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U.S. DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
ADMINISTRATIVE COMPLAINT

March 28, 2013

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COMPLAINANTS¹

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The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization of more than 500,000 members that is dedicated to preserving the Bill of Rights.

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The ACLU of Wisconsin is the ACLU's Wisconsin affiliate. With approximately 6,741 members, the ACLU of Wisconsin has worked consistently to protect the civil liberties guaranteed Wisconsin residents under state and federal law including the right of women and girls to equality.



¹ The ACLU and the ACLU of Wisconsin are herein collectively termed "the ACLU."

RECIPIENT

Betty Missling
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Barron Area School District
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PRELIMINARY STATEMENT

1. This Complaint is filed by the ACLU pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (“Title IX”), and the regulations and policies promulgated thereunder. *See* 34 C.F.R. § 106 *et seq.* Title IX prohibits discrimination on the basis of sex in federally funded education programs and activities.
2. As detailed in the Factual and Legal Allegations below, data obtained by the ACLU from Barron Area School District pursuant to an open records request² indicate that in March, 2011, the District approved, and in the 2011-2012 school year, Riverview Middle School operated a single-sex program in fifth grade math and language arts classes that violated 34 C.F.R. § 106.34(b) in the following ways:
 - a. Classifying its students by sex without adequate justification; specifically:
 - i. Classifying its students by sex based upon impermissible stereotypes concerning the interests and abilities of boys and girls; and
 - ii. Failing to articulate an important objective of either improving educational achievement of its students through an overall established policy to provide diverse educational opportunities, or of meeting the particular, identified educational needs of its students; and
 - iii. Failing to ensure that offering single-sex classes was substantially related to the achievement of the program’s objectives;
 - b. Employing different teaching methods for boys and girls that promoted impermissible stereotypes concerning the interests and abilities of boys and girls;
 - c. Failing to ensure that participation in the single-sex classes was truly voluntary, by providing parents with one-sided and misleading information about the classes based on impermissible, overly broad stereotypes concerning the different talents, interests and abilities of boys and girls; and
 - d. Failing to provide a substantially equal coeducational alternative to the single sex classes.
3. The ACLU requests that the Office for Civil Rights (“OCR”) investigate Barron Area School District to determine whether the single-sex classrooms at Riverview High School are in compliance with Title IX, and remedy any unlawful conduct.

² Letter from Karyn Rotker, Senior Staff Attorney, ACLU-WI to Monti Hallberg, Dist. Adm’r., Barron Area Sch. Dist., (Nov. 11, 2011) (attached hereto as **Exhibit A**).

JURISDICTION

4. OCR is responsible for ensuring compliance with Title IX and receiving information about, investigating, and remedying violations of Title IX and its implementing regulations and guidelines in the region. 34 C.F.R. §§ 106.71, 100.7.
5. The ACLU has not filed this complaint with any other agency or institution.
6. The problems documented are ongoing, thus this complaint is timely.
7. Barron Area School District receives federal financial assistance, including funds directly from the United States Department of Education (“ED”) and ED funds passed through the Wisconsin Department of Education, and is therefore prohibited from discriminating on the basis of sex by Title IX and must comply with ED regulations.

OPERATIVE LAW

8. Title IX provides in relevant part that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

9. ED’s Title IX regulations require with respect to single-sex class assignments in a coeducational school that:

Each single-sex class or extracurricular activity is based on the recipient's important objective

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities [of which single-sex education cannot be the sole example], provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective.

