

Agenda: Title IX and Federally Conducted Education Programs
1/12/98

Title IX Notice of Proposed Rulemaking (NPRM) as Common Rule:

1. HUD: Statutory requirement of Congressional notification prior to publication of NPRM *Do all together? - Have HUD publish separately*
2. Interior: Related issues of consultation with Native American community and resolution of whether Title IX applies to tribally-run schools *up to 3 mo's*
Move forward + hold NA.
3. Current draft of NPRM (based on ED Title IX regulation), includes "affirmative action" (see attachment) *ok w/ "current law"*
4. WH assistance requested to expedite OMB review and approval of text (EO 12866 gives OMB up to 90 days to review the proposed rule, in practice, OMB generally responds in 60 days) *speed it up-*
5. OMB/Paperwork Reduction Act: WH assistance may be requested to resolve any new issues raised by OMB on compliance with the Paperwork Reduction Act
6. After OMB approval, WH assistance may be requested to ensure agencies that have not yet approved NPRM do so speedily upon receipt of final version (Commerce, DOJ, Labor, DOT, and NASA)
7. Summary of edits to current draft of NPRM (preamble)

Draft Executive Order

1. Summary of edits to current draft of EO
2. Unresolved issues with coverage of DOD programs: exemption for "military" and continued operations of programs for non-DOD employees
Proposed text: "Nothing in this order amends, supplements, or subtracts from an individual's protections and remedies under the Uniform Code of Military Justice, 10 U.S.C. Chapter 47."
3. Views on what should be in Executive order v. subsequent guidance/regulation
4. Views on coverage of contractors

Current draft of NPRM (based on ED Title IX regulation), includes "affirmative action" (§ ____ .3 copied from 34 CFR § 106.3)

§ ____ .3 Remedial and affirmative action and self-evaluation.

(a) Remedial action. If the designated agency official 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 designated agency official 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 that resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964-1965 Comp., p. 339. *consistent w/ law.*

(c) Self-evaluation. Each recipient education institution shall, within one year of the effective date of these Title IX regulations:

(1) Evaluate, in terms of the requirements of these Title IX regulations, 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;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that 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 completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c) (2) of this section and of any remedial steps taken pursuant to paragraph (c) (3) of this section.

DRAFT

In Reply Refer To:
OEO/Policy/Civil Rights

Mr. Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division
Office of the Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5643
Washington, D.C. 20530

Dear Mr. Lee:

This letter is in further response to your request dated November 24, 1997 that we provide our views as to whether Title IX applies to tribally-run schools, and if it does apply, whether special provisions are desired to accommodate any operations within such schools. This letter also responds to the November 24, 1997 request regarding the draft notice of proposed rulemaking (NPRM) of a common rule prepared by the Department of Justice to implement Title IX of the Education Amendments of 1972, and our agency's adoption of this rule. Since these matters are interrelated, we are addressing both in this letter.

Based on extensive discussions and a careful review of the issues, the Department of the Interior's (Department) position as expressed in the enclosed memorandum from the Assistant Secretary - Indian Affairs is that the Department has a responsibility to consult with the Tribes when regulations are proposed that impact Indian programs (See Executive Order 12866, 512 DM Chapter 2, and Public Law 95-561). Therefore, the question concerning the applicability of Title IX to tribally-run schools and the need for special provisions in the NPRM, cannot be answered prior to consultation with the Tribes. This consultation process is critical to maintaining the government-to-government relationship that President Clinton has expressed as the policy of his Administration. In this situation, such consultation would include discussions of both the applicability of Title IX to tribally operated education programs funded by the Bureau of Indian Affairs, as well as the content of the regulations themselves.

The Department supports the NPRM and because of our desire to participate in the NPRM as well as meet our consultation commitment to the Tribes, we are requesting that the following language be inserted in the preamble of the common rule or other appropriate place in the rule, to allow the Department's continued participation in the NPRM:

The application of this rule to tribally operated education programs funded by the Bureau of Indian Affairs is reserved until such time as the Department of the Interior completes its statutory requirements for tribal consultation in accordance with Public Law 95-561, 25 U.S.C. § 2011.

Recognizing the need to expeditiously issue regulations to strengthen and enforce Title IX, the Department is willing to conduct a special consultation on this issue commencing in February 1998 if the foregoing proposed language is approved for inclusion in the common rule. If such approval is granted, the Department will promptly secure final signature approval of the NPRM for the common rule.

We hope that a decision will be made to accommodate our request so that the Department of the Interior can participate along with other Departments in the NPRM.

Sincerely,

John Berry
Assistant Secretary
Policy, Management and Budget



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

JAN 8 1998

Memorandum

To: Assistant Secretary - Policy, Management and Budget
From: Assistant Secretary - Indian Affairs *Kevin Love*
Subject: NPRM: Title IX

We have reviewed the notice of proposed rule making for 43 CFR part 17 that establishes standards for the purpose of effectuating Title IX of the Education Amendments of 1972 as amended. Because this proposed rule does not address culturally relevant issues for American Indians and Alaska Natives and does not provide for an exception of Title IX for "culturally appropriate activities," I must object to its issuance, unless the following language can be inserted in the Preamble of the Common Rule or some other appropriate place in the rule:

The application of this rule to tribally operated education programs funded by the Bureau of Indian Affairs is reserved until such time as the Department of the Interior completes its statutory requirements for tribal consultation in accordance with Public Law 95-561.

The Bureau of Indian Affairs (BIA) is required to engage in substantial notice and comment when regulations are proposed which impact Indian programs. (See Executive Order 12866, 512 DM Chapter 2 and Public Law 95-561.) The consultation process is critical to maintaining the government-to-government relationship that President Clinton stated as the policy of his administration. The consultation must include discussion of both the applicability of Title IX to tribally operated education programs funded by the BIA, as well as the content of the regulations themselves.

In the Interior Department, the greatest impact of these rules will be on the Office of Indian Education Programs' (OIEP) schools and educational programs. OIEP will be holding its regular consultation during April 1998. This item can be included in that process, or OIEP has indicated its willingness to conduct a special earlier consultation commencing in February.

I understand the urgency of providing regulations to strengthen and enforce Title IX. I must, however, ensure that the views of Indian school boards are considered and incorporated, as necessary, in any regulation which significantly impacts Indian Country.

Draft 12/30/97

[DOUBLE SPACE DOCUMENT FOR FEDERAL REGISTER]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 4

SMALL BUSINESS ADMINISTRATION

13 CFR Part 113

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1253

DEPARTMENT OF COMMERCE

15 CFR Part 8a

TENNESSEE VALLEY AUTHORITY

18 CFR Part 1317

DEPARTMENT OF STATE

22 CFR Part 146

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 229

UNITED STATES INFORMATION AGENCY

22 CFR Part 508

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3

DEPARTMENT OF JUSTICE

28 CFR Part 42

DEPARTMENT OF LABOR

29 CFR Part 36

DEPARTMENT OF THE TREASURY

31 CFR Part 28

DEPARTMENT OF DEFENSE

32 CFR Part 196

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 18

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 7

GENERAL SERVICES ADMINISTRATION
41 CFR Part 101-6

DEPARTMENT OF THE INTERIOR
43 CFR Part 17

FEDERAL EMERGENCY MANAGEMENT AGENCY
44 CFR Part 19

NATIONAL SCIENCE FOUNDATION
45 CFR Part 618

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
National Endowment for the Arts
45 CFR Part 1155

National Endowment for the Humanities
45 CFR Part 1171

Institute for Museum and Library Sciences
45 CFR Part 1182

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
45 CFR Part 2555

DEPARTMENT OF TRANSPORTATION
49 CFR Part 25

Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving
or Benefiting from Federal Financial Assistance

AGENCIES: Nuclear Regulatory Commission; Small Business Administration; National
Aeronautics and Space Administration; Department of Commerce; Tennessee Valley
Authority; Department of State; Agency for International Development; International
Development Cooperation Agency; United States Information Agency; Department of
Housing and Urban Development; Department of Justice; Department of Labor;
Department of the Treasury; Department of Defense; Department of Veterans Affairs;
Environmental Protection Agency; General Services Administration; Department of the
Interior; Federal Emergency Management Agency; National Science Foundation;

National Endowment for the Arts, National Endowment for the Humanities, Institute for Museum and Library Sciences, National Foundation on the Arts and the Humanities; Corporation for National and Community Service; Department of Transportation.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed regulation, presented as a common rule, provides for the enforcement of Title IX of the Education Amendments of 1972, as amended ("Title IX"), by the agencies identified above. Title IX prohibits discrimination on the basis of sex in education programs or activities that receive Federal financial assistance.

DATES: Comments must be received on or before (Insert date 60 days after date of publication in the FEDERAL REGISTER).

ADDRESSES: Interested parties should submit written comments on this notice of proposed rulemaking to Merrily A. Friedlander, Chief, Coordination and Review Section, P.O. Box 65960, Washington, D.C. 20035-6560, facsimile (202) 307-0595. See Supplementary Information Section for comments regarding the availability of this document in alternative formats.

FOR FURTHER INFORMATION CONTACT: Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, (202) 307-2222.

SUPPLEMENTARY INFORMATION:

Background

The purpose of this proposed common rule is to provide for the enforcement of Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681, *et seq.*) ("Title IX"), as it applies to educational programs and activities that receive Federal financial assistance from the agencies participating in this notice. Because the proposed standards to be established are the same for all of the participating agencies, they are publishing this notice of proposed rulemaking jointly. The procedures for how an agency will enforce Title IX, including the conduct of investigations and compliance reviews, also follow the same structure; all agencies except the Department of the Treasury ("Treasury") are incorporating their respective procedures under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*) which are virtually identical among the agencies. Title IX is modeled after Title VI and the statutes have the same statutory enforcement mechanisms. Although Treasury does not have Title VI regulations, it is establishing enforcement procedures, as set forth below, that are akin to other agencies' Title VI procedures for enforcement. The final rule adopted by each agency will be codified in that agency's portion of the Code of Federal Regulations as

indicated in this notice.

In 1979 and 1980, two agencies published notices of proposed rulemaking for Title IX, but the proposed rules were never issued as final rules. On April 25, 1979, the Veteran's Administration published a notice of proposed rulemaking. *See* 44 Fed. Reg. 24320 (1979). On June 17, 1980, the Department of Justice published a notice of proposed rulemaking. *See* 45 Fed. Reg. 41001 (1980). By participating in this notice of proposed rulemaking, these agencies are initiating a new rulemaking proceeding.

Additional Comment Information

Copies of this notice are available, upon request, in large print and electronic file on computer disk. Other formats will be considered upon request.

Overview

As set forth in this proposed rule, the substantive nondiscrimination obligations of recipients, for the most part, are identical to those established by the Department of Education ("ED") under Title IX. *See* 34 CFR Part 106. ED's regulations are the model for this notice 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. The regulations, initially issued by the former Department of Health, Education, and Welfare (and adopted by ED upon its establishment in 1980), are the result of an extensive public comment process and congressional review. HEW received and considered more than 9700 comments before drafting its final regulations. Further, after the final regulations were issued, but before they became effective, Congress held six days of hearings to determine whether the regulations were consistent with the statute. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975).*

In addition, under Executive Order 12250, the Department of Justice is responsible for the "consistent and effective implementation" of several civil rights laws, including Title IX. Using the ED regulation as the basis for this common rule promotes consistency and efficiency not only for agencies but for the recipient community. ED is the lead agency for enforcement of Title IX through its guidance, interpretations, technical assistance, investigative expertise, and resources committed. As the vast majority of recipients of Federal assistance from the identified agencies also receive assistance from ED, recipients should be subject to a single set of obligations with respect to Title IX.

Further, both Congress and the courts have interpreted Title IX based on ED's regulations. For example, in 1974, Congress amended the statute after holding hearings on provisions in ED's proposed rule. See 20 U.S.C. 1681(a)(6). In 1982, the Supreme Court upheld that portion of ED's regulations that prohibit discrimination by a recipient on the basis of sex in its employment practices. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). As discussed below, Congress also passed the Civil Rights Restoration Act of 1987 (CRRRA), in large part, to overrule the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), and thus to make Title IX consistent with ED's pre-Grove City interpretation of the statute. See S. Rep. No. 100-64, 2 (1987), reprinted in 1988 U.S.C.C.A.N. 3, 3-4. The recipient community, Federal agencies, and the courts should have the benefit of continued reliance on past interpretations of Title IX and its regulations, and using the ED regulation as the model for other agencies promotes that consistency.

