The original documents are located in Box 49, folder "1975/07/17 - Title IX Meeting" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.

MEETING ON TITLE IX
THURSDAY, JULY 17, 1975
2:00 p.m.
Oval Office

FINAL TITLE IX

REGULATION IMPLEMENTING

EDUCATION AMENDMENTS

OF 1972

PROHIBITING SEX DISCRIMINATION IN EDUCATION

Effective Date: July 21, 1975

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE/Office for Civil Rights

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

June 1975

MEMORANDUM FOR COLLEGE AND UNIVERSITY PRESIDENTS,
CHIEF STATE SCHOOL OFFICERS AND LOCAL
SCHOOL SUPERINTENDENTS

The Department has published an implementing Regulation for Title IX of the Education Amendments of 1972, which prohibits sex discrimination in Federally-assisted education programs. Specifically, Title IX states:

> "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..."

The enclosed Regulation describes how Title IX will be enforced and how it applies to educational institutions. The effective date of the Regulation is July 21, 1975.

Title IX and the Regulation affect virtually all public school systems and post-secondary education institutions. The final Regulation, which will be submitted to the Congress for 45 days as required by law, takes into account some 10,000 written comments on the Proposed Regulation published in June, 1974 and there have been revisions as a result.

Secretary Weinberger of the Department of Health, Education, and Welfare has urged that institutions take the requirements of Title IX as an opportunity to end sex discrimination in American education. That is the objective of the law and the Regulation.

Special attention is called to a provision in the Regulation that each institution evaluate its current policies and practices and take remedial action where necessary.

If you have any questions regarding Title IX, please feel free to write to me or to seek the assistance of our regional offices in Boston, New York City, Philadelphia, Atlanta, Chicago, Dallas, Kansas City, Denver, San Francisco, and Seattle.

Peter E. Holmes
Director
Office for Civil Rights

HEW NEWS

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

FOR RELEASE AT NOON, EDT
TUESDAY, June 3, 1975

STATEMENT BY

Caspar W. Weinberger
Secretary of Health, Education, and Welfare

We are approaching a landmark point in the Nation's history. On July 21st, Title IX Regulations prohibiting sex discrimination against women in education are scheduled to take effect. This is appropriate in 1975, International Womens' Year.

The law underlying these regulations is based on the sound premise that, in a knowledge-based society, equal opportunity in education is fundamental to equality in all other forms of human endeavor.

The President signed the Title IX Regulations on May 27th. I call upon every American to support Title IX, as an affirmation of the principles of equality upon which our Nation was founded. The most effective enforcement of all is a public which supports the law.

Much of the discrimination against women in education today exists unconsciously and through practices long enshrined in tradition. The Regulations require that during the next year those in education begin a searching self-examination to identify any discriminatory policies or practices which may exist within their institutions and to take whatever remedial action is needed.

No other provision of the Regulation has more potential for ending sex discrimination in education than this, and I hope educators charged with carrying out this provision will do so in a spirit that fully embraces the real purposes of the law.

Before turning to the major issues involved in this final Regulation, let me point out that Title IX is indeed far-reaching in its sweep. It forbids sex discrimination in any educational institution receiving Federal assistance. This includes the Nation's 16,000 public school systems and nearly 2,700 post-secondary institutions.

The nearly 10,000 public comments received during the June through October comment period made it amply clear that there was no way to draft regulations for Title IX that will please all of the people all of the time.

Such a broad public reaction is healthy and reflects the fact that we undertook our responsibilities with a commitment to face the difficult and controversial issues inherent in the law. We believe that, by taking on these hard issues at the outset, we have laid a foundation for real progress under the law. This has taken time, but we believe that it is time well spent. It may well save far more time in reaching the goal of full compliance.

The comments we received raised six major issues which I will discuss today. These are not necessarily the most important issues, but they are the points that drew the most comments:

ISSUE I -- PHYSICAL EDUCATION CLASSES

The first concerns the requirement to make all physical education classes co-educational, as originally proposed. The final Regulation slightly modifies this position. It allows separation during participation in contact sports and explicitly permits grouping of students by ability. It also allows separation during classes in sex education.

We have allowed varying adjustment periods for schools to realign schedules, alter facilities and replan curricula. Schools will be expected to comply as expeditiously as possible, but some recognition of practical problems and costs appears warranted.

ISSUE II -- FINANCIAL AID

Issue Two concerns a proposed provision prohibiting institutions from administering scholarships designating a particular sex in wills and trusts. The final Regulation allows nondiscriminatory "pooling" of these scholarships under a two-step procedure.

Step One requires an institution to select students to be awarded financial aid on the basis of criteria other than a student's sex. Once students have been thus identified, a school's financial aid office would award the aid from both sex-restrictive and non sex-restrictive sources. If not enough aid is then available through non-restrictive sources for members of one sex, the school would then be required either to obtain funds from other sources or award less funds from sex-restricted sources.

ISSUE III -- FOREIGN SCHOLARSHIPS

The proposed Regulation exempted from compliance single-sex scholarships, fellowships and other awards given under foreign wills, trusts or similar legal instruments, and the final Regulation continues this exemption.

We have attempted to reconcile the many public comments opposing this exemption with what we construe to be the intent of Congress. We believe that Congress did not intend to cause such programs as the Rhodes scholarships to be discontinued.

The final Regulation therefore permits schools to administer single-sex scholarships and awards for study abroad, provided that the school also makes available reasonable foreign-study opportunities for students of the other sex.

ISSUE IV -- PENSION BENEFITS

The proposed Regulation on pension benefits followed the current position of the Department of Labor's Office of Federal Contract Compliance, which allows employers to provide either equal contributions or equal periodic benefits to members of each sex. While we have made no change in the final regulations, this is a most complex area which is further complicated by the fact that at least three Federal agencies administer rules on this subject.

The President has directed the Equal Employment Opportunity Coordinating Council to study this issue further, in consultation with HEW, and to report back to him by October 15th. We expect this study to guide us toward a uniform policy.

Meanwhile, this Regulation maintains consistency between HEW's enforcement of Title IX as to employment and our enforcement of Executive Order 11246 which also applies to employment discrimination by universities and colleges with Federal contracts.

ISSUE V -- CURRICULUM AND TEXTBOOKS

The proposed Regulation did not cover sex-stereotyping in textbooks and curricular materials. This produced a good deal of public comment. Nonetheless, the administration remains convinced that this position is correct, and the final Regulation explicitly affirms this position. Textbook and curricular content is, I believe, more properly dealt with at the State and local level. In my opinion, it would be both highly questionable from a constitutional standpoint, and wholly inappropriate for the Federal government to move into this area, and I do not think there is any evidence that the Congress desired such a result.

ISSUE VI -- ATHLETICS

Certainly the most talked about issue was athletics. As you know, Congress attempted to clarify the Department's mandate in this area last summer by passing language in the Education Amendments of 1974 requiring that our Regulation cover intercollegiate sports in some "reasonable" way.

We have modified the proposed Regulation in several respects, but held to the basic requirement that schools must indeed provide equal opportunity for both sexes to participate in intramural, interscholastic and intercollegiate athletics.

We left in the provision allowing separate teams in those sports in which competitive skill is the basis for selecting team members, and we added a provision allowing separate teams in contact sports. This is not a requirement, nor is it a suggestion that colleges can refuse to offer football, basketball or other contact sports to members of each sex separately if there is enough student interest to warrant it.

Many athletic activities do not involve bodily contact--tennis, track, swimming, golf and others. In these sports, if an institution offers a team for one sex and not for the other, and if it has limited the opportunities it has offered to members of the other sex in the past, then members of that sex must be allowed to try out for positions on the team.

In all, I think this Regulation enhances opportunities for women in athletics, but it will also allow schools the flexibility they need to keep competitive sports alive and well.

The Regulation also describes what the Department will look at when it considers whether a school is providing equal opportunity in athletics.

For example, we will look to see whether the sports and levels of competition offered by the school accommodate the interests and abilities of both sexes. We will also see whether there is equity in providing equipment and supplies, scheduling games and practices and in providing coaching.

The Regulations do not demand dollar-for-dollar matching expenditures for each sex. The crucial sentence concerning expenditures reads as follows:

> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of one sex.

I recognize that changes will be necessary to bring athletics offered by some institutions into compliance with the Regulation, and time may be needed to allow for these changes. Therefore, the Regulation gives elementary schools up to a year to comply. Secondary and postsecondary schools, which have greater problems, may have up to three years.

Although these are the most controversial issues, in discussing them it is essential not to lose sight of the basic scope and thrust of Title IX:

> --Nondiscrimination in admissions to educational institutions is at the heart of the Regulations; the only exceptions are those in the statute itself. The days of quotas or stiffer standards for female graduate school applicants are over--and should be over.
>
> --The Regulations proscribe sex discrimination in employment at the elementary and secondary level for the first time, in addition to expanding coverage in higher education.

COMPLIANCE

The Title IX Regulation adopts Title VI compliance procedures on an interim basis. There is a reason for this:

Simultaneously with the publication of Title IX Regulations, we are also publishing a proposed regulation that calls for a consolidated enforcement approach to all of the Department's statutory civil rights responsibilities, Title IX, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and other authorities.

This new approach will assure a more balanced and comprehensive effort. Our aim will be to focus HEW's enforcement machinery on the main, systemic forms of discrimination, and give priority attention to these, rather than follow an approach in which priorities are dictated by the morning's mail, and each complaint, whether specious or not, must be fully investigated, just because the complaint has been made. In practice, this means that the limited resources of the Department may be diluted by the need to investigate unsupported complaints, leaving really major forms of discrimination virtually unexamined.

Our new approach does not mean that we are going to stop considering information from individuals or groups that concerns noncompliance. It does mean that this information will be used by our Office for Civil Rights to help us determine enforcement priorities and guide the direction of our compliance reviews.

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We are persuaded that this is a more effective approach. In the area of racial discrimination, for example, where we have used this proposed method of enforcement, we have achieved the following results in elementary and secondary education between July 1973 and February 1975.

-- a quarter of a million children were reassigned from racially identifiable classes;

-- 26,000 special education students were re-evaluated;

-- over 51,000 students were reassigned from racially identifiable schools;

-- over 1,200 minority teachers and staff were hired;

-- and over 2,500 teachers were reassigned from racially identifiable faculties.

One final word: We intend to approach Title IX enforcement in a constructive spirit. We want to achieve the goals of the Title as soon as possible, rather than undergo a series of futile confrontations and endless law suits. We call upon schools and colleges to do their utmost in the same spirit.

To their great credit, many are already moving in good faith to end sex discrimination. For such schools, Title IX, as we propose to administer it, can only help. For those that are not trying in good faith to end discrimination against women, I have one message: We can wait no longer. Equal education opportunity for women is the law of the land--and it will be enforced.

Now to your questions.

HEW FACT SHEET

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

June 1975

TITLE IX - CIVIL RIGHTS

In June 1972, the Congress passed Title IX of the Education Amendments, a law which affects virtually every educational institution in the country. The law prohibits discrimination by sex in educational programs that receive Federal money.

The spirit of the law is reflected in this opening statement: Under Title IX, "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 . . ."

The law was originally introduced in 1971 as an amendment to the Civil Rights Act of 1964. Following Congressional debate and changes, the law, signed on June 23, 1972, emerged as Title IX of the Education Amendments of 1972, a broad-scale bill covering a range of Federal assistance programs.

During the deliberations on the new law, individuals and organizations testified to existing conditions which they believed made the passage of such a law essential.

Examples:

--Testimony indicated that girls were frequently denied the opportunity to enroll in traditionally male courses such as industrial arts and boys the opportunity to enroll in courses such as home economics because of overtly discriminatory secondary school policies. Even if such course enrollment restrictions were not present and a student interest existed, boys and girls would be counseled to enroll in traditionally male and female career development courses.

--Evidence concerning physical education activities indicated that women and girls were shortchanged. A school in a Midwestern district, for example, operated a program for girls that was substantially inferior to that operated for boys. In another case, rules in one State forced a high school to deny its best tennis player both coaching and a chance to compete on the school's tennis team because that athlete was female.

--A national survey conducted in 1970-71 by the National Education Association showed that while women constituted 67 percent of all public school teachers, they accounted for only 15 percent of the principals and 0.6 percent of the superintendents. Most of the women holding administrative positions were confined to the elementary school level. Specifically, women represented 19 percent of the nation's elementary school principals; but, only 3.5 percent of the junior high principals and three percent at the senior high level.