34 C.F.R. § 106.34(b)(1)(i); *see* 71 Fed. Reg. 62,530, 62,534-62,535 (Oct. 25, 2006).

10. Justifications for single-sex classes may not “rely on overly broad generalizations about the different talents, capacities, or preferences of either sex.” 34 C.F.R. § 106.34(b)(4)(i); 71 Fed. Reg. 62,530, 62,535.
11. Whichever of these objectives is selected, the program must be implemented evenhandedly, enrollment in single-sex classes must be “completely voluntary,” and the program must offer a substantially equal coeducational alternative. 34 C.F.R. § 106.34(b)(1). “In order to ensure that participation in any single-sex class is completely voluntary, if a single-sex class is offered, the recipient is strongly encouraged to notify parents, guardians, and students about

their option to enroll in either a single-sex or coeducational class and receive authorization from parents or guardians to enroll their children in a single-sex class.” 71 Fed. Reg. at 62537. “[T]he Department of Education regulations require an affirmative assent by parents or guardians before placing children in single-sex classrooms. Such affirmative assent would preferably come in the form of a written, signed agreement by the parent explicitly opting into a single-sex program.” *Doe v. Wood County Bd. of Educ.*, 2012 WL 3731518 at *4 (S.D.W.Va. Aug. 29, 2012).

12. Additionally, any program involving single-sex classes must be evaluated by the recipient at least every two years “to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.” 34 C.F.R. § 106.34(b)(4).

FACTUAL ALLEGATIONS

General Allegations

13. The ACLU submitted requests for records under Wisconsin’s Open Records Act (ORA) to Barron Area School District (“the District”) on November 11, 2011. The District’s response was received by the ACLU of Wisconsin on June 4, 2012.
14. Records provided to the ACLU by Barron Area School District in response to this request indicate that Riverview Middle School, located in Barron, Wisconsin, operated single-sex classes within a coeducational facility in fifth grade math and language arts classes during the 2011-2012 school year, and planned to continue the program in 2012-2013.³
15. Riverview Middle School covers the fifth to eighth grades. Upon information and belief, it educates approximately 329 students.⁴
16. A school staff member stated that the single-sex program has been temporarily discontinued for the 2012-2013 year due to scheduling issues and the gender-composition of the incoming fifth grade, but that the District intends to reinstitute the single-sex classes for the 2013-2014 school year.⁵

Lack of Justification for Classification by Sex

17. The documents provided in response to the ACLU’s November 11, 2011 Open Records Act request, which sought “policies governing any single-sex education program or activity” and “records relating to the decision or rationale for creating single-sex education programs or

³ See Barron Area School District Administrative Office, *Barron Area School District Board of Education Regular Meeting Minutes* 1 (Mar. 21, 2011) (attached hereto as **Exhibit B**); Letter from unknown, Riverview Middle Sch., to Parents of Incoming Fifth Graders, Riverview Middle Sch. (May 2011) (attached hereto as **Exhibit C**).

⁴ See Wisconsin Dept. of Pub. Instruction, *Enrollment Statistics for Riverview Middle in the 2011-2012 School Year*, <http://data.dpi.state.wi.us/data/GroupEnroll.aspx?GraphFile=BlankPageUrl&SCounty=47&SAthleticConf=45&SCE SA=05&FULLKEY=110308040140&SN=Riverview+Mid&DN=Barron+Area&OrgLevel=sc&Quad=demographi cs.aspx> (last visited Feb. 6, 2013).

⁵ Telephone communication from Kristy Thompson, Guidance Counselor, Riverview Middle Sch., to Samantha Clifford, Legal Intern, ACLU Women’s Rights Project (Oct. 2, 2012).

activities,” do not indicate an adequate justification for the sex separation program at Riverview Middle School.

