

THE WHITE HOUSE
WASHINGTON

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To: Julie Fernandez, 217-R
From: Eddie Lorenz

Here's the

Memo on Title IX.

I'll call you.
E.

May 8, 1998

Title IX Initiative Overview and Update

BACKGROUND

- On June 17, 1997, the 25th anniversary of Title IX of the Education Amendments of 1972, as amended ("Title IX"), which prohibits discrimination on the basis of sex in federally assisted education programs and activities, President Clinton issued a directive to all executive agencies requiring them, in consultation with the Attorney General, to invigorate enforcement of Title IX. (Tab 1). President Clinton directed executive departments and agencies to develop vigorous new Title IX enforcement plans and submit them to the White House, with copies to the Department of Justice (DOJ). Under Executive Order 12250, the Attorney General has authority to coordinate the effective enforcement of Title IX. This authority has been delegated to the Civil Rights Division (CRT).
- DOJ also was tasked with coordinating the development of a regulation to enforce Title IX for the 25 agencies providing Federal financial assistance to training and educational programs that do not currently have regulations. Since its passage in 1972, only 4 agencies have adopted regulations: the Departments of Education (ED), Energy, Health and Human Services, and Agriculture.
- President Clinton's memorandum also stated his intention to issue an Executive order prohibiting discrimination on the basis of sex, race, color, and national origin in federally conducted education and training programs. In that regard, he directed Federal agencies to submit to DOJ an inventory of their federally conducted education and training programs in order for DOJ to review such material and prepare an appropriate order.

TITLE IX REGULATION

■ Actions and Issues

- In response to the President's directive, DOJ drafted a regulation as a common rule to be published initially as a notice of proposed rulemaking (NPRM). The draft common rule is based upon the text of ED's regulation, 34 C.F.R. Part 106, with modifications to reflect statutory amendments in 1976 and 1988 (since ED's regulations have not been updated to reflect these changes), one modification to reflect Supreme Court precedent, as well as several minor clarification edits. ED's regulations were used as a model, as opposed to writing entirely new regulations, for several reasons: the history of public participation in the

development and congressional approval of ED's regulations, ED's leadership role in Title IX enforcement, judicial interpretations of ED's regulations, recipients' familiarity with the regulations, and an interest in maintaining consistency of interpretation of regulations enforcing Title IX.¹

- In the Fall of 1997, COR distributed an initial draft of the NPRM and solicited comments from the Office of Legal Counsel (OLC), the 25 participating agencies, and received informal comments from the Office of Management and Budget (OMB). Based upon those comments and suggestions, the draft NPRM was revised and re-vetted to the agencies that suggested changes. Additionally, the draft NPRM was reviewed and approved by the EEOC pursuant to Executive Order 12067, and by ED. The latest version of the NPRM, preceded by a summary of the edits to ED's regulation, is attached at **Tab 2**.
- **Tribally-run schools:** An issue was raised last year regarding whether Title IX applies to Tribally-run schools. (These are schools that receive funds from the Department of Interior's (DOI) Bureau of Indian Affairs (BIA), but are totally controlled by the tribes.) If tribal schools are subject to Title IX, we would likely need to add provisions to the regulation to accommodate tribal customs. In mid-January, we submitted a written request to OLC for an opinion on this issue. However, it is our understanding that OLC will not complete its review of the matter until they receive comments from DOI's Solicitor's Office.