--A study by the National Center for Educational Statistics revealed that as of 1973, women college faculty members received average salaries almost $2,500 less than those of their male counterparts. The study also showed that 9.7 percent of female faculty members had achieved the rank of professor, contrasted with 25.5 percent of males.

DEVELOPMENT OF REGULATIONS

This was the setting under which DHEW's Office for Civil Rights drew up the proposed regulation to carry out the nondiscrimination principles of Title IX. It applied, with a few specific exceptions, to all aspects of education programs or activities carried on by Federally assisted school districts, institutions of higher learning, or others receiving Federal financial aid. Generally, it covered admissions, treatment of students and employment.

On June 20, 1974, a proposed regulation was published in the Federal Register and public comment was invited. To assist the public in understanding the proposed regulations, representatives from the Office for Civil Rights conducted extensive briefings in 12 major cities throughout the country.

From the publication of the proposed regulations in June to the close of the comment period in October, HEW received nearly 10,000 public comments. The heaviest volume of comment came in six areas on the following issues:

--sex discrimination in sports and athletic programs,

--coeducational physical education classes,

--sex stereotyping in textbooks,

--the possible impact of the law on fraternities and sororities,

--scholarships, and

--employment issues.

Drafted on the basis of the proposed regulation issued in June of 1974 and reflecting a number of changes suggested by concerned

citizens, organizations and institutions, the final regulation has been signed by the President as required by the statute. Effective July 21, 1975, the final regulation prohibits, with certain exceptions, sex discrimination in education programs or activities which receive Federal financial assistance.

The regulation will be administered by the Office for Civil Rights of the U.S. Department of Health, Education and Welfare.

45 C.F.R. PART 86:

SUBSTANTIVE PROVISIONS

The final regulation covers the following areas with respect to recipients of Federal financial assistance for educational programs or activities:

Coverage;

Admission of students;

Treatment of students;

Employment; and

Procedures.

COVERAGE

Except for the specific limited exemptions set forth below, the final regulation applies to all aspects of all education programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for any of those programs.

With respect to admissions to educational institutions, the final regulation applies only to: vocational, professional and graduate schools and to institutions of public undergraduate education (except those few public undergraduate schools which have been traditionally and continually single sex).

The final regulation does not cover admission to: recipient pre-schools, elementary, and secondary schools (except to vocational schools), private undergraduate institutions and, as noted above, to those few public undergraduate educational institutions that have been traditionally and continually single sex.

Even institutions whose admissions are exempt from coverage must treat all students nondiscriminatorily once they have admitted members of both sexes.

Military institutions at both the secondary and higher education level are entirely exempt from coverage under Title IX. Practices in schools run by religious organizations also are exempt to the extent compliance would be inconsistent with religious tenets. Thus, for example, if a religious tenet relates only to employment, the institution would still be prohibited from discrimination against students.

ADMISSIONS

The final regulation covers recruitment as well as all admissions policies and practices of those recipients not exempt as to admissions. It includes specific prohibitions of sex discrimination through separate ranking of applicants, application of sex-based quotas, administration of sex-biased tests or selection criteria, and granting of preference to applicants based on their attendance at particular institutions if the preference results in sex discrimination. The final regulation also forbids application in a discriminatory manner of rules concerning marital or parental status, and prohibits discrimination on the basis of pregnancy and related conditions, providing that recipients shall treat pregnancy and disabilities related to pregnancy in the same way as any other temporary disability or physical condition.

Generally, comparable efforts must be made by recipients to recruit members of each sex. Where discrimination previously existed, additional recruitment efforts directed primarily toward members of one sex must be undertaken to remedy the effects of the past discrimination.

EXAMPLES -- ADMISSIONS

--An institution whose admissions are covered by the regulation may not set quotas on the number of men or women who will be admitted. Thus, a medical school may not set such quotas, although a private undergraduate school may do so.

--An institution whose admissions are covered may not set different standards of admission for one sex than for the other. Thus, a graduate school may not require a lower grade point average for men than for women, although a private undergraduate school may do so.

--An institution of graduate, professional or vocational education which prior to enactment of Title IX had limited its admissions primarily to members of one sex must undertake special efforts to notify and recruit members of the sex previously barred or restricted in order to overcome the effects of past discrimination. Thus, a professional

school which previously purposely limited the proportion of females in each entering class to approximately 15% would be required to initiate special recruitment efforts to attract qualified female students. A similar institution whose admissions had not been subject to such a quota arrangement, but had admitted students without discrimination on the basis of sex, would be required only to make comparable efforts to attract members of each sex.

* * * * *

TREATMENT

As stated before, although some schools are exempt from Title IX with regard to admissions, all schools must treat their admitted students without discrimination on the basis of sex. With regard to treatment of students, therefore, the final regulation applies to recipient pre-schools, elementary and secondary schools, vocational schools, colleges, and universities at the undergraduate, graduate and professional levels, as well as to other agencies, organizations and persons which receive Federal funds for educational programs and activities.

Specifically, the treatment sections of the regulation cover the following areas:

(1) Access to and participation in course offerings and extracurricular activities, including campus organizations and competitive athletics;

(2) Eligibility for and receipt or enjoyment of benefits, services, and financial aid;

(3) Use of facilities, and comparability of, availability of, and rules concerning housing (except that single-sex housing is permissible).

The final regulation incorporates a Congressional exemption enacted into law in 1974, for the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Campfire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth services organizations. Thus, a recipient educational institution may provide assistance to such specifically exempted single-sex organizations without violating the non-discrimination requirements of the statute.

Classes in health education, if offered, may not be conducted

separately on the basis of sex, but the final regulation allows separate sessions for boys and girls at the elementary and secondary school level during times when the materials and discussion deal exclusively with human sexuality. There is, of course, nothing in the law or the final regulation requiring schools to conduct sex education classes. This is a matter for local determination.

Physical Education

While generally prohibiting sex segregated physical education classes, the final regulations do allow separation by sex in physical education classes during competition in wrestling, boxing, basketball, football, and other sports involving bodily contact. Schools must comply fully with the regulation with respect to physical education as soon as possible. In the case of physical education classes elementary schools must be in full compliance no later than one year from the effective date of the regulation. In the case of physical education classes at the secondary and postsecondary level, schools must be in compliance no later than three years from the effective date of the regulation. During these periods, while making necessary adjustments, any physical education classes or activities which are separate, must be comparable for each sex.

Athletics

Where selection is based on competitive skill or the activity involved is a contact sport, athletics may be provided through separate teams for males and females or through a single team open to both sexes. If separate teams are offered, a recipient institution may not discriminate on the basis of sex in provision of necessary equipment or supplies, or in any other way, but equal aggregate expenditures are not required. The goal of the final regulation in the area of athletics is to secure equal opportunity for males and females while allowing schools and colleges flexibility in determining how best to provide such opportunity.

In determining whether equal opportunities are available, such factors as these will be considered:

--whether the sports selected reflect the interests and abilities of both sexes;

--provision of supplies and equipment;

--game and practice schedules;

--travel and per diem allowances;

--coaching and academic tutoring opportunities and the assignment and pay of the coaches and tutors;

--locker rooms, practice and competitive facilities;

--medical and training services;

--housing and dining facilities and services;

--publicity.

Where a team in a non-contact sport, the membership of which is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for whom no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered. For example, if tennis is offered for men and not for women and a woman wishes to play on the tennis team, if women's sports have previously been limited at the institution in question, that woman may compete for a place on the men's team. However, this provision does not alter the responsibility which a recipient has with regard to the provision of equal opportunity. Recipients are requested to "select sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes." Thus, an institution would be required to provide separate teams for men and women, in situations where the provision of only one team would not "accommodate the interests and abilities of members of both sexes." This provision applies whether sports are contact or noncontact.

In the case of athletics, like physical education, elementary schools will have up to a year from the effective date of the regulations to comply, and secondary and postsecondary schools will have up to three years.

Organizations

Generally, a recipient may not, in connection with its education program or activity, provide significant assistance to any organization, agency or person which discriminates on the basis of sex. Such forms of assistance to discriminatory groups as faculty sponsors, facilities, administrative staff, etc., may, on a case-by-case basis, be determined to be significant enough to render the organization subject to the non-discrimination requirements of the regulation. As noted, previously, the final regulation incorporates an exemption for the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Campfire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth service organizations. However, recipients continue to be prohibited from providing significant assistance to professional or honorary fraternal organizations.

Benefits, Services, and Financial Aid

Generally, a recipient subject to the regulation is prohibited

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from discriminating in making available, in connection with its educational program or activity, any benefits, services, or financial aid although "pooling" of certain sex-restrictive scholarships is permitted. Benefits and services include medical and insurance policies and services for students, counseling, and assistance in obtaining employment. Financial aid includes scholarships, loans, grants-in-aid and work-study programs.

Facilities

Generally, all facilities must be available without discrimination on the basis of sex. As provided in the statute, however, the regulation permits separate housing based on sex as well as separate locker rooms. toilets and showers. A recipient may not make available to members of one sex locker rooms, toilets and showers which are not comparable to those provided to members of the other sex. With respect to housing, the regulation requires comparability as to the facilities themselves and non-discrimination as to their availability and as to the rules under which they are operated, including fees, hours, and requirements for off-campus housing.

Curricular Materials

The final regulation includes a provision which states that "nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials." As noted in the Preamble to the final regulation, the Department recognizes that sex stereotyping in curricula is a serious matter, but notes that the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. The Department assumes that recipients will deal with this problem in the exercise of their general authority and control over curricula and course content. For its part, the Department will increase its efforts, through the Office of Education, to provide research, assistance, and guidance to local educational agencies in eliminating sex bias from curricula and educational material.

EXAMPLES--TREATMENT

--A recipient school district may not require boys to take shop and girls to take home economics, exclude girls from shop and boys from home economics, or operate separate home economics or shop classes for boys and girls.

--A recipient vocational or other educational institution may not state in its catalog or elsewhere that a course is solely or primarily for persons of one sex.

--Male and female students shall not be discriminated against on the basis of sex in counseling. Generally, a counselor may not use different materials in testing or guidance based on the student's sex unless this is essential in eliminating bias and then, provided the materials cover the same occupations and interest areas. Also, if a school finds that a class contains a disproportionate number of students of one sex, it must be sure that this disproportion is not the result of sex-biased counseling or materials.

--A recipient school district may not require segregation of boys into one health, physical education, or other class, and segregation of girls into another such class.

--Where men are afforded opportunities for athletic scholarships, the final regulation requires that women also be afforded these opportunities.

Specifically, the regulation provides: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

--Locker rooms, showers, and other facilities provided for women must be comparable to those provided for men.

--A recipient educational institution would be prohibited from providing financial support for an all-female hiking club, an all-male language club, or a single-sex honorary society. However, a non-exempt organization whose membership was restricted to members of one sex could adhere to its restrictive policies, and operate on the campus of a recipient university, if it received no assistance from the university.

--Male and female students must be eligible for benefits, services and financial aid without discrimination on the basis of sex. Where colleges administer scholarships designated exclusively for one sex or the other, the scholarship recipients should initially be chosen without regard to sex. Then when the time comes to award the money, sex may be taken into consideration in matching available monies to the students chosen. No person may be denied financial aid merely because no aid for his or her sex is available. Prizes, awards and scholarships not established under a will or trust must be administered without regard to sex.

--An institution which has one swimming pool must provide for use by members of both sexes on a non-discriminatory basis.

--An institution which lists off-campus housing for its students must ensure that, in the aggregate, comparable off-campus housing is available in equal proportion to those members of each sex expressing an interest in it.

--Administration by a recipient institution of different rules based on sex regarding eligibility for living off-campus, curfews, availability of cleaning and janitorial assistance, etc. would violate the regulation.

EMPLOYMENT

All employees in all institutions are covered, both full- and part-time, except those in military schools, and in religious schools, to the extent compliance would be inconsistent with the controlling religious tenets. Employment coverage under the proposed regulation generally follows the policies of the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance. Specifically, the proposal covers:

(a) employment criteria

(b) recruitment

(c) compensation

(d) job classification and structure

(e) fringe benefits

(f) marital or parental status

(g) effect of state or local law or other requirements

(h) advertising

(i) pre-employment inquiries

(j) sex as a bona fide occupational qualification.

