MEMORANDUM

TO: Addressees

FROM: The Secretary

SUBJECT: Delegation of Authority to Assert Deliberative Process Privilege

I. DELEGATION

Under the authority vested in me by section 412 of the Department of Education Organization Act, 20 U.S.C. §3472, I hereby delegate to you, your successor in function, and anyone acting for you, the authority to assert a deliberative process privilege that is the basis for withholding documents or testimony requested in litigation or other forums in which the privilege may lawfully be asserted, whether or not the Department is a party to the matter at issue. The assertion of the privilege is limited to documents and statements that were created, maintained, or related to program operations within the scope of the responsibilities of your position or documents or statements related to Departmental functions for which you have been delegated authority. To ensure consistency in its application, the privilege must be exercised in accordance with the following guidelines:

Personal Review

To assert the privilege, you must personally review the material (which can include both oral and written statements) for which the assertion of the privilege is being considered. Blanket assertions of the privilege cannot stand. However, if the documents are voluminous, you may rely on a detailed review of the documents prepared by a subordinate. For each document for which the privilege is asserted, the review provided to you should include: 1) the statement's author, 2) the statement's recipients, 3) the date prepared, 4) a description of the statement, including how it is both predecisional and deliberative, and 5) why the statement's release would hinder open and frank communications among Department policymakers. After considering this review, you should review a representative sample of the statements. You must personally assert the privilege.

To assert the privilege for oral communications, you must receive the proposed testimony under these same standards.

Predecisional and Deliberative

The privilege applies to statements that are both: 1) predecisional 2) deliberative.

1) Predecisional—Material is predecisional if it was prepared to assist a Department decision maker in arriving at his or her decision. The decision can be to not act at the time.

2) Deliberative—Material is deliberative if it was created in the process of formulating agency policy and procedures. Deliberative material includes material that contains opinions, evaluations, or advice, as well as material that interprets the existing state of affairs with a view towards changing present policy. An example of deliberative material is a document or discussion from a junior to senior official that contains opinions that have no binding effect on the recipient.

The deliberative statement typically will include recommendations or express opinions on legal or policy matters.

Factual Material

The privilege does not apply to material or discussions that are solely factual. If portions of the material contain predecisional and deliberative discussions and portions are not (e.g., if part of the material contains facts) the deliberative process privilege should not be asserted for the portions of material that are purely factual. However, if the factual material is intertwined with recommendations or thought-processes, the entire communication may be protected. For example, facts that would reveal nature of the deliberations are protected and analysis or evaluation of facts as part of deliberations are protected.

Post-Decisional

The privilege does not apply to the outcome of the deliberative process, i.e., the decision itself. Conversely, the fact that the decision maker adopted a proposed recommendation does not destroy the privilege that attaches to the earlier form of advice.

The privilege may still apply to materials created after a final decision has been reached, although more caution should be exercised in this case. If the Department is engaged in a continuing process of examining policy recommendations, these communications may still be privileged. The privilege does not extend to explanations, interpretations or applications of an existing policy unless the materials were generated as part of the development of the final explanations, interpretations, or applications, or as part of a new deliberative process to re-evaluate existing policy.

Balancing Test

Even if the above criteria are met and you determine that the privilege could be properly invoked, you must balance the Department's and the public's interest in nondisclosure with the party's need for the information requested. To do so, consider: 1) the relevance to the litigation of the information sought to be protected; 2) the availability of other sources for the information; 3) the gravity of the issues involved in the litigation; and 4) the impact that disclosure would have on government employees' candor in providing opinions if they realized that disclosure of their

opinions could be compelled in litigation. Here, it may be helpful to consider the age of the communication. If significant time has passed between the time of the communication and the policy action, disclosure may be less likely to curtail candid discussion. On the other hand, disclosure of communications while the policy action is still being considered would be expected to have a more harmful effect.

Provide Specific Reasons

If you decide to invoke the privilege, you must provide specific reasons for preserving the confidentiality of the requested information.

II. RESERVATIONS

None.

III. REDELEGATION

This authority may not be redelegated.

IV. CERTIFICATION AND EFFECTIVE DATE

This delegation is effective upon certification by the Department's Principal Delegations Control Officer and supersedes all previous delegations of this authority.

(Signed)
Richard W. Riley

OGC Clearance and Date: /s/ Ted Sky, July 8, 1998

Certification Date: July 22, 1998

Certified by Departmental Delegations Control Officer: /s/ Naty Beetle

Control Number: EA/EG/86

Addressees and PO Control No.

EA/EB/141 – Deputy Secretary
EA/EC/192 – Assistant Secretary for Civil Rights
EA/EE/23 – Under Secretary
EA/EG/86 – General Counsel
EA/EH/76 – Assistant Secretary for Special Education and Rehabilitative Services
EA/EJ/33 - Assistant Secretary for Legislation and Congressional Affairs
EA/EK/100 - Assistant Secretary for Intergovernmental and Interagency Affairs

EA/EL/82 – Chief Financial Officer
EA/EM/259 – Director of the Office of Management
EA/EP/338 - Assistant Secretary for Postsecondary Education
EA/ES/62 - Assistant Secretary for Elementary and Secondary Education
EA/ET/50 - Director, Office of English Language Acquisition
EA/EU/2 - Deputy Under Secretary for Innovation and Improvement
EA/ET/50 – Director, OBEMLA
EA/EV/61 - Assistant Secretary for Vocational and Adult Education

EA/EI/2 - Chief Information Officer
EA/EN/2 - Chief Operating Officer, Federal Student Aid
EA/EQ/2 - Deputy Under Secretary for Safe and Drug-Free Schools
EA/ER/1 - Director, Institute of Education Sciences