DOI has delayed in providing comments to OLC because of its statutory obligation to consult with tribal governments prior to issuance of any regulation affecting Indian education programs. We were concerned initially that this requirement would prevent DOI from participating in the common rule. However, with our encouragement and assistance, they began the consultation process in March and have already received comments from their regional offices. According to our contact in the Office of Indian Education Programs, they are currently analyzing those comments and expect to have a report by the end of May. One of the issues addressed during the consultation was whether the tribes felt Title IX should apply to their schools. Note that the rudimentary view is

¹ As further background, note that during 1995 the CRT, through the Coordination and Review Section (COR) drafted new model Title IX regulations, also based upon ED's regulations-- but with many more clarifications and changes than the current proposed regulations. Assistant Attorney General Deval Patrick sent the draft regulations to the Equal Employment Opportunity Commission (EEOC) and ED for review and comment. Subsequently a decision was made to hold off on issuing new Title IX regulations because of fear of backlash.

that tribal schools will likely not be covered by the regulation because of their sovereign status.

- **Delegation Agreement:** In conjunction with the development of the common rule, we are drafting a delegation agreement that will allow for the sharing of enforcement responsibilities with respect to recipient educational institutions that are funded by more than one agency. This agreement will allow agencies that fund certain types of educational institutions to refer complaints to ED, HHS, and VA if the recipient educational institution also is funded by ED, HHS, or VA. An agency may refer a complaint that concerns programs or activities of an elementary and secondary education system, and institutions of higher education and vocational education to ED; complaints regarding programs and activities involving health-related schools to HHS; and matters concerning programs or activities of proprietary educational institutions (i.e., private, for profit, non-college degree granting institutions that provide technical and skilled training) to VA.
- A delegation agreement will eliminate the possibilities for overlap and duplication, and will improve civil rights enforcement with respect to recipient educational institutions that are funded by more than one agency. Similar agreements exist for Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. However, only a few such agreements exist for Title IX because ED did not want Title IX delegations from agencies that did not have Title IX implementing regulations. It is our objective to draft one document to identify the obligations of all agencies that provide Federal financial assistance to educational institutions, and wish to participate in a delegation or sharing of responsibilities.
- A draft delegation agreement was provided to ED, HHS, and VA for comment late last year. We have since met with representatives from these three agencies to discuss their concerns and ideas. The draft agreement is currently being revised to reflect the comments received. Upon completion, we will resend the draft to ED, HHS, and VA for approval before sending a draft to the remaining 25 participating agencies for review. Once a document has been agreed upon by the participating agencies, it will be published in the Federal Register. We do not expect the delegation agreement to become effective until issuance of the final rule.
- **Danforth Amendment:** The remaining issue preventing our transmittal of the proposed regulation to OMB involves the Danforth Amendment, which was added to Title IX in 1988. The Danforth Amendment provides: "Nothing in this chapter shall be construed to require or prohibit any person, or public entity, to provide or pay for any benefit or service, including the use of facilities, related to

an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion." 20 U.S.C. 1688.

- The issue is whether Congress intended an exception to the first sentence of the amendment, when the life of the woman would be endangered if the pregnancy continued to term, or for medical complications arising from or related to an abortion. In late December, we received comments from OLC suggesting that we eliminate language added to ED's regulation regarding the "life of the woman" exception. We also agreed to eliminate language regarding an exception for "medical complications." This decision was met with opposition by the National Women's Law Center (NWLC).
 - OLC's stated position is that the second sentence of the amendment provides a sufficient basis to support an exception for "medical complications," but not the "life of the woman." OLC's unofficial position has been that the statute is not sufficiently ambiguous to allow an analysis of the legislative history on the "life of the woman" exception. *- this is changed. OLC now says not "best" interpret but o.k.*
 - The NWLC has clearly stated their position. They believe that the legislative history clearly supports exceptions for both the "life of the woman" and "medical complications," and that we should state those exceptions clearly in both the preamble and the regulation. The document at **Tab 3** provides the relevant portions of the preamble and proposed regulation. The portions at issue are printed in strike-out format and have been deleted from the latest version of the NPRM; however, the NWLC strongly supports putting that language back in. Also, included at **Tab 3** are documents submitted by the NWLC in support of their position. Since the beginning of this year, we have basically been debating how the Danforth Amendment and these exceptions should be dealt with in the regulation. In addition to the legal arguments under consideration, naturally, there are concerns regarding the potential reactions that any abortion language may create.
- **Status of NPRM**
- Pursuant to a request by the Civil Rights Division, OLC has agreed to re-examine the language of the Danforth Amendment to determine whether the Department can "reasonably" argue that sufficient ambiguity exists to permit a review of the legislative history on the "life of the woman" exception. We had hoped to hear from OLC on this issue this week.
 - Basically, the Department has to decide firmly what our position is going to be,

and then we will have to meet with the appropriate individuals to relay that decision. This is the only issue preventing the document from going to OMB for review.

- Once the Danforth issue is resolved, the NPRM will be sent to OMB for review. OMB has up to ninety days to complete its review and approval. Upon final adoption by all of the participating agencies, interim action must occur before the rule can be sent to the Office of the Federal Register for publication. Namely, the Department of Housing and Urban Development must submit the NPRM to the House and Senate housing committees in fulfillment of its statutory requirement to provide 15 days notice of a proposed rulemaking prior to publication in the Federal Register. Naturally, that review could lead to further delays. It is only after all required parties have properly reviewed and approved the proposed rule, that it will be published as a proposed rulemaking for public comment. In light of recent delays, we are no longer projecting a publication date.

EXECUTIVE ORDER

■ **Actions and Issues**

- In response to President Clinton's directive, COR conducted a survey of all Federal agencies in August 1997 to determine the extent of training and education programs or activities conducted by the Federal government. The comprehensiveness of the surveys varies by agency.
- CRT staff met with the White House Counsel's Office in Fall 1997 to discuss issues related to the Executive order. Thereafter, DOJ staff drafted an Executive order to implement appropriate restrictions against sex, race, color, and national origin discrimination in federally conducted education programs.
- In early 1998, OLC reviewed the draft Executive order and provided specific comments and guidance. We also sent a draft to OPD and the White House Counsel's Office. In January, DOJ staff again met with White House staff and discussed potential exemptions for contractors and military personnel, as well as other issues related to the Executive order and NPRM. To date, the Executive order has not been shared with other Federal agencies.
- **Contractors:** After discussions with the Justice Management Division, OLC and the White House, we decided to exclude contractors from coverage under the Executive order. The theory for this exclusion is that contractors are covered by a number of other nondiscrimination provisions. There is no specific language in

the Executive order excluding contractors, rather, contractors are simply not mentioned.

- **Bureau of Indian Affairs-Run Schools:** The Executive order will apply to Indian schools that are controlled by the Department of Interior's Bureau of Indian Affairs (BIA). These are federally conducted schools as opposed to tribally conducted. We are informed by our contacts at BIA's Office of Indian Education Programs that they are encouraging the tribes to accept grant funds or contracts to run their own schools (i.e., become federally assisted), and anticipate that within the next few years, BIA will cease to run any schools. Thus, the extent of coverage for tribal schools, will in the long run, depend upon Title IX's applicability to tribally conducted schools.
- **Military Exemption:** An ongoing issue involves the extent and nature of military exemptions. The Department of Defense (DOD) has requested a very broad exemption from the prohibitions of the Executive order for military training programs. A full discussion of their request is included in the memorandum attached at **Tab 4**. (Transmittal memo to White House). Basically, DOD would like to exempt all of their education and training programs except the DOD Dependents Schools and the DOD Domestic Dependent Elementary and Secondary Schools. Their exemption would exclude civilians, foreign nationals, and state and local law enforcement officials participating in any DOD program designed "for the purpose of" training members of the armed forces.
- **Foreign Nationals:** As part of the request for a survey of federally conducted training and education programs, we asked agencies to identify any impediments to enforcement in particular programs or specific requests for exemptions. The most frequently requested exemption was for programs involving participation by foreign nationals. The rationale frequently concerned the agency's inability to participate in the selection of foreign participants. However, the selection process is specifically excluded from coverage under the Executive order at 3-306. Our pending transmittal to the White House recommends that the Executive order exclude members of a foreign government or foreign armed forces who are participating in any training in this country and any foreign civilians participating in military, national security, or anti-terrorism training in this country. For a full discussion of this issue, see the attached transmittal memorandum at **Tab 4**.
- **Enforcement Guidance:** The Executive order is not intended to contain enforcement details. Rather, it is anticipated that DOJ will draft subsequent guidance to outline specifics such as the scope of programs covered, specific program exemptions, examples of discriminatory conduct, and details of the administrative complaint process. We will begin drafting those guidelines in the

near future.

■ **Status of Executive Order**

- The Executive order, along with a transmittal to the White House and a summary chart of federally conducted programs, is in the front office awaiting review and transmittal. The outstanding issues noted above will be resolved in concert with the White House Counsel's Office. (See **Tab 4**).
- Upon receipt of comments from the White House, we will revise the Executive order and the document will be forwarded by either DOJ or the White House to OMB for review and distribution to the affected departments and agencies for review and comment.

PRESS COVERAGE OF TITLE IX

- In recent months, a number of articles (we've located 16 since January) have been published regarding the Department of Education's enforcement of Title IX in the athletics arena, the impending regulations, and the Executive order being drafted by DOJ. (Articles are attached at **Tab 5**). Many of the articles stem from a story by Jessica Gavora, published in The Women's Quarterly, Winter 1998 edition and reprinted in part in The Wall Street Journal, April 21, 1998. Most of the articles, like Gavora's, suggest that the Clinton administration is broadly expanding the enforcement of Title IX by drafting new regulations that will require or result in "quotas in the classroom."
- The fears regarding quotas stem from the fact that ED uses several "proportionality" tests in examining various aspects of athletic programs to determine gender equity. For example, when determining whether a school offers equitable opportunities to male and female students for participation in intercollegiate athletics, ED uses a "three-part test." One prong of this test allows an educational entity to establish a "safe harbor" by showing a "substantial proportionality" between the number of men and women participating in athletic programs and the number of men and women enrolled in the institution. However, it is our understanding, based upon a review of the regulations, ED's published guidance, and case law, as well as conversations with ED's General Counsel's Office, that these proportionality tests have never been and will not be transferred into the academic arena.
- To date, DOJ has not responded in any way to the articles. However, on May 1, 1998, the Wall Street Journal published two responsive letters to the editor that addressed Jessica Gavora's articles. (See last two articles at **Tab 5**). One was from Norma Cantu, Director, OCR, ED. The second was from Verna Williams,

Senior Counsel at the National Women's Law Center. Ms. Williams' article was well written and directly addressed many of the issues we have discussed regarding inaccuracies in Gavora's articles.

- **Q & A's:** We have drafted Q & A's (attached at **Tab 6**) to address some of the issues that continue to arise regarding Title IX generally, as well as the new regulations. We are currently vetting the Q & A's at ED to ensure our answers regarding the new rule comport with their current practice in enforcing Title IX.

PROPOSED TITLE IX REGULATION— Danforth Provisions

Proposed Preamble with Complications and Life of the Woman Exemption **Strike-out language has been removed from current draft**

Third, ____ 18(c) reflects the "abortion neutrality" provision in the CRRA, commonly referred to as the Danforth amendment, which provides: "Nothing in this part shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion." 20 U.S.C. 1688.