18. The primary articulated mission of the program was to meet “specific learning style needs” of boys and girls, and to use “gender-based” instruction to “[c]lose the gender gap... [i]mprove academic rigor in classes... [and i]mprove student behavior and attitudes through increased student competence, confidence and class participation.”⁶
19. The District produced no valid evidence supporting any relationship, substantial or otherwise, between the use of “gender-based” instruction and the academic or behavioral improvements sought to be achieved.
20. Rather, the program at Riverview Middle School was explicitly premised on impermissible generalizations, namely, discredited theories about the supposedly “different” brains and learning styles of boys and girls.
21. Correspondence from the District accompanying the documents make explicit that presumptions about the purportedly innate learning differences for boys and girls, was central to and directly influenced “the decision to consider single gender opportunities for students.”
22. For example, prior to the decision to implement the single-sex classes, school staff participated in a book study of *Why Gender Matters*, by Dr. Leonard Sax.⁷ In that book, Sax propounds the theory that hardwired differences between boys and girls necessitate the use of single-sex classrooms and the employment of different teaching methods for boys and girls.⁸
23. Internal notes taken by school staff during the book study highlighted many presumed learning differences for boys and girls, recording that girls:
 - Tend to draw nouns
 - Prefer to play with dolls
 - Less likely to take risks
 - UNDER estimate their ability
 - Prefer warm/fuzzy movies...
 - Girls feel yucky/nausea when stressed. . .
 - Girls generalize failures and feel they have little worth-81
 - Girls will do homework even when not interested in the subject matter. They want teacher to like them. . .
 - Stressed girls WANT to be w/girls MORE
 - Being friends with female teacher raises status w/peers (but not with male teachers)-85
 - Girls consult early. . .
 - Stress impairs learning – 89
 - Stress decreases performance – 92
 - Stress for SAT test may actually lower scores – 92

⁶ See Ex. C (Letter from unknown to Parents of Incoming Fifth Graders, *supra* note 3); Riverview Middle School, *Benefits of Gender Based Instruction* (Flyer) (date unknown) (attached hereto as **Exhibit D**).

⁷ Explanatory note from the Barron Area Sch. Dist. in response to ACLU-WI Open Records Request (June 30, 2012) (attached hereto as **Exhibit E**).

⁸ See Dr. Leonard Sax, *Why Gender Matters: What Parents and Teachers Need to Know About the Emerging Science of Sex Differences* 4, 18, 86-92, 108-112 (2005).

Lang/fine motor skills dev 6 years earlier...⁹

The same notes report that boys:

Draw verbs. . .

Prefer to play with cars and trucks

Like taking risks

OVER estimate ability

Prefer violent movies...

Get 'tingly high' from stress. . .

Boys see failure as relevant to the subject, not them as a person-81

Less motivated to do HW unless interested in the subject. . .

Stressed boys want to be alone

Being friends w/teacher lowers status with peers-85

Boys consult as last resort. . .

Moderate stress improves scores-92

Stress of SAT may improve scores-92

Targeting and special memory develop 4 yrs earlier than in girls. . .¹⁰

24. Program administrators also relied on Michael Gurian's *The Boys and Girls Learn Differently Action Guide for Teachers*, which contains discredited pseudo-scientific claims and gross gender stereotypes.¹¹ For instance, Gurian has claimed that boys are better than girls in math because their bodies receive daily surges of testosterone, while girls have similar skills only "a few days per month" when they experience "increased estrogen during the menstrual cycle"; that boys are abstract thinkers and so are naturally good at things like philosophy and engineering, while girls are concrete thinkers and should be given objects that they can touch to learn about math and science; and that boys should be given Nerf baseball bats with which to hit things so they can release tensions during class.¹²

25. The promotional materials distributed by the school also linked claimed biological differences to alleged benefits of single-sex education, asserting that the school's "research and experience" has found that girls, in single gender classrooms: "Ask more questions. Do more hands-on work with equipment. Take more leadership roles. Talk more. Have higher self-esteem. Are less obsessed by clothes, hair, make-up and popularity. Concentrate more on academics." The same source stated that boys in single-gender classrooms: "Do better with some freedom of movement. Are less distracted so they can focus on learning. Can practice social skills more comfortably. Participate more often and more freely. Are less distracted. They are less focused on girls and impressing them, therefore boys act out less often and concentrate on academics."¹³ These materials included no actual data or references to support their assertions.

⁹ Unknown author, Why Gender Base Matters (Notes) (date unknown) (attached hereto as **Exhibit F**).

¹⁰ *Id.*

¹¹ Untitled document listing sources consulted in Barron Area Sch. Dist.'s decision to institute single-sex classes, provided in response to ACLU-WI Open Records Request (June 30, 2012) (attached hereto as **Exhibit G**).