As to fringe benefits, employers must provide either equal contributions to or equal benefits under pension plans for male and female employees; as to pregnancy, leave and fringe benefits to pregnant employees must be offered in the same manner as are leave and benefits to temporarily disabled employees.

EXAMPLES--EMPLOYMENT

--A recipient employer may not recruit and hire employees solely from discriminatory sources in connection with its educational program or activity.

--A recipient employer must provide equal pay to male

and female employees performing the same work in connection with its educational program or activity.

--A recipient employer may not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy or related conditions.

ENFORCEMENT PROCEDURE

The final regulation incorporates by reference a procedural section which includes among other things, compliance reviews, access to information, administrative termination procedures (hearings), decision, administrative and judicial review and post-termination proceedings.

Should a violation of the statute occur, the Department is obligated to seek voluntary compliance. If attempts to secure voluntary compliance fail, enforcement action may be taken:

(1) by administrative proceedings to terminate Federal financial assistance until the institution ceases its discriminatory conduct; or

(2) by other means authorized by law, including referral of the matter to the Department of Justice with a recommendation for initiation of court proceedings. Under the latter mode of enforcement, the recipient's Federal funds are not jeopardized.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office for Civil Rights
Washington, D.C. 20201

JUNE 1975

TITLE IX QUESTIONS AND ANSWERS

QUESTION:
What is Title IX?

ANSWER:
Title IX is that portion of the Education Amendments of 1972 which forbids discrimination on the basis of sex in educational programs or activities which receive Federal funds.

QUESTION:
Who is covered by Title IX?

ANSWER:
Virtually every college, university, elementary and secondary school and preschool is covered by some portion of the law. Many clubs and other organizations receive Federal funds for educational programs and activities and likewise are covered by Title IX in some manner.

QUESTION:
Who is exempt from Title IX's provisions?

ANSWER:
Congress has specifically exempted all military schools and has exempted religious schools to the extent that the provisions of Title IX would be inconsistent with the basic religious tenets of the school.

Not included with regard to admission requirements ONLY are private undergraduate colleges, nonvocational elementary and secondary schools and those public undergraduate schools which have been traditionally and continuously single-sex since their establishment.

However, even institutions whose admissions are exempt from coverage must treat all students without discrimination once they have admitted members of both sexes.

QUESTION:
Does the law cover social sororities and fraternities?

ANSWER:
Congress has exempted the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Camp Fire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth services organizations. However,

if any of these organizations conduct educational programs which receive Federal funds open to nonmembers, those programs must be operated in a nondiscriminatory manner.

QUESTION:
May a vocational school limit enrollment of members of one sex because of limited availability of job opportunities for members of that sex?

ANSWER:
No. Further, a school may not assist a discriminatory employer by referral of students or any other manner.

QUESTION:
In athletics, what is equal opportunity?

ANSWER:
In determining whether equal opportunities are available, such factors as these will be considered:

-whether the sports selected reflect the interests and abilities of both sexes;

-provision of supplies and equipment;

-game and practice schedules;

-travel and per diem allowances;

-coaching and academic tutoring opportunities and the assignment and pay of the coaches and tutors;

-locker rooms, practice and competitive facilities;

-medical and training services;

-housing and dining facilities and services;

-publicity.

QUESTION:
Must an institution provide equal opportunities in each of these categories?

ANSWER:
Yes. However, equal expenditures in each category are not required.

QUESTION:
What sports does the term "athletics" encompass?

ANSWER:
The term "athletics" encompasses sports which are a part of interscholastic, intercollegiate, club or intramural programs.

QUESTION:
When are separate teams for men and women allowed?

ANSWER:
When selection is based on competitive skill or the activity involved is a contact sport, separate teams may be provided for males and females, or a single team may be provided which is open to both sexes. If separate teams are offered, a recipient institution may not discriminate on the basis of sex in providing equipment or supplies or in any other manner.

Moreover, the institution must assure that the sports offered effectively accommodate the interest and abilities of members of both sexes.

QUESTION:
If there are sufficient numbers of women interested in basketball to form a viable women's basketball team, is an institution which fields a men's basketball team required to provide such a team for women?

ANSWER:

One of the factors to be considered by the Director in determining whether equal opportunities are provided is whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. Therefore, if a school offers basketball for men and the only way in which the institution can accommodate the interests and abilities of women is by offering a separate basketball team for women, such a team must be provided.

QUESTION:
If there are insufficient women interested in participating on a women's track team, must the institution allow an interested woman to compete for a slot on the men's track team?

ANSWER:
If athletic opportunities have previously been limited for women at that school, it must allow women to compete for the men's team if the sport is a noncontact sport such as track. The school may preclude women from participating on a men's team in a contact sport. A school may preclude men or women from participating on teams for the other sex if athletic opportunities have not been limited in the past for them, regardless of whether the sport is contact or noncontact.

QUESTION:
Can a school be exempt from Title IX if its athletic conference forbids men and women on the same noncontact team?

ANSWER
No. Title IX preempts all state or local laws or other requirements which conflict with Title IX.

QUESTION:
How can a school athletics department be covered by Title IX if the department itself receives no direct Federal aid?

ANSWER:
Section 844 of the Education Amendments of 1974 specifically states that: "The Secretary shall prepare and publish...proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in Federally-assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."

In addition, athletics constitutes an integral part of the educational processes of schools and colleges and, thus, are fully subject to the requirements of Title IX, even in absence of Federal funds going directly to the athletic programs.

The courts have consistently considered athletics sponsored by an educational institution to be an integral part of the institution's education program and, therefore, have required institutions to provide equal opportunity.

QUESTION:
Does a school have to provide athletic scholarships for women?

ANSWER:
Specifically, the regulation provides: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

QUESTION:
How can schools and colleges interested in a positive approach to Title IX deal with its provisions?

ANSWER:
To encourage each school and college to look at its policies in light of the law, the final regulation now includes a self-evaluation provision. This requires that during the next year the educational institution look at its policies and modify them to comply with the law as expressed by the regulation. This includes remedying the effects of any past discrimination.

QUESTION:
Does Title IX cover textbooks?

ANSWER:
No. While the Department recognizes that sex stereotyping in curricula and educational material is a serious matter, it is of the view that any specific regulatory requirement in this area raises constitutional questions under the First Amendment. The Department believes that local education agencies must deal with this problem in the exercise of their traditional authority and control over curriculum and course content.

QUESTION:
Many universities administer substantial sums of scholarship money created by wills and trusts which are restricted to one sex. If the will or trust cannot be changed to remove the restriction, must the universities cease administration of the scholarship?

ANSWER:
Where colleges administer domestic or foreign scholarships designated by a will, trust or similar legal instrument, exclusively for one sex or the other, the scholarship recipients should initially be chosen without regard to sex. Then, when the time comes to award the money, sex may be taken into consideration in matching available money with students to be awarded the money. Scholarships, awards or prizes which are not created by a will, trust, or similar legal instrument, may not be sex-restricted.

QUESTION:
What are the Title IX requirements for counseling in schools and colleges?

ANSWER:
An institution using testing or other materials for counseling may not use different materials for males and females, nor may it use materials which lead to different treatment of students on the basis of sex.

If there is a class or course of study which has a disproportionate number of members of one sex, the school is required to assure that the disproportion does not stem from discrimination by counselors or materials.

QUESTION:
May a college administer or assist in the administration of sex-restrictive scholarships, such as the Rhodes, which provide opportunities for students to study abroad?

ANSWER:
Yes, if (1) The scholarship was created by a will, trust, or similar legal instrument, or by an act of foreign government, and (2) The institution otherwise makes available reasonable opportunities for similar studies abroad by members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

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PART II

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

NONDISCRIMINATION ON BASIS OF SEX

Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

1

On June 20, 1974, the Office for Civil Rights of the Department of Health, Education, and Welfare gave notice of proposed rulemaking to the effect that it intended to add Part 86 to the Departmental regulation to effectuate title IX of the Education Amendments of 1972 (20 U.S.C. sections 1681 et seq.), except sections 904 and 906 thereof (20 U.S.C. 1684 and 1686), with regard to Federal financial assistance administered by the Department (39 FR 22228). Title IX provides 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," with certain exceptions. Title IX is similar to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) except that title IX applies to discrimination based on sex, is limited to education programs and activities, and includes employment. Title IX is also similar to, but independent of, sections 799A and 845 of the Public Health Service Act which, in effect, proscribe discrimination on the basis of sex in admissions to certain health training programs (42 U.S.C. 295h–9 and 42 U.S.C. 298b–2).

2

Interested persons were given until October 15, 1974, in which to submit written comments, suggestions, or objections regarding the proposed regulation. The Department received over 9700 comments, suggestions or objections and, after consideration of all relevant matter presented by interested persons, the regulation as proposed is hereby adopted, subject to changes as reflected herein.

3

EFFECTIVE DATE

This regulation has been signed by the Secretary of Health, Education, and Welfare and approved by the President. It will be transmitted to Congress pursuant to section 431(d)(1) of the General Education Provisions Act, as amended by section 509(a)(2) of the Education Amendments of 1974 (Pub. L. 93–380, 88 Stat. 567). The regulation will become effective on July 21, 1975.

4

SUMMARY OF REGULATION

Subpart A of this regulation (§§ 86.1 through 86.9) includes definitions and provisions concerning: remedial and affirmative actions, self-evaluation, required assurances, dissemination of information policies, and other general matters related to discrimination on the basis of sex. The Subpart also explains the effect of state and local laws and other requirements.

5

Subpart B (§§ 86.11 through 86.17) describes the educational institutions and other entities, whether public or private, which are covered in whole or in part by the regulation. It also includes exemptions as to the admissions practices of certain educational institutions and an exemption as to the membership practices of social fraternities and sororities, the Boy Scouts, Girl Scouts, Camp Fire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth service organizations. This Subpart defines "admissions," and describes certain educational institutions which are eligible to submit transition plans designed to convert their single-sex admissions processes to non-discriminatory processes over a stated period of time not to exceed seven years from the date of enactment of title IX (*i.e.*, by June 24, 1979). The exemptions for the admissions practices of certain educational institutions are set forth in § 901 (a) of title IX as originally passed by Congress in Pub. L. 92–318. The exemption for the membership practices of the aforementioned youth organizations was inserted into title IX by § 3(a) of Pub. L. 93–568, signed by the President on December 31, 1974.

6

Subpart C (§§ 86.21 through 86.23) sets forth the general and particular prohibitions with respect to nondiscrimination based on sex in admissions policies and admission preferences, including requirements concerning recruitment of students. The regulatory requirements regarding treatment of students and employment (Subparts D and E) are applicable to all educational institutions receiving Federal financial assistance, including those whose admissions are exempt under Subpart C.

7

Subpart D (§§ 86.31 through 86.42) sets forth the general rules with respect to prohibited discrimination in educational programs and activities. The specific subject matter covered in Subpart D includes discrimination on the basis of sex in academic research, extracurricular and other offerings, housing, facilities, access to programs and activities, financial and employment assistance to students, health and insurance benefits for students, physical education and instruction, athletics, discrimination based on the marital or parental status of students and portions of classes dealing with sex education. The regulation explicitly does not affect the use of particular textbooks or curricular materials.

8

Subpart E (§§ 86.51 through 86.61) sets forth the general rules with respect to employment in educational programs and activities. The specific subject matters covered are: discrimination on the basis of sex in hiring and employment criteria, recruitment, compensation, job classification and structure, promotions and terminations, fringe benefits, consideration of marital or parental status, leave practices, advertising, and pre-employment inquiries as to marital or parental status. It also includes provisions for exemptions where sex is a bona fide occupational qualification.

9

Subpart F (§ 86.71) sets forth the interim procedures which will govern the implementation of the regulation by incorporating by reference the Department's procedures under title VI of the Civil Rights Act of 1964.

SCOPE OF APPLICATION

10

Section 86.11, in Subpart B, provides that the regulation applies "to each education program or activity which receives or benefits from Federal financial assistance" administered by the Department. Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that the education functions of a school district or college include any service, facility, activity or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination; *see Brenden v. Independent School District 742*, 477 F. 2d 1292 (8th Cir. 1973).

