



SEP 26 1997

SEP 22 1997

MEMORANDUM FOR ANNE MCGUIRE

Attached is a letter from Secretary Shalala to The President regarding his Directive on strengthening enforcement of Title IX of the Education Amendments of 1972, as amended throughout his Administration.

William V. Corr

Attachment

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extensive
program when
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programs

Phil -
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THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

SEP 26 1997

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

This is in response to your Directive on strengthening enforcement of Title IX of the Education Amendments of 1972, as amended throughout your Administration. In your memorandum to Heads of Executive Departments and Agencies, you requested "a description of department or agency priorities for enforcement, methods to make recipients of federal financial assistance aware of their obligation not to discriminate, and grievance procedures to handle Title IX complaints."

Within the Department of Health and Human Services (HHS), the Office for Civil Rights (OCR) coordinates civil rights compliance activities and is delegated responsibility to review cases arising under Title IX. This Department provides financial assistance for education programs and activities to colleges and universities, research institutions, state, local and tribal governments, and a wide-array of recipients who are public and private non-profit community organizations.

The OCR's responsibility to ensure that HHS funded programs and activities comply with Title IX is accomplished through its investigative and enforcement process. Enclosed is OCR's Case Resolution Manual, which describes how civil rights cases are prioritized and processed. Although the Department has had regulations implementing Title IX for many years, we have had very few complaints. However, in reviewing complaints and making respective findings, OCR has adopted policy guidelines concerning the application of the Title IX prohibition against sex-based discrimination. OCR initiates a prompt investigation whenever a complaint, report or compliance review indicates a possible civil rights violation. Letters of complaint are prioritized based on the issues of alleged non-compliance raised in the complaint, the resources required to investigate the allegations, and the overall workload or operating plan of the regional office with jurisdiction to investigate the case.

Complaints usually fall into one of three categories: (1) complaints of national or local interest or where priority investigation will probably result in a finding of noncompliance; (2) complaints requiring additional information to determine the merits of an investigation; and (3) complaints suitable for closure, e.g., when a federal or state court or another federal agency or state human rights agency has already resolved the allegations. In some cases, a compliance review may be the most effective means of addressing a particular complaint, for example, one alleging class discrimination on the basis of sex under Title IX. The complainant and, where appropriate, the recipient are notified of whether OCR plans to proceed with a formal investigation. The OCR's objective is to resolve each complaint in an appropriate and timely manner. This may be accomplished in a variety of ways: through early complaint resolution, fact-finding conference, mediation, preliminary or in-depth investigation of the issues, or post-violation negotiations and enforcement.

The OCR's complaint resolution process incorporates provisions for individuals to challenge the proposed resolution or no-violation determination within 30 days from the date OCR issues a formal decision. The complainant is informed of this decision prior to issuing the decision letter and advised that the investigating office can be contacted to discuss any questions prior to filing a formal challenge with OCR's headquarters' office. OCR headquarters staff will promptly review any request for review of a field office decision and notify the complainant if further action is warranted. The complainant will be notified that a decision will be rendered within 90 days from receipt of his/her request for review. OCR's grievance process is designed to be equitable and to provide due process to all parties to the grievance.

The OCR monitors the implementation of all written agreements that include actions to be taken as a result of a finding of sex discrimination. If OCR and the recipient are unable to resolve any deficiencies in the implementation of the agreement, OCR will move to enforcement for failure to fulfill the promised corrective action.

The statutes and regulations OCR enforces authorize it to review the policies, procedures and practices of HHS recipients to determine their compliance status. The OCR's compliance activities, particularly targeted projects, such as reviews, outreach and technical assistance are undertaken in partnership with HHS operating divisions, state and local governments or providers, and with other federal agencies. These outreach and partnership initiatives support HHS-wide goals of ensuring the protection of individual rights to access HHS funded programs and activities.

Page 3 - The President

Through its compliance review program, OCR reviews the policies, procedures and practices of selected recipients of HHS funds and is able to identify and remedy discriminatory activities which may not be addressed through complaint investigations. Whenever a compliance review indicates a potential violation, technical assistance is offered to voluntarily resolve the matter, prior to initiating any enforcement action.

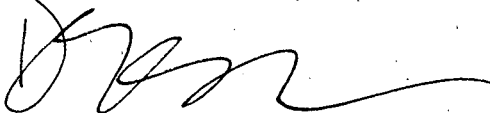
Through its technical assistance program, OCR provides support and guidance to HHS funded agencies to assist them in voluntarily complying with the law. For example, every applicant for financial assistance from HHS is required to sign an assurance agreement with OCR that it will operate its programs and activities in compliance with Title IX as a condition of initial and continued approval to receive HHS funding. This assurance may extend to the recipient's subgrantees, contractors or successors in interest. In addition, recipients are notified that they are required to designate an employee to coordinate their Title IX responsibilities, provide public notification of its non-discrimination policy, and develop and publish grievance procedures. The OCR ensures that recipients comply with these responsibilities during its complaint investigation, monitoring and compliance review processes.

Also enclosed is a copy of Part 86 of Title 45 of the Code of Federal Regulations, of which Section 86.8 details grievance procedures, and Section 86.9 describes required methods for disseminating information on non-discrimination on the basis of sex.

On August 26, 1997, we complied with your directive to identify and describe education programs or activities conducted by HHS and forwarded the information to the Attorney General.

We would be pleased to provide any further information upon request.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Donna E. Shalala', with a stylized, flowing script.

Donna E. Shalala

Enclosures

TAB A: Case Resolution
Manual



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office for Civil Rights
Washington, D.C. 20201

DATE: July 1, 1996

TO: All OCR Staff

FROM: Dennis Hayashi *Dennis Hayashi*
Director
Office for Civil Rights

SUBJECT: The Office for Civil Rights' Case Resolution Manual

I am forwarding to you for implementation OCR's new Case Resolution Manual (CRM). The CRM represents an accomplishment to which all of OCR has contributed and for which all of OCR can be proud. I want personally to thank the Region I Pilot Team for spearheading this effort and for the team's obvious insight and creativity and its tremendous dedication to improving OCR's approach to casehandling in a way that enhances our ability to carry out our mission.

I am also aware that essential to the CRM's development was the input provided to the team from throughout OCR and the Office of the General Counsel (OGC)/Civil Rights Division. The final CRM could not have been realized without your collective expertise, thoughtful comments, and cooperation.

The hard work and the major strategies that evolved from the regional pilot projects were a direct and extremely important support to the resulting CRM. The CRM clearly reflects the pilots' goals to simplify, expedite, and streamline OCR's case processing.

Equally important was the inclusion in all pilot strategies of the formation of groups or teams of investigators, supervisors and attorneys to handle one or more case processing stages. The Dallas and Seattle Regional offices went one step further, participating in an additional pilot effort to have their entire offices working in teams. The lessons we hope to learn once we complete and evaluate these two pilots added to the accomplishments of other OCR teaming efforts may serve as effective models of operation.

As we conclude this stage of the pilot projects, I would like to commend each regional office for the energy and diligence you have shown in undertaking the projects, and for the innovative ideas and practices that you have contributed to the CRM. Although the pilot aspect of your efforts is completed, you will find that most of the pilot activities will continue on an on-going basis because they are incorporated in and consistent with the CRM. This will be true, even if an activity is not specifically spelled out in the CRM. For example, the CRM calls for each region to have a triage

system, and it gives illustrations of how such a system might operate. The examples are not all inclusive and allow for your regional office to operate a triage system that may not be described in the CRM. On the other hand, to the extent that a pilot project or components of pilots are inconsistent with the CRM, those activities should be discontinued.

We believe it is important, however, that OCR continue to experiment with ways to make our case processing activities more effective. We are still open to and encourage you to develop new pilot proposals following issuance of the CRM.

We have been working closely with the Multi-Regional Bargaining Unit of NTEU and NTEU Chapter 229 on the implementation of the CRM. Consistent with agreements that we have reached with NTEU, the effective date for implementation will be July 8, 1996. During this next week, you will have an opportunity to review the CRM in its entirety and to raise any questions that you might have with your supervisors. In addition, because we recognize that the CRM is a work in progress that may require changes as we implement its provisions, we have set six months as an appropriate point in time when we will all re-evaluate the CRM based on our collective experience with it. Your input during the evaluation period will be secured through the NTEU.