¹² See Michael Gurian & Arlette Ballew, *The Boys and Girls Learn Differently Action Guide for Teachers* 17, 75, 90-92, 100 (2003).

¹³ Ex. D (Riverview Middle School flyer, *supra* note 6).

26. Promotional materials sent to Riverview parents touting the benefits of single sex instruction stated that boys and girls “mature at different rates” and process “math and language in different parts of the brain”¹⁴; that boys and girls brains develop differently and that “[b]oys and girls notice different things (boys: motion; girls: bright colors and people)”¹⁵; that girls: “Are more easily distracted by noise. Prefer quiet and focus. Prefer cooperative work. Prefer problem solving tasks that help people. Hear better. Mature faster linguistically by about 4 years.”¹⁶ The materials compared this to qualities it suggested were characteristic of boys, who: “Are more kinesthetic. Prefer more freedom of movement. Do better when they can be louder and less restricted. Mature faster mathematically by about 4 years.”¹⁷
27. No evidence was produced demonstrating that the District conducted any individualized assessment of student need in mathematics or language arts before instituting the program. No documents were produced demonstrating that the District considered *any* grade-, school- or county-specific data in support of its decision, or that the District quantified the particular need for the envisaged gains in student behavior, confidence, class participation, or academic rigor at Riverview.
28. The District failed to produce any valid studies or educational data demonstrating any link between single-sex education and any improved academic or behavioral outcomes within our outside of the District. The sole secondary research cited (but not actually produced) was a paper in *The School Administrator*; while that article offers tentative support for single-sex programs within coeducational schools, it was an opinion piece that was not subjected to peer review. Moreover, it acknowledged that limited data exist in support of separation of students within coeducational schools, and concluded that the results the author had observed in two studies she had personally performed in Arkansas could not be generalized, but rather should be used to generate additional research questions.¹⁸
29. Instead, in support of its program, the school presented unattributed quotes from students, stating “I feel like I can be more open with just boys in the room” or “[w]e really help each other more when its [*sic*] just girls.”¹⁹
30. Although the materials themselves recognize that these “differences are generalizations and may not be true for your student,”²⁰ they nevertheless promote them as the justification for their program.
31. This evidence does not constitute sufficient evidence to demonstrate a substantial relationship between single-sex instruction and the goals the program aimed to achieve.
32. Based on the records produced and the Barron Area School District website, there is no evidence that Barron Area School District has an established policy to improve educational achievement by offering a diversity of educational options.

¹⁴ Ex. C (Letter from unknown to Parents of Incoming Fifth Graders, *supra* note 3).

¹⁵ Ex. D (Riverview Middle School flyer, *supra* note 6).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Sandra Stotsky, *The Promise of Single-Sex Classrooms*, 5 *School Administrator* 32, 32-35 (May, 2012) (attached hereto as **Exhibit H**).

¹⁹ See Ex. D (Riverview Middle School flyer, *supra* note 6).

²⁰ See Ex. C (Letter from unknown to Parents of Incoming Fifth Graders, *supra* note 3).

Impermissible Sex Stereotypes in the Educational Environment

33. The single-sex program at Riverview Middle School promotes harmful stereotypes about boys and girls by employing different teaching methods in the boys' and girls' classrooms.
34. Barron Area School District produced materials outlining gender-based instruction techniques, advising teachers on "what works with girls," and instructing them to:
 - Use quieter teaching voice.
 - Give more processing and sharing time – frequency and length.
 - Make opportunities for sharing feelings.
 - Encourage leadership and mutual support.
 - Use persistence in depth of questioning.²¹
35. The parallel "what works with boys" advised teachers to:
 - Avoid down time.
 - Use louder teacher voice.
 - Whenever possible give specific written directions.
 - Repeat directions frequently.
 - Encourage non-threatening fine motor skill activities.
 - Frequent questions or reflections.²²
36. The materials did not include or reference any valid studies or primary research supporting these assertions or linking these techniques specifically (or single-sex education in general) with improved academic outcomes.
37. Riverview staff visited, and were influenced by, other schools that used sex-stereotyped methods of instruction and classroom management. For example, notes taken during these visits reported that in the boys' classrooms teachers used "PHYSICAL movement to answer questions" and there were "[s]tanding students, sitting students, even backs to teacher. All is accepted."²³ . . . "Used examples the boys would like (Hank Aaron, etc) but at times boys would run with that thought. . ."²⁴
38. Conversely, in the girls' classrooms, teachers set up classrooms so that "Girls sat with feet under desks facing forward. . . [there was] lots of verbal and low activity movement," and different, stereotypically "female" topics were discussed. "Not many sports talked about. Emphasis on art and music. Very 'girlie' art. Fairly serious topics: cats, TV, music, clothes, bunnies, art, puppies, flowers, night, lucky yo yo , sox, skiing, paint brunch, phone, puzzles, piano, microphone, dance shoes, friends, family, shopping, nails, horses, books, friends [*sic*], heart. . ."²⁵