11

Title IX requires in 20 U.S.C. 1682, that termination or refusal to grant or continue such assistance "shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found." The interpretation of this provision in title IX will be consistent with the interpretation of similar language contained in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1). Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in title VI, which holds that Federal funds may be terminated under title VI upon a finding that they "are infected by a discriminatory environment * * *" *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F. 2d 1068, 1078–79 (5th Cir. 1969).

A more detailed discussion of various sections in each of the Subparts of the title IX regulation is set forth in the following paragraphs. In certain cases, major issues and the reasons for the final language are discussed.

SUBPART A—CHANGES

13

Section 86.1—The statement of purpose is amended by adding the words "whether or not such program or activity is offered or sponsored by an educational institution as defined in this part."

14

Paragraph 86.2(a)—The definition of "title IX" as used in the regulation is amended by adding "except §§ 904 and 906 thereof." The U.S. Code citation has been appropriately amended to reflect this change.

15

Paragraph 86.2(j)—The definition of "local education agency" is amended to include the following parenthetical abbreviation: "L.E.A."

16

Section 86.3—Remedial and affirmative action and self-evaluation. Paragraph (a) of this section is amended to read as follows:

If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

17

Paragraph (b) of this section is amended by adding the sentence "Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246."

In addition, paragraphs (c) and (d) of this section have been added. Paragraph (c) requires recipients within a year of the effective date of the regulation to evaluate their policies and practices and the effects thereof in terms of the requirements of the regulation, to modify any of these polices and practices which do not or may not meet the requirements of the regulation, and to take appropriate remedial action to eliminate the effects of any discrimination which resulted or may have resulted from adherence to them. Paragraph (d) requires that the recipient maintain for at least three years from completion of the evaluation made pursuant to paragraph (c) a description of any modifications made and any remedial actions taken pursuant to paragraph (c).

18

Section 86.4(a)—The general description of assurances required is amended to add the following:

An assurance of compliance with this Part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

19

Paragraph 86.6(a)—The paragraph concerning the effect of this regulation on other Federal provisions is amended to add the words "and do not alter" immediately prior to the word "obligations" in the proposed regulation.

20

Section 86.8—The section concerning designation of a responsible employee is amended as follows: The section as it appeared in the proposed regulation is redesignated as paragraph 86.8(a) and is amended by adding, at the end of the section as it appeared in the proposed regulation, the sentence: "The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph." A second paragraph designated paragraph 86.8(b) is added to read:

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this Part.

21

Section 86.9—The section on dissemination of policy has been amended as follows: Subparagraph 86.9(a)(1) is amended by adding the words "and parents of elementary and secondary students" following the word "students," and by adding the words "and all unions or professional organizations holding collective bargaining or professional agreements" before the words "with the recipient."

ANALYSIS

22

Although a number of changes were made in Subpart A, most of these changes may be viewed as clarifications rather than as substantive alterations. One substantive change was made in § 86.3 where two new paragraphs concerning self-evaluation have been added. The Secretary believes that many of the discriminatory policies and practices now adhered to continue largely because the institutions responsible for them are unaware of their existence. Accordingly, the Secretary believes that the requirement that recipients conduct an initial inquiry into their activities will enable them to identify and to eliminate much discrimination without the intrusion of the Federal government. In addition, where a compliance review reveals noncompliance, the Department will be able to take into account in determining necessary corrective action to be taken by a recipient the actions already being taken by the recipient to further equal opportunity and to achieve full compliance with title IX and the regulation pursuant to their self-evaluation.

An additional substantive change was made in § 86.8 where the regulation now requires recipients to establish grievance procedures (§ 86.8(b)). The Secretary believes that the establishment of grievance procedures by recipients will facilitate compliance and prompt correction of complaints with resort to Federal involvement.

The regulation leaves up to the recipient the choice of having one central grievance procedure or of establishing individual procedures on different campuses if that is appropriate.

23

Other than as noted above, the content of Subpart A remains substantively close to that in the proposed rule. § 86.2 is especially important since it provides definitions applicable throughout the regulation. Of particular note is § 86.2(o) which provides that where an educational institution is composed of more than one school, department or college, admission to which is independent of admission to any other component, each such school, department or college is considered as a separate unit for the purposes of determining whether its admissions are covered by the regulation. Thus, if a private institution is composed of an undergraduate and a graduate college, admissions to the undergraduate college are exempt (see discussion under Subpart B below), but admissions to the graduate school are not.

24

Paragraph 86.3(a) requires remedial action to overcome the effects of previous discrimination based on sex which has been found or identified in a Federally assisted education program or activity. Remedial action pursuant to paragraph 86.3(a) is restricted to those areas of a recipient's education program or activity which are not exempt from coverage. Paragraph 86.3(b) permits, but does not require, affirmative efforts to overcome the effects of conditions which have resulted in limited participation in all or part of a recipient's education program or activity by members of either sex. Moreover, the affirmative efforts referred to in paragraph 86.3(b) do not alter any obligations which a recipient may have as a Federal contractor pursuant to Executive Order 11246.

25

Section 86.4 requires each recipient of Federal financial assistance to submit to the Director an assurance that each of its education programs and activities receiving or benefiting from such assistance will be administered in compliance with the regulation. Such an assurance will be considered unsatisfactory if, at any time after it is given, the recipient fails to take any remedial action found necessary to correct discrimination or the effects thereof.

SUBPART B—CHANGES

26

Section 86.12 is amended as follows: Paragraph 86.12(b) concerning the claiming of an exemption based on religion is amended to read:

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this Part which conflict with a specific tenet of the religious organization.

27

Sections 86.14 through 86.16 are redesignated as §§ 86.15 through 86.17. A new § 86.14 is added dealing with membership practices of social fraternities and sororities, YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls and certain voluntary youth organizations. A new paragraph 86.15(a), reflecting the specific language of subparagraph 901(a)(2) of the Statute, is added specifying that the regulation does not apply to the admissions practices of educational institutions prior to June 24, 1973, which is one year from the date of enactment of title IX.

ANALYSIS

28

Three changes were made in Subpart B of which two might be considered substantive: The procedure for obtaining an exemption from the coverage of title IX because of conflict between the statutory requirements and the religious tenets of a recipient or its controlling organization have been modified and simplified. An educational institution now need only submit a statement by its highest ranking official identifying the provisions of the regulation which conflict with the tenets of the religious organization involved. The most notable substantive change in Subpart B, however, is the addition of a new § 86.14 which essentially incorporates the provisions of the recently enacted "Bayh Amendment" to title IX. The amendment, which is found at § 3 of Pub. L. 93-568, exempts from the requirements of title IX and, hence, of this regulation, the membership policies and practices of certain organizations which, though educational in nature or assisted by an education institution, have traditionally restricted their membership to members of one sex. It is important to note that, with respect to fraternal organizations, both the amendment and the regulation limit their exemption to fraternties and sororities of a social nature. Thus, membership policies of business and other professional fraternities and sororities may be subject to coverage either if they themselves receive Federal financial assistance in connection with an education program or activity or if they fall within the ambit of subparagraph 86.31(b)(7) under which recipients are prohibited from providing significant assistance to agencies, organizations or persons which discriminate on the basis of sex.

29

Apart from the changes noted immediately above, Subpart B remains substantively the same as it appeared in the proposed regulation. Section 86.12 provides that the regulation does not apply to religiously controlled institutions to the extent that such application would be inconsistent with the religious tenets of the controlling organization. Section 86.13 of the regulation provides that all public and private military schools which are recipients of Federal financial assistance, whether secondary or postsecondary, are exempt from coverage. Neither the statute nor the regulation applies to United States military and merchant marine academies since these schools are Federal entities rather than recipients of Federal assistance.

30

The statute covers admissions in only certain institutions: vocational, professional, graduate, and public undergraduate institutions, except such of the latter as from their founding have been traditionally and continually single-sex. The admissions policies of private undergraduate institutions are exempt. Under the statute and § 86.15, the admissions requirements do not apply, in general, to admissions to public or private preschool, elementary and secondary schools. Because the statute mandates such coverage as to vocational schools, however, admission to public or private vocational schools, whether at the junior high school, high school or post-secondary level, is covered by paragraph 86.15(c) and must be nondiscriminatory. With respect to coverage of admissions to institutions of professional and vocational education, the Secretary has interpreted the statute as excluding admissions coverage of professional and vocational programs offered at private undergraduate schools. Thus, admission to programs leading to a first degree in fields such as teaching, engineering, and architecture at such private colleges will be exempt under paragraph 86.15(d). A number of comments were received urging the Secretary to change his interpretation of the statute in this area. Even after reassessing the Department's position on this issue, the Secretary believes that Congress did not address the overlap between the term "professional" and the term "undergraduate." Thus, the Secretary remains convinced that, while that section of the statute pertaining to admissions might be read as including professional degrees wherever they are offered, the statute can also be read as stating that admissions to private undergraduate schools were to be totally exempt. The exemption in paragraph 86.15(d) for admissions to public traditionally and continually single-sex undergraduate institutions will affect only a few institutions. Likewise, § 86.16 of the regulation, concerning transition by single-sex institutions whose admissions are covered by the statute into institutions with nondiscriminatory admissions practices, will affect relatively few institutions.

SUBPART C—CHANGES

31

Section 86.21—Subparagraph 86.21(b)(2) is amended to include the words "and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable" following the paragraph as it appeared in the proposed regulation. That section is further amended by omitting the words "successful completion of" and inserting the words "success in."

32

Subparagraphs 86.21(c)(2) and (3) are amended by deleting the words "miscarriage, abortion" and inserting in lieu thereof the words "termination of pregnancy."

33

Subparagraph 86.21(c)(4) is amended by deleting the term "Ms."

34

Section 86.23—Paragraph 86.23(a) is amended to read as follows:

(a) *Nondiscriminatory recruitment.* A recipient to which this Subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

ANALYSIS

35

Neither of the two changes in Subpart C is substantive. The amendment to subparagraph 86.21(b)(2) clarifies a principle which provoked some confusion in the comments.

Both that change and the revision of paragraph 86.23(a) reflect an effort to conform the provisions of the regulations dealing with students and those dealing with employees. Apart from these changes, the substance of Subpart C remains unchanged and generally prescribes (subject to the appropriate admissions exemptions) requirements for nondiscrimination in recruitment and admission of students to education programs and activities. In addition to a general prohibition of discrimination in paragraph 86.21(a), the regulation delineates, in paragraph 86.21(b), specific prohibitions based on sex relating to such practices as ranking of applicants, application of quotas, and administration of tests or selection criteria. Use of tests for admission which are shown to have a disproportionately adverse effect on members of one sex must be shown validly to predict success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect must be shown to be unavailable (subparagraph 86.21(b)(2)). Further, in connection with this prohibition, § 86.22 of the regulation forbids a recipient from giving preference to applicants on the basis of their attendance at particular institutions if the preference results in discrimination on the basis of sex. Such preferences may be permissible under that section, however, if the granting institution can show that the pool of applicants eligible for such preferences includes roughly equivalent numbers of males and females, or it can show that the total number of applicants eligible to receive preferences is insignificant in comparison with its total applicant pool.

36

Specific prohibitions in Subpart C also forbid applying rules concerning such matters as marital or parental status in a manner which discriminates in admissions on the basis of sex (subparagraph 86.21(c)(1)). Subparagraph 86.21(c)(2) prohibits discrimination on the basis of pregnancy and related conditions, and subparagraph 86.21(c)(3) provides that recipients shall treat disabilities related to such conditions in the same manner and under the same policies as any other temporary disability or physical condition is treated. Finally, in addition to the provisions of § 86.23 discussed above, a recipient may not, under paragraph 86.23(b), recruit primarily or exclusively at institutions the student bodies of which are exclusively or predominantly single-sex if the effect of such recruitment efforts is to discriminate on the basis of sex.

SUBPART D—CHANGES

37

Section 86.31, concerning education programs and activities, is amended as follows:

38

Subparagraph 86.31(b)(6) is amended by adding after the word "behavior" the word "sanctions."

39

Subparagraph 86.31(b)(6) is amended by adding after the word "applicant" the words "including eligibility for in-state fees and tuition."

40

Subparagraph 86.31(b)(7) is amended to read as follows:

(b)(7) aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

Paragraph (c) is redesignated as paragraph (d) and a new paragraph (c) is inserted to read as follows:

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportuffities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

41

Subparagraph 86.31(d)(2)(i) is amended by deleting the word "ensure" appearing in the second line of the proposed regulation and substituting therefor the words "assure itself."