The new, and in some instances, uncharted territory of the CRM also requires that we have direct experience with it before attempting to alter our current performance management systems. At this juncture, there will be no adverse impact on performance expectations or performance appraisals as a result of implementing the CRM. Any discussions related to modifications to the performance management systems will become appropriate at some point in the future, after we have had an opportunity to assess the CRM. All such discussion will be held in direct collaboration with NTEU.

We must all keep in mind, however, that each of us has a responsibility to grow in our performance as we carry out the provisions of the CRM. There will, of course, be a break-in or learning period, but I am certain that I can rely upon you to continue to maintain the high professional standards that you have shown in the past.

I look forward, as I am certain we all do, to moving forward with the flexible and creative tools that the CRM gives us. It enables OCR to make the maximum use of its resources while continuing to ensure that we have the most effective civil rights compliance program possible.

Congratulations on a job well done.

OFFICE FOR CIVIL RIGHTS
DEPARTMENT OF HEALTH AND HUMAN SERVICES
CASE RESOLUTION MANUAL
(6/21/96)

INTRODUCTION

The mission of the Office for Civil Rights (OCR) in the Department of Health and Human Services (HHS) is to promote and ensure that people have equal access to and opportunity to participate in and receive services in all HHS programs without facing unlawful discrimination. The Case Resolution Manual (Manual) provides OCR with the tools to accomplish these objectives promptly and effectively and to maximize the impact of existing resources.

Building from the recommendations of OCR's Strategic Plan which incorporated findings of the HHS Civil Rights Review, the Pilot Team has sought input and comment from throughout the OCR organization including the Office of the General Counsel (OGC)/Civil Rights Division. Results of streamlining efforts in our sister federal civil rights enforcement agencies have been reviewed and relied upon for this Manual.

The Manual is not a prescriptive document. It offers flexibility, not rigid rules. It establishes general parameters within which a variety of resolution approaches can be appropriately utilized. OCR already has considerable success with the use of existing formal and informal means to help resolve dispute between parties. We need to examine and expand, where appropriate and feasible, the use of additional Alternative Dispute Resolution (ADR) methods. After all, OCR should place primary emphasis on effective change, not document production. Reinvention, case prioritization or triaging, and creativity will enable OCR to focus more of its resources in finding violations, providing timely technical assistance, securing system compliance from recipients of HHS assistance (or other covered entities) and taking forceful corrective actions where necessary. Neither the Manual nor its application should be construed to contradict or undermine the intent of any statute or regulation that OCR has the responsibility to enforce. The Manual must not be used as an excuse for inaction and we must not close our eyes when compliance issues are there.

The Manual is premised on a strong belief in the merit of teamwork: within the investigative team, within each region, and between each OCR component. It places a premium on consultation and a willingness to take responsibility. It assumes full engagement of each individual throughout the resolution process.

The role and definition of teams, however, has not been set out in detail so as to allow each Region to evaluate the best use of its staff. Clearly, there is a place for teamwork in all stages including the assessment, case planning and the resolution processes.

From the very beginning of a case, there is a place for multi-functional involvement which means representation of all staff who become involved in case resolution such as the Regional Manager, the Division Director, Branch Chief, one or more EOS and the Regional Civil Rights Counsel. It is the role of a Team Leader to

determine the timing and extent of involvement of team members in the process. It is important that the role of each team member be clearly defined and established for each case. While certain elements are more effectively handled by an individual, teamwork is the energizing and supporting factor of the entire process. Such early responsibility of key staff collaborating as a team provides for an in-depth evaluation of the issues, eventually leading to a more direct, effective and prompt resolution of the complaint. Team meetings should always be decision making forums.

Making the decision whether to proceed to complaint resolution should clearly involve team input. The supportive nature of the team will free the initiative of each member, strengthen the staff, and above all provide training and development for each team member.

With regard to team work then the question is not how many teams nor how many team members but rather which members of the current regional staff should be involved in the processing of this case at this time if the issues are going to be resolved in the most expeditious manner.

The purpose of the new Manual is to set aside once and for all the system of unnecessary layers of vertical decision making, along with sequential problem solving, and replacing it with a more horizontal team approach through which all regional staff members who will eventually be involved in the process are included in the decision making on a continuing basis.

The Manual also calls for more effective contact with the complainant and the recipient, both of whom should be seen as customers whose best interests are met when services are delivered in a non-discriminatory manner. In some cases they too will join as team members in the development of corrective action plans or resolution agreements.

Communication and involvement are essential to effective case processing. Frequent meetings and brief, written status reports, circulated to everyone and clearly defining the involvement of each team member should be the norm. It will be essential if the new Manual is to cut across typically troublesome functional boundaries.

The Manual has attempted to provide streamlined procedures that maintain quality and consistency. OCR's success will derive from the commitment and involvement of staff at all levels to support each other throughout the process.

There are many critical civil rights issues confronting our nation today. OCR has a key role to play in the federal effort to address these issues. The resolution approach set forth in this Manual enables us to utilize our resources wisely and to maximize our effectiveness in ensuring civil rights compliance.

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OCR CASE RESOLUTION MANUAL

1. EVALUATE THE COMPLAINT

If OCR determines that written information provided to the Department of Health and Human Services (HHS) is a complaint, OCR will evaluate the complaint to understand the complainant's allegations, gather appropriate information, including jurisdictional information, and decide whether OCR will proceed to complaint resolution or take other appropriate action. A variety of methods may be used to facilitate this process. They include the timely use of case triage, staffing and the team approach where appropriate.

A. Determine Whether OCR Has Received a Complaint

A complaint is a written statement to HHS alleging that the rights of one or more persons have been violated and requesting, directly or by implication, that HHS take action.

Correspondence that OCR receives, even if it concerns an alleged civil rights violation, may not be a complaint¹. Immediately upon receipt, OCR must determine whether or not the correspondence is a complaint.

The following are generally not complaints:

1. Oral allegations.
2. Anonymous correspondence.
3. Courtesy copies of correspondence or a complaint filed with others.
4. Inquiries that seek advice or information but do not seek action or intervention from the Department.

B. Acknowledge the Complaint

¹ 45 C.F.R. §80.7(c) states that OCR "will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply". Even if the information provided to OCR does not meet the definition of a complaint, it does not mean that other OCR tools may not be used to address the issue. OCR staff should be creative and attentive in using an array of compliance tools to find or remedy discrimination. In no case should OCR staff interpret or apply this Manual in a manner contrary to the requirements of applicable statutes and regulations.

A brief letter should immediately be sent to each complainant, acknowledging receipt of the complaint, stating that the complaint will be evaluated, and assuring the complainant that he or she will be contacted within a given time. The region will attach to the letter the document "Information About OCR's Complaint Resolution Procedures." (TAB D)

C. Assign a Case Number and Establish a File for Each Complaint

Upon receipt by the correct regional office, OCR assigns the incoming complaint a case number and establishes a case file for each complaint.

In cases of multiple complaints, the following guidelines should be applied in determining how many case numbers should be assigned:

1. The office will assign a separate case number to each recipient of HHS assistance (or, a covered entity as applicable hereafter) named in the complaint. If, during the course of the investigation, OCR determines that other recipients are involved in the alleged acts of discrimination, the office will open separate complaints and assign a case number for each such recipient.
2. Complaints from more than one person against the same recipient that contain different allegations are treated as separate complaints.
3. Complaints filed by more than one person that raise substantially identical allegations against the same recipient may be treated as one complaint and assigned one case number, or if received later, incorporated into an existing complaint.
4. New allegations filed by the same person against the same recipient after complaint resolution has begun are reviewed on a case-by-case basis to determine whether the allegations should be added to the open complaint or treated as a new complaint.

D. Gather Basic Information

OCR will actively work with complainants (or alleged injured parties as applicable hereafter) and examine other sources of information (e.g., survey data or recipient information) to ensure that it has sufficient information to evaluate complaints appropriately. OCR staff will provide appropriate assistance to complainants, including persons with disabilities and individuals who speak a language other than English, who may need help in

providing information OCR needs. The information needed will usually include at least the following:

1. a signed, written explanation of what has happened including when;
2. a way to contact the complainant;
3. identification of the person or group injured by the nature of the alleged discrimination;
4. identification of the person or institution alleged to have discriminated;
5. sufficient information to understand the factual bases for the complainant's belief that discrimination has occurred and the basis of that discrimination (e.g., disability, race, age, etc).
6. what harm/damage (whether it could be quantified) has occurred to the complainant and what remedies/relief are being sought by the complainant.

If information establishes that OCR has no jurisdiction over the person or institution alleged to have discriminated, it is not necessary to inquire further about the factual bases for the complainant's belief that discrimination has occurred.

