made out, that is, where there had not been any minority students or faculty, and the school was formed or its enrollment expanded concurrently with desegregation orders in the public schools. This area is not settled and we can surely expect further developments.