As mentioned, the proposed regulations are not identical to ED's regulations. This proposal addresses several statutory changes that are not reflected in the existing (but soon to be modified) ED regulation, one modification in order to be consistent with Supreme Court precedent, and a few minor changes. A detailed discussion of these changes is set forth below.

Upon the issuance of final regulations by the participating agencies, beneficiaries and affected parties will have more opportunities to file complaints or seek information regarding Title IX enforcement from various agencies. The agencies intend to develop a means of sharing enforcement responsibilities and information to ensure that the most effective action is pursued, at the same time avoiding both duplication of inquiries by the Federal government and any undue burden on recipients due to multiple inquiries.

Summary of Regulation

As stated, Title IX prohibits discrimination on the basis of sex in educational programs or activities that receive Federal financial assistance. Specifically, the statute states that, "[n]o 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 specific exceptions for various entities, programs, and activities. 20 U.S.C. 1681(a). This statute was modeled after Title VI, which prohibits discrimination on the basis of race, color, and national origin in all programs or activities that receive Federal financial assistance. The goal of Title IX is to ensure that Federal funds are not utilized for and do not support sex-based discrimination, and that individuals have equal opportunities, without regard to sex, to pursue, engage or participate in, and benefit from academic, extracurricular, research, occupational training, employment, or other educational programs and activities. For example (and without limitation), subject to exceptions

described in this regulation, Title IX prohibits a recipient from discriminating on the basis of sex in: student admissions, scholarship awards and tuition assistance, recruitment of students and employees, the provision of courses and other academic offerings, the provision of and participation in athletics and extracurricular activities, and all aspects of employment, including, but not limited to, selection, hiring, compensation, benefits, job assignments and classification, promotions, demotions, tenure, training, transfers, leave, layoffs, and termination. See North Haven, 456 U.S. at 521 (stating that Title IX "must [be] accord[ed] . . . a sweep as broad as its language" to realize goals of eliminating discrimination and promoting equal opportunity); Cannon v. University of Chicago, 441 U.S. 677, 709 (1979) (concluding that an implied private right of action was necessary for Title IX's full enforcement); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992)¹ (concluding that sexual harassment violates Title IX's proscription against sex discrimination). Of course, Title IX prohibits discrimination on the basis of sex in the operation of, and benefits provided by, education and training programs conducted by noneducational institutions, including prisons, museums, job training institutes, nonprofit organizations, and other entities as well.

It should be noted that we have retained sections from the ED regulation that impose deadlines for action by recipients. For example, section _____.3 includes a deadline for educational institutions to conduct a self-evaluation and section _____.16 includes a timetable for completion of transitions by an educational institution eliminating its single-sex status. We have included these and other provisions to allow for the possible but rare instance where such sections may continue to be relevant for certain recipients. If a recipient of assistance from a participating agency also receives funding from ED or another agency with an existing Title IX regulation, however, the deadlines, as interpreted by the ED or other agency's regulation, as applicable, continue to govern. Further, to the extent a recipient has conducted an evaluation or established procedures to conform to the ED or another agency's Title IX regulation, the recipient need not repeat such action in order to conform to the regulations adopted by the participating agencies. For example, if a recipient has established grievance procedures, it need not modify such procedures or establish other procedures to comply with these regulations in the absence of guidance or instructions from a participating agency that modification or other action is necessary. Similarly, if a recipient already has conducted a self-evaluation under Title IX, it need not conduct a new self-evaluation as a result of receiving funds from a participating agency, but need only take action if such evaluation or implementation is found to be incomplete or not in compliance with the regulations.

¹ See Office for Civil Rights, Dep't of Educ., Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).

Subpart A sets forth definitions as well as provisions concerning remedial action and affirmative action, required assurances, adoption of grievance procedures, and notification of nondiscrimination policies. The effect of State and other laws and other requirements is also explained.

The definition of "educational institution," which in turn refers to a "local education agency," has been modified to be consistent with the recodification of "local education agency."

In addition, it should be understood that the definition of "federal financial assistance," which remains unchanged from the ED regulation (and is consistent with agencies' regulations implementing Title VI and Section 504 of the Rehabilitation Act of 1973, as amended), includes a "contract . . . *that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.*" See § __.2. "Federal financial assistance" does not include a direct procurement by the Federal government to obtain supplies and/or services for its own use and benefit that does not contain a subsidy. A procurement or contract negotiated at fair market value, or even above, is not Federal financial assistance. Such a contract does not have "as one of its purposes the provision of assistance." Further, the reference in the definition of "Federal financial assistance" to "agreements" includes "cooperative agreements" by agencies.

Two matters should be noted with respect to assurances. First, the method or practice of awarding Federal financial assistance varies among the participating agencies. Some, but not all agencies, require a formal application for Federal assistance prior to any award, and such applications will contain the assurances required, including as required by § __.4 of the proposed regulation. Other agencies award assistance through instruments where the formal agreement or contract of assistance is the only document executed by the recipient. In the latter instance, the agreement or contract will include, as a condition of the award, the required assurances of § __.4. The presence of an assurance in a contract, agreement, or document other than "application," wherein the execution of such document includes the assurance of compliance as a condition of the award, satisfies § __.4. Second, in order to maintain consistency among agencies regarding the text of the assurance for compliance with Title IX, without regard to the specific document in which it is contained, we modified § __.4(c) to include the text of the assurance.

Subpart B addresses the scope or coverage of Title IX. Subject to specific exceptions for institutions or activities, any educational program or activity, any part of which receives or benefits from Federal financial assistance, is subject to Title IX.

Modifications of ED's existing regulations to conform to the statutory amendments to Title IX are addressed in this subpart. Section __.12 is amended to

incorporate the expanded exemption for entities controlled by religious institutions. Under the CRRA, the exemption is no longer limited to educational institutions that are controlled by religious organizations with tenets contrary to Title IX. Instead, any educational operation of an entity may be exempt from Title IX due to control by a religious organization with tenets that are not consistent with the provisions of Title IX. See 20 U.S.C. 1687. Further, the exemption would apply to a particular education program operated by a recipient if this separate program is subject to religious tenets that are not consistent with Title IX. If a recipient has obtained an exemption from ED, such exemption may be submitted to another funding agency as a basis for an exemption from it.

While it is not expected that many educational institutions will have a transition plan, we have retained the text of sections ____ .16 and 17. In addition, the text of ____ .16 has been slightly modified to require that any transition plans be submitted solely to the Department of Education.

A new section, ____ .18, addresses all other statutory amendments. See 20 U.S.C. 1681(a)(7)-(9), 1687, 1688. Three exemptions to Title IX's coverage are identified in ____ .18(a) based on amendments passed in 1976. 20 U.S.C. 1681(a)(7)-(9). Congress exempts activities undertaken by the American Legion to operate Boys State, Girls State, Boys Nation, and Girls Nation, and any promotional activity or selection of participants for such programs by educational institutions. 20 U.S.C. 1681(a)(7). In addition, father-son and mother-daughter activities that are sponsored by educational institutions are similarly exempt from coverage, with the condition that if such activities are conducted, reasonably comparable activities must be provided for students of the opposite sex. 20 U.S.C. 1681(a)(8). Third, educational institutions may provide scholarships or other benefits to persons who participate in single-sex contests where personal appearance is a basis for reward, commonly referred to as "beauty pageants." 20 U.S.C. 1681(a)(9).

As part of the CRRA, Congress also added a definition of "program or activity." See 20 U.S.C. 1687. Congress took this action in order to reverse the meaning and consequences of the Supreme Court's decision in Grove City College, which defined "program or activity" in restrictive terms. 465 U.S. at 572-74; S. Rep. No. 100-64, at 11-16, reprinted in 1988 U.S.C.C.A.N. at 13-18. The Court concluded in Grove City College that Federal student financial assistance provided to a college established Title IX jurisdiction only over the college's financial aid program, not the entire college. Ibid. This interpretation significantly narrowed the prohibitions of Title IX and its counterparts, Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, et seq., the Age Discrimination Act of 1975, 42 U.S.C. 6101, et seq., and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794. See S. Rep. No. 100-64, at 2-3, 11-16, reprinted in 1988 U.S.C.C.A.N. at 3-4, 13-18.

By statutory amendment, and as set forth in ____ .18(b), Congress restored the broad interpretation accorded the phrase "program or activity" prior to Grove City College. The provision addresses the scope of coverage for four broad categories of recipients: State or local entities, educational institutions, private entities, and entities that are a combination of any of those groups. The scope of coverage is no longer limited to the exact purpose or nature of the Federal funding. If, for example, a State or local agency receives Federal assistance for one of many functions of the agency, all of the operations of the *entire* agency are subject to the nondiscrimination provisions of Title IX. 20 U.S.C. 1687(1)(A). Further, if the aid is distributed to an entity or unit of government that subsequently distributes the assistance to a second agency, the entire agency to which the assistance was initially allocated is subject to Title IX. See 20 U.S.C. 1687(1)(B); S. Rep. No. 100-64, at 16, reprinted in 1988 U.S.C.C.A.N. at 18. With respect to educational institutions, it is critical to remember that *all* of the operations of the institution, whether or not an operation is educational or academic in nature, are subject to Title IX's prohibition on discrimination. Thus, for example, housing programs, a shuttle service, food service, and other commercial operations are covered by Title IX if any part of the entity is a recipient of Federal funds. The degree of coverage of private entities, such as private corporations and partnerships, will vary depending on how the funding is provided, the principal purpose or objective of the entity, and/or how the entity is structured (e.g., physically separate offices or plants). All of the operations of private businesses that are principally engaged in education, health care, housing, social services, or parks and recreation are considered a "program or activity" for purposes of Title IX. 20 U.S.C. 1687(3)(A)(ii). S. Rep. No. 100-64 provides numerous other examples of the scope of coverage with regard to each category of recipient, and readers are referred to this material. S. Rep. No. 100-64, at 16-20, reprinted in 1988 U.S.C.C.A.N. at 18-22.

Finally, it is important to note that the restored, broad interpretation of "program or activity" does not in any way alter the requirement of 20 U.S.C. 1682 that a proposed or effectuated fund termination be limited to the particular program(s) "or part thereof" that discriminate(s), or, as appropriate, to all of the programs that are infected by the discriminatory practices. See S. Rep. No. 100-64, at 20, reprinted in 1988 U.S.C.C.A.N. at 22 ("The bill defines 'program' in the same manner as 'program or activity,' and leaves intact the 'or part thereof' pinpointing language.").

Third, ____ .18(c) reflects the "abortion neutrality" provision in the CRRA, commonly referred to as the Danforth amendment, which provides: "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 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.

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

² This provision is consistent with the Danforth amendment and congressional intent. 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. 242 (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); *id.* at 353 (statement of Sen. Wilson) ([The second sentence of the Danforth amendment] was language which 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. 2945 (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 2948 (statement of Rep. Edwards). *See also id.* at 2935 (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 2945 (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 2948 (statement of Rep. Edwards) ("Whether it be scholarships, promotions, extracurricular activities, student employment or any other benefits offered to students or employees, under title

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 provisions: ____ .21(c)(3), ____ .39, ____ .40(b)(4), and ____ .57(c).

It also should be noted that some agencies, based on other Federal laws, have promulgated regulations that similarly prohibit discrimination on the basis of sex in programs that receive Federal financial assistance. For example, the Department of Labor issued regulations at 20 C.F.R. part 34 to implement § 167 (the nondiscrimination provisions) of the Job Training Partnership Act, as amended (JTPA), 29 U.S.C. 1577. Section 167 prohibits discrimination on the basis of sex. Further, § 167(a)(1) specifically applies the prohibitions against sex discrimination found in Title IX. Therefore, to eliminate any confusion or duplication, the Department of Labor has determined that recipients of financial assistance under JTPA, by complying with § 167 and 29 CFR part 34, satisfy the obligation to comply with these Title IX regulations.