OCR may contact the complainant by telephone to obtain missing necessary information. A record of contact summarizing the conversation should be placed in the case file. In the alternative, OCR will inform the complainant in writing of the information needed. If the necessary information is not provided within 15 calendar days of the date of the notification letter (unless extended by OCR), the complaint will be closed and the complainant so informed.

If the complaint contains sufficient information with respect to at least one allegation, but lacks sufficient information with respect to other allegations, OCR will attempt to obtain the missing information, as described above. Allegations not completed within the 15 day time frame will be closed; OCR will initiate complaint resolution only for those allegations for which sufficient information has been provided.

See TAB A for Special Intake Procedures covering:

- referral of age discrimination (non-employment) complaints to FMCS for mediation;

- referral or transfer of individual allegations of race, color, national origin, sex and religion discrimination in employment to EEOC;
- coordination of OCR, EEOC and DOJ jurisdiction over disability discrimination in employment complaints;
- handling of Hill-Burton Community Service complaints; and
- notification to the Architectural and Transportation Barriers Compliance Board (Access Board) of complaints regarding the accessibility of facilities subject to the Architectural Barriers Act.

E. Determine Whether the Complaint is Timely

Generally, OCR will take action only with respect to those complaints that have been filed within 180 calendar days of the last act of alleged discrimination.² The filing date of a complaint is the earlier of the following:

1. the postmark of the complaint; or
2. the date the complaint is received by any HHS office, or for Title II complaints referred from DOJ, the date the complaint is received by DOJ.

Timely complaints include those where the complaint alleges a continuing discriminatory policy or practice. The person or team evaluating the complaint shall make the determination of the existence of a continuing discriminatory policy or practice and, if necessary, consult with regional legal staff.

F. Determine Whether To Extend Time for Filing

If a complaint is not filed in a timely manner, OCR will notify the complainant that for good cause it may extend the time for filing and request that the complainant provide any additional information that might justify an extension.

OCR will consider the following factors when determining whether to extend the 180-day time limitation:

1. When the complainant became aware of the alleged discriminatory act;
2. The reasons offered by or on behalf of a complainant for not filing earlier;

² There is no timeliness requirement for a complaint that alleges noncompliance under Title VI and XVI of the Public Health Service Act (Hill-Burton Act).

3. The extent to which the complainant has sought or obtained relief through other administrative or legal proceedings;
4. Whether the complainant filed on a timely basis with another Federal, State, or local agency with which OCR has concurrent jurisdiction;
5. Whether actions of the recipient or other covered entity contributed to the late filing; or
6. Other reasons that OCR determines sufficient to warrant an extension.

If an extension is not requested or requested but not granted, the case will be closed and the complainant informed of the decision.

G. Determine Whether OCR Has Jurisdiction

OCR should determine whether it has jurisdiction over the complaint under any of the Federal statutes and regulations enforced by OCR. This normally involves answering two questions: first, is the general subject matter of the complaint covered by an OCR statute? and, second, does the statute apply to this particular allegation (because, for example, the party charged was receiving Federal financial assistance from HHS when the alleged action occurred)?

OCR has jurisdiction under three Federal statutes that apply generally to programs and activities receiving Federal financial assistance:

1. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d et. seq., 45 C.F.R. Part 80 (discrimination on grounds of race, color or national origin);
2. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, 45 C.F.R. Part 84 (discrimination against otherwise qualified individuals on the basis of disability; (OCR also has Section 504 jurisdiction over HHS-conducted programs, 45 C.F.R. Part 85. See guidance in TABs A and E);
3. Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et. seq., 45 C.F.R. Part 91; (age discrimination) (see guidance in TABs A and E);

OCR also has jurisdiction under these narrower authorities:

4. Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 et seq., 28 C.F.R. Part 35 ("designated agency"

jurisdiction over disability discrimination complaints against certain public entities) (see guidance in TAB A);

5. Titles VI and XVI of the Public Health Service Act, 42 U.S.C. 291 et. seq., and 42 U.S.C. 300g et. seq., 42 C.F.R. Part 124, Subpart G. (Community Service obligations of Hill-Burton facilities) (see guidance in TAB A);
6. Section 542 of the Public Health Service Act, as amended, 42 U.S.C. 290dd-1 (barring discrimination in admission or treatment against substance abusers suffering from medical conditions by Federally-assisted hospitals and outpatient facilities), 45 C.F.R. §84.53;
7. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, 45 C.F.R. Part 86; (sex discrimination in Federally-assisted education programs);
8. Sections 794 and 855 of the Public Health Service Act, 42 U.S.C. 295m and 298b-2, 45 C.F.R. Part 83 (sex discrimination in Federally-assisted health training programs);
9. Section 508 of the Social Security Act (Maternal and Child Health Services Block Grant), 42 U.S.C. 708 (sex and religion added as prohibited grounds);
10. Section 533 of the Public Health Service Act (Projects for Assistance in Transition from Homelessness), 42 U.S.C. 290cc-33 (sex and religion added as prohibited grounds);
11. Section 1908 of the Public Health Service Act (Preventative Health and Health Services Block Grant), 42 U.S.C. 300w-7 (sex and religion added as prohibited grounds);
12. Section 1947 of the Public Health Service Act (Community Mental Health Services Block Grant and Substance Abuse Prevention and Treatment Block Grant), 42 U.S.C. 300x-5 (sex and religion added as prohibited grounds);
13. Family Violence Prevention and Services Act, 42 U.S.C. 10406 (sex and religion added as prohibited grounds);
14. Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. 8625 (race, color, national origin and sex discrimination prohibited);
15. Community Services Block Grant Act, 42 U.S.C. 9906 (race, color, national origin and sex discrimination prohibited);

16. Equal Employment Opportunity Provisions of the Communications Act of 1934, as amended, 47 U.S.C. 398 (barring employment discrimination by Federally-funded public telecommunication entities on grounds of race, color, religion, national origin or sex);
17. Howard M. Metzenbaum Multiethnic Placement Act of 1994, 42 U.S.C. 5115a (limiting covered agencies and entities use of race, color and national origin as factors in child placement decisions).

H. Prioritize Cases

The primary objective of prioritizing cases is to give OCR the management tool to target cases that are of significant national or local interest that raise key compliance issues. This is particularly necessary given the limitation of resources and the many tasks (compliance reviews, outreach, technical assistance) that OCR must also perform.

When cases are triaged or prioritized, planning should take into consideration the allocation of resources (e.g., the number of investigators, the use of outside consultants, early involvement by OPDIVs or State agencies and how their resources could be tapped, etc.) depending on the circumstances of each case and its relationship to the overall workload or operating plan of the regional office.

Complaints should be classified into one of the three categories described below. Subcategories within the three categories may be utilized so long as the essential priority handling scheme is preserved and operates effectively. It is important to keep in mind that many cases will be provisionally categorized into Category B, with the final categorization dependent on further analysis or investigation.

Category A: National/Local Significance; Potential Violations

The first category includes complaints that are of significant national or local interest or where priority investigation will probably result in a finding of noncompliance. Complaints should also be classified as Category A if irreparable harm will result unless processing is expedited.

Category B: Complaints Requiring Additional Information

Many complaints will initially appear to have some merit but will require additional evidence to determine whether continued investigation is likely to result in a violation finding. In addition, in other cases it will simply not be possible to make a judgement regarding the merit of the complaint at the time of

receipt. In these cases additional investigation will be needed, as resources permit, to determine whether these complaints should be moved into Category A and given priority status or moved into Category C and closed.

Category C: Complaints Suitable For Closure

A complaint may be placed in Category C and closed when OCR has sufficient information from which to conclude that it is not likely that further investigation will result in a finding of noncompliance.

See I, below, for examples of cases suitable for closures under Category C.

I. Determine Whether Complaint Closure Is Appropriate

Generally, OCR will close a complaint under the following circumstances:

1. The complaint is so weak, attenuated, or insubstantial that it is without merit, or so replete with incoherent statements that the complaint, as a whole, should be considered baseless or frivolous (i.e. lacking any arguable basis in law or fact).
2. The complaint is a continuation of a pattern of previously filed complaints involving the same or similar allegations against the same recipient or other recipients that repeatedly have been found factually or legally insubstantial by OCR.
3. The same allegations and issues have been addressed in a recently closed OCR complaint or compliance review, are being addressed in another open complaint or compliance review, or will be addressed in a scheduled compliance review.
4. OCR action is inappropriate because of previous decisions by Federal courts, the Secretary of HHS, the Civil Rights Reviewing Authority or Departmental Appeals Board judges, DOJ guidance, OGC legal advice, or OCR policy determinations.
5. A Federal or State court, or another Federal or State human rights agency, has already resolved the allegations, and, based on an individualized evaluation of that resolution and the issues, available facts and circumstances of the complaint, no action by OCR is warranted (Note: Attorney input may be helpful in evaluating the previous decision, its scope and effect on the rights of the parties, any Federal civil rights or HHS program interests involved, etc.)

