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United States Government Accountability Office
Washington, DC 20548

B-306349

September 30, 2005

Mr. Kent Talbert
Deputy General Counsel
Department of Education

Subject: *Department of Education—No Child Left Behind Newspaper Article*

Dear Mr. Talbert:

In the last year, we received two congressional requests regarding the Department of Education's (Department) contract with Ketchum, Inc. (Ketchum) to promote education programs under the No Child Left Behind Act of 2001. These requests asked for our legal opinion as to whether the Department violated the publicity or propaganda prohibition by (1) producing and distributing a prepackaged news story regarding supplemental educational programs, (2) conducting a media analysis measuring the media's perceptions of the No Child Left Behind Act and its programs, and (3) directing Ketchum to subcontract with Armstrong Williams to promote the No Child Left Behind Act and its programs. We have enclosed copies of two opinions regarding these three specific activities.

In the course of our review of the contract and its deliverables, we learned that the Department, through Ketchum, had contracted with the North American Precis Syndicate (NAPS) to write a newspaper article entitled "Parents want Science Classes that Make the Grade." The article reports on a study that the Department conducted regarding parents' views on the declining science literacy of students. According to the documents provided to us, this article, which appeared in numerous small newspapers and circulars throughout the country, failed to disclose the Department's involvement in its writing. Our case law, including the two recent opinions enclosed, has consistently held that materials produced by or at the direction of the government that fail to identify the government as the source of the materials constitute covert propaganda. *See, e.g.,* B-302710, May 19, 2004. Accordingly, we commend this matter to you to determine whether there has been a violation of the publicity or propaganda prohibition.

The Inspector General issued a report, "Review of Department Identified Contracts and Grants for Public Relations Services," ED-OIG/I13F-0012, September 2005 (IG Report), reviewing similar articles prepared under another NAPS contract, finding that the articles did not violate the publicity or propaganda restriction. The IG Report explained that, because the information conveyed in the articles consisted of information and not advocacy of a particular point of view, disclosure of the Department's involvement in the writing of the articles was not necessary. IG Report at 15. The IG Report's conclusions were based upon an analysis similar to the analysis contained in a July 24, 2004, opinion of the Office of Legal Counsel (OLC), in which OLC concluded that the government source of prepackaged news stories need not be disclosed to the audience when the content of the news report was purely informational.

In May of this year, Congress enacted section 6076 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 110 Stat. 231, 301 (May 11, 2005). Section 6076 provides that no appropriations "may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency." *Id.* In the conference report submitted to both Houses, the conferees specifically noted the controversy between OLC's analysis and our analysis of covert propaganda and stated that the section "confirms the opinion of the Government Accountability Office dated February 17, 2005 (B-304272)." H.R. Conf. Rep. No. 109-72, at 158-59 (2005). The opinion to which the report was referring was the Comptroller General's circular letter addressed to the Heads of Departments, Agencies and others concerned, which clearly states that the critical element in determining whether prepackaged news stories constitute covert propaganda is whether the intended audience is informed of the source of the materials. B-304272, Feb. 17, 2005. Hence, in the context of prepackaged news stories, Congress has clearly rejected the OLC view and analysis adopted in the IG Report.

In reaching its conclusions, the IG Report did not consider the effect of section 6076. We recently contacted the Office of Inspector General regarding this matter and confirmed that the IG Report did not consider section 6076. We also note that, after the enactment of section 6076, the Office of Management and Budget alerted federal agencies to its existence, directing that agencies "must fully comply with applicable laws and should conduct such review as is necessary to ensure that their practices are fully compliant." Memorandum on Statutory Provisions on Video News Releases, M-05-20, July 21, 2005. Thus, we urge that you consider the recent expression of Congress when reviewing the NAPS articles for possible publicity or propaganda and Antideficiency Act violations.

We appreciate the cooperation of your Department, your office and the Office of the Inspector General in dealing with these and other matters. Should your review of the

NAPS articles raise any questions that we have not previously addressed in determining whether materials constitute impermissible publicity or propaganda, we would of course welcome them. If you have any questions, please feel free to contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667, or Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, at (202) 512-8257.

Sincerely yours,

/signed/

Gary L. Kepplinger
Deputy General Counsel

Enclosures