²¹ See Ex. D (Riverview Middle School flyer, *supra* note 6).

²² *Id.*

²³ Unknown author, *Observations at Somerset Middle Sch., in Wis. – Gender Based Math Boy's High Group* (Feb. 9, 2011) (attached hereto as **Exhibit I**).

²⁴ Unknown author, *Observations made of the Boy Gender Classroom in Osceola, Wis.* (Jan. 28, 2011) (attached hereto as **Exhibit J**).

²⁵ Unknown author, *Observations at Somerset Middle School in Wis. – Gender Based Math FACE girls* (Feb. 9, 2011) (attached hereto as **Exhibit K**).

39. The notes of Riverview administrators and teachers during these visits indicated that the observer viewed these differential teaching methods, and the observed gender differences in behavior, positively, stating that for the boys there was “[o]rganized chaos- It works!”²⁶ and in the girls’ classes, “[a]ll attentive during instruction. . . Hands were raised even before questions were asked. . . All quiet during correcting – no talking at all.”²⁷
40. Taken together, these notes, promotional materials, and the literature that influenced school administrators and formed the basis for the program strongly suggest that classroom instruction in the boys’ and girls’ classrooms was differentiated based on sex stereotypes, which is prohibited by Title IX.

Voluntariness and Coeducational Option

41. While the scant documents produced indicate that “mixed-gender classes” were offered in addition to the single-sex classes in math and language arts, the information provided to parents was biased and misleading, containing unsupported and one-sided statements touting the benefits of single-sex education, and including pseudoscientific claims about purported differences in boys’ and girls’ learning and development.²⁸
42. No information was provided about the content or resources of the coed classes as compared to the single-sex classes.²⁹
43. Although it appears that some effort was made to assess changes in student performance on STAR math and reading tests during the 2011-2012 school year, there is no evidence that the District conducted any assessment of whether the single-sex classes relied on overly broad generalizations about the different talents, capacities, or preferences of either sex, or whether the program was meeting its stated objectives of improving “student behavior and attitudes through increased student competence, confidence and class participation.”

²⁶ Ex. I (*Gender Based Math Boy’s High Group*, *supra* note 23).

²⁷ Unknown author, *Observations at Somerset Middle School in Wis.– Gender Based Math Girls Mrs. Boucher* (Feb. 9, 2011) (attached hereto as **Exhibit L**).

²⁸ See Ex. C (Letter from unknown to Parents of Incoming Fifth Graders, *supra* note 3); Ex. D (Riverview Middle School flyer, *supra* note 6).

²⁹ See Ex. C (Letter from unknown to Parents of Incoming Fifth Graders, *supra* note 3); Ex. D (Riverview Middle School flyer, *supra* note 6).