6. The same allegations are currently pending in a Federal or State court or in another Federal or State human rights agency, and, based on the nature, history and status of the proceeding and an individualized evaluation of the issues, available facts and circumstances of the complaint, no action by OCR is warranted (Note: Attorney input may be helpful in evaluating the pending proceedings, their scope and effect on the positions of the parties to the complaint, any Federal civil rights or HHS program interests involved, etc.)
7. The information received does not provide sufficient detail to proceed with complaint resolution. Where appropriate, the region may use the information as the basis for targeting future compliance reviews or technical assistance activities.
8. The Region determines that its ability to complete the investigation is being substantially impaired by the complainant's or injured party's refusal to cooperate. In such a case, the complainant or injured party should be contacted as soon as possible. If this does not resolve the matter, a letter will be sent to the complainant or injured party explaining why the failure to cooperate (including refusal to give permission to disclose identity) has made it impossible to investigate further. The letter should inform the complainant or injured party that refusal to cooperate within 15 days of the date of the letter will result in OCR closing the case.
9. A complaint over which OCR otherwise has jurisdiction may be closed when OCR transfers or refers the complaint to another agency for investigation. See Tab A, Special Intake Procedures.
10. The death or unavailability of the complainant or injured party or an essential witness makes it impossible to investigate the allegations fully, or when the death of the complainant or injured party forecloses the possibility of relief because the complaint involved potential relief solely for the complainant or injured party. (Monetary relief can be obtained for the estate of a deceased complainant or injured party.)
11. A complaint involving an OCR high priority issue or an extremely novel and complex issue which, because of its scope, may require massive OCR resources. In such instances, the Regional Manager may consider treating such a complaint as a compliance review, after considering the "basic information" described in D. above. If the region selects this option, it should discuss the decision with the complainant, close the complaint, assign a review number, and

initiate the review as soon as possible. As part of this process, the region should also consider whether any of the complaint allegations can be resolved immediately. The results of the review will be shared with the complainant upon completion.

12. If the Regional Manager determines that a compliance review is the most effective means of addressing multiple individual complaints against the same recipient, the region should discuss the decision with the complainants, close the individual complaints, assign a review number, and initiate a review as soon as possible. Any outstanding individual allegations that can not be promptly resolved should be incorporated into the review. The results of the review will be shared with the complainants upon completion.

For handling of Part 85 cases, see TAB E.

J. Notify the Parties

OCR's objective is to complete complaint evaluation as promptly as possible. The time required will vary depending upon the nature of the complaint and the amount of information provided. The general target date for completion of complaint evaluation is 30 days from receipt of the complaint.

OCR will notify the complainant and, where appropriate, the recipient whether OCR will proceed to complaint resolution.

1. a. If OCR decides not to proceed to complaint resolution, the letter to the complainant (and recipient if appropriate) will state that the complaint is being closed and will explain the reason for the decision.
- b. If the complaint has been resolved during the evaluation process, the complaint resolution letter to the complainant (and recipient if appropriate) should contain:
 - o the basis for the complaint (race, color, national origin, sex, disability, age or other);
 - o a brief statement of the allegations over which OCR has jurisdiction;
 - o a brief statement of OCR's jurisdiction over the recipient; and
 - o an explanation of the basis for OCR's determination that the complaint has been resolved.
2. If OCR decides to proceed, the evaluation letters to the complainant and recipient will contain:

- o the basis for the complaint;
- o a brief statement of the allegations over which OCR has jurisdiction;
- o a brief statement of OCR's jurisdiction over the recipient; and
- o an indication of when the parties will be contacted.

Where a letter is sent to the recipient, the document "Information About OCR's Complaint Procedures" (Tab D) should be attached. Where appropriate, preliminary data or information may be requested seeking a position statement/response to the allegations.

II. ATTEMPT TO RESOLVE THE COMPLAINT

OCR has a variety of Alternate Dispute Resolution (ADR) tools for resolving complaints. These include: Early Complaint Resolution, fact-finding conference, mediation, early neutral evaluation, OCR-initiated predetermination resolution negotiation with the recipient or other covered entity, preliminary or in-depth investigation of the issues, preliminary or final release of investigative findings, post-violation LOF negotiations and enforcement. Offices are encouraged to use any of these approaches to resolve allegations from complainants that fall within OCR's jurisdictions.

Any approach, or combination of approaches, may be initiated at any time after receipt of the complaint and multiple approaches may be used to resolve any case. Staff should constantly consider which tool is most likely to promote complaint resolution promptly and appropriately. For example, the complaint resolution team may be moving towards findings when the recipient indicates a willingness to enter into an agreement. At that point, the team could negotiate an agreement and promptly resolve the complaint.

The general guidelines for specific investigatory procedures are set forth at TAB B. Monitoring is an integral part of the resolution process whenever remedial action is required. Strong remedies can only be achieved through effective monitoring.

OCR may consider a complaint resolved when any of the following occur:

1. The complainant decides to withdraw his or her complaint. If the complaint included class allegations based upon information obtained by the region prior to the withdrawal, the region may: (a) close out the entire complaint; (b) pursue resolution of the class allegations; or (c) use the information to target future compliance review activity.
2. OCR obtains information at any time indicating that the allegations raised by the complaint have been resolved. In such a case, OCR will attempt to confirm the apparent resolution. If OCR determines that there are no current allegations appropriate for further complaint resolution, the complaint should be closed.
3. The complaint has been investigated by another agency and the resolution of the complaint meets OCR regulatory standards; i.e. all allegations were investigated, appropriate legal standards were applied and any remedies secured meet OCR's standards.

4. OCR facilitates resolution between the recipient and complainant through Early Complaint Resolution (ECR).
5. OCR resolves the issues presented by the complaint with the recipient or other covered entity, such that the recipient or entity takes required actions, commits itself by letter (or a resolution plan, or exchange of correspondences with OCR) to take specific future actions, or enters into a complaint predetermination resolution agreement with OCR to do so.
6. OCR determines that there is insufficient evidence to support a finding of a violation.

The need for attorney input into resolution of complaints should be assessed cooperatively by OCR and OGC.

A. Determine the Need for Complainant Consent and Identification

When identification of the complainant is necessary to resolve the complaint, OCR will require consent in writing before proceeding to complaint resolution. OCR does not need a specific form from the complainant, but does need written confirmation that the complainant authorizes OCR to disclose the complainant's name. A complainant filing on behalf of another person is responsible for securing the written consent from that individual. Where the person is a minor child or incompetent adult, the consent form must be signed by the person's parent or guardian. The written consent should include an assurance of cooperation with OCR's complaint resolution activities.

The complainant's name cannot be released until we have received written consent. If OCR does not receive written consent within 15 calendar days (unless extended by OCR), the complaint will be closed, and the complainant so informed.

B. Invest in Case Planning

OCR's objective is to resolve each case on its own merits in an appropriate and timely way. Hence, complaint resolution should be preceded by planning, using a team approach that includes attorney input when appropriate.

Effective case planning usually includes the following essential steps: (a) determine a target date and any other expected internal time frames to be adhered to that reflect OCR's experience in resolving cases of similar complexity and scope; (b) identify the specific issues to be resolved, and (c) decide whether an investigative plan should be prepared. The results of case planning should be documented in the case file.

C. Use Alternate Methods of Case Resolution Where Appropriate

Below are examples of three such methods that can be used. Staff should consider any other ADR tools that may be pertinent for the case under consideration.

1. Attempt "Early Complaint Resolution"

"Early Complaint Resolution" (ECR) facilitates the resolution of complaints by providing the parties involved the opportunity to resolve the allegations prompting the complaint. It may occur at any time during the complaint resolution process.

If the region determines that ECR is appropriate, and the complainant and the recipient (after being informed of the information above) are willing to proceed, the region will initiate ECR to facilitate an agreement between the recipient and the complainant.