42

Subparagraph 86.32(c)(2) is amended after the word "students" in line 5 of the paragraph as it appeared in the proposed regulation to read as follows:

shall take such reasonable action as may be necessary to assure itself that such housing * * *

The remainder of the paragraph is unchanged.

43

Paragraph 86.34(a) is redesignated as § 86.34 and is amended further by adding six subparagraphs containing language:

(a) Providing adjustment periods with respect to classes and activities in physical education;

(b) Allowing grouping of students in physical education classes and activities by ability;

(c) Allowing separation of students by sex within physical education classes and activities during participation in contact sports;

(d) Requiring use of standards for measuring skill or progress in physical education classes which do not adversely affect members of one sex;

(e) Allowing portions of classes in elementary and secondary schools which deal exclusively with human sexuality to be conducted separately for boys and girls; and

(f) Allowing recipients to offer a chorus or choruses composed of members of one sex or predominantly composed of members of one sex if those choruses are based on vocal range or quality.

44

Paragraph 86.34(b) is redesignated as § 86.35 and retitled "Access to schools operated by L.E.A.s."

45

Paragraph 86.34(c) is redesignated as § 86.36 to read as follows:

§ 86.36 *Counseling and use of appraisal and counseling materials.*

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds tht the enrollment of a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

46

Paragraph 86.35(a) is redesignated as § 86.37 and the new section includes four paragraphs which include language:

(a) Generally prohibiting recipients from limiting eligibility for or providing different financial assistance to students on the basis of sex or from assisting outside organizations or persons which so discriminate in providing assistance, and from applying any rules or assisting in the application of any rules which treat members of one sex differently from members of the other sex on the basis of marital or parental status;

(b) Specifically allowing recipients to administer or assist in administration of sex-restrictive scholarships, fellowships or other forms of financial assistance established under a domestic or foreign will, trust, bequest or other similar instrument, if the overall administration is nondiscriminatory;

(c) Requiring the provisions of reasonable opportunities to receive athletic scholarships or grants-in-aid in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics, but allowing separate financial assistance for members of each sex provided in connection with separate athletic teams to the extent those teams are permitted under this regulation.

47

A new § 86.38 is added which is entitled "Employment assistance to students." The new section includes two paragraphs: Paragraph 86.35(b) becomes paragraph 86.38(a). Paragraph 86.35(c) is redesignated as paragraph 86.38(b).

48

Section 86.36 is redesignated as § 86.39 and is amended by adding at the end of the section as it appeared in the proposed regulation the sentence "However, any recipient which provides full coverage health service must provide gynecological care."

50

Paragraph 86.40(b) is amended to include five subparagraphs containing language:

1. Prohibiting discrimination against or exclusion of pregnant students from an education program or activity unless the student voluntarily requests to participate in a separate portion of the program or activity of the recipient;

2. Allowing a recipient to require a pregnant student to obtain a certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students

for other physical or emotional conditions;

3. Allowing recipients to offer separate instruction for pregnant students so long as admittance to such instruction is voluntary and provided such instruction is comparable to that offered to non-pregnant students;

4. Requiring recipients to treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom like any other temporary disability; and

5. Where a recipient does not maintain a temporary disability policy for the student or where a student does not qualify for leave, the recipient must treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom as a justification for a medical leave of absence at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

51

Paragraph 86.38(b), "Determination of student interest," and paragraph 86.38(c), "Affirmative efforts," of the proposed regulation have been deleted. Section 86.38 is redesignated as § 86.41 and is further amended to include language:

(a) Prohibiting discrimination by a recipient in any interscholastic, intercollegiate, club, or intramural athletics.

(b) Allowing separate teams when those teams are based on competitive skill or if they are in contact sports, but requiring that if a team is provided for members of one sex and not for the other in a non-contact sport and athletic opportunities for the sex for whom a team is not provided have previously been limited, members of that sex be allowed to try-out for the team offered. (Contact sports are defined for the purpose of the regulation.)

(c) Delineating some of the factors which will be considered in assessing whether a recipient has provided equal opportunity in the area of athletics.

(d) Allowing recipients an adjustment period during which they must work to comply with this section as quickly as possible but in no event allowing non-compliance to continue past one year from the effective date of the regulation in the case of elementary schools and in no case later than three years from the effective date of the regulation in the case of secondary and post-secondary schools.

52

A new § 86.42 is added concerning curriculum.

ANALYSIS

53

Several of the changes made in Subpart D are substantive in nature. The language in subparagraph 86.31(b)(7) has been amended in response to comments in order to clarify the Department's position when agencies, organizations or person not part of the recipient would be subject to the requirements of the regulation. Some of these "outside" organizations have been exempted from title IX with respect to their membership policies by a recent amendment to the Statute which was enacted in late 1974. This amendment is reflected, as already noted, in § 86.14 which exempts social fraternities and sororities, certain named groups such as the Girl Scouts and certain voluntary youth service organizations. Other groups, however, such as business and professional fraternities and sororities and honor societies continue to be covered. The regulation provides that if the recipient furnishes the "outside" agency or organization with "significant assistance," the "outside" agency or organization becomes so connected with the education program or activity of the recipient that any discriminatory policies or practices for which it is responsible become attributable to the recipient. Thus, such forms of assistance as faculty sponsors, facilities, administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations.

Section 86.31(c) provides that where a sex-restricted scholarship, fellowship, or other such award established by a foreign will, trust or similar legal instrument but administered by a recipient constitutes a benefit to a student *already matriculating* at the recipient institution (*e.g.* the Rhodes Scholarship and the Clare Fellowship which provides opportunities for male students at domestic institutions to study abroad), the scholarship, fellowship or award may not be administered by the recipient unless the recipient administers, provides, or otherwise makes available, reasonable opportunities for similar studies for students of the other sex. Such benefits may be derived from either domestic or foreign sources.

54

The language in subparagraph 86.32(c)(2) has been changed in response to numerous comments which indicated concern that institutions which list or approve off-campus housing would be required to conduct on-site reviews of that housing which would result in a high cost to the institution and thereby militate against its continuing to aid students in finding off-campus housing. Under the regulation, on-site reviews, while permissible, need not be made as a routine matter by institutions, but the institution must take reasonable steps to assure itself that off-campus housing is comparable with respect to quality, quantity, and cost for members of each sex, given the proportion of individuals of each sex seeking such housing.

55

The changes in § 86.34 are also substantive. Subparagraph 86.34(a) requires physical education classes at the elementary school level to comply fully with the regulation as quickly as possible but to be in full compliance no later than one year from the effective date of the regulation in order to permit schools and local education agencies sufficient time to adjust schedules and prepare staff. It further requires physical education classes at the secondary and post-secondary levels to comply fully with the regulation as quickly as possible but to be in full compliance no later than three years from the effective date of the regulation. During such grace periods, while the recipient is making any necessary adjustments, it must ensure that physical education classes and activities which are separate are comparable for members of each sex. The recipient must be able to demonstrate that it is moving as expeditiously as possible within the prescribed time frame toward eliminating separate physical education classes. The adjustment period permitted at the secondary and post-secondary levels is significantly longer than that to be permitted at the elementary level because of the existence of wide skill differentials attributable to the traditionally lower levels of training available to girls in many schools.

56

Subparagraph 86.34(b) provides that ability grouping in physical education classes is permissible provided that the composition of the groups is determined objectively with regard to individual performance rather than on the basis of sex. Subparagraph 86.34(c) allows separation of students by sex within physical education classes during competition in wrestling, boxing, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. Subparagraph 86.34(d), requiring the use of standards for measuring skill or progress in physical education which do not impact adversely on members of one sex, is intended to eliminate a problem raised by many comments that, where a goal-oriented standard is used to assess skill or progress, women will almost invariably score lower than men. For example, if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex. Accordingly, the appropriate standard might be an individual progress chart based on the number of push-ups which might be expected of that individual.

57

Subparagraph 86.34(e) which allows separate sessions in sex education for boys and girls at the elementary and secondary school level was published on July 12, 1974, as a clarification of the proposed regulation published in June (39 FR 25667). The final language has been slightly modified in response to comments indicating that the original language published on July 12, which referred generally to "sessions involving sex education" was somewhat vague. The present language more precisely identifies the material which may be taught separately as that dealing "exclusively with human sexuality." It should be stressed, of course, that neither the proposed regulation nor these final provisions require schools to offer sex education classes. Rather, the regulation specifically allows particular portions of any such classes that a school district elects to offer to be offered separately to boys and girls.

58

Numerous comments were received on the subject of physical education both in favor of and opposed to the position taken in the proposed regulation. Many commentators linked their opposition to coeducational physical education to their opposition to coeducational sex education classes. Some asked for separate but equal or comparable physical education. Others were opposed to the proposed regulation on the grounds of safety and supervision problems, and because they believed that physical differences between the sexes mandated differential treatment. Another group suggested that women would be discriminated against by losing in competition and receiving lower grades. Finally, some were opposed to any Federal involvement in local school matters.

59

The expanded section on counseling and use of appraisal and counseling materials was included in response to comments. Three amendments to the original language are of particular note: First, while the language which appeared in the proposed regulation treated only use of appraisal and counseling materials, paragraph 86.36(a) of the final regulation prohibits discriminatory counseling itself. Second paragraph 86.36(b) which incorporates some of the proposed language on materials also includes several further concepts. It allows use of different counseling materials based on sex if use of such materials is shown to be essential in eliminating sex bias. Recipients are required to use internal procedures for ensuring that their counseling materials are free from sex bias; and finally, where use of a particular test or instrument results in a classification which is substantially disproportionate in sexual composition, the recipient must take whatever action is necessary to assure itself that the disproportionate classification is not the result of a sex-biased test or of discriminatory administration of an unbiased test. Third, paragraph 86.36(c) requires that where a recipient educational institution finds that the composition of a class is disproportionately male or female, it must take steps to assure itself that the disproportion is not the result of sex-biased counseling or the use of discriminatory counseling or appraisal materials.

60

New § 86.37 concerning financial assistance to students has also been expanded over its earlier version as § 86.35 of the proposed regulation. The proposed regulation prohibited recipients from giving different types of financial assistance or different amounts of any form of such assistance on the basis of sex. The present provisions remain unchanged with respect to this requirement.

61

Numerous comments were received from colleges and universities claiming that the proposed paragraph 86.35(a) would cause to "dry-up" a substantial portion of funds currently available for student financial assistance made available through wills, trusts and bequests which require that award be made to members of a specified sex. As a result, a new paragraph 86.37(b) has been added which allows recipients to administer or assist in the administration of scholarships, fellowships or other financial assistance programs established pursuant to domestic or foreign wills, trusts, or similar legal instruments, which require that awards be made only to members of a specified sex, provided that the overall effect of such administration or assistance is nondiscriminatory. Thus, the regulation now requires institutions to award financial aid on the basis of criteria other than sex. Once those students eligible for financial aid have been identified, the financial aid office may award aid from both sex-restrictive and non-sex-restrictive sources. If there are insufficient sources of financial aid designated for members of a particular sex, the institution would be required to obtain the funds from other sources or to award less assistance from the sex-restrictive sources.

62

For example, if fifty students are selected by a university to receive financial assistance, the students should be ranked in the order in which they are to receive awards. If award is based on need, those most in need are placed at the top of the list; if award is based on academic excellence, those with the higher academic averages are placed at the top of the list. The list should then be given to the financial aid office which may match the students to the scholarships and other aid available, whether sex-restrictive or not. However, if after the first twenty students have been matched with funds, the financial aid office runs out of non-restrictive funds and is left with only funds designated for men, these funds must be awarded without regard to sex and not solely to men unless only men are left on the list. If both men and women remain on the list, the university must locate additional funding for the women or cease to give awards at that point.

The provision included in the proposed regulation exempting sex-restricted scholarships, fellowships, and other financial assistance programs established under foreign wills, trusts or similar legal instruments, has been removed. Where such scholarships, fellowships, and financial aid are administered by the recipient and constitute assistance to a student enabling him or her to *matriculate at the recipient institution*, they may be treated like similar forms of financial assistance established under domestic wills, trusts, and similar legal instruments or by acts of foreign governments, and paragraph 86.37(b) has been modified accordingly.