The first sentence of the Danforth Amendment is incorporated in subsection ____ 18(c)(1), which states that recipients are not required to provide or pay for any benefit or service related to an abortion. ~~Consistent with congressional intent,¹ however, this provision does not allow recipients of Federal assistance to deny medical procedures, benefits, services, or the use of facilities if the life of the woman will be endangered if the pregnancy continued to term, or for medical complications arising from or related to an abortion.~~

The second sentence of the Danforth amendment is incorporated in ____ 18(c)(2). In addition, this subsection makes it clear that, consistent with the Danforth Amendment, the regulations prohibit discrimination against, exclusion of, or denial of benefits to, a person because that person has obtained, sought, or will seek an abortion. This prohibition applies to any service or benefit for an applicant (for enrollment or employment), student, or employee.²

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~~See 134 Cong. Rec. S227 (daily ed. Jan. 28, 1988) (In response to Sen. Metzenbaum's charge that discriminatory treatment would follow adoption of the Danforth amendment, and criticism that the amendment failed to account for abortions that are necessary to save the life of the woman, Sen. Danforth replied that Sen. Metzenbaum's characterizations were "completely erroneous and totally without foundation at all."); 134 Cong. Rec. H568 (daily ed. Mar. 2, 1988) (statement of Rep. Hawkins), *id.* at H571 (statement of Rep. Jeffords), *id.* at H581 (statement of Rep. Aucoin) ("Equally important is the fact that the bill clearly prohibits denial of provision of services related to complications arising from abortion under the terms of title IX."); *id.* at H584 (statement of Rep. Edwards) ("Under its provisions, a covered institution does not have to include the costs of an abortion procedure in insurance for its students or employees. But [it] does not mean that it can exclude, for example, medical complications related to an abortion. Under the Danforth Amendment, Title IX still requires those complications to be covered.");~~

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This provision is consistent with the Danforth provision and congressional intent.

Finally, in order to conform ED's existing text to that aspect of the Danforth amendment that does not require or prohibit a recipient from providing services or payment for an abortion, a specific reference to ____ .18(c) is added to the following four provisions: ____ .21(c)(3), ____ .39, ____ .40(b)(4), and ____ .57(c).

Subpart C addresses nondiscrimination on the basis of sex in admission and recruitment practices with respect to students. For example, recipients may not impose numerical limits on the number or proportion of persons of either sex who may be admitted. In addition, a recipient may not give preference to another by separately ranking applicants on the basis of sex, or otherwise treat an individuals differently because of his or her sex. Additional

Statements of numerous senators and representatives, including Sen. Danforth and other sponsors, reiterate the plain meaning of the prohibition, and treat the imposition of penalties as one form of discriminatory treatment against women who have sought or will seek an abortion. See 134 Cong. Rec. S163 (daily ed. Jan. 27, 1988) (statement of Sen. Danforth) ("In fact, it is prohibited — hospitals, colleges, universities — from *discriminating* against people who have had abortions or who are seeking abortions. So it does not intend to authorize, in fact, it prohibits, *penalties* against people who have made their own choice for abortion.") (emphasis added); 134 Cong. Rec. S227 (daily ed. Jan. 28, 1988) (statement of Sen. Wilson) ([The second sentence of the Danforth amendment] was language that I and others insisted be in there, precisely to ensure that there could not be *discrimination* against women who either are seeking or have received abortion-related services.") (emphasis added).

Other members of Congress agreed with the Danforth amendment because of the specific inclusion of language prohibiting discrimination. E.g., 134 Cong. Rec. H581 (daily ed. Mar. 2, 1988) (statement of Rep. AuCoin) ("And with their statements [by Sen. Danforth and Wilson, as quoted above] clarifying that this legislation before us today expressly prohibits, and does not in any way permit, discrimination against women who have had or are seeking abortions, I can support this bill."); *id.* at H584 (statement of Rep. Edwards). See also *id.* at H571 (statement of Rep. Jeffords) ("The second sentence of the amendment will ensure that a woman is not denied scholarships, promotions, extracurricular activities, student employment or any other benefits because she has received or is seeking an abortion."); *id.* at H581 (statement of Rep. AuCoin) ("With assurances from the authors of the Danforth amendment, and with the clarification provided by the floor leaders today, it is now clear that this legislation prohibits discrimination based on a person's decision regarding abortion -- in scholarships, in housing, in extracurricular activities, in student or faculty hire and tenure, and in other benefits offered to students or employees under title IX."); *id.* at H584 (statement of Rep. Edwards) (Whether it be scholarships, promotions, extracurricular activities, student employment or any other benefits offered to students or employees, under title IX benefits cannot be withheld from a student or employees because she received or is seeking an abortion.").

prohibitions of discrimination on the basis of parental and marital status are also identified.