In ECR, OCR does not sign, approve, or endorse any agreement reached between the parties; however, OCR should assist both parties in understanding pertinent legal standards and possible remedies. At the conclusion of ECR, OCR should obtain a copy of a statement signed by the complainant that the allegation has been resolved or a copy of any settlement agreement that has been signed by the complainant.

Once resolution of any allegation has been obtained, OCR may close that portion of the complaint; other approaches may be utilized to resolve any outstanding allegations.

2. Develop Resolution Agreements or Other Forms of Promised Actions

An effective case resolution takes a variety of forms or could result from different methods other than a formal, written agreement between OCR and the recipient. For example, a recipient may submit a resolution plan or a letter (or exchange of correspondences between OCR and the recipient and/or other pertinent parties) committing itself to specific acts in such details as described below. The Regional Manager or his or her designee, in consultation with the Regional Attorney and Headquarters staff where necessary, may choose among various resolution options depending on the circumstances of the case.

If the decision is to secure a written Agreement executed between OCR and the recipient, the following factors and steps should be noted.

A formal, written Agreement is a critical step in the resolution of any case because this is when we identify changes that must be made. All agreements should be crafted with a view toward effective monitoring. Any agreement should incorporate the following:

- a. It should be signed by a person with authority to bind the recipient, and approved by the Regional Manager or his or her designee, with consultation by the Regional Attorney, where necessary.
- b. It should include (i) specific acts or steps the recipient will take to resolve the allegations; (ii) the timetable for implementing each act or step; and (c) a specific timetable for submission of documentation.
- c. If, as the result of the investigation, OCR has sufficient information to conclude that there are violations other than those alleged, these should also be addressed in the agreement.

3. Fact Finding Conference

The process of minimizing unnecessary investigative work by identifying key facts that are not in dispute has been referred to as a fact finding conference. As a practical matter, it may be more convenient to conduct separate telephone interviews and follow-up conversations where travel costs and time would make an in-person fact finding conference impractical. Another option could be arranging a teleconference between OCR, the complainant, and the recipient's representative.

a. OCR's Role

- o To clearly communicate to the parties regarding the allegations under investigation and the potential benefits of narrowing the questions of fact to those matters in dispute between the parties. Also, to inform the parties that OCR will evaluate any agreed-upon facts in reaching a decision on the complaint and that OCR will not deem it necessary to obtain independent corroboration of facts that the parties agree upon.
- o To plan and be prepared for the fact finding conference. To have identified in advance those questions of fact that should be resolved in order

for OCR to reach a decision on the allegations raised in the case.

- o To direct inquiries to the parties that are clear and focused on facts that are essential to reach a decision on the allegations raised.
- o To inquire that each person stipulating to or agreeing to facts has personal knowledge or has the authority to speak for the recipient or complainant as to the facts agreed upon.
- o To accurately record and maintain the facts as agreed upon by the parties. To ensure the parties are informed of the facts that OCR finds are not in dispute.

b. Role of Complainant and Recipient's Representative

- o To cooperate in responding to OCR's questions regarding facts that are important to the resolution of the complaint.
- o To provide accurate responses and to make a sincere effort to resolve or minimize any factual differences that may arise during the fact finding conference.

D. Determine Whether an Investigative Report Will Be Helpful

In some cases, it will be helpful to prepare an investigative report (IR). An IR is a written document that may include the following: the allegations investigated in a case, the legal standards applicable to those allegations, a summary and analysis of the information discovered during the investigation, the findings of fact OCR draws from that information, the conclusions of law OCR reaches based upon those findings, and any recommendations for further action needed as a result of those conclusions.

E. Communicate Decisions to Interested Parties

Regional staff should communicate with parties (complainants and recipients), as appropriate, regarding progress in resolving the complaint. These communications should be reflected in the case file.

1. Prepare Case Resolution Letters Where the Complaint is Resolved

If the complaint resolution process results in resolution of the complaint, the regional office will issue a complaint resolution letter. It is anticipated that these letters will be concise and include sufficient information so that those receiving the document can understand how OCR reached its determination. Specifically, it should contain:

- o the basis for the complaint (race, color, national origin, sex, disability, religion, and/or age);
- o a brief statement of the allegations over which OCR has jurisdiction;
- o a brief statement of OCR's jurisdiction over the complaint;
- o an explanation of the basis for OCR's determination that the complaint has been resolved;
- o a copy of any agreement where appropriate; and
- o if resolution is the result of ECR, the following information is provided:

OCR will not monitor the agreement but will inform the parties that if a breach occurs, the complainant has the right to file another complaint. If a new complaint is filed, OCR will investigate allegations of discrimination, not allegations that the agreement has been breached. However, the 180-day limitation on timeliness of a complaint will be determined by the date of the alleged breach.

In some cases, the letter may also include a summary of the pertinent legal standard and a brief statement and analysis of the ultimate facts. In selecting how much detail to include in the letter, OCR staff should consider a variety of factors including the scope of the violation, length of plan implementation, conduct of the recipient, and recipient's or complainant's understanding of OCR's actions.

2. Prepare a No Violation Letter of Findings Where Appropriate

An LOF can be issued under the following circumstances:

The investigation establishes that there is no legal basis for violation or the violation has been resolved, but the complexity of the facts would require an LOF or an LOF would have significant precedential value for OCR or the public.

3. Respond to Complainant's Questions/Concerns about Resolution or No Violation Determination

OCR is committed to ensuring that every complaint is appropriately resolved. The complainant should be informed that, if she or he objects to the resolution or no violation determination, she or he may, within 30 days from the date of OCR's letter, complete and submit a "Complainant's Request for Review" form (attached to TAB D as an Exhibit) to the OCR Headquarter's Office. The complainant should also be informed that, prior to submitting the Complainant's Request for Review form to OCR Headquarters, she or he should feel free to contact the regional office to discuss any questions the complainant may have regarding the case.

Within 30 days of the receipt of a Complainant's Request for Review form, OCR Headquarter's office staff will conduct a preliminary analysis to determine if the request is timely submitted and request additional information from the region, if appropriate. After review, the OCR Headquarter's office will notify the complainant of its decision as quickly as possible; this decision will be made within 90 days from the receipt of the complainant's request for review. If further investigation or other resolution action is warranted, the recipient will also be notified.

Exceptions to the 90 day requirement to complete the review process may be made only with the written approval of the OCR Director.

4. Notify DOJ When Required

If a Title II complaint was referred by the Department of Justice, a copy of the resolution letter must be sent to DOJ.

F. Carry Out Effective Monitoring

Monitoring is critical to ensure that all necessary action is completed. OCR monitors the implementation of all agreements (formal written agreement between OCR and the recipient and any other forms of resolution described above) that include actions to be taken subsequent to the date of any agreement. Monitoring may or may not require an on-site visit.

Monitoring activities should be undertaken as outlined in the agreement. The Regional Manager or his/her designee may agree to modify the schedule or the terms of the agreement, if necessary. Documentation that records the basis for such a modification should be placed in the case file. Any

modifications to the agreement must be appended to the original agreement.

Whenever appropriate, OCR should keep in touch with the recipient, the complainant and any other pertinent parties to ensure effective implementation of the agreement. This is particularly important if any modification of the terms of the agreement will significantly harm the rights and interests of the complainant.

If the regional office and the recipient are unable to resolve any deficiencies in the implementation of the agreement, the region should take appropriate action. See Section III.E.

III. SECURE COMPLIANCE

A. Issue Violation Letter of Findings

When an investigation establishes that there is a violation and predetermination resolution is unsuccessful, OCR will issue a violation Letter of Findings (LOF).

The following information should be included, as appropriate, in the violation LOF:

1. A statement of OCR's jurisdictional authority, including recipient status and the statutory basis for the investigation.
2. A statement of each issue, the findings for each, supported by any necessary explanation or analysis of the information on which the findings are based, and of the applicable regulations.
3. A description of what remedies the recipient must take to achieve voluntary compliance. A proposed Corrective Action Agreement may be attached to the LOF for the recipient's consideration and adoption.
4. Notice of the time limit on OCR's settlement process and the consequence of failure to achieve a voluntary settlement.

B. Conduct Negotiation

Prior to the start of negotiations, the OCR team should develop strategies regarding the roles to be played by various members, appropriate remedies, timeframes for the completion of remedial steps and/or reporting requirements. Negotiations may include meetings, an exchange of letters and/or telephone calls. The complainant should be informed of OCR's reasoning for the specific remedial actions required of the recipient and where appropriate, be given an opportunity to respond or offer alternative solutions. Records of contacts between and among parties should be maintained in the case file.