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 individuals differently because of his or her sex. Additional prohibitions of discrimination on the basis of parental and marital status are also identified.

Subpart D addresses nondiscrimination on the basis of sex in education programs and activities. Specific areas covered in this subpart are housing, access to course offerings, access to schools operated by local education agencies, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, consideration of marital and parental status, and athletics. The proposed regulations do not cover a recipient's use of particular textbooks or curricular materials. The time frames identified in section ____ .41(d), which address athletic programs, apply only if the recipient also does not receive funding from the Department of Education; otherwise, such recipient is expected to have complied within the time frames established by the ED regulation.

Subpart E covers the prohibitions of discrimination on the basis of sex in employment in educational programs and activities. Specific aspects of employment that are addressed include hiring and employment criteria, recruitment, compensation,

IX benefits cannot be withheld from a student or employees because she received or is seeking an abortion.").

job classification and structure, promotion and termination, fringe benefits, consideration of marital or parental status, leave practices, advertising, and preemployment inquiries as to parental and marital status. The subpart also includes a provision to exempt actions where sex is a bona fide occupational qualification. Section _____.56(b)(2), which concerns the provision of fringe benefits, is modified slightly in order to conform to principles established by the Supreme Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.. The Supreme Court has held that fringe benefit plans may not require higher contributions for women than for men to receive the same benefits. See City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978). Further, benefit plans may not provide lower benefits to women who made the same contributions as men. See Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983).

Subpart F addresses the agencies' respective procedures for implementation and enforcement of Title IX. Within 60 days of the publication of this regulation as a final rule, each agency will publish a notice in the *Federal Register* that identifies its respective programs that are covered by this regulation. Agencies will supplement or modify this notice, as appropriate, to reflect changes in coverage.

For those agencies that have regulations to implement Title VI, such procedures will be adopted and incorporated by reference. Titles VI and IX address discrimination in Federally assisted programs and have identical statutory enforcement schemes. The administrative enforcement procedures in Title VI regulations are virtually identical among the participating agencies, and differences are minor. For the Department of the Treasury, the specific text is set forth herein since it does not have a Title VI regulation. In addition, pursuant to Reorganization Plan No. 2 of 1977, the U.S. Information Agency (USIA) continues to be subject to, and incorporates, the Department of State's Title VI enforcement procedures, as set forth herein. See 43 Fed. Reg. 15371 (1978). Further, the Corporation for Community and National Service, which is the successor to ACTION, is subject to the Title VI regulations promulgated by ACTION. See National and Community Service Trust Act of 1993, Pub. L. No. 103-82, § 203(c)(2), 107 Stat. 785, 892; 45 CFR Part 1203. To the extent an agency has regulations, based on other statutes, that address nondiscrimination on the basis of sex in programs or activities that receive Federal financial assistance, such regulations remain in force and are not affected by this regulation.

Applicable Executive Orders and Regulatory Certifications

This regulation has been reviewed by the Equal Employment Opportunity Commission pursuant to Executive Order 12067.

This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The participating agencies have

determined that this rule is a "significant regulatory action" under Executive order 12866, § 3(f), Regulatory Planning and Review, yet it is not "economically significant" as defined in § 3(f)(1), and, therefore, the information enumerated in § 6(a)(3)(C) of the order is not required. Pursuant to Executive order 12866, this rule has been reviewed by the Office of Management and Budget.

The participating agencies have determined that this regulation is not a major rule as defined by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. All of the entities that are subject to these regulations are already covered by Title IX. While this regulation imposes standards of liability and requires that recipients establish grievance procedures and take other action, a substantial number of entities already are subject to other agencies' Title IX regulations that impose the same requirements. Accordingly, these regulations will not impose new obligations on many recipients.

This regulation enforces a statutory prohibition on discrimination on the basis of sex and, therefore, the participating agencies certify that no actions were deemed necessary under the Unfunded Mandates Reform Act of 1995. Furthermore, this regulation will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

The participating agencies, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), have reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities because all of the entities that are subject to these regulations are already subject to Title IX, and a substantial number of entities already are subject to the Title IX regulations of other agencies.

Paperwork Reduction Act of 1995

Section ____4 contains information collection requirements. As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), the Department of Justice, on behalf of the participating agencies, has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Assurances of compliance.

These regulations require applications for Federal financial assistance for an education program or activity to be accompanied by an assurance from the applicant or

recipient that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these regulations.

The public reporting and recordkeeping burden for this collection of information for all participating agencies is estimated to be _____ hours in order to read and complete the assurance form. This burden is incurred when an applicant or recipient completes an application for Federal financial assistance from a participating agency for the first time or if there is a break in continuity of assistance from such agency. It is estimated that approximately 25% of recipients seek assistance from more than one Federal agency; thus, the Department of Justice estimates that assurances would be required an average of 1.25 times rather than once, per recipient.

Based on data provided by all participating agencies, the estimated burden for reading and completing this form was calculated as follows:

Respondents	_____	
Responses	x	1.25
Hours per respondent	x	.25 (15 minutes)

Annual reporting burden	_____	

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, D.C. 20503; Attention: Desk Officer for U.S. Department of Justice.

The Department of Justice will consider comments by the public on this proposed collection of information in --

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the participating agencies, including whether the information will have a practical use;
- Evaluating the accuracy of the participating agencies' collective estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department of Justice or participating agencies on the proposed regulation.

Text of the Proposed Common Rule

The text of this common rule as proposed for amendment in this document appears below:

[PART/Subpart] ____--NONDISCRIMINATION ON THE BASIS OF SEX IN
EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING
FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A-Introduction

- § ____ .1 Purpose and effective date.
- § ____ .2 Definitions.
- § ____ .3 Remedial and affirmative action and self-evaluation.
- § ____ .4 Assurance required.
- § ____ .5 Transfers of property.
- § ____ .6 Effect of other requirements.
- § ____ .7 Effect of employment opportunities.
- § ____ .8 Designation of responsible employee and adoption of grievance procedures.
- § ____ .9 Dissemination of policy.
- § ____ .10 [Reserved]

Subpart B-Coverage

- § ____ .11 Application.
- § ____ .12 Educational institutions and other entities controlled by religious organizations.
- § ____ .13 Military and merchant marine educational institutions.
- § ____ .14 Membership practices of certain organizations.
- § ____ .15 Admissions.
- § ____ .16 Educational institutions eligible to submit transition plans.
- § ____ .17 Transition plans.
- § ____ .18 Statutory amendments.
- § ____ .19-20 [Reserved]

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

- § ____ .21 Admission.
- § ____ .22 Preference in admission.
- § ____ .23 Recruitment.
- § ____ .24-30 [Reserved]

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

- § ____ .31 Education programs and activities.
- § ____ .32 Housing.
- § ____ .33 Comparable facilities.
- § ____ .34 Access to course offerings.
- § ____ .35 Access to schools operated by LEAs.
- § ____ .36 Counseling and use of appraisal and counseling materials.
- § ____ .37 Financial assistance.
- § ____ .38 Employment assistance to students.
- § ____ .39 Health and insurance benefits and services.
- § ____ .40 Marital or parental status.
- § ____ .41 Athletics.
- § ____ .42 Textbooks and curricular material.
- § ____ .43-50 [Reserved]

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

- § ____ .51 Employment.
- § ____ .52 Employment criteria.
- § ____ .53 Recruitment.
- § ____ .54 Compensation.
- § ____ .55 Job classification and structure.
- § ____ .56 Fringe benefits.
- § ____ .57 Marital or parental status.
- § ____ .58 Effect of state or local law or other requirements.
- § ____ .59 Advertising.
- § ____ .60 Pre-employment inquiries.
- § ____ .61 Sex as a bona fide occupational qualification.
- § ____ .62-70 [Reserved]

Subpart F-Procedures

- § ____ .71 Notice of Covered Programs.
- § ____ .72-90 [Reserved]

Authority: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

Subpart A--Introduction

- § ____ .1 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), 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 these Title IX regulations. The effective date of these Title IX regulations shall be 30 days after publication of the final rule.

§ ____ .2 Definitions.

As used in these Title IX regulations, the term:

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.

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.

Applicant means one who submits an application, request, or plan required to be approved by an agency official, or by a recipient, as a condition to becoming a recipient.

Designated agency official means [to be inserted by agency].

Educational institution means a local educational agency ("LEA") as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined in this section.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the agency:

(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 that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Institution of graduate higher education means an institution that:

(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;

(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.

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 that certifies credentials or offers degrees, but that may or may not offer academic study.

Institution of professional education means an institution (except any institution of undergraduate higher education) that 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 Secretary of Education.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) that 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 full-time study.

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 that operates an education program or activity that receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

Student means a person who has gained admission.

Title IX means Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681-1688) (except sections 904 and 906 thereof), as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Pub. L. 94-482, 90 Stat. 2234, and by Section 3 of Pub. L. 100-259, 102 Stat. 28, 28-29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

Title IX regulations means the provisions set forth at [to be inserted by agency.]

Transition plan means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

§ ____ .3 Remedial and affirmative action and self-evaluation.

(a) Remedial action. If the designated agency official 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 designated agency official 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 that resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964-1965 Comp., p. 339.

(c) Self-evaluation. Each recipient educational institution shall, within one year of

the effective date of these Title IX regulations:

(1) Evaluate, in terms of the requirements of these Title IX regulations, 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;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that 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 completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§ ____ .4 Assurance required.

(a) General. Every application for Federal financial assistance for any education program or activity shall as a condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § ____ .3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official 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. (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient "will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: . . . Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681-1683, 1685-1688)." This text may be modified at the discretion of, or upon application by an agency and approval by, the Office of Management and Budget.

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§ ____ .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 that 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 §§ ____ .11 through ____ .20.

§ ____ .6 Effect of other requirements.

(a) Effect of other Federal provisions. The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended, 3 CFR, 1964-1965 Comp., p. 339; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) Effect of State or local law or other requirements. The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that 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 these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that 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 that receives or benefits from Federal financial assistance.

§ ____ .7 Effect of employment opportunities.

The obligation to comply with these Title IX regulations 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.

§ ____ .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 these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. 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 that would be prohibited by these Title IX regulations.

§ ____ .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 that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, 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 §§ ____ .21 through 30 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § ____ .8, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of these Title IX regulations or of the date these Title IX regulations first apply 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 that 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 (b)(1) of this section that 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 these Title IX regulations.

(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 shall require such representatives to adhere to such policy.

§ ____ .10 [Reserved]

Subpart B--Coverage

§ ____ .11 Application.

Except as provided in §§ ____ .11 through ____ .20, these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives or benefits from Federal financial assistance.

§ ____ .12 Educational institutions and other entities controlled by religious organizations.

(a) Exemption. These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) Exemption claims. An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ ____ .13 Military and merchant marine educational institutions.

These Title IX regulations do 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.

§ ____ .14 Membership practices of certain organizations.

(a) Social fraternities and sororities. These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), 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. These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) Voluntary youth service organizations. These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), 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.

§ ____ .15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) Administratively separate units. For the purposes only of this section, §§ ____ .16 and ____ .17, and §§ ____ .21 through ____ .30, each administratively separate

unit shall be deemed to be an educational institution.

(c) Application of §§ ____ .21 through ____ .30. Except as provided in paragraphs (d) and (e) of this section, §§ ____ .21 through ____ .30 apply to each recipient. A recipient to which §§ ____ .21 through ____ .30 apply shall not discriminate on the basis of sex in admission or recruitment in violation of such sections.

(d) Educational institutions. Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ ____ .21 through ____ .30 apply 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. §§ ____ .21 through ____ .30 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ ____ .16 Educational institutions eligible to submit transition plans.

(a) Application. This section applies to each educational institution to which §§ ____ .21 through ____ .30 apply that:

- (1) Admitted students of only one sex as regular students as of June 23, 1972; or
- (2) Admitted students of only 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 §§ ____ .21 through ____ .30 unless it is carrying out a transition plan approved by the Secretary of Education as described in § ____ .17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

§ ____ .17 Transition plans.