PROPOSED RULE WITH COMPLICATIONS AND LIFE OF THE WOMAN
Strike-out language has been removed from current draft

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraphs (b)(1), (2), or (3) of this section.;

(5) Such term does not include any operation of an entity which is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(6) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to, traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a "program or activity" subject to these Title IX regulations if the college, university or other institution receives or benefits from Federal financial assistance.

(c)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. ~~Medical procedures, benefits, services, and the use of facilities if the life of the woman will be endangered if the pregnancy continued to term or to address complications related to an abortion are not subject to this section.~~

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (c)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient which receives or benefits from Federal financial assistance because such individual has sought or received, or is seeking a legal abortion, or any benefit or service related to a legal abortion.

§§ ____ .19 through ____ .20 [Reserved]

MODEL TITLE IX REGULATIONS FOR FEDERAL GOVERNMENT AGENCIES

References to the Hyde Amendment in the Danforth Amendment's Legislative History

The National Women's Law Center supports the inclusion of language in the model Title IX regulations, making clear that the Danforth amendment (codified at 20 U.S.C. § 1688) does not apply to abortions necessary for the life of the woman or resulting from rape or incest, or to complications related to abortion. From past discussions, we understand there is agreement that complications are not subject to the Danforth amendment, but that some issue has arisen concerning abortions necessary to save the life of the woman. In fact, we believe that the amendment should also not cover these abortions or abortions resulting from rape or incest. The numerous references to the Hyde amendment, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994) (current version), in the legislative history of the Danforth amendment reveal Congress' intent to exclude from coverage of this amendment abortions necessary to save the life of the woman and those arising from rape or incest, as well as complications related to an abortion.

The Hyde amendment then prohibited federal funding of abortions under the Medicaid program except in certain circumstances — when necessary to save the life of the mother and when a woman suffered rape or incest, provided that she promptly reported the crime. 1981 Hyde Amendment, Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980). Senator Danforth himself explicitly stated that his amendment would not change the law, but would simply make Title IX consistent with congressional policy, as reflected in the Hyde amendment. 134 Cong. Rec. S 169 (daily ed. Jan. 27, 1988); *see also* 134 Cong. Rec. S 226 (daily ed. Jan. 28, 1988) (statement of Sen. Danforth); 134 Cong. Rec. S 164 (daily ed. Jan. 27, 1988) (same); *id.* at S 173 (same). In addition, Senators Metzenbaum and Danforth had a dialogue in which the former stated: "There is not even a life of the mother exception in the Danforth amendment. And a woman could be bleeding to death from pregnancy complications and under the Danforth amendment she could be denied a lifesaving abortion." Senator Danforth responded: "[T]he characterization of the bill by the Senator from Ohio is completely erroneous and totally without foundation at all. It is a fabrication." 134 Cong. Rec. at S 227 (daily ed. Jan. 28, 1988). Senator Danforth then continued by citing the antidiscrimination provision of his amendment to support his assertion.

Furthermore, the Senators who supported the Danforth amendment described its intent as to be consistent with the Hyde amendment. *See* 134 Cong. Rec. S 217 (daily ed. Jan. 28, 1988) (statement of Sen. Hatch); *id.* at S 220 (statement of Sen. Domenici); *id.* (statement of Sen. Gramm); *id.* at S 229 (analysis by Dept. of Educ.); 134 Cong. Rec. S 166 (daily ed. Jan. 27, 1988) (statement of Sen. Humphrey); *id.* at S 171 (statement of Sen. Nickles). Senator Humphrey argued that without the Danforth amendment, the bill would reach the "heights of hypocrisy" because the federal government had adopted a policy of refusing to pay for abortions except in the most narrow circumstances. 134 Cong. Rec. at S 166 (daily ed. Jan. 27, 1988) ("The Medicaid program has funded abortions only in the narrowest of instances . . .").