LEGAL ARGUMENT

44. As outlined in ¶¶ 1-43 of the Factual Allegations above, Riverview Middle School is not in compliance with 34 C.F.R. § 106.34(b)(1)(i)(A) because the justification for its single-sex math and language arts classes was not part of an overall established policy to provide diverse educational opportunities. The District produced no evidence demonstrating that it has an established policy to provide diverse educational opportunities.
45. As outlined in ¶¶ 1-43 of the Factual Allegations above, Riverview Middle School is not in compliance with 34 C.F.R. § 106.34(b)(1)(i)(B) because the justification for its single-sex math and language arts classes was not to meet the particular, identified educational needs of its students. The district conducted no assessment of the individualized educational needs of its students prior to implementing the single-sex math and language arts classes.
46. As outlined in ¶¶ 1-43 of the Factual Allegations above, Riverview Middle School is not in compliance with 34 C.F.R. §§ 106.34(b)(1)(i) and 106.34(b)(4) because the primary articulated mission of the program was to meet “specific learning style needs”³⁰ of boys and girls, and to use “gender-based” instruction premised on overly broad generalizations about the different talents, capacities, or preferences of boys and girls. This is an invalid justification for sex-based classifications as a matter of law, for at least two reasons:
- a. As the Supreme Court has held, the provision of single-sex education cannot be itself used as a justification for a sex-based classification because this confuses the “means” with the “end.” Such a justification constitutes a “notably circular” argument that distorts the applicable test to determine the constitutionality of sex-based classifications (like the decision to institute single-sex classes). *See United States v. Virginia*, 518 U.S. 516, 545 (1996) (“*VMI*”).
 - b. The Supreme Court has similarly rejected the use of generalizations about the differences between men and women in learning and developmental needs – which are the basis of the program at Riverview Middle School – as a justification for single-sex education. *See VMI*, 518 U.S. at 549-50.
47. As outlined in ¶¶ 1-43 of the Factual Allegations above, Riverview Middle School is not in compliance with 34 C.F.R. §§ 106.34(b)(1)(i) and 106.34(b)(4) because there was no evidence that the institution of single-sex classes or the use of gender-based instruction was substantially related to the objectives of decreasing the gender gap, improving academic outcomes, or improving student behavior and attitudes. The District’s decision was based entirely upon evidence that was non-scientific, weak, and anecdotal, and that failed to support the notion that the use of gender-differentiated instruction (or the use of single-sex education in general) would bring about the academic and behavioral improvements sought.
48. As outlined in ¶¶ 1-43 of the Factual Allegations above, Riverview Middle School is not in compliance with Title IX or with 34 C.F.R. §§ 106.34(b)(1)(i) and 106.34(b)(4) because teachers employed different teaching methods in the boys’ and girls’ classrooms based on overly broad generalizations about the different talents, capacities, or preferences of boys and girls. This violates the core prohibition of Title IX that students not be subject to

³⁰ Ex. C (Letter from unknown to Parents of Incoming Fifth Graders, *supra* note 3).

discrimination – i.e. different treatment – on the basis of sex in federally funded programs and activities.

49. As outlined in ¶¶ 1-43 of the Factual Allegations above, Riverview Middle School is out of compliance with 34 C.F.R. § 106.34(b)(1)(iii) because participation in the single-sex classes was not completely voluntary. The information provided to parents was biased and misleading, and included unsubstantiated claims based on overly broad generalizations about the purportedly different talents, capacities, or preferences of boys and girls.
50. As outlined in ¶¶ 1-43 of the Factual Allegations above, Riverview Middle School may be out of compliance with 34 C.F.R. § 106.34(b)(1)(iv) because it is unclear whether a substantially equal coeducational alternative was available.

RELIEF REQUESTED

51. The ACLU requests that:

- a. The OCR investigate Barron Area School District and Riverview Middle School to determine whether Riverview Middle School is in compliance with Title IX and its implementing regulations.
- b. The OCR order Barron Area School District to take all necessary steps to remedy any unlawful conduct identified in its investigation, as required by Title IX and its implementing regulations. 34 C.F.R §§106.34 and 34 C.F.R. Part 100, Appendix B.
- c. If any violations are found, the OCR secure assurances of compliance with Title IX from all schools administered by Barron Area School District.
- d. The OCR monitor any resulting agreements with Barron Area School District and/or individual schools to ensure that full compliance with Title IX is achieved.

Respectfully submitted,



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Enclosures

cc:

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