(a) Submission of plans. An institution to which § ____ .16 applies and that 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 Secretary of Education, a

transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education 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 § ____ .16 applies shall result in treatment of applicants to or students of such recipient in violation of §§ ____ .21 through ____ .30 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 § ____ .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 that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ ____ .18 Statutory amendments.

This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(a) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(b) "*Program or activity*" or "*program*" mean all of the operations of any entity described in paragraphs (b)(1)-(4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(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 that 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 that 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.

(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 that 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]

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

§ ____ .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 §§ ____ .21 through ____ .30 apply, except as provided in §§ ____ .16 and ____ .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 §§ ____ .21 through ____ .30 apply 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 that 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 that 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 §§ ____ .21 through ____ .30 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that 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 that so discriminates or excludes;

(3) Subject to § ____ .18(c), 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 these Title IX regulations.

§ ____ .22 Preference in admission.

A recipient to which §§ ____ .21 through ____ .30 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only 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 §§ ____ .21 through ____ .30.

§ ____ .23 Recruitment.

(a) Nondiscriminatory recruitment. A recipient to which §§ ____ .21 through ____ .30 apply 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 § ____ .3(a), and may choose to undertake such efforts as affirmative action pursuant to § ____ .3(b).

(b) Recruitment at certain institutions. A recipient to which §§ ____ .21 through ____ .30 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that 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 §§ ____ .21 through ____ .30.

§§ ____ .24 - ____ .30 [Reserved]

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

§ ____ .31 Education programs and activities.

(a) General. Except as provided elsewhere in these Title IX regulations, 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 that receives or benefits from Federal financial assistance. Sections ____ .31 through ____ .50 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ ____ .21 through ____ .30 do not apply, or an entity, not a recipient, to which §§ ____ .21 through ____ .30 would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in §§ ____ .31 through ____ .50, 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) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

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

(7) 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, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; Provided, that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that 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 that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that 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 activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

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

§ ____ .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 that provided by such recipient.

(2)(i) 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:

(A) Proportionate in quantity; and

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

(ii) A recipient may render such assistance to any agency, organization, or person

that provides all or part of such housing to students of only one sex.

§ ____ .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.

§ ____ .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 that do not have such effect.

(e) Portions of classes in elementary and secondary schools that 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 that may result in a chorus or choruses of one or predominantly one sex.

§ ____ .35 Access to schools operated by local education agencies (LEAs).

A recipient that 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.

§ ____ .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 that 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 that 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.

§ ____ .37 Financial assistance.

(a) General. Except as provided in paragraphs (b) and (c) 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 that 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 that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that 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 that require 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 paragraph (b)(1) of this section, 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 paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section 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) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § _____.41.

§ _____.38 Employment assistance to students.

(a) Assistance by recipient in making available outside employment. A recipient that 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 that discriminates on the basis of sex in its employment practices.

(b) Employment of students by recipients. A recipient that employs any of its students shall not do so in a manner that violates §§ _____.51 through _____.70.

§ _____.39 Health and insurance benefits and services.

Subject to § _____.18(c), 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 that would violate §§ _____.51 through _____.70 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ _____.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 that treats students differently on the basis of sex.

(b) Pregnancy and related conditions. (1) A recipient 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 as 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 that 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) Subject to § ____ .18(c), 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 that 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 that 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 as 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 that she held when the leave began.

§ ____ .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 a 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 these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) Equal opportunity. (1) A recipient that 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 designated agency official 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.

(2) For purposes of paragraph (c)(1) of this section, 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 designated agency official 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 that 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 that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary 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.

§ ____ .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.

§§ ____ .43 through ____ .50 [Reserved]

SUBPART E--DISCRIMINATION ON THE BASIS OF SEX IN EMPLOYMENT IN
EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

§ _____.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 that 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 that 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 §§ _____.51 through _____.70, 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 that 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 these Title IX regulations.

(b) Application. The provisions of §§ _____.51 through _____.70 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.

§ ____ .52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity that 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.

§ ____ .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 so discriminated in the past, 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 that 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 §§ ____ .51 through ____ .70.

§ ____ .54 Compensation.

A recipient shall not make or enforce any policy or practice that, 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 that are performed under similar working conditions.

§ ____ .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 that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § ____ .61.

§ ____ .56 Fringe benefits.

(a) "Fringe benefits" defined. For purposes of these Title IX regulations, "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 § ____ .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 that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

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

§ ____ .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 that 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. Subject to § ____ .18(c), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, 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 that 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 that 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.

§ ____ .58 Effect of state or local law or other requirements.

(a) Prohibitory requirements. The obligation to comply with §§ ____ .51 through ____ .70 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) Benefits. A recipient that 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.

§ ____ .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.

§ ____ .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 these Title IX regulations.

§ ____ .61 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ ____ .51 through ____ .70 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 that 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.

§§ ____ .62 - ____ .70 [Reserved]

SUBPART F--PROCEDURES

§ ____ .71 Notice of covered programs.

Within 60 days of the final publication of this Title IX regulation, the agency shall publish in the Federal Register a notice of the programs covered by this regulation. The agency shall periodically republish the notice to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the agency's office that enforces Title IX.

§§ _____.72- _____.90 [Reserved]

[NOTE: see agency adoption of common rule for text specific to each agency.]

1/12/98

Draft Executive order summary:

Introduction (pages 1-3):

Identifies "coverage gap" for federally conducted v. federally assisted programs, addresses promotion of economy and efficiency (with respect to coverage for contractors).

Section 1, Statement of policy (pages 4-5):

Protections for all persons, not just citizens, for identified programs in US, territories, possessions, and DOD schools overseas (no other coverage for overseas programs).

Section 2, Definitions (pages 5-6)

Definitions by example of "education and training programs;" authority of Attorney General to expand on definition in subsequent regulations.

Section 3, Application to contractors (pages 6-8)

Application to contracts that exceed \$100,000 that include training and education programs for persons other than the contractor's employees (in accordance with FASA, which limits many requirements to contracts that exceed \$100,000).

Summary contract clause identified; Attorney General has the authority, with the FAR Council, to identify other provisions for contracts.

(Penalties identified in Sec. 5, p.11)

Section 4, Exemptions (pages 8-9)

Executive order has no impact on statutes that limits participation in programs on the basis of race, color, national origin, or sex, or an "otherwise lawful affirmative action plan."

Allowance for BIA-run education programs that are in conformance with tribal custom.

No application to selections by entities other than Federal agencies and their contractors regarding who participates in Federal training programs.

Section 5, Administrative enforcement (pages 9-11)

Complaints may be filed with each agency for investigation.

If there is a finding of a violation, a report is shared with the appropriate agency official to review for potential

disciplinary action. The report may include recommendation of remedial and/or corrective action.

Specific denial of remedial relief in monetary form.

If noncompliance by a contractor, penalties may be imposed, including termination of the contract, refusal for future contracts, or other actions as deemed appropriate.

Section 6, Implementation (page 11-13)

Attorney General to issue regulations or policies in 6 months.

Agencies to establish procedures to handle complaints within 3 months of DOJ guidance.

Agencies to cooperate with DOJ, DOJ to provide assistance as requested.

Section 7, Annual Reports (page 13-14)

Annual reports on complaints and resolution by agencies to DOJ for first 3 years; subsequently every 3 years.

Section 8, General Provisions (page 14)

No interference with coordination authority under EO 12250.

No addition, modification, subtraction to rights of persons under Title VII.

No addition, modification, subtraction to rights of persons subject to the Uniform Military Code of Justice.

Section 9, Judicial review (pages 14-15)

No rights under Contract Disputes Act, no private right of action, recognize right under APA only.

Draft 12/30/97

Executive Order _____

Nondiscrimination on the Basis of Race, Color, National Origin,
and Sex in Federally Conducted Education and Training Programs

Numerous civil rights laws, including Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d, et seq., and Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681, et seq., prohibit discrimination on the basis of race, color, national origin, and sex, in educational programs and activities that receive Federal financial assistance. In addition, other Federal laws, including Title VII of the Civil Rights Act of 1964, as amended (Title VII), prohibit discrimination against employees by employers on the basis of race, color, national origin, sex, and other grounds with respect to, among other things, opportunities for and participation in education and training programs. The Federal government has acted, and will continue to act, aggressively through litigation, policy guidance, outreach, and other means to expand and ensure equal opportunities for minorities and women that participate in State, local, and private education programs that receive Federal financial assistance.

In addition to providing Federal assistance to various education and training programs, the Federal government *itself* conducts numerous education and training programs. For example, the Department of Defense operates schools for grades kindergarten through high school to educate the dependents of

service members and others in the United States and around the world. The Department of Interior also operates schools, kindergarten through the undergraduate level, to educate Native Americans. Many agencies also provide training on Federal laws and regulations to a variety of audiences in a variety of settings: formal academies teach state and local personnel principles, laws, techniques, and strategies relating to effective law enforcement; seminars instruct members of select industries on Federal requirements for licensing and operation; programs in prisons train Federal inmates on trade skills; and members of the public are educated about the environment and natural resources.¹

I believe it is essential that the Federal Government hold itself to the same principles of nondiscrimination in educational opportunities that we now apply to education programs and activities of State and local governments and private institutions receiving Federal financial assistance.² Existing laws and regulations prohibit certain forms of discrimination in Federally conducted education and training programs -- including discrimination against people with disabilities (prohibited by the Rehabilitation Act of 1973, as amended), and discrimination based on race, color, national origin, sex, or religion against

¹ Other programs, particularly those that may be more questionable or controversial on coverage, could be described here to show the intent for coverage.

² This sentence is from the President's June 17, 1997, memo.

Federal employees (prohibited by Title VII).³ Through this Executive order, we are now expanding prohibitions of discrimination on the basis of race, color, national origin, and sex to certain other Federally conducted education and training programs and activities.

Furthermore, stability is an essential element of economy and efficiency. Discriminatory practices cause interruption, loss of productivity, inefficiency, instability in the work environment, and interference with the learning process, and, thus, disrupt the orderly delivery of services.

NOW, THEREFORE, to promote economy and efficiency in government procurement of supplies and services⁴, to enforce the Constitution and laws of the United States, and to achieve equal opportunity in federally conducted education and training programs, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including section ___ of title __, United States Code⁵; sections 471, et seq., including section 486, title 40, United States

³ This sentence is slightly modified from text of the President's June 17, 1997, memo.

⁴ Several Executive orders that impose obligations on contractors begin with a narrative of how such action (e.g., publication of environmental actions, compliance with immigration law provisions, hiring of displaced workers, etc.), will ensure a more stable procurement program with the government, and therefore promote economy and efficiency. See Exec. Order No. 12,969, 3 C.F.R. 403 (1995 Comp.) (Federal Acquisition and Community Right-to-Know); Exec. Order No. 12,933, 3 C.F.R. 927 (1994 Comp.) (Nondisplacement of workers on follow-on contracts).

⁵ This is the citation for the establishment of DOD's domestic and overseas school programs.

Code⁶; section 7301, title 5, United States Code⁷; and section 301, title 3, United States Code, it is hereby ordered as follows:

Section 1. Statement of policy on education programs and activities conducted by executive departments and agencies.

1-101. No individual shall, on the basis of race, color, national origin or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in⁸ an education or training program or activity of any Executive department or agency⁹ conducted in the United States, the territories, the possessions, the Commonwealths of Puerto Rico and of the Mariana Islands, and as set forth in Subsection 1-102.

⁶ This is the authority for Exec. Order No. 11,246's coverage of contractors, although it is not specifically cited in the order.

⁷ This is the authority to govern conduct of federal employees.

⁸ The phrase "be denied the benefits of, . . . be subject to," is the operating text of Title VI, Title IX, and Section 504 of the Rehabilitation Act.

⁹ See subsection 8-803, which addresses independent agencies. As an alternative, we may consider using specific definitions of "agency" and "independent agency," based on 42 U.S.C. § 3502, Paperwork Reduction Act, to distinguish who is/is not covered. Other orders cite to 5 U.S.C. § 105, which defines Executive agencies as "an Executive department, a Government corporation, and an independent establishment." It is doubtful that § 105 can be utilized for this order.