As a general rule, a successful negotiation after a violation LOF has been issued results in the execution of a Corrective Action Agreement signed by the recipient and OCR. Other methods may be used at the Regional Manager's discretion, in consultation with the Regional Attorney and/or Headquarters staff.

C. Move to Enforcement when Recipient Failed to Achieve Voluntary Compliance

1. If OCR is unable to achieve voluntary compliance, OCR will recommend enforcement action which may include: (a) administrative proceedings to suspend, terminate or refuse to grant or continue HHS financial assistance to the recipient; or (b) referral of the case to DOJ for judicial proceedings to enforce any rights of the United States under any law of the United States. Whenever enforcement action is anticipated, regional and headquarters staff will consult as appropriate.

2. Regional Recommendation

The regional office negotiation team prepares an Enforcement Recommendation whenever voluntary compliance is not successful. The package should generally include the following documents:

- a. A case summary that includes the chronology of the case including attempts to achieve voluntary compliance and provides information on federal financial assistance;
- b. A litigation memorandum which should include:
 - o the nature of the violation on each issue enforcement is recommended;
 - o a discussion of the applicable statutes, regulations, policy interpretations and case law;
 - o an evaluation of the evidence available to prove the case; and
 - o a discussion of any possible defenses.
 - o A draft Notice of Opportunity for Hearing, if the region recommends administrative proceedings, or a draft judicial complaint, if it recommends referral to DOJ for judicial enforcement.
- c. A copy of the LOF and where available, a copy of the Investigative Report;
- d. Explanation of relevant materials received after the LOF was issued and identification of those points on which OCR and the recipient could not agree;

The Regional Recommendation should be forwarded to the Associate Deputy Director, Office of Program Operations and the Office of General Counsel, Headquarters simultaneously.

D. Move to Enforcement for Denial of Access

Follow Tab B, Part VI.B, until it is clear that the recipient will not voluntarily provide access to the information. Then follow the procedures at III-C above. OCR's final letter notifying the recipient of its authority to obtain access to the information and its intention to recommend enforcement action if access is not provided will replace the LOF.

E. Move to Enforcement for Failure to Implement Agreement or Promised Corrective Actions

Where a region concludes that a recipient will not voluntarily fulfill a prior commitment to take promised actions, it should follow the procedures in III-C above, if the case is otherwise ripe for enforcement action. Prior to recommending enforcement action, the region should consider, with attorney input:

- o Whether the available evidence is sufficient to prove a violation of the recipient's prior commitment, the underlying statutory or regulatory violation, or both;
- o Whether the recipient's prior commitment, given its nature and terms, would be judicially enforceable;
- o Whether OCR has fulfilled any pre-enforcement obligation it has under a Corrective Action Agreement, Resolution Agreement, or other settlement to give the recipient written notice of, and an opportunity to respond to, apparent violations of the agreement;
- o if an LOF was previously issued, whether up-dated findings are needed; and
- o if an LOF was not previously issued, whether an LOF should now be issued (e.g. to give the recipient proper notice of, and the opportunity to correct, a statutory or regulatory violation, or, in block grant situations where the governor must be notified of a statutory or regulatory violation and given an opportunity to obtain compliance.

IV. CONDUCT COMPLIANCE REVIEWS

A. General

The statutes and regulations OCR enforces provide for OCR to review, from time to time, the policies, procedures and practices of HHS recipients to determine whether they are in compliance. OCR recognizes that some types and incidents of illegal discrimination will not be the subject of individual complaints but, nonetheless, constitute substantial or procedural noncompliance that should be addressed. For example, discrimination against members of underserved communities may not be reflected in individually filed complaints for the precise reason that members of such communities are not aware of their rights and/or of the processes available to pursue those rights. Other discrimination victims may be too frightened to file complaints. Or, for a variety of other reasons, an injured party may be precluded from filing a complaint even though the evidence shows that the underlying discriminatory policy or practice persists.

All compliance reviews should include a component for technical assistance and, except for certification audits, community outreach. The pivotal objective of a compliance review is to address comprehensive systemic issues. Whenever a compliance review indicates a potential violation, OCR should offer technical assistance to resolve the matter. Alternately, at the discretion of the Regional Manager, OCR may initiate an investigation to more thoroughly examine the underlying issues or to seek legally binding Agreements to effectuate systemic remedies. The review process enables OCR to use its resources with greater flexibility and efficiency.

The procedures identified in the Manual for complaint resolution and enforcement should be utilized for compliance reviews, as appropriate.

There are three types of compliance reviews: the Full Scope Review (FSR), the Limited Scope Review (LSR) and the Certification Audits (CA). Other types of compliance reviews (e.g., research reviews) may be developed at the discretion of the Regional Manager in consultation with headquarters staff.

B. Full Scope Review (FSR)

This type of reviews generally focus on issues that relate to national priorities or significant regional initiatives/interests. FSRs require a thorough review of system/class issues and involve a preliminary phase of data request, in-house analysis, and a subsequent phase of on-site visits, community outreach and technical assistance. Where possible, OPDIVS, other pertinent State and Federal agencies should be consulted or actively invited to be a

member of the review team during the initial planning and subsequent review and resolution processes.

C. Limited Scope Review (LSR)

LSR is designed to focus on a single issue that is generally of a limited scope or confined to a particular recipient. It may be initiated as a result of additional issues (generally unrelated to the complainant or alleged injured party) uncovered in an existing or prior complaint. A simple paper audit of policies and procedures, utilization review, community outreach, etc. is usually adequate to provide a snap shot of the compliance status of a recipient so targeted. If such a snap shot reveals potential violation, technical assistance should be provided. Alternately, at the discretion of the Regional Manager, a more in-depth investigation or FSR may ensue.

D. Medicare Pre-grant Clearance Reviews

The Health Care Financing Administration (HCFA) is responsible for certifying the eligibility of all medical facilities (hospitals, nursing homes, home health agencies, etc.) which apply to participate in the Medicare program. After a facility applies to participate in Medicare for the first time, or reapplies, or has been previously certified but has changed its name, ownership or corporate structure, HCFA notifies OCR and OCR will conduct a pre-grant clearance review to ensure that the facility will be in compliance with applicable HHS nondiscrimination statutes and regulations.

OCR will send to the entity, via certified mail, a technical assistance package which will contain the Title VI, Section 504, and Age Discrimination Act regulations and fact sheets (Title IX regulations, Public Health Service Act sex discrimination regulations or information on other statutes, e.g. the Multiethnic Placement Act, will be included as appropriate). The purpose of the package, accompanied by a cover letter, is to help the entity understand its nondiscrimination obligation as a HHS recipient. Wherever possible, send the entity sample documents, suggested sources of data, explanation of regulatory requirements which may not be easily understood, etc. In addition, the entity will be asked to provide data/information to demonstrate its compliance.

Before clearing an entity, OCR should determine that:

- It has submitted to OCR a signed nondiscrimination Assurance of Compliance (HHS Form 690)
- It has received copies of the Title VI, Section 504, Age Discrimination Act and other applicable HHS nondiscrimination regulations from OCR

- It has conducted a review of its policies and procedures for compliance with the applicable statutes and regulations
- It has adopted a non-discrimination policy that complies with the applicable regulations
- It has published and will continue to disseminate copies of its nondiscrimination policy to clients, potential clients and employees
- It provides interpreters and auxiliary aids, without extra charge, where necessary to give limited English proficient and sensory impaired persons an equal opportunity to receive health care and social services
- It has conducted a Section 504 self-evaluation (and, where applicable, a Title IX self-evaluation) in accordance with the regulation
- Where applicable, it has appointed a Section 504, Title IX and PHSA coordinator
- Where applicable, it has a Section 504, Title IX and PHSA grievance procedure
- It is not conducting pre-employment or post-employment medical examinations or, making other disability-related inquiries, of job applicants or employees in a manner prohibited by Title I of the Americans with Disabilities Act, as incorporated by Section 504
- It is complying with the Section 504 regulation requiring its program, when viewed in its entirety, to be readily accessible to persons with disabilities (specifying whether it is a "small provider" with fewer than 15 employees)
- It does not use any age distinction in providing benefits and services to its client program that is prohibited by 45 C.F.R. Part 91 (specifying any age distinction it is using and the regulation exception or exceptions relied upon to justify its use)

Discretion should be used in determining what or how much information is needed. Before requesting any data, OCR staff should review all available information regarding the entity. This might include information in existing OCR files (from previous pregrant clearance, other compliance reviews or complaint investigations, completed survey forms). OCR staff may find it particularly appropriate to limit the data request when the clearance involves a change of ownership when the entity had received OCR clearance within a year. On the other hand, based

on past experience with the entity/applicant or information received from other sources, OCR may seek additional information from the above list.