64

Subparagraph 86.37(c)(1) requires recipients to provide reasonable opportunities for athletic scholarships or grants-in-aid for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

65

Subparagraph 86.37(c)(2) retains the provision of paragraph 86.35(d) of the proposed regulation allowing sex-restrictive athletic scholarships provided as part of sex-restrictive athletic teams to the extent the operation of such teams is consistent with subparagraph 86.37(c)(1) and the athletics section of the regulation (§ 86.41).

66

Section 86.38 requires, as did its predecessor section, that assistance in making outside employment available to students, and that employment of students by a recipient must be undertaken in a nondiscriminatory manner.

67

Section 86.39, in addition to incorporating § 86.36 of the proposed regulation, requires that if full coverage health service is offered by recipients it must include gynecological care. This requirement should not be interpreted as requiring the recipient to employ a specialist physician. Rather, it is the Department's intent to require only that basic services in the gynecological field such as routine examinations, tests and treatment be provided where the recipient has elected to offer full health service coverage. Any limitations on health services offered cannot be based on sex.

68

The content of paragraph 86.40(a) is unchanged from the earlier proposal. The changes in paragraph 86.40(b) summarized above continue to require that pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom be treated like any other temporary disability. In response to many comments, the regulation now provides in subparagraph 86.40(b)(2) that a recipient may require a student who is or has recently been pregnant to obtain a doctor's certificate as to her ability to participate in the normal education program or activity so long as such a certificate is required of all students for other physical or emotional conditions. Subparagraph 86.40(b)(3) now allows a recipient to operate a portion of its program or activity separately for pregnant students. However, it prohibits mandatory assignment of students to such classes or schools and the instructional program offered separately must be comparable to that offered to non-pregnant students.

69

Section 86.41, the athletics section of the regulation, has been changed to meet some of the problems raised by the comments. Many comments received during the comment period indicate some confusion as to whether intramural programs are covered by this section. Since the intent is to cover intramurals, the phrase "interscholastic, intercollegiate, club or intramural athletics" has been substituted for the term "athletic programs" appearing in the first sentence of paragraph 86.38(a) of the proposed regulation.

70

Paragraph 86.41(a) provides that athletics must be operated without discrimination on the basis of sex. The Department continues to take the position that athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of title IX even in the absence of Federal funds going directly to athletics. Except for certain specific exemptions not directly pertinent to athletics, paragraph 901(a) of title IX is virtually identical to paragraph 601(a) of title VI of the Civil Rights Act of 1964. Since the language of title IX so closely parallels that of title VI, in the absence of specific Congressional indications to the contrary, the Department has basically interpreted title IX consistently with interpretations of title VI in similar areas. Under title VI, the courts have consistently considered athletics sponsored by educational institutions to be an integral part of that institution's education program or activity and, consequently, covered by title VI. See, for example, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971) and *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 891 (5th Cir. 1966), *affirmed en banc*. 380 F.2d 385 (5th Cir. 1967) *cert. denied sub nom. United States* v. *Caddo Parish Board of Education*, 389 U.S. 840 (1967).

71

Similarly, in cases wherein plaintiffs have challenged state and local rules prohibiting competition between men and women in high school athletics as being a violation of the equal protection clause of the Fourteenth Amendment, interscholastic sports have been specifically recognized as part of the education process. *Brenden* v. *Independent School District 742*, 477 F.2d 1292, 1297–1299 (8th Cir. 1973); *Bucha* v. *Illinois High School Association*, 351 F. Supp. 69, 74 (M.D. Ill. 1972); cf. *Hass*. v. *South Bend Community School Corporation*, 289 N.E. 2d 495, 499 (S. Ct. Ind. 1972) and *Reed* v. *Nebraska School Activities Association*, 341 F. Supp. 258, 262 (D. Neb. 1972).

72

In addition, § 844 of the Education Amendments of 1974 (Pub. L. 93–380) compels the Department to "[P]repare and publish * * * proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 * * * which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Thus, in light of the case law under title VI and the Fourteenth Amendment, and the Congressional mandate to cover intercollegiate athletics in § 844 of Pub. L. 93–380, the Department believes that coverage of athletics is mandated by title IX and that such coverage must be reflected in the regulation.

73

A substantial number of comments was received by the Department on the various issues raised concerning the athletic provisions of the proposed regulation. Numerous comments were received favoring a proposal submitted by the National Collegiate Athletic Association that the revenues earned by revenue-producing intercollegiate sports be exempted from coverage under this regulation. Other comments were submitted against this proposal.

74

The NCAA proposal was not adopted. There is no basis under the statute for exempting such sports or their revenues from coverage of title IX. An amendment to the Education Amendments of 1974 was introduced by Senator John Tower on the floor of the Senate specifically exempting from title IX revenue from revenue-producing intercollegiate athletics. 120 *Cong. Rec.* S 8488 (daily ed. May 20, 1974). The "Tower Amendment" was deleted by the conference committee and was, in effect, replaced by the so-called "Javits Amendment" which became § 844 of Pub. L. 93–380 mandating that the Department publish proposed title IX regulations whch would include "reasonable provisons" covering intercollegiate athletics.

75

In response to the comments, while paragraph 86.41(a) remains substantively the same as its predecessor, the remainder of the athletics section has been changed. Paragraph 86.38(b) of the proposed regulation required an annual determination of student interest by a recipient. This provision was widely misinterpreted as requiring institutions to take an annual poll of the student body and to offer all sports in which a majority of the student body expressed interest and abolish those in which there is no interest. The Department's intent, however, is to require institutions to take the interests of both sexes into account in determining what sports to offer. As long as there is no discrimination against members of either sex, the institution may offer whatever sports it desires. The "determination of student interest" provision has been removed. A new paragraph 86.41(c)(i) requires institutions to select "sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes." In so doing, an institution should consider by a reasonable method it deems appropriate, the interests of both sexes.

Paragraph 86.38(c) of the proposed regulation required all recipients sponsoring athletic activities to take certain affirmative efforts with regard to members of the sex for which athletic opportunities have been limited notwithstanding the lack of any finding of discrimination. Since such a requirement could be considered "affirmative action" and was somewhat inconsistent with § 86.3, it has been deleted. However, "affirmative efforts" may still be required pursuant to paragraph 86.3(a) or may be undertaken on a voluntary basis pursuant to paragraph 86.3(b). Paragraph 86.41(b) permits separate teams for members of each sex where selection for the team is based on competitive skill or the activity involved is a contact sport. If, however, a team in a non-contact sport, the membership of which is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for whom no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered. For example, if tennis is offered for men and not for women and a woman wishes to play on the tennis team, if women's sports have previously been limited at the institution in question, that woman may compete for a place on the "men's" team. However, this provision does not alter the responsibility which a recipient has under § 86.41(c) with regard to the provision of equal opportunity. Under § 86.41(c)(i), recipients are required to select "sports and levels of competition which effectively accomodate the interests and abilities of members of both sexes." Thus, an institution would be required to provide separate teams for men and women in situations where the provision of only one team would not "accommodate the interests and abilities of members of both sexes." This provision, of course, applies whether sports are contact or non-contact. As in the section on physical education, a contact sport is defined by using some examples and leaving the status of other sports to be determined on the basis of whether their purpose or major activity involves bodily contact.

76

Paragraph 86.41(c) retains the substance of paragraph 86.38(d) of the proposed regulation but has been expanded to provide more guidance on what factors the Department considers integral to providing equal opportunities in athletics. A list has been provided for the guidance of recipients of items which will be considered by the Office for Civil Rights in evaluating a recipient's interscholastic, intercollegiate, club or intramural athletics to determine if equal opportunity is available. These items will be considered whether or not a recipient sponsors separate teams, since inequality of opportunity may exist even where women participate on the same teams with men. The enumeration of items is not intended as a limitation on the items which the Department may deem pertinent for consideration during a particular compliance investigation or review.

77

As provided in the proposed regulation, the Department will not consider, as a *per se* failure to provide equal opportunity, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if such separate teams are offered or sponsored. Clearly, it is possible for equality of opportunity to be provided without exact equality of expenditure. However, any failure to provide necessary funds for women's teams may be considered by the Department in assessing equality of opportunity for members of each sex.

78

Finally, paragraph 86.41(d) has been added to provide a period of time similar to that allowed in the area of physical education for recipients to adjust their athletics offerings to comply with the requirements of the regulation. The Department will construe this section as requiring recipients to comply before the end of the adjustment period wherever possible.

79

The last substantive change in Subpart D is the addition of specific exemption of textbooks and curricular materials from the scope of the regulation. The new section explicitly states the Department's position that title IX does not reach the use of textbooks and curricular materials on the basis of their portrayals of individuals in a stereotypic manner or on the basis that they otherwise project discrimination against persons on account of their sex. As stated in the preamble to the proposed regulation, the Department recognizes that sex stereotyping in textbooks and curricular materials is a serious matter. However, the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. There is no evidence in the legislative history that the proscription in title IX against sex discrimination should be interpreted as requiring, prohibiting or limiting the use of any such material. Normal rules of statutory construction require the Department, wherever possible, to interpret statutory language in such a way as to avoid potential conflicts with the Constitution. Accordingly, the Department has construed title IX as not reaching textbooks and curricular materials on the ground that to follow another interpretation might place the Department in a position of limiting free expression in violation of the First Amendment.

80

The Department received a number of comments as well as one petition concerning discrimination in textbooks and curricular materials. The comments in favor of including coverage of textbooks and curricular materials came from national organizations, several college or university presidents or chancellors, several local school superintendents, several local organizations and interest groups, and a number of individuals. Comments opposing coverage were also submitted.

SUBPART E—CHANGES

81

Sections 86.41 through 86.51 are redesignated as §§ 86.51 through 86.61. Subparagraph 86.51(a)(4) is added providing as follows:

A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such a preference has the effect of discriminating on the basis of sex in violation of this Part.

82

Subparagraph 86.51(b)(2) is amended to add after the word "termination" the words "application of nepotism policies." Subparagraph 86.51(b)(6) is amended to delete the words "pregnancy leave" and to substitute therefor the words "leave for pregnancy, childbirth, false pregnancy, termination of pregnancy."

83

Section 86.53 is amended by deleting § 86.53(a) and substituting the following:

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

84

Section 86.54 is amended by deleting paragraphs 86.44 (b) and (c) as they appeared in the proposed regulation and by substituting a new paragraph 86.54(b) to read:

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

85

Paragraph 86.55(c) is amended by deleting the words "operate to." Section 86.57 is amended by deleting paragraphs 86.57 (b), (c), (d) and (e) and by substituting therefor language:

(1) Prohibiting discrimination in employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(2) Requiring treatment of pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom, to be treated as any other temporary disability for the purposes of leave, seniority and other benefits or services.

(3) Requiring, where a recipient does not maintain a leave policy or where an employee does not qualify for leave under such a policy because of inadequate longevity on the job, that the recipient shall treat an employee's pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom, as a justification for reasonable leave without pay with guaranteed reinstatement upon her return.

86

Section 86.60 is amended by deleting the term "Ms."

ANALYSIS

87

Before discussing the substantive changes in Subpart E, one explanation is needed regarding a section that was not changed. Subpart E generally follows the Sex Discrimination Guidelines (29 CFR Part 1604) of the Equal Employment Opportunity Commission (EEOC) and the regulations of the Office of Federal Contract Compliance (OFCC), United States Department of Labor (41 CFR Part 60). The EEOC administers title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the OFCC is responsible for the coordination and implementation of Executive Order 11246, as amended, which prohibits employment discrimination by Federal contractors. HEW is responsible for administration, pursuant to the OFCC regulations, of the Executive Order as to Federal contractors who are educational institutions. Virtually all recipients subject to this Part 86 are also subject to title VII and many are also subject to the Executive Order. Except in the area of fringe benefits, where Subpart E of the title IX regulation differs from the title VII Sex Discrimination Guidelines of the EEOC, an employer who complies with the title IX regulation will generally be complying both with title VII and the Executive Order. It should be emphasized, however, that nothing in the title IX regulation alters any responsibilities that an employer may have under the Executive Order or title VII. Paragraphs 86.3(b) and 86.6(a) of Subpart A have been modified to accentuate this point.

88

Accordingly, subparagraphs 86.56(b)(2) of Subpart E remains the same as subparagraph 86.46(b)(2) as it appeared in the proposed regulation and continues to follow the Executive Order regulations in requiring that fringe benefit plans provide either for equal periodic benefits to members of each sex or equal contributions by the employer for members of each sex (§ 86.39 imposes identical requirements for student benefit plans). The title VII Sex Discrimination Guidelines of the EEOC differ in that they prohibit payment of unequal periodic benefits on the basis of sex and preclude employers from justifying unequal periodic benefits on the basis of differences in cost for males and for females. While the approach taken in the final regulation is felt to be the most reasonable at present, the Secretary recognizes the need to move toward some provision for equality in periodic benefits. In view of the potential problems associated with such a provision and also with the present inconsistency between the EEOC, OFCC and HEW approaches, the President has directed that a report be prepared by October 15 recommending a single approach.

89

Subparagraph 86.51(a)(1) makes it clear that the regulation applies to part-time employees. In the preamble to the proposed regulation it was stated that the section concerning fringe benefits (now § 86.56) would be interpreted as follows: It would require that where an institution's female permanent employees are disproportionately part-time or its permanent part-time employees are disproportionately female, and the institution does not provide its permanent part-time employees fringe benefits proportionate to those provided full time employees, the institution demonstrate that such a manner of providing fringe benefits does not discriminate on the basis of sex. Assuming the absence of discriminatory hiring practices on the part of an employer which channel female job applicants into part-time positions, it is questionable whether the Department has the authority to place the burden on an employer to demonstrate that failure to give part-time employees fringe benefits proportionate to those provided to full-time employees under the circumstances stated above is not discriminatory. Since discriminatory hiring practices which channel female job applicants into part-time jobs are clearly prohibited by subparagraph 86.51(a)(1), and because of the questions which may be raised as to the soundness of the interpretation given to § 86.56 in the preamble to the proposed regulation, the Department will assume the initial burden of demonstrating that a particular method of providing fringe benefits to part-time employees is discriminatory.

90

Subparagraph 86.51(a)(4) parallels paragraph 86.23(b) which concerns student recruitment. It prohibits recipients from granting preferences to employment applicants who are graduates of particular institutions, the student bodies of which are exclusively or predominantly of one sex, if the effect of such preferences results in discrimination on the basis of sex.

91

Paragraph 86.43(a) as it appeared in the proposed regulation required recipients who recruit for employment to make comparable efforts to recruit members of each sex. Paragraph 86.53(a) of the final regulation no longer requires comparable efforts but provides that a recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. This change recognizes that, under some circumstances, an employer may expend greater efforts to recruit members of one sex without discriminating against members of the other. For example, where a school district is located close to an all-female private undergraduate school, the district may have to expend greater efforts to recruit male teachers than it will have to use to recruit female teachers. However, where a recipient is presently discriminating on the basis of sex, or has in the past so discriminated, it shall take remedial action to recruit members of the sex discriminated against until the effect of such past discrimination no longer exists.

92

In response to the public comments, the language of paragraph 86.54(b) has been simplified over the language appearing in the proposed regulation to prohibit a recipient from enforcing any policy or practice which results in the payment of wages to members of one sex at a rate less than that paid to members of the other sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. This makes the title IX regulation consistent with the wording of the Equal Pay Act of 1963, Pub. L. 88–38, 29 U.S.C. paragraph 206(d), and will enable the Director to rely on the case law established under the Equal Pay Act to interpret and enforce paragraph 86.54(b).

93

Paragraphs 86.57(b), (c) and (d) have been slightly modified from the earlier version to make it clear that a recipient cannot discriminate on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom and that such conditions and any temporary disabilities resulting therefrom must be treated by the recipient as any other temporary disability for all job-related purposes.

94

Paragraph 86.47(e) in the proposed regulation provided that an employee could not be required to commence leave related to pregnancy so long as her physician certified that she was capable of performing her duties, and that she must be allowed to resume work after such a leave no more than two weeks after her physician certifies that she is capable of doing so or, in the case of an employee who is a teacher, at the beginning of the first academic term after such certification is made. This section has been completely deleted from the final regulation since it is inconsistent with paragraph 86.57(b) which requires that all conditions related to pregnancy be treated as disabilities for job-related purposes. If a recipient requires that any employees suffering from a temporary disability be required to obtain a physician's certification that they are capable of continued work, then it may also require such a certification from pregnant employees. If a recipient requires all employees who take sick leave for a temporary disability to return to work after such leave two weeks after a physician certifies that such employees are capable of returning, then the same procedure must be utilized for pregnant employees. However, if none of these certifications is required for other temporary disabilities, none may be required of pregnant employees. Likewise, a recipient may not require pregnant employees to give advance notice of when they intend to commence sick leave unless such advance notice is also required of all other employees who intend to go on sick leave due to a temporary disability in cases where advance knowledge of the absence makes such notice possible.

95

Paragraph 86.60(a) prohibits pre-employment inquiries as to an applicant's marital status since such inquiries are frequently the foundation for discrimination against married women. Subparagraph 86.21(c)(4) in Subpart C contains a similar prohibition with regard to pre-admission inquiries. The proposed regulation proscribed inquiries into whether a job applicant was "Ms., Miss or Mrs." Since under paragraph 86.60(b) inquiries as to the sex of an applicant may be made so long as it is made of members of both sexes and is not used to discriminate, the inquiry proscribed in paragraph 86.60(a) as to whether an applicant is "Ms., Miss or Mrs." has been changed to delete the "Ms."

96

Finally, § 86.51 permits consideration of sex in making employment decisions where sex is a "bona fide occupational qualification." This section is retained in the final regulation to make the title IX regulation consistent with the Sex Discrimination Guidelines of the EEOC and with the OFCC regulations implementing Executive Order 11246. This section will be interpreted narrowly, consistent with interpretations already made under title VII of the Civil Rights Act of 1964 and the Executive Order.

SUBPART F

§ 86.71 Interim Procedures

For the purposes of implementing this Part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80-6—80-11 and 45 CFR Part 81.

The Secretary has chosen to adopt the title VI procedures for use during the interim period between the effective date of this regulation and effectiveness of the final consolidated procedural regulation to simplify enforcement during that time and to avoid applying a different procedure for enforcement of requirements concerning discrimination based on race, color, or national origin from those based on sex. The Department is publishing, simultaneously with this final regulation, a proposed consolidated procedural regulation which will apply to most of the Department's civil rights enforcement activities. Comments on that proposal are solicited, as provided in the notice of proposed rulemaking, for 45 days.

QUESTIONS

Questions concerning the application or interpretation of this regulation should be addressed to the Regional Directors of the Office for Civil Rights whose addresses are as follows:

Region I—Mr. John G. Bynoe, RKO General Building, 5th Floor, Bulfinch Place, Boston, Massachusetts 02114.

Region II—Mr. Joel Barkan, 26 Federal Plaza, Room 3908, New York 10007.

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Dated: May 27, 1975.

CASPAR W. WEINBERGER,
Secretary.

Dated: May 27, 1975.

Approved:

GERALD R. FORD,
President.

Part 86 is added to read as set forth below:

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX UNDER FEDERALLY ASSISTED EDUCATION PROGRAMS AND ACTIVITIES

Subpart A—Introduction

Subpart B—Coverage

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

Subpart F—Procedures

Subpart A—Introduction

§ 86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)

§ 86.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except §§ 904 and 906 thereof; 20 U.S.C. §§ 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Health, Education, and Welfare.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this Part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this Part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(i) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following competition of the evaluation required under paragraph (c) of this section, and shall provide to the Director upon request, a description of any modifications made pursuant to subparagraph (c)(ii) and of any remedial steps taken pursuant to subparagraph (c)(iii).

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h–9 and 298b–2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this Part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93–568, 88 Stat. 1862, amending Sec. 901)

§ 86.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.15 and 86.16, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (c) and (d) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.17 Transition plans.

(a) *Submission of plans.* An institution to which § 86.15 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.18–86.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.16 and 86.17.

(b) Specific prohibitions. (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.24–86.30 [Reserved]

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a

recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships; or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activtiy takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681. 1682, 1686)

§ 86.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Sections 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the

use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 86.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b), (c) and (d) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) a recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b) (1) of this paragraph, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b) (2) (i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under subparagraph (b) (2) (i) of this paragraph because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41 of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 86.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipent shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b) (1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 86.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.43-86.50 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 86.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.51.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit

or service of employment not subject to the provision of § 86.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal conrtibutions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.62–86.70 [Reserved]

Subpart F—Procedures [Interim]

§ 86.71 Interim procedures.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80–6—80–11 and 45 CFR Part 81.

SUBJECT INDEX TO TITLE IX PREAMBLE AND REGULATION*

* Preamble paragraph numbers are in brackets [ ]

[FR Doc.75-14551 Filed 6-3-75;8:45 am]

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U.S. DEPARTMENT OF H.E.W.

HEW–391

THE WHITE HOUSE

WASHINGTON

July 17, 1975

MEMORANDUM FOR: JAMES CANNON

FROM: RODERICK HILLS R.H.

SUBJECT: Title IX and Intercollegiate Sports

I did not propose any changes in the regulation. I propose, however, that we closely monitor the HEW implementation of the regulation as it applies particularly to athletic scholarships.

The focus at HEW, at least at the lower levels, is on a supposed need to equalize financial support being given to women involved in athletic activity with that given to men. Given that focus, HEW understandably has established a quota system which would allot scholarships to women on a ratio of the number of women "interested" in intercollegiate activities to the number of men so "interested."

I would change the focus. The issue as I see it is whether the university in question is making the same effort to provide athletic activity for women as it is making for men. There is no reasonable possibility and, indeed, there is no reasonable desirability of creating an intercollegiate sports activity comparable to NCAA football. Accordingly, no school should be penalized for failing to do so. However, a school should be required to encourage intercollegiate activities for women where feasible. Thus, tennis, swimming and track, as examples, are areas where a school should make reasonable efforts to promote women's competition.

The regulations should be interpreted as requiring a school to describe its entire athletic program for women, to compare it to men, and to develop an affirmative action program to increase women's activities. Relevant criteria would be:

1. The caliber of coaches (including the salaries paid).
2. The quality of facilities.
3. The furnishing of uniforms.
4. The availability of athletic scholarships.

If a school has scholarships for a men's tennis team and an active intercollegiate tennis competition, there obviously should be an affirmative action program to promote the same type of program for women. If five scholarships are made available to the men's tennis team to recruit top ranked talent, then a comparable number of scholarships should be available to attract top ranked women. Indeed, an affirmative action program for a given sport might cost more money to be spent initially on a women's sport than on a men's sport of the same nature that is well established.

Practically speaking, my suggestion is that an HEW audit team evaluate the overall sports program for men against the existing overall sport program for women plus the affirmative action program. A determination of whether a given school is in compliance or not would require findings as to what a school is or is not doing for women that it could reasonably do.

My complaint about the present posture of HEW is with the effort to provide equality in a number of relatively unimportant details, such as athletic scholarships, rather than looking to the overall question of relative equality of opportunity in athletic activity.

More specifically, the issue should not be whether as many women as men get athletic scholarships, but whether the athletic opportunities as a whole are roughly comparable for men and women.

THE WHITE HOUSE

WASHINGTON

July 18, 1975

MEETING ON TITLE IX

Friday, July 18, 1975
2:00 p.m. (30 minutes)
The Oval Office

From: Jim Cannon

I. PURPOSE

To review the current status of where we are on Title IX and the Congressional review of HEW's proposed regulations.

II. BACKGROUND, PARTICIPANTS AND PRESS PLAN

A. Background: This is one in a series of recent meetings you have had on Title IX.

B. Participants:

Jim Lynn, Phil Buchen, Jack Marsh, Max Friedersdorf, Jim Cannon and Dick Parsons. (Secretary Weinberger is in Salt Lake City, and will be unable to attend.)

C. Press Plan: To be handled as a staff meeting.

III. AGENDA

1. Can the regulations currently before the Congress be amended by executive action to accommodate the athletic coaches' concerns, and with what result?

2. Does the O'Hara bill constitute a viable approach to the problem?

3. What other options, if any, are there?

NOTE: A paper with further information is attached.

THE WHITE HOUSE

WASHINGTON

July 18, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: Jim Cannon

SUBJECT: Title IX and Intercollegiate Sports

This memorandum sets forth your options regarding application of HEW's Title IX Regulation to intercollegiate sports programs.

Option 1. Amend the Regulation so as to Exempt from Coverage Intercollegiate Sports.

The Regulation could be amended either to exempt intercollegiate sports altogether or simply to exempt sports-generated revenues from allocation in accordance with requirements of the Regulation. To do this, the Secretary of HEW could either withdraw the Regulation currently before Congress, amend it and resubmit it, or allow the Regulation currently before Congress to become effective and submit a specific amendment thereto.

There are two major problems with this approach:

- It is highly visible, and places the President out in front on an issue which is very sensitive with women's groups. The great likelihood is that we would displease many more people than we would please.

- Counsel generally agree that, as a matter of law, Title IX covers intercollegiate sports. Therefore, amendment of the Regulation to exempt intercollegiate sports, or even revenue-producing sports, would only engender litigation, the result of which would probably be judicial imposition and administration of the Regulation with respect to college sports programs.

Option 2. Support Legislation Exempting Revenue-Producing Sports from Coverage under the Law.

Representative James O'Hara has introduced a bill which would, in part, amend Title IX as follows:

> "The provisions of this title shall not apply to the expenditure of revenues derived from a particular sport or team, to the extent such revenues are devoted to the support and maintenance (including student scholarships and grants-in-aid) of that sport or team."

As you know, the college football coaches believe that this kind of exemption is essential to the continuation of intercollegiate sports programs. They point out that most college sports programs are funded out of the revenues generated by one or two sports, usually football and/or basketball. These revenue-producing sports must, they argue, have a superior right to available funds, since, without them, a school's entire athletic program is jeopardized.

On the other hand, many, including Cap Weinberger, believe that the level of competition in intercollegiate sports can remain sufficiently high to attract fans and produce revenue, even if less is spent on men's programs and more is spent on women's programs. They argue that exemption of revenue-producing sports from Title IX will merely perpetuate a discriminatory system under which colleges and universities spend millions on men's programs and only a few thousands on sports programs for women. Finally, some argue that the approach embodied in the O'Hara bill would be held unconstitutional under the Fourteenth Amendment.

Your support of the O'Hara bill (or some similar bill) would, I am informed, greatly facilitate its passage.

If your desire is to make certain that the level and quality of intercollegiate sports programs will not be adversely affected by Title IX, this would appear to be the more promising approach.

Option 3. Maintain Current Position.

Of course, you always have the option of maintaining your current position, which, in this case, may be the most politically desirable.

Attached for further reference are: a copy of the O'Hara bill (Tab A); and a copy of a memorandum on this subject from Rod Hills (Tab B).

A

94TH CONGRESS
1ST SESSION

H. R. 8395

IN THE HOUSE OF REPRESENTATIVES

JULY 8, 1975

Mr. O'HARA (for himself, Mr. SIMON, Mr. MOTTL, Mr. HALL, Mr. QUIE, Mr. ERLENBORN, Mr. ESCH, Mr. ESHLEMAN, Mr. BUCHANAN, Mrs. SMITH of Nebraska, and Mr. BIAGGI) introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend title IX of the Education Amendments of 1972, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title IX of the Education Amendments of 1972 is amended by adding at the end thereof new sections as follows:

"ATHLETICS

"SEC. 908. The provisions of this title shall not apply to the expenditure of revenues derived from a particular sport or team, to the extent such revenues are devoted to the sup-

port and maintenance (including student scholarships and grants-in-aid) of that sport or team.

"PHYSICAL EDUCATION

"SEC. 909. Nothing in this title shall be construed to prohibit separation of students by sex in physical education classes conducted by a recipient institution if equal facilities, instruction, equipment, and (taking into account student interest) equal opportunity for instruction and participation are provided for students of each sex.".

B

THE WHITE HOUSE

WASHINGTON

July 17, 1975

MEMORANDUM FOR: JAMES CANNON

FROM: RODERICK HILLS R.H.

SUBJECT: Title IX and Intercollegiate Sports

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More specifically, the issue should not be whether as many women as men get athletic scholarships, but whether the athletic opportunities as a whole are roughly comparable for men and women.

THE WHITE HOUSE

WASHINGTON

July 17, 1975

MEMORANDUM FOR : ROD HILLS

FROM : JIM CANNON

SUBJECT : Title IX and Intercollegiate Sports

In light of our discussion at the 8:00 a.m. staff meeting, I would appreciate having a brief summary of your differences with HEW on the Title IX Regulation as it applies and may be applied to intercollegiate sports.

Could you also note how you would propose that Paragragh C of Section 86.37 and Paragraphs A,B, and C of Section 86.41 of the Regulation be changed to reflect the law that Congress passed?

I would appreciate your comments as quickly as possible. We may have the meeting tomorrow.

cc: Dick Parsons

NOTES ON TELEPHONE CALL WITH CAP WEINBERGER

Friday, July 18, 1975

(1) Can the regulations currently before the Congress be amended by executive order?

No, they can't be amended by executive order to the best of my knowledge. It's perfectly simple to amend them. You publish new regulations or you publish amendatory regulations any time you want--a piece of paper which says "Amendment such-and-such"--but that piece of paper is also a regulation and has to run through the whole process, perhaps 30-day comment period in this cause, because the Congress has demanded it. You go through the Congress and wait 30 days for them to review in whole or in part the amendment--exactly the same process we went through with the Title IX regulations.

At the moment we are in a position where we have gone down the middle, and while there has been some sniping on the sides we haven't gone completely overboard. The athletic groups are saying incorrectly that equal expenditures are necessary, and they are not. But you would invite a law suit.

Congress has made alot of noise but aren't going to do anything and as a result the rules will go into effect Monday.

(2) Are equal expenditures required?

Absolutely not. They are specifically stated <u>not</u> to be required. I got that statement in there after great pain and suffering. Most women's teams don't want equal expenditures--they just want more than they're now getting.

(3) What do you suggest to be the basis in the law Congress passed for applying the regulation to intercollegiate sports?

This is the legal point we thrashed around for months. In the original Title IX the application of the court decisions to the language required that you cover all education programs run by institutions receiving federal funds, and there are court decisions in the civil rights law which say athletic programs

are indeed programs run by the institution getting the federal funds. Then last year after the regulations had first been published, the Congress passed the Javits Amendment, a substitute for the Tower Amendment. In the application of the regulation to intercollegiate athletics, reasonable provision shall be made for some kind of sports. The purpose was to assure that athletics were covered. If they weren't before--and I think they were--they are covered now.

(4) Have you had a chance to look at Jim O'Hara's bill?

I took the basic position that we would do whatever Congress told us. My personal feeling was that they would have a hard time sustaining the constitutionality where you have revenue-producing sports. If that's what Congress wants to do, we would pass regulations that way. But it gets you into accounting problems.

Another thing that may come up is the business of quotas. The Athletic scholarship simply says you can give athletic scholarships to men all you want and if you do you should try to allocate a reasonable portion to women. That could easily be changed in an amended regulation.

THE WHITE HOUSE

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July 18, 1975

MEMORANDUM FOR THE RECORD

FROM: JIM CANNON

SUBJECT: President's Comments on Title IX

He wants a letter to go up on MOnday with these elements:

1. After looking at the debate on Title IX and the law, it is clear that it was the intent of Congress under any reason of interpretation to include athletics.

2. He thinks there are some unique situations, especially in the sports of college football, which requires special considerations in the application of Title IX. He could endorse some concept that relieves that situation (avoid mention of Tower or O'Hara). He believes that Congress should hold hearings promptly and consider the athletic situation in colleges, including getting the solid information out on the table about what colleges are now spending on men sports and women sports.

3. In the meantime, the Administration will do what it can under the law to establish guidelines to preserve the broadest possible intercollegiate athletic programs.

At some point in the letter, possibly the beginning, the President would want to remind the addressees about long and extensive process of hearings that was involved in the drafting and publication of the regulations.

The letter should go to the chairmen of the appropriate House and Senate committees, with copies to the ranking minority members.

NOTE: John Rhinelander from HEW said the guidelines could be available in three weeks.

NOTE: The press plan should be to send a letter up on Monday, make it public on Tuesday, and have Cap brief the press and answer questions.

cc: Jim Cavanaugh
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MEMORANDUM FOR THE PRESIDENT

FROM: Jim Cannon

SUBJECT: Title IX and Intercollegiate Sports

This memorandum sets forth your options regarding application of HEW's Title IX Regulation to intercollegiate sports programs.

Option 1. Amend the Regulation so as to Exempt from Coverage Intercollegiate Sports.

The Regulation could be amended either to exempt intercollegiate sports altogether or simply to exempt sports-generated revenues from allocation in accordance with requirements of the Regulation. To do this, the Secretary of HEW could either withdraw the Regulation currently before Congress, amend it and resubmit it, or allow the Regulation currently before Congress to become effective and submit a specific amendment thereto.

There are two major problems with this approach:

- It is highly visible, and places the President out in front on an issue which is very sensitive with women's groups. The great likelihood is that we would displease many more people than we would please.

- Counsel generally agree that, as a matter of law, Title IX covers intercollegiate sports. Therefore, amendment of the Regulation to exempt intercollegiate sports, or even revenue-producing sports, would only engender litigation, the result of which would probably be judicial imposition and administration of the Regulation with respect to college sports programs.

Option 2. Support Legislation Exempting Revenue-Producing Sports from Coverage under the Law.

Representative James O'Hara has introduced a bill which would, in part, amend Title IX as follows:

> "The provisions of this title shall not apply to the expenditure of revenues derived from a particular sport or team, to the extent such revenues are devoted to the support and maintenance (including student scholarships and grants-in-aid) of that sport or team."

As you know, the college football coaches believe that this kind of exemption is essential to the continuation of intercollegiate sports programs. They point out that most college sports programs are funded out of the revenues generated by one or two sports, usually football and/or basketball. These revenue-producing sports must, they argue, have a superior right to available funds, since, without them, a school's entire athletic program is jeopardized.

On the other hand, many, including Cap Weinberger, believe that the level of competition in intercollegiate sports can remain sufficiently high to attract fans and produce revenue, even if less is spent on men's programs and more is spent on women's programs. They argue that exemption of revenue-producing sports from Title IX will merely perpetuate a discriminatory system under which colleges and universities spend millions on men's programs and only a few thousands on sports programs for women. Finally, some argue that the approach embodied in the O'Hara bill would be held unconstitutional under the Fourteenth Amendment.

Your support of the O'Hara bill (or some similar bill) would, I am informed, greatly facilitate its passage.

If your desire is to make <u>certain</u> that the level and quality of intercollegiate sports programs will not be adversely affected by Title IX, this would appear to be the more promising approach.

<u>Option 3. Maintain Current Position.</u>

Of course, you always have the option of maingaining your current position, which, in this case, may be the most politically desirable.

Attached for further reference are: a copy of the O'Hara bill (Tab A); and a copy of a memorandum on this subject from Rod Hills (Tab B).

94TH CONGRESS
1ST SESSION

H. R. 8395

IN THE HOUSE OF REPRESENTATIVES

JULY 8, 1975

Mr. O'HARA (for himself, Mr. SIMON, Mr. MOTTL, Mr. HALL, Mr. QUIE, Mr. ERLENBORN, Mr. ESCH, Mr. ESHLEMAN, Mr. BUCHANAN, Mrs. SMITH of Nebraska, and Mr. BIAGGI) introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend title IX of the Education Amendments of 1972, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title IX of the Education Amendments of 1972 is amended by adding at the end thereof new sections as follows:

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"SEC. 908. The provisions of this title shall not apply to the expenditure of revenues derived from a particular sport or team, to the extent such revenues are devoted to the sup-

port and maintenance (including student scholarships and grants-in-aid) of that sport or team.

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"SEC. 909. Nothing in this title shall be construed to prohibit separation of students by sex in physical education classes conducted by a recipient institution if equal facilities, instruction, equipment, and (taking into account student interest) equal opportunity for instruction and participation are provided for students of each sex.".

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[7/18/75]

How Quickly Guidelines

3 weeks

President: ① opts both at debate —
retention of Congress
under any circumstances
interpretation included
athletics

② We push them on
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responsibility for Dow

I got it up Monday

ope to hold hearings

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at Begin- and

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Get back —

nop — present the
student position
with regard to
athletic program

John — Get word up out
on table —
Keep out pondo
out

We're willing to work
approving corrective
compromise to
form 4 by is
later in year

option A
No sales

option B
Approve expenditure