1-102. The provisions of this Order shall apply to education programs and activities that are operated by the Department of Defense Dependents Schools.¹⁰

Section 2. Definitions.

2-201. "Program or activity" includes programs or activities conducted, operated, administered, or undertaken by an executive department or agency, or by a contractor to an executive department or agency in carrying out its Federal contract.¹¹

2-202. "Education and training programs" include, but are not limited to, formal schools, extracurricular activities, academic programs, occupational training, scholarships and fellowships, student internships, training for industry members, summer enrichment camps, and programs to train teachers.

2-203. The Attorney General is delegated authority to determine the scope of education and training programs, in addition to those identified in subsection 2-202 and section 4, that are subject to and exempt from coverage by this order, respectively.

2-204. "Contractor" means an entity that has submitted the

¹⁰ Training programs conducted overseas that are solely for foreign nationals, including law enforcement and anti-terrorism training, will not be covered by this Executive order.

¹¹ Exec. Order No. 12,892, which addresses fair housing in federally assisted and conducted activities, defines "program or activity" as follows: ". . . shall include program and activities operated, administered, or undertaken by the Federal government, [federally assisted programs], and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions)." 3 C.F.R. 849 (1994 Comp.).

successful bid or proposal in response to a competitive [acquisition] solicitation."¹²

Section 3. Application to certain contractors of executive departments and agencies.¹³

3-301. Each executive department and agency shall, [to the maximum extent practicable], include in contracts expected to equal or exceed \$100,000, with the contractors described in subsection 3-302, the following clause:

COMPLIANCE WITH EXECUTIVE ORDER _____

"Consistent with the efficient performance of this contract, the contractor shall comply with the terms of this order, and any implementing regulations, rules, policies, or

¹² This definition is from Exec. Order No. 12,969, Acquisition and Community Right-to-Know. An alternative definition from another Executive order is: "'Contractor' shall have the meaning as defined in subpart 9.4 of the Federal Acquisition Regulation."

¹³ There are numerous issues associated with coverage of contractors, including the Federal Acquisition Streamlining Act (FASA) and rulemaking procedures associated with the Federal Acquisition Regulations (FAR). In addition, there is tremendous variation among Executive orders that affect contracting; some require consultation with the Federal Acquisition Regulation Council before development of contract clauses (Exec. Order No. 12,933), some include specific contract provisions or requirements within the text of the order (Exec. Order No. 12,969), others identify policy yet specifically state there will be no contract clause developed (Exec. Order No. 12,989). As a result, the enforcement mechanisms and sanctions for violations vary significantly.

The format of Section 4 is a compilation of Exec. Order No. 12,969, Acquisition and Community Right-to-Know, which has an elaborate scheme for requirements on acquisition contracts, and Exec. Order No. 12,933, which concerns right of first refusal with respect to follow-on maintenance/custodial contractors.

guidance. If it is determined by an agency, pursuant to regulations, rules, policies, or guidance issued by the Attorney General, that the contractor is not in compliance with the requirements of this clause or any implementing regulations, rules, policies, or guidance, appropriate sanctions may be imposed and remedies invoked against the contractor, as provided in Executive Order ____ and its implementing regulations, rules, policies, or guidance."

3-302. Contractors subject to the eligibility criterion described in subsection 3-301 above are those who conduct, in the performance of their contracts with executive departments and agencies, education or training programs for individuals other than their own employees.¹⁴

3-303. As consistent with Title IV of the Federal Acquisition Streamlining Act of 1994, Public Law 103-355, and section 4(11) of the Office of Federal Procurement Policy Act, 41 U.S.C. 403(11), the requirements of this order are only applicable to

¹⁴ As currently drafted, all contracts that exceed \$100,000 would include this phrase, for subsequent determination as to whether they in fact conduct education programs subject to this order.

It appears that the largest contingent of contractors that could be subject to this order are the "Management and Operating (M&O) contractors" that operate the national laboratories for the Department of Energy. While as a percentage of total operating budget this is minimal, I would estimate at least a couple million dollars are spent on programs in community schools, internships, direct fellowships, etc. It should be noted that Energy assert that training provided by its contractors for its respective employees should not be covered by the EO. The text of subsection 3-302 accommodates this view.

competitive acquisition contracts expected to equal or exceed \$100,000.¹⁵

3-304. The Attorney General, in consultation with the Federal Acquisition Regulation Council, may identify additional provisions to be included in contracts subject to this order.¹⁶

Section 4. Exemptions from coverage.

4-401. The provisions of this Order do not apply to _____
[military programs.]

4-402. This Order does not apply to, affect, interfere, or modify in any way the operation of any otherwise lawful affirmative action plan.

4-403. An individual shall not be deemed subjected to discrimination by reason of his or her exclusion from the benefits of a program limited by federal law to individuals of a particular sex, race, color, or national origin, including Native American or Alaska native, different from his or hers.¹⁷

4-404. This Order does not apply to programs and activities conducted by the Department of Interior, Bureau of Indian Affairs, that are in conformance with tribal customs or otherwise

¹⁵ This sentence is duplicative of text included in Exec. Order No. 12,969.

¹⁶ The regulations issued for Exec. Order No. 12,933 include provisions to be incorporated in contracts that are in addition to a specific clause stated in the EO itself.

¹⁷ This text, with slight modifications, was proposed by the Department of Interior (DOI). DOI's proposed text referred specifically to "Indians, natives of certain territories, and Alaska natives." This sentence is also very similar to text of ED's Title VI provision, 34 C.F.R. 100.3(d).

culturally appropriate. For example, classes that require separation of students on the basis of gender in order to conform to tribal customs that require such separation would not be in violation of this order.

4-405. This order does not apply to the selection process utilized and/or decisions made by any entity *other than* the executive department or agency, or a contractor, regarding who may attend or participate in an education or training program conducted by an executive department or agency, or a contractor.

Section 5. Administrative enforcement.

5-501. Any person who believes him or herself, or any specific class of individuals, to be aggrieved by a violation of this order or implementing regulations, rules, policies, or guidance, may, by him or herself or a representative, file a written complaint with the agency that such person believes is in violation of this order or implementing regulations, rules, policies, or guidance. Pursuant to procedures established by the Attorney General, each executive department or agency shall conduct an investigation of a complete complaint alleging a violation by one of its employees or contractors.

5-502. (a) If the office within an executive department or agency that is designated to investigate complaints for violations of this order or its implementing rules, regulations, policies, or guidance concludes that an employee has not complied with this order or any implementing rules, regulations, policies, or guidance, such office shall refer a copy of the report and

findings, and supporting evidence to an appropriate agency official. The appropriate agency official shall review such material and determine what, if any, disciplinary action is appropriate.

(b) In addition, the designated investigating office may provide appropriate agency officials a recommendation for any corrective and/or remedial action. The appropriate officials shall consider such recommendation and implement corrective and/or remedial action by the agency, when appropriate. Nothing in this order authorizes monetary relief to the complainant as a form of remedial or corrective action by an executive department or agency.

5-503. Any action to discipline an employee who violates this order or its implementing rules, regulations, policies, or guidance (including removal from employment, if appropriate), shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act (Civil Service Reform Act of 1978, Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1111, see Tables for classification.)¹⁸

5-504. If the designated office within an executive department or agency concludes that a contractor to the executive department or agency has not complied with this order or any implementing rules, regulations, policies, or guidance, such office shall

¹⁸ This sentence, apart from parenthetical reference to "employment" rather than "service," is verbatim from Exec. Order No. 12,564, 3 C.F.R. ____ (1986?), reprinted in 5 U.S.C. § 7301 app. (1986) (Drug-free Federal Workplace).

endeavor to end and remedy such violation by informal means, including conference, conciliation, and persuasion. In the event of failure of such informal means, the executive department or agency, in conformity with implementing rules, regulations, policies, or guidance, shall impose sanctions including, but not limited to:

- a. cancellation or termination of contracts with such contractor;
- b. refusal to enter into future contracts with such contractor until it is satisfied that the contractor will comply with the rules, regulations, and procedures issued or adopted pursuant to this order;
- c. any other action as may be appropriate.¹⁹

Section 6. Implementation and Agency Responsibilities.

6-601. Within 180 days of the issuance of this order, the Attorney General shall publish in the Federal Register such rules, regulations, policies, or guidance²⁰, as deemed appropriate by her, to be followed by all executive departments and agencies.²¹ The Attorney General shall address:

¹⁹ Exec. Order No. 12,933 allows for debarment of the contractor for 3 years for a failure to comply with an agency order or a "willful violation."

²⁰ Exec. Order No. 12,969, community right to know, requires that EPA issue "guidance" to be published in the Federal Register.

²¹ Depending on resolution of the form of subsequent material, this phrase and Sections 5-504 and 6-602 may be modified to refer to agencies' promulgation of regulations.

- a. the scope of education programs and activities subject to and exempt from coverage by this order, in addition to those identified in Sections 2 and 4;
- b. examples of discriminatory conduct;
- c. applicable legal principles;
- d. provisions to be included in contracts;
- e. enforcement procedures with respect to complaints against employees and contractors;
- f. remedies;
- g. requirements of an agency's annual report as set forth in Section 7;
- h. and such other matters as deemed appropriate.

~~The Attorney General may, at such times as deemed appropriate by her, issue supplemental rules, regulations, policies, or guidance on implementation of this order.~~

6-602. Within 60 days of the publication of final rules, regulations, policies, or guidance by the Attorney General, each executive department and agency shall establish a procedure to receive and address complaints regarding its federally conducted education and training programs activities, and education and training programs and activities of its contractors.²² Each executive department and agency shall take all necessary steps to effectuate any subsequent rules, regulations, policies, or

²² Many Executive orders include delegation of lead authority to one agency, with the obligation that others follow such instructions or issue regulations subject to approval of the lead agency.

guidance issued by the Attorney General within 60 days of issuance.

6-603. The head of each executive department and agency shall be responsible for ensuring compliance with this order.²³

6-604. Each executive department and agency shall cooperate with the Attorney General and provide such information and assistance as the Attorney General may require in the performance of the Attorney General's functions under this order.²⁴

6-604. Upon request and to the extent practicable, the Attorney General shall provide technical advice and assistance to executive departments and agencies to assist in full compliance with this order.²⁵

Section 7. *Annual Report.*

7-701. Consistent with the regulations, rules, policies, or guidance issued by the Attorney General, each executive department and agency shall submit to the Attorney General a report that summarizes the number and nature of complaints filed with the agency and the disposition of such complaints. Such reports shall be submitted annually for the first three years after the effective date of this order, and submitted within 60

²³ This sentence is in Exec. Order No. 12,898 (Environmental justice) and other executive orders.

²⁴ Identical language can be found in Exec. Order No. 12,969 (Acquisition and community right-to-know), and others.

²⁵ Identical language is included in Exec. Order No. 12,969 (contracting and community right-to-know), 1995 comp., p. 406; similar language is in Exec. Order No. 12,892, Sec. 3-303(a) (Fair housing).

days of the end of the preceding year's activities.²⁶

Subsequently, reports shall be submitted every three years, within 90 days of the end of each 3 year period.

Section 8. *General Provisions.*

8-801. Nothing in this order shall limit the authority of the Attorney General to provide for the coordinated enforcement of nondiscrimination requirements in Federal assistance programs under Executive Order No. 12250.

8-802. Nothing in this order amends, supplements, or subtracts from an employee's protections and remedies under Title VII of the Civil Rights Act of 1964, as amended.

8-803. ~~Independent agencies are requested to comply with the provisions of the order and implementing regulations, rules, policies, or guidance.~~

Section 9. *Judicial Review.*

9-901. This order creates no rights under the Contracts Disputes Act, and disputes regarding the requirement of the contract clause shall be disposed of only as provided by the Attorney General in regulations, rules, policies, or guidance issued by the Attorney General.²⁷ This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order

²⁶ Several Executive orders require that annual reports be submitted.

²⁷ This sentence stems from Exec. Order No. 12,933.

is not intended, however, to preclude judicial review of final decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701, et seq.²⁸

²⁸ The text of the last two sentences can be found in Exec. Order No. 12,969 and Exec. Order No. 12,989. Similar text is contained in Exec. Order No. 12,933.



FORCE MANAGEMENT
POLICY

ASSISTANT SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000



AUG 25 1997

Ms. Merrily A. Friedlander
Chief, Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
1425 New York Avenue, NW, Room 4013
Washington, DC 20035-5968

Dear Ms. Friedlander:

This is an interim response to the memorandum of July 14, 1997, from the Acting Assistant Attorney General for Civil Rights concerning an inventory of Federally conducted education and training programs.

Not all of the information being provided to you is in the format requested by Ms. Pinzler, as some Department of Defense (DoD) organizational elements do not store their data in a way which permits rapid reconfiguration. In some instances, data you requested is not available in any existing data base, but is in the process of being collected.

We are aware of 22 institutions and programs of higher education and professional development within the Department of Defense which were identified in a previous survey of DOD educational institutions and programs. However, we do not have available specific program description information which would clarify the exact nature of these programs. Although these programs do appear to admit civilians, including non-DoD civilians, the intent of the program seems to be to train DoD military personnel. Evidently, non-DoD personnel can be included on a space-available basis, as a courtesy to other U.S. or state and local governmental agencies, or to employees of other national governments. Even though we do not know the exact scope or content of any proposed Title IX issuance, we are concerned that identifying such programs as being covered under Title IX could result in the institutions or programs refusing to accept non-DoD personnel in order to avoid inclusion. We plan to do further investigation into the exact nature of such programs, but estimate that we will be unable to provide you with appropriate information until September 30, 1997.

We have also become aware of over 260 science, mathematics, and engineering education programs which fall under the policy and program oversight responsibility of the Director, Defense Research and Engineering (DDR&E). The existing DDR&E data base, however, does not contain FY 97 funding levels, an accurate description of all programs, or identification of program authorities or policies. Since student information is not currently available, we would prefer not to identify these programs until we can ensure that they meet your inventory criteria. Descriptions of a subset of these programs, however, are available at the DDR&E website



(<http://www.acq.osd.mil/ddre/edugate/>) and we have placed a hard copy of that information at Tab A. Please note that this information covers programs actually conducted by all three Military Departments as well as several Defense Agencies. Therefore, some of the programs identified may be listed again in the report from the DoD Component which actually conducts the program. The DDR&E is already collecting information on program authorities, based upon a post-Adarand Department of Justice data request, but it will be unavailable until the end of October. Actual FY 97 and projected funding information will also be available at that time.

At Tabs B-J are responses from the Department of the Army, Department of the Navy, Defense Commissary Agency, Defense Intelligence Agency, Defense Investigative Service, Defense Logistics Agency, Department of Defense Education Activity, National Security Agency, and Washington Headquarters Services. The Department of the Air Force, Army and Air Force Exchange Service, Defense Contract Audit Agency, Defense Finance and Accounting Service, Defense Information Systems Agency, Defense Special Weapons Agency, and the On-Site Inspection Agency report no education programs which meet the inventory criteria. We have yet to receive replies from the Ballistic Missile Defense Organization, DoD Inspector General, and the National Guard Bureau.

The National Imagery and Mapping Agency (NIMA) has identified six education programs. Participation in all six programs is limited to NIMA employees, but not all NIMA employees are DoD employees. We are concerned about including information in a DoD report that affects employees of a non-DoD intelligence organization. It would be our preference not to identify these programs since all participants are U.S. Government employees.

We anticipate being able to provide missing DoD Component reports to you by August 29, 1997. It is suspected, however, that there may have been some education programs which may still have been missed, just as there have been some reported twice in the attached information. For example, we believe that there may be covered programs in the Joint Staff, Under Secretary of Defense (Policy), Under Secretary of Defense (Comptroller), and the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence).

Therefore, an additional internal survey will be initiated, and we hope to be able to share those results with you by September 19, 1997. As mentioned earlier, expanded and updated DDR&E information will not be available until October 31, 1997.

As requested in the July 14th memorandum, we have tried to err on the side of inclusiveness. However, we have excluded all training programs for military personnel and current civilian employees. Should you have any questions or concerns regarding the attached information, please contact Jerry Anderson, Office of the Deputy Assistant Secretary of Defense (Equal Opportunity), by telephone at (703) 695-0105, by facsimile at (703) 695-4619, or by e-mail at andersoj@pr.osd.mil.

Thank you for your cooperation in this most important matter.

Sincerely,

F. Pang, Acting

Attachments:

As stated

cc (with attachments): DGC (P&HP), DoD

Index

Tab

Organization

A	Director, Defense Research & Engineering oversight programs
B	Department of the Army
C	Department of the Navy
D	Defense Commissary Agency
E	Defense Intelligence Agency
F	Defense Investigative Service
G	Defense Logistics Agency
H	Department of Defense Education Activity
I	National Security Agency
J	Office of the Secretary of Defense, Director for Administration and Management

DEPARTMENT OF THE ARMY

Name of Program	1997 Funding Level	Number and Type of Participants	General Description of Program	Authority, Policies, and Possible Impediments
[REDACTED]	[REDACTED]	[REDACTED] 97	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Jr. Reserve Officer Training Corps	\$85 Million	230,498 high school/secondary school students	JROTC is a citizenship-building program conducted by local school system in affiliation and partnership with the US Army.	Title 10 USC, DOD and DA policy There are no known impediments.

FORCE MANAGEMENT
POLICYASSISTANT SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

8 1 997 1997

Bill Lann Lee, Esquire
Acting Assistant Attorney General
Civil Rights Division
Washington, D.C. 20530

Dear Mr. Lee:

This letter responds to questions raised by your office regarding completion by the Department of Defense of its inventory of the civilian education programs or activities it conducts, in support of the President's initiative related to preventing discrimination in civilian education programs or activities conducted by the Federal Government. It also completes the inventory of civilian education programs or activities conducted by the Department of Defense.

The Department of Defense fully supports this initiative, as announced by the President. I and my staff on August 25 provided to you with an interim listing of those civilian education programs or activities conducted by the Department of Defense which meet the definition of "education program or activity" contained in the President's letter of June 17, 1997 and the guidance you provided in your letter of July 14, 1997. With the attached submissions from the National Guard Bureau and the Director, Defense Research and Engineering, you have my assurance, as requested by your staff, that the Department of Defense inventory listing now is complete. The survey referenced in our August 25 letter produced no additional civilian education programs or activities for inclusion in the inventory.

Since the question of scope appears to have resurfaced, however, let me take this opportunity to reiterate the views of the Department of Defense regarding this matter. It is our understanding that the President's initiative is intended to expand the scope of protection against discrimination based on sex, race, color and national origin to include civilian education programs and activities conducted by the Federal Government which are currently not covered by existing laws prohibiting such discrimination. Training and education programs conducted by this Department for military personnel, including training and education programs conducted by the Military Services, do not fall within this category.

The President's memorandum does not refer to or contemplate addressing education programs or activities whose primary purpose is to train military members, e.g. "military" training and education programs or activities, as opposed to "civilian" training and education programs and activities. My understanding is based on the President's June 17, 1997 memorandum (especially paragraph (1) on page 3) and on discussions between our respective offices and the White House, before the President's initiative was announced, over how best to handle the exclusion of these military education and training programs. We have used this



understanding in developing the inventory listing initially provided to your office in August and completed today.

It also is important to note that military personnel are not Department of Defense or Military Service "employees." Military personnel are subject to and protected by the Uniform Code of Military Justice (UCMJ) (10 U.S.C. chapter 47). They are individuals who have voluntarily enlisted or accepted appointment into the armed forces of the United States, thereby changing their status from "civilian" to "member of the armed forces" and subjecting themselves to military authority, including the potential for criminal prosecution under the UCMJ. Unlike "employees," they cannot unilaterally change their status or resign from their positions ("quit their jobs") at any time.

In addition, the armed forces, themselves, are based on a unique construct of command authority, known as the military chain of command, enforced through the UCMJ. Military members are both subject to and protected by the UCMJ. Conduct which prejudices the good order and discipline of the armed forces, including prohibited discrimination, already can be charged as a crime under the UCMJ. Continued maintenance of the good order and discipline among the armed forces dictates that they continue to have the exclusive authority and responsibility, through the command structure, to enforce prohibitions against discrimination, including those based on race, sex, national origin and color. Superimposing external structures on the armed forces in order to duplicate prohibitions against discrimination in military training and education programs is unnecessary and could significantly damage the military command structure.

Military training and education programs are governed generally and, in some cases, specifically, by statute, in particular title 10 of the U.S. Code. The purposes of these programs are often conceptually and substantively different than those of programs conducted for civilians, whether they are civilian Government employees or members of the public. Additionally, military training and education, particularly basic training, advanced individual training, advanced skills training, officer candidate training, and the senior service schools, are intended to teach and enhance skills which those entering the military do not possess, e.g., military discipline, military combat and combat support, and military command.

In addition to, and apart from, the matter of military training and education programs, I also would like to respond to the President's direction that the Department identify and describe those substantive and procedural issues which we anticipate might arise as a result an initiative to prohibit discrimination based on race, sex, color and national origin in Federally conducted civilian education programs and activities (as you further defined them in your July 14 letter). Initially, we note that this initiative could run counter in certain respects to Congressionally mandated preference programs, such as the National Security Agency's Undergraduate Training and Assistance Program and the Defense Intelligence Agency's Undergraduate Training Program. These programs, which require that preferences be accorded to certain minority groups, provide, *inter alia*, funding for the undergraduate education of individuals who will subsequently work in

certain fields for NSA and DIA. A Presidential executive order mandating that the Department not discriminate based on race, sex, color or national origin in these education and training programs might be read as conflicting with such requirements.

Your July 14 letter asked that, for purposes of this initiative, the Department of Defense list in its inventory of Federally conducted education and training programs its occupational training programs attended by any student who is not a Department of Defense employee, whether that student is an employee of other Federal agency, a State or local agency, or a member of the public. We are concerned that including internal Department of Defense education and training programs directed at Department of Defense civilian employees, which also may be open to some civilian employees of other agencies, could have a substantially negative impact on those programs. Since all Federal employees already have substantive statutory protections, their inclusion would not support the goal of the President's initiative of expanding the scope of protection against discrimination based on sex, race, color and national origin to include education programs and activities conducted by the Federal Government which are currently not covered by existing laws prohibiting such discrimination. It would provide, in effect, duplicative protections, with the potential for duplicative and, possibly, contradictory remedies.

We are concerned that, if the approach envisaged by the July 14 letter were adopted, organizations of the Federal Government, including the Department of Defense components, would close their education and training programs to civilian employees of sister agencies. This would deny all employees involved, both Defense and non-Defense personnel, the benefits and richness of experience that such joint training can provide. It also may force agencies which currently rely on these training and education programs to expend additional resources either to establish training programs of their own or to contract for training.

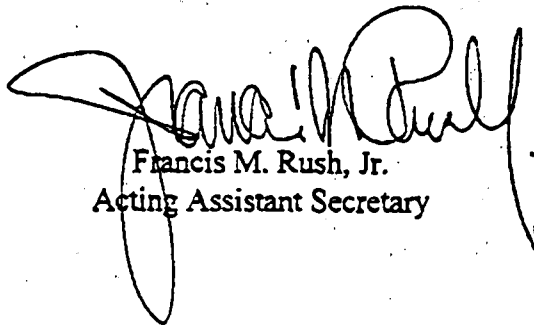
Alternatively, it may eliminate these training opportunities for outside employees all together. This would be particularly harmful for those communities of interest which cross Departmental and agency lines, such as the Intelligence Community, the Drug Enforcement community, and the Counter-Terrorism community. It would also run counter to current initiatives within these communities to foster joint training and educational opportunities in order to further broad Governmental objectives in each of these areas.

In sum, this Department fully supports the President's initiative to prohibit discrimination based on race, sex, color and national origin in Federally conducted civilian education and training programs, such as the Department of Defense Dependents Schools and the Department of Defense Domestic Dependent Elementary and Secondary Schools. We do not support changing the scope of this initiative to include military training and education programs. In addition, we have concerns regarding the potential conflict between an imprecisely drafted executive order and existing Congressional mandates for preferences for minorities in certain Department of Defense education programs. We also are concerned that inclusion of education and training programs established by the Department of Defense for its civilian employees that also are open to civilian employees of other Government agencies will have the effect of closing

training opportunities to those non-Defense employees, as well as running counter to other current initiatives that foster joint participation in training and education opportunities in various interdepartmental communities of interest within the Executive Branch.