OCR's cover letter should advise the entity that the requested information must be returned to OCR in a timely manner (generally not to exceed 60 days). It should also state that the request for information is not subject to the prior clearance requirements of the Paperwork Reduction Act of 1980, P.L. 96-511 (44 U.S.C. 3501 et. seq.). Within a reasonable time after the letter and package is sent, the assigned staff person should call the entity and offer assistance.

The entity should submit a timeframe for taking any necessary steps to ensure its civil rights compliance not completed at the time of its data response. The regional office should use its discretion in accepting such timeframes. A clearance letter acknowledging receipt of the response should be sent to the entity; and, if applicable, the letter should confirm the proposed timeframes for completing required steps. A copy of this letter will be sent to HCFA.

If no data response is received after 60 days, the entity should be sent a warning letter (with copy to HCFA) advising the entity of the consequences of not responding. This letter should indicate that OCR may take one or both of the following steps:

- Medicare Funding: OCR will report the entity's failure to respond to HCFA which could cause the entity's Medicare agreement to be null and void from inception and necessitate the return of all Medicare monies received.

- Other Federal Funding: If the entity receives other HHS assistance (for example, Medicaid reimbursements), it has filed an assurance of compliance which authorizes OCR to obtain access to the requested information in accordance with 45 C.F.R. 80.6(c) (and/or other applicable regulations). Its failure to respond could be construed as a denial of access which could lead OCR to take administrative or other action under 45 C.F.R. 80.8(a) (and/or other applicable regulations). Such action may lead to the suspension or termination of, or refusal to grant or to continue Federal financial assistance to the entity.

Every effort should be made to provide the entity with technical assistance prior to initiating any enforcement action.

A case file should be maintained for each entity referred to OCR by HCFA for Medicare certification. It should contain

the necessary information so that a reviewer can readily determine whether sufficient information exists or is collected to warrant civil rights clearance. To facilitate such a review and determination, a clearance report should be completed and placed in the file. Departure from this practice should be documented.

SPECIAL INTAKE PROCEDURES**I. Age Discrimination Complaints**

All non-employment complaints containing an allegation of age discrimination, including those also containing allegations under Title VI, Title IX, and/or Section 504, are referred to:

Federal Mediation and Conciliation Service
2100 K Street S.W.
Washington, D.C. 20427

OCR will notify the complainant and recipient of OCR's statutory jurisdiction over the complaint and the procedures for processing. If the complaint involves allegations other than age, the parties will be advised that OCR will investigate those issues following completion of the FMCS proceedings. In accordance with 45 C.F.R. §91.50, the complainant will be informed that, if OCR fails to make a finding within 180 days or finds in favor of the recipient, the complainant will have the right to bring a civil suit for injunctive relief.

If the complaint is not resolved by FMCS within 60 days from the date it was filed with OCR, and FMCS does not seek an extension of the mediation period pursuant to 45 C.F.R. §91.43, OCR will resume processing the complaint.

OCR will refer to FMCS for handling any age complaint alleging retaliation by the recipient that is received prior to the completion of the mediation process. Retaliation complaints received following mediation will be handled by OCR.

II. Individual Race, Color, National Origin, Sex, or Religion Employment Complaints

Certain individual race, color, national origin, sex, or religion employment complaints over which both OCR and EEOC may have jurisdiction must be "referred" to EEOC in a timely manner upon receipt of the complaints, in accordance with 28 C.F.R. Part 42, Subpart H (DOJ) and 29 C.F.R. Part 1691 (EEOC). Also, under those regulations, all employment complaints over which OCR lacks jurisdiction, but over which EEOC may have jurisdiction, must be "transferred" to EEOC. The following guidelines apply to the handling of these complaints:

After the receipt of the complaint, OCR will promptly determine whether the complaint will be investigated by OCR or referred to EEOC, and will so notify the complainant and recipient.

Complaints referred to EEOC. Where the entire complaint is referred to EEOC, the complaint will be closed. The letters notifying the complainant and recipient of referral to EEOC must state that OCR is closing the complaint. No determination of completeness or timeliness need be made.

Complaints referred in part to EEOC. Where OCR retains any portion of the complaint (e.g., allegations of discrimination in services), the original case will be closed upon referral to EEOC and a new case number assigned to the portion retained by OCR.

Note: If the complaint is a pattern and practice complaint or an individual complaint that also has other non-employment issues, it must be retained by OCR. For handling of such complaints see the above-cited DOJ and EEOC regulations.

III. Disability Employment Complaints

Joint regulations of DOJ (28 C.F.R. Part 37) and EEOC (29 C.F.R. Part 640), effective 8/4/94, establish procedures for coordinating the investigation of complaints alleging employment discrimination based on disability. The regulations govern intake of all such complaints. Under the joint regulations:

When OCR has Section 504 jurisdiction:

- o if a complaint solely alleges discrimination against an individual, and OCR determines that EEOC may have jurisdiction under Title I of the ADA (see note below), OCR promptly notifies the complainant, in writing, that it intends to forward the complaint to EEOC for investigation and processing under Title I of the ADA, unless the agency receives a written request from the complainant within 20 days of the date of the notice letter requesting that OCR retain the complaint for investigation. The letter describes the basic procedural differences between investigations under Section 504 and Title I and inform the complainant of the potential for differing remedies under each statute. (If the complainant requests that OCR retain the complaint, OCR will promptly make decisions regarding completeness and timeliness.)
- o a complaint that solely alleges discrimination against an individual is retained for investigation if the EEOC does not have Title I jurisdiction.
- o a complaint is retained for investigation if it alleges discrimination in both employment and in other practices or services of the employer or if it alleges a pattern or practice of discrimination in employment (even if dual-filed at EEOC).

When OCR lacks Section 504 jurisdiction but has "designated agency" authority under Title II of the ADA:

- o the complaint is referred to EEOC if OCR determines that EEOC may have Title I jurisdiction.
- o the complaint is retained for investigation if EEOC does not have Title I jurisdiction.

(See 28 C.F.R. §35.190(b)(3) quoted in IV. Title II ADA Complaints (Other than Employment), below, for the scope of OCR's Title II authority)

When OCR lacks Section 504 jurisdiction and Title II authority:

- o the complaint is referred to EEOC if OCR determines that the EEOC may have Title I jurisdiction.
- o the complaint is referred to the DOJ Civil Rights Division if EEOC does not have Title I jurisdiction.

Consult the regulations in complex situations, e.g. 28 C.F.R. §37.9 and 29 C.F.R. §1640.9, re forwarding of certain dual-filed or triple-filed complaints by one Title II "designated agency" to a different Section 504 agency.

Note: Title I of the ADA applies to "any person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person". State and local governments meeting this test are covered. Title I does not apply to the United States, a corporation wholly owned by the government of the United States, an Indian tribe or a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

IV. Title II ADA Complaints (Other than Employment)

Under the DOJ Title II regulations at 28 C.F.R. §35.190(b)(3), HHS is the "designated agency" handling complaints regarding State and local government entities' exercise of responsibility, regulation or administration as to:

All programs, services and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools; health care and social service providers and institutions, including "grass-roots" and community services organizations and programs; and preschool and day care programs.

If OCR receives an ADA complaint over which it does not have jurisdiction, it should be referred to the Department of Justice and closed. The complainant should be notified of the referral.

V. Hill-Burton Community Service Assurance Complaints

OCR has authority to investigate complaints alleging violation of Titles VI and/or XVI of the Public Health Service Act (Hill-Burton) and the Secretary's Delegation of Hill-Burton community service enforcement authority of December 8, 1980 (45 Fed. Reg. 82721, December 16, 1980). If OCR receives such a complaint, the letters to the complainant and the recipient will include the following additional information:

- o A statement that, upon receipt of a signed Complainant Consent Form, OCR must forward a copy of the complaint to the facility (recipient) pursuant to §124.606(a)(2)(ii); (For the letter to the recipient, enclose a copy of the complaint after receipt of the consent form) and

- o A statement of the relevant part of §124.606(a)(4), as follows:

"... If the Secretary dismisses a complaint or the Attorney General has not brought an action for compliance within six months from the date on which the complaint is filed, the person filing it may bring a private action to effectuate compliance with the assurance. If the Secretary determines that he will be unable to issue a decision on a complaint or otherwise take appropriate action within the six month period, he may, based on priorities for the disposition of complaints that are established to promote the most effective use of enforcement resources, or on the request of the complainant, dismiss the complaint without a finding as to compliance prior to the end of the six month period, but no earlier than 45 days after the complaint is filed."