These statements indicate that Congress intended to exclude abortions that were covered by Medicaid at the time, as well as complications related to abortion.

Model Title IX Regulations for Federal Government Agencies and Departments

The National Women's Law Center supports the inclusion of language in the model Title IX regulations ("the model regulations") that provides: "Medical procedures, benefits, services, and the use of facilities if the life of the woman will be endangered if the pregnancy continued to term or to address complications related to an abortion are not subject to this section." This provision is consistent with the statute's language and legislative history and represents a reasonable interpretation by the agencies charged with enforcing Title IX.

First, Title IX's abortion neutrality provision -- the Danforth Amendment to the Civil Rights Restoration Act of 1987 -- reads:

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

20 U.S.C. § 1688. The clarification at issue is necessary to ensure that the model regulations are not misconstrued to deny women access to such medical care.

The language concerning the life of the woman and complications falls squarely within the confines of the statute. The statute states that no covered entity can discriminate against a woman who is seeking or has received any benefit or service related to a legal abortion. Denying a woman an abortion necessary to save her life or medical services to address complications would certainly be "a penalty . . . imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion." It would be a high penalty indeed. Moreover, life threatening conditions and complications are *per se* not abortions.

The legislative history also indicates that the provision at issue is consistent with congressional intent. Senator Danforth himself, as well as other sponsors, explicitly addressed this issue. In response to Senator Metzenbaum's concern that the amendment would result in discriminatory treatment and did not account for abortions needed to save the life of the mother, Senator Danforth responded that such characterizations were "completely erroneous and totally without foundation at all." 134 Cong. Rec. S227 (daily ed. Jan. 28, 1988). Representative Aucoin stated: "Equally important is the fact that the bill clearly prohibits denial of provision of services related to complications arising from abortion under the terms of Title IX. 134 Cong. Rec. H568 (daily ed. Mar. 2, 1988). Chief sponsor Representative Edwards added: "Under its provisions, a covered institution does not have to include the costs of an abortion procedure in insurance for its students or employees. But [it] does not mean that it can exclude, for example, medical complications related to an abortion. Under the Danforth Amendment, Title IX still requires those complications to be covered." *Id.* at H584. There is no legislative history we were able to find to the contrary.

Second, the model regulations are a reasonable interpretation of the statute by the agencies charged with its enforcement. In Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983), five Justices agreed that while the text of Title VI did not itself proscribe unintentional racial discrimination, federal agencies could enact valid regulations with such a proscription. See 463 U.S. at 591-92 (White, J.); *id.* at 617-24 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting). Justice White in his opinion stated that the language of Title VI on its face is ambiguous and that the agencies' interpretations of the statute -- i.e., regulations -- should not be rejected "absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history." *Id.* at 592 (citing Zenith Radio Corp. V. United States, 437 U.S. 443, 450 (1978)). Justice Marshall in his dissent also articulated the longstanding principle that an agency's construction of a statute need not be the only reasonable one to warrant deference, as long as it is not unreasonable. *Id.* at 621 (citing Zenith, 437 U.S. at 451). Assuming, *arguendo*, that the text of Title IX is ambiguous with respect to whether covered entities may provide an abortion necessary to save the life of the woman or medical services to address complications, the statute and its legislative history support the clarifying regulation at issue.

The clarification will ensure that Title IX is not used to deny women access to important medical care, in furtherance of the objectives of the statute. Accordingly, inclusion of this provision represents a reasonable interpretation of the statute that is consistent with its language and legislative history.