The letter has been coordinated with the Office of the General Counsel of the Department of Defense.

Sincerely,

A handwritten signature in black ink, appearing to read "Francis M. Rush, Jr.", with a large, stylized flourish extending from the bottom left.

Francis M. Rush, Jr.
Acting Assistant Secretary

Attachment:

cc (with attachment):

General Counsel, DoD

David Ogden, Esquire

Counselor to the Attorney General

Loretta King, Esquire

Deputy Assistant Attorney General (Civil Rights)

Name of Agency: National Guard Bureau Counterdrug Directorate

Name of Program	FY 1997 Funding Level	Number and Type of Participants	General Description of Program	Authority, Policies, and Possible Impediments
Multijurisdictional Counterdrug Task Force Training (MCTFT)	\$3,824,000. Courses are provided tuition-free.	13,800 (E) Federal, State and Local Police Officers in Conventional Classes; 400 (E) in Law Enforcement Distance Learning and 25,000 (E) Drug Demand Reduction Community Coalition personnel.	To instruct Law Enforcement Officers to investigate and prosecute narcotic cases within a multijurisdictional counterdrug task force, and how to avail their agencies to military support resources.	Congressionally directed. MCTFT will not discriminate on the basis of race, color, religion, sex, age, national origin, marital status, or against any qualified handicapped individual, in its employment and/or admission practices and treatment of students.
National Interagency Civil-Military Institute (NICI)	\$3 Million. Courses are provided tuition-free.	867 (A) Federal, State and Local Police Officers, DoD personnel involved in the Counterdrug field, Drug Demand Reduction personnel and community coalitions.	Provide training to military and civilian leaders on the interagency processes required for effective military support to civil authorities thus enhancing the interoperability of the military with Federal, State and Local counterdrug operations, Demand Reduction Activities and Disaster/Civil Emergency Support.	32 USC 112. Students are admitted to courses provided by NICI without regard to their race, sex, color, religion, age, marital status or national origin.
Regional Counterdrug Training Academy (RCTA)	\$2,924,000. Courses are provided tuition-free.	2013 (A) State and Local Police Officers and DoD Counterdrug personnel.	Develop and provide Counterdrug Training to State, Local and Municipal Law Enforcement agencies, and to DoD personnel involved in Counterdrug activities.	Congressionally directed. Students are admitted to courses provided by RCTA without regard to their race, sex, color, religion, age, marital status or national origin.

Name of Agency: National Guard Bureau

Name of Program	FY 1997 Funding Level	Number and Type of Participants	General Description of Program	Authority, Policies and Possible Impediments
National Guard ChalleNGe Program	\$37,360,300	The program is conducted in 15 states and a maximum of 3642 students may enroll in the program per year. Nationwide, the program employees approximately 600 state employees.	The program provides military based training, supervised work experience in community services and conservation projects to civilian youth who cease to attend secondary school before graduating so as to improve skills and employment potential.	Currently, the authority for the program is 32 USC 501. The program complies with Title VII of the Civil Rights Act of 1964 and DOD regulations issued thereunder; Executive Order 11246 and Department of Labor regulations issued thereunder; Section 504 of the Rehabilitation Act of 1973 and DOD regulations issued thereunder; and The Age Discrimination Act of 1975.
National Guard STARBASE Program	\$3,394,000	The program is conducted in 14 states and territories with an approximate enrollment of 20,000 students per year. Nationwide, the program employs approximately 56 state employees.	The program is for youth kindergarten through grade 12 and is designed to expose classes and teachers of inner-city schools to real world applications of math and science through "hands on" learning, simulations and experiments in aviation and space related fields.	Authority for the program is Section 2193 of Title 10. The program complies with Title VII of the Civil Rights Act of 1964 and DOD regulations issued thereunder; Executive Order 11246 and Department of Labor regulations issued thereunder; Section 504 of the Rehabilitation Act of 1973 and DOD regulations issued thereunder; and The Age Discrimination Act of 1975.



U.S. Department of Justice

Civil Rights Division

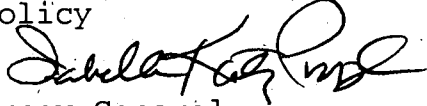
Office of the Assistant Attorney General

Washington, D.C. 20035

DEC 1 1997

MEMORANDUM FOR ROBERT L. WEINER
Senior Counsel
White House Counsel's Office

ELENA KAGAN
Deputy Assistant to the President
for Domestic Policy

FROM: Isabelle Katz Pinzler 
Acting Assistant Attorney General
Civil Rights Division

SUBJECT: Status of Activities on Title IX and Federally
Conducted Education Programs Initiative

The purpose of this memorandum is to provide an overview of our objectives and proposed timetable with respect to the President's initiative on Title IX and federally conducted education and training programs. In summary, it is our objective to publish a proposed regulation to enforce Title IX by 24 agencies and to submit a draft Executive order for review by the end of this year. Publication of the proposed regulation will be difficult to achieve in this time frame, however, unless there is substantial coordination and prompt attention by all of the participating agencies, the Office of Federal Register (OFR), the Department's Office of Legal Counsel (OLC), and the Office of Management and Budget (OMB). Therefore, after you have reviewed this memo, I would like to discuss with both of you how communication to involved agencies from either of your respective offices may help ensure that the remaining activities receive prompt attention, so that we can meet our December 31, 1997, publication goal. I will address activities concerning Title IX and the Executive order in turn.

Actions to Invigorate Title IX

1. Preparation of Notice of Proposed Rulemaking

Our primary effort with respect to the invigoration of Title IX of the Education Amendments of 1972 is the development of a regulation that will be promulgated by 24 agencies. We are preparing a common rule; thus, one document will be published in

the Federal Register by all participating agencies that will show the common text and agency adoptions. Agency adoptions include definitions and minor revisions that are unique to that agency and the agency's adoption, or approval of, the text of the common rule.

Thus far, we have drafted the text of the notice of proposed rulemaking (NPRM), and obtained comments from the Department of Education (ED) and the Equal Employment Opportunity Commission (EEOC). The EEOC has authority to review the NPRM pursuant to Executive order 12067 and we solicited ED's opinions since our proposal is based on their Title IX regulation. We also have obtained preliminary comments from OFR as to form.

In addition, on November 21 and 24, 1997, copies of the draft regulation and agency adoption forms were delivered to the 24 participating agencies. We asked that agencies provide comments and return the adoption forms to us by December 10, 1997. Our correspondence to agencies also solicited information that we need to complete forms for purposes of the Paperwork Reduction Act. We also provided a copy of the NPRM to OLC for review.

As explained more fully below, in order to publish the NPRM in the Federal Register, the following steps must be completed:

1. Return of agency adoption forms and comments from agencies, and comments from OLC;
2. Incorporation of edits from agencies and OLC;
3. Submission to OMB for review and approval; and
4. Submission to OFR for review and printing.

In order for OFR to publish the NPRM, OFR must receive the draft in proper form with agency adoptions that are signed by the designated official. In many cases, agencies have identified the head of the agency as the individual who must sign proposed regulations. I have enclosed a list of those individuals designated to sign the regulation for each of the participating agencies. As stated above, we are providing agencies approximately two weeks in which to review the draft regulation and return the signed adoption. The agencies have been notified orally of the proposed edits; thus, they have some expectation of the text of the document. While we notified agencies of our proposed deadline of December 10, 1997, our experience is that we do not always receive timely responses, particularly when materials must be reviewed by the head of the agency. The Thanksgiving holiday and the tight time frame raise the specter that we will not receive all material, notwithstanding best efforts.

We do not expect substantial edits from the agencies; however, we do need time to review their responses. OLC also has suggested that they may have substantive comments on certain provisions. Upon incorporation of edits and any changes from OLC, the material then will be submitted to OMB for review. Upon their approval, the document then may be submitted to OFR for review. Of course, OFR also needs time to review the document prior to publication. It is my understanding that they receive a substantial amount of material for review for publication by year's end beginning in mid-December and, if we receive approval from the other agencies in rapid fashion, we will be part of the rush by agencies for year-end publication.

2. Department of Interior Participation in NPRM

I also wish to bring to your attention a matter concerning the Department of Interior (DOI). While DOI has expressed its interest in participating in the common rule, they have not determined the full reach, or limits, of Title IX as it applies to its programs. Based on discussions among our staff and employees of DOI, it is our understanding that DOI is reviewing the applicability of Title IX to programs, particularly schools, operated by Indian tribes, and considering what impact tribal sovereignty has on the reach of Title IX. If DOI decides that Title IX is applicable to schools run by tribes, it is possible that language may need to be added to the proposed regulation to accommodate the influence of tribal customs on certain programs in these schools. Notwithstanding our requests that DOI state its views in writing, we have not received any material to date. I have attached to this memorandum a letter that I sent to DOI regarding this matter. In response to my letter, staff at DOI have orally informed us that DOI likely will be seeking an extension, until December 31, 1997, to report their views, in part because of the recent appointment of the Assistant Secretary of Indian Affairs. I also will solicit informal views from OLC.

Given the complexities of these issues, it is unclear when this matter will be resolved, and it is unclear what impact this will have on the NPRM. Nevertheless, DOI can participate in the common rule because it has other programs subject to Title IX. If we proceed with publication of the NPRM and subsequently it is decided that additional language is needed to address Indian programs, this matter will need to be addressed in a supplemental notice in the Federal Register.

3. Delegation Agreement

On November 21, 1997, we distributed to ED, and the Departments of Health and Human Services (HHS), and Veterans Affairs (VA) a draft 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. For example, 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 schools of medicine, dentistry, nursing, other 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. Similar agreements exist for Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, but only a few such agreements exist to date for Title IX. Upon receipt of comments from ED, HHS, and VA, we will prepare a revised draft for submission to the remaining participating agencies. Once a document has been agreed upon by the participating agencies, it will be published in the Federal Register. We do not expect the agreement to take effect until issuance of the final rule.

Actions Regarding the Executive Order

As you know, on September 30, 1997, members of the Civil Rights Division and the Office of Legal Counsel met with you to discuss various issues associated with collecting inventories from Federal agencies and drafting an Executive order. We received guidance on several of these matters shortly thereafter. Since then, we have made numerous contacts and received at least an initial submission from all agencies.

Unfortunately, the Department of Defense (DOD) has not completed its inventory of federally conducted education programs, nor has it submitted data regarding what constitutes "military" programs, despite an agreement that we would receive this material by October 29, 1997. As was discussed at our meeting, in order to identify exceptions or draw distinctions between "military" and "civilian" programs in the order, we need to know what programs fall within each category. It is my understanding that the DOD Office of General Counsel is preparing a memorandum on the issue of an exemption for "military" programs, separate from efforts by the Equal Opportunity office to collect the inventory data from the multiple DOD entities. Given the lack of responsive data from DOD, I believe it is necessary that your office intervene at this point.

In addition, at your request, we drafted an interim report with respect to receipt of agency inventories and preparation of the Executive order. A copy of this draft was submitted to both

of you for comment. We can modify one sentence to report that we have received responses from all agencies yet need supplemental data from a few. We await your comments prior to submitting this report to the Attorney General.

We are continuing to explore other matters associated with the Executive order. It is possible that another meeting to discuss issues will be helpful as we continue in this process. Of course, I will keep you informed as our work progresses.

Please feel free to contact me at (202)514-6715, or Lisalyn Jacobs at (202) 616-2732, to discuss these matters.

Attachments



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

NOV 24 1997

Mr. John Leshy
Solicitor
U.S. Department of Interior
1849 C Street, N.W.
Room 6351
Washington, D.C. 20240

Mr. John Berry
Assistant Secretary - Policy,
Management, and Budget
U.S. Department of Interior
1849 C Street, N.W.
Room 1063
Washington, D.C. 20240

Dear Mr. Leshy and Mr. Berry:

As part of President Clinton's initiative to reinvigorate the enforcement of Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq. (Title IX), the Department of Justice (DOJ) is preparing a common rule to enforce Title IX. Representatives of the Department of Interior's (DOI's) Solicitor's office and Office for Equal Opportunity (OEO) have attended meetings held on June 30 and September 30, 1997, hosted by DOJ's Civil Rights Division's Coordination and Review Section, that have addressed the proposed text of this regulation. In addition, members of these offices have engaged in numerous telephone conversations with DOJ staff regarding the common rule. I understand that DOI has decided to participate in the notice of proposed rulemaking (NPRM) of the common rule, and the purpose of this letter is to address an issue that is unique to DOI's participation. For reference, I have enclosed a copy of the draft notice and the text for your agency's adoption of this rule.

Over the last few months, during several discussions on the common rule with members of DOI's OEO and the Solicitor's Office, Division of Indian Affairs, and more recently with the Bureau of Indian Affairs, DOJ staff raised the issue of whether schools operated by Indian tribes are subject to Title IX. DOJ staff preparing the common rule explained our need to know DOI's views, in writing, on this matter given the upcoming publication of the NPRM. While we are no longer asking agencies to publish an appendix that identifies programs covered by the proposed rule, the application of Title IX to tribally run schools remains a matter that DOI and DOJ need to address. If it is decided that

Title IX does apply to such schools, we would like your views as to whether additional provisions are desired in order to accommodate any operations within such schools. It also would be helpful for us to know, prior to issuance of the NPRM, if DOI believes that this regulation does not reach such schools.

Please note that because DOI has many programs apart from tribally run schools that fall within the scope of Title IX, we do not foresee that this issue would prevent DOI from participating in the NPRM. Because this issue may require special provisions, however, and the process is further complicated if it is addressed after publication of the NPRM, we need your input so that we may resolve this matter as quickly as possible. I appreciate the complexities of this issue; however, in order for us to assess what impact this issue may have on the NPRM, and because of time constraints on publishing this notice, we are requesting a memorandum that states DOI's view on whether Title IX applies to tribally operated schools by December 10, 1997.

For your information, I also have enclosed a copy of a letter addressed to Ms. E. Melodee Stith, Director, Office for Equal Opportunity, which sets forth a summary of the regulation and various steps that must be taken in order to complete this notice for publication in the Federal Register.

If you have any questions regarding this matter, please contact Ms. Loretta King, Deputy Assistant Attorney General, at (202) 616-1278 or Ms. Jennifer Levin, an attorney who is coordinating the common rule, at (202) 305-0025.

Thank you for your assistance.

Sincerely,



for Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

Enclosures

cc: Ms. E. Melodee Stith
Director
Office for Equal Opportunity



U.S. Department of Justice

Civil Rights Division

Coordination and Review Section
P.O. Box 66560
Washington, DC 20035-6560

NOV 24 1997

Ms. E. Melodee Stith
Director
Office for Equal Opportunity
U.S. Department of Interior
1849 C Street, N.W.
Mailstop 5221
Washington, D.C. 20240

Dear Ms. Stith:

I have enclosed for your review a draft notice of proposed rulemaking (NPRM) of a common rule prepared by the Department of Justice to implement Title IX of the Education Amendments of 1972, and the text for your agency's adoption of this rule.

Set forth below is a summary of the regulation and various steps that must be taken in order to complete this notice for publication in the Federal Register. Because of time constraints on publishing this notice, I ask for your continuing cooperation and timely response for the information and forms requested by December 3 or December 10, 1997, as noted.

As explained in prior meetings hosted by the Civil Rights Division's Coordination and Review Section, the text of this proposed regulation is based on the Department of Education's (ED's) Title IX regulation, with additions to reflect statutory amendments, one modification to be consistent with Supreme Court precedent, and procedural or schematic modifications to allow for publication as a common rule. To assist your review, our modifications to the ED regulation are reflected by shading for additions of new text and ~~strike-outs~~ for deletions of existing text.

In addition, I have enclosed the text for your agency's adoption of the rule. This form is based on the data you submitted, and, where appropriate, modifications based on subsequent conversations between Ms. Jennifer Levin and you or a member of your staff. We also have worked closely with the Office of Federal Register (OFR) as we prepared the NPRM and the agency adoptions. Based on certain OFR requirements, it was necessary to change some of the forms. For example, if the proposed list of subjects included terms that OFR does not accept, they were deleted. In addition, we were advised by OFR that the term or phrases "Civil rights, Sex discrimination, and Women" should be included as part of every agency's list of

subjects. Thus, these words were added when agencies did not include such language.

Further, some agencies are adding this regulation as a subpart to an existing part. Depending on whether the authority citations for the part are reported collectively or individually for each subpart, the authority citation for this adoption may include all sources of authority (statutes, Executive orders, etc.) that are appropriate to the entire part, or only the authority for the subpart on Title IX. Please pay particular attention to reviewing this text, where appropriate.

It is important that you take several steps in order that we may complete the process for publication of the NPRM in a timely manner:

1. Please ensure that the **agency adoption form is signed** and that the **original** is returned to the Department of Justice by **Wednesday, December 10, 1997**. If someone other than the name identified in fact signs the document, please type that person's full name and title beneath the name and title listed. The OFR will not accept a document that does not have the name and title of the signatory. It is essential that we have the document with the original signature. Please have this hand-delivered to:

Jennifer Levin
Attorney
Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
1425 New York Avenue, N.W., Room 4015
Washington, D.C. 20005

If you believe edits are needed to the form, please contact Ms. Levin as soon as possible. She can be reached by telephone at (202) 305-0025, or by facsimile at (202) 307-0595.

Please be advised that it is possible that the OFR will have additional edits to these forms. For that reason, we have limited the text on the signature page. Of course, we will notify you if OFR requires any edits. Since OFR accepts hand-written corrections, we likely can accomplish corrections without requiring you to submit modified forms for a second signature.

2. With the assistance of your agency Federal Register liaison, **notify the Office of Federal Register's CFR unit** of your reservation of the part or subpart designated for purposes of the Title IX regulation. In order to avoid a conflict

with another office within the agency that may choose the same location within the CFR, it is essential to notify the OFR CFR unit as soon as possible. They can be reached at (202) 523-3419.

3. Submit any comments on the proposed regulation to the Department of Justice by **Wednesday, December 10, 1997**. Comments may be delivered to Ms. Levin, sent by facsimile ((202) 307-0595), or if minimal in nature, addressed by telephone. Given time constraints, we cannot guarantee consideration of your comments if they are received after that date.
4. Paperwork Reduction Act requirements: Pursuant to the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., two types of notices and approval from the Office of Management and Budget (OMB) are required; one notice for the regulation that includes information collection, and a second notice for the form itself. First, if a proposed regulation includes information collection requirements that fall within the scope of the Paperwork Reduction Act (PRA), a notice of this fact must be published with, or as part of, the NPRM. It is our view, in light of amendments to the PRA in 1995, that only assurance forms are subject to the Act. See 5 C.F.R. § 1320.3(h)(1).

We have incorporated notice of the PRA requirement into the NPRM (see pages 12-14). The NPRM currently explains that an assurance form is required when an applicant or recipient completes an application for Federal financial assistance from a participating agency for the first time or if there is a break in continuity of assistance from such agency. We estimate that approximately 25% of recipients seek assistance from more than one Federal agency; thus, we estimate that assurances would be required 1.25 times rather than once, per recipient. The public may comment on this information collection requirement, including comments on our assumptions about the burdens imposed.

In addition to the information included in the NPRM, forms that provide more detailed estimates of the time and financial burdens on government agencies and recipients relating to the assurance form must be submitted to OMB. We seek your views on our estimates, as well as certain other information in order that we may complete these forms on behalf of all participating agencies. We currently are

preparing the notice and associated forms based on the following assumptions and estimates:

1. Length of time for a recipient to fill out an assurance form: 20 minutes
2. Capital and startup costs to a recipient imposed by the assurance form requirement in the NPRM: None.
3. Operating and maintenance costs to a recipient imposed by the assurance form requirement in the NPRM: None.
4. Cost to the Federal government per recipient: \$7.00. This figure is based on:
 - a. Estimated cost to develop this form (broken down per recipient): \$.05
 - b. Salary of a GS-7/1 clerical worker who assembles, mails, receives, and processes the form (assuming half an hour total labor, and a salary of \$12.71/hour): \$6.35
 - c. Estimated cost of copying form (assuming two pages, \$.04 per page): \$.08
 - d. Estimated cost of supplies and postage: \$.50/form
 - e. Estimated cost of storing form (portion of file cabinet per form): \$.02

If you think these estimates are significantly in error, please provide your views with alternative cost assessments by Wednesday, December 3, 1997. In addition, please provide the following information by Wednesday, December 3, 1997:

1. An estimated number of recipients of Federal financial assistance from your agency who will complete an assurance form in FY 1998; and
2. An estimated number of how many recipients are colleges, universities, postsecondary schools, or other educational institutions.

We understand that you may not have sufficient data in order to provide an exact figure. Reasonable estimates are acceptable. Please include a brief description as to how the estimate was calculated. This need not be more than a few sentences.

Second, as mentioned, apart from giving the public an opportunity to comment on the proposed information collections, an agency must also seek OMB approval and a control number for its information collection forms; in this case, the assurance form. If your agency does not have a control number from OMB for its assurance forms, and you choose to use a form that is different than the OMB standard assurance forms (SF 424b for non-construction programs or SF 424d for construction programs), you must have this form cleared by OMB. To do this, please contact the Clearance Officer of your agency. You will need to prepare notices of information collection review for publication in the Federal Register and to submit an application packet to OMB to obtain its approval of your form. This notice and approval process is distinct from that associated with the rule itself, and must be done by each agency.

Finally, please note that this draft NPRM has not yet been reviewed by the OMB or the Department of Justice's Office of Legal Counsel. If substantive changes are made by either office, we will so inform you.

Again, if you have any questions regarding the agency adoption form, please contact your agency Federal Register liaison or Ms. Levin at (202) 305-0025. If you have specific questions for the OFR, our contact at that office for this common rule is Ms. Ruth Pontius, Scheduling Unit, (202) 523-3187.

Thank you for your continued cooperation and prompt responses as we continue the process of preparing the common rule.

Sincerely,

Merrily A. Friedlander

Merrily A. Friedlander

Chief

Coordination and Review Section
Civil Rights Division

Enclosures

Individuals Signing Agency Adoptions for Title IX Common Rule

William M. Daley
Secretary of Commerce

L. M. Bynum
Alternate OSD Federal Register Liaison Officer
Department of Defense

Andrew Cuomo
Secretary of Housing and Urban Development

Brooks Yeager
Acting Assistant Secretary - Policy, Management, and Budget
Department of Interior

Janet Reno
Attorney General

Alexis M. Herman
Secretary of Labor

Bonnie R. Cohen
Under Secretary of State for Management

Rodney Slater
Secretary of Transportation

Robert E. Rubin
Secretary of Treasury

Hershel W. Gober
Acting Secretary for Veterans Affairs

Stewart A. Davis
Acting General Counsel
Corporation for National and Community Service

Carol M. Browner
Administrator
Environmental Protection Agency

James L. Witt
Director
Federal Emergency Management Agency

James M. Taylor
Acting Associate Administrator for Equal Employment Opportunity
General Services Administration

Linda Bell
Director, Policy, Planning, and Budget
Institute of Museum and Library Sciences

Daniel S. Goldin
Administrator
National Aeronautic and Space Administration

Jane Alexander
Chairman
National Endowment for the Arts

Michael S. Shapiro
General Counsel
National Endowment for the Humanities

Lawrence Rudolph
General Counsel
National Science Foundation

John C. Hoyle
Secretary of the Chairman
Nuclear Regulatory Commission

Aida Alvarez
Administrator
Small Business Administration

Frank Alford
Manager, Supplier and Diverse Business Relations
Tennessee Valley Authority

Jessalyn L. Pendarvis
Director, Office of Equal Opportunity Programs
Agency for International Development

Joseph Duffey
Director, U.S. Information Agency