VI. Notification to Architectural and Transportation Barriers Compliance Board (ATBCB)

45 C.F.R. §85.61(f) requires OCR to notify the Architectural and Transportation Barriers Compliance Board (Access Board) upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968 is not readily accessible to and usable by individuals with disabilities. This is a required notice to an agency with overlapping jurisdiction, not a referral or transfer. OCR would proceed independently with the complaint under 45 C.F.R. §§85.41-85.43. For OCR's responsibilities under 45 C.F.R. Part 85, see TAB E.

DATA COLLECTION AND INFORMATION GATHERING

I. General

Generally, OCR requests documentary evidence from the recipient, develops interview questions based upon those data and any other available information, and conducts interviews with the complainant, recipient personnel, and others as appropriate. The exact approach taken for data/information collection will vary from case to case depending on the issues raised, the extent to which relevant data are in the control of the recipient or others, and investigative strategies. A team approach is preferred and strongly recommended. Some general principles that should guide decision making during data collection include:

- A. Attempt to obtain independent written documentation to corroborate oral statements.
- B. Clearly label all evidence, both documents and written records of contact, with information identifying the case being investigated and the circumstances under which the evidence was obtained (e.g., where and when an interview was conducted, and who provided a given document).

II. OCR's Authority for Obtaining Information

OCR has the right to complete access during a recipient's normal business hours to all information maintained by the recipient needed to determine compliance status on those issues under investigation. See 45 C.F.R. §§ 80.6 and 91.34 and 42 C.F.R. § 124.605-606. Generally, this includes access to oral information from a recipient's employees as well as to written or non-written information, such as electronic storage media, microfilming, retrieval systems, and photocopies maintained by the recipient. OCR, not the recipient, decides what information is relevant to a determination of compliance.

OCR has no legal authority to require the complainant or any other non-recipients (except under 28 C.F.R. Part 35 and 45 C.F.R. Part 85) to provide information. See Section II.A. regarding any case where the complainant's refusal to provide information interferes with OCR's ability to investigate the case.

III. Requests for Records

A. Data Request Letters

A data request letter is a written request to the recipient for information relevant to the investigation. It can be used to

initiate information collection or to request additional information after the primary information collection activity has been completed. If the request was made orally it should be documented in the file.

B. Time Frames for Recipient's Response

The recipient should generally be given a reasonable amount of time from the date of OCR's request to submit the information requested.

C. Form of Data Provided by Recipient

OCR's legal authorities require that a recipient must submit information in any form OCR stipulates as necessary for our compliance activities. However, other Federal regulations and policies may restrict OCR's information requests.

1. Under the Paperwork Reduction Act (44 U.S.C. §3501 et seq.), unless the request is made in the context of an ongoing complaint or compliance review investigation (see 5 C.F.R. §1320.3), OCR may not generally require a recipient to record information on a "form" or other standardized data collection instrument without obtaining prior approval for its use by the Office of Management and Budget. OCR may, however, suggest suitable formats to be used at the discretion of the recipient as information collection instruments.
2. Similarly, OCR must consider Federal policies concerning paperwork burdens when requesting a recipient to do more than provide OCR access to normally maintained information. Requests that a recipient manipulate or compile information to meet an OCR need must be reasonable and take into consideration the burden being placed on the recipient.
3. If a recipient invites OCR to come on site and collect the requested information, and provides OCR with sufficient access to files, records, logs, and appropriate indexes for OCR to extract the needed information, then the recipient has provided OCR with the requisite access.

D. OCR Access to Otherwise Confidential Records

Under 45 C.F.R. §80.6, asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance, despite contrary state or local law. Nonetheless, OCR should respect and try to protect reasonable expectations of individual privacy. For example, OCR may permit a recipient to code patient names and retain a key to the code. However, OCR should inform the recipient that if such a procedure impedes the investigation, OCR will need access to the unmodified records. Relevant Federal confidentiality rules, such as 42 C.F.R. Part 2 implementing 42 U.S.C. §290dd-2, regulating consented and unconsented disclosure of substance abuse patient records, should be observed.

IV. Interviews

A. General

An interview is any conversation with anyone during the course of an investigation for the purpose of obtaining information relevant to the issues in the case.

B. Preliminary Steps

An investigative interview should usually begin with the following:

1. A general explanation of why the person is being interviewed, including what OCR is, what law or laws are part of the current investigation, and where appropriate, a brief explanation of what is being investigated.
2. A brief discussion of OCR complaint resolution procedures, including providing the interviewees with a copy of TAB D.
3. A resolution of any questions about representation of the witness or the presence of third parties during the interview.

C. Witness' Right to Representation

The witness' right to representation does not include a general right to have other persons present during the interview. Besides the OCR investigator, the person being interviewed, and any needed interpreters, the only other person present during any interview should be the witness' personally designated representative. If the witness, other than an upper level manager, identifies the recipient's counsel or a supervisor or manager for the recipient as a personal representative, the witness should be informed that such a person may have a conflict of interest between that person's responsibilities to the recipient and the person's responsibilities

as a personal representative. The witness should also be informed that if a representative with responsibilities to the recipient appears to interfere with OCR's ability to interview the witness or obtain requested information, the representative will be asked to leave. The witness should then be asked again if the witness wishes to have a personal representative and whom the witness wishes to have as that representative. If the witness still identifies the same person as the witness, and OCR has no other reason to believe the presence of the identified representative will interfere with the gathering of information, OCR should proceed with the interview. Regional investigators should discuss these considerations with the witness prior to scheduling the interview.

D. Recipient's Employees

Recipients must provide OCR with access to all books, records, accounts, and other sources of information or facilities that OCR finds necessary to determine compliance. This includes what an employee can supply orally as well as any written information he/she may have that is not maintained elsewhere by the recipient. OCR cannot compel a recipient's employees to provide information upon the employee's refusal; however, the recipient is responsible for providing the information by any other possible method.

E. Interviews with Minors or Legally Incompetent Individuals

Generally, parental or guardian written consent should be obtained when interviewing any person who is a minor or otherwise legally incompetent, for example, mentally impaired. If this presents a problem, consult with the Regional Attorney for guidance.

F. Records of Interviews

A written record of both telephone and in-person interviews should be made to preserve information obtained. Whether notes are taken or a tape recorder is used during a particular interview depends on the investigative technique of the interviewer and the reactions of the interviewee. If tapes are transcribed, the original tapes should also be kept. Tape recording will be done only with the consent of the interviewee. Regardless of the technique used during the interview, a written record of the interview should be created.

The record of the interview to be placed in the case file should contain the following information:

1. name and identification of the interviewee, interviewer, and any other person present (include an explanation for the presence of any other persons);
2. date, time, and location of interview (including whether the interview was conducted by telephone);

3. written record reflecting the questions and responses obtained during the interview (this need not be a verbatim transcript but should accurately reflect the responses of the witness).

The need for signed witness statement, affidavit, declaration or even more formal testimony (e.g., deposition) to be used for later enforcement purposes should be assessed or considered as appropriate.

V. Fact Finding Conferences

The process of minimizing unnecessary investigative work by identifying key facts that are not in dispute has been referred to as a fact finding conference. As a practical matter, it may be more convenient to conduct separate telephone interviews and follow-up conversations where travel costs and time would make an in-person fact finding conference impractical. Another option could be arranging a teleconference between OCR, the complainant, and the recipient's representative.

A. OCR's Role

- o To clearly communicate to the parties regarding the allegations under investigation and the potential benefits of narrowing the questions of fact to those matters in dispute between the parties. Also, to inform the parties that OCR will evaluate any agreed-upon facts in reaching a decision on the complaint and that OCR will not deem it necessary to obtain independent corroboration of facts that the parties agree upon.
- o To plan and be prepared for the fact finding conference. To have identified in advance those questions of fact that should be resolved in order for OCR to reach a decision on the allegations raised in the case.
- o To direct inquiries to the parties that are clear and focused on facts that are essential to reach a decision on the allegations raised.
- o To inquire that each person stipulating to or agreeing to facts has personal knowledge or has the authority to speak for the recipient or complainant as to the facts agreed upon.
- o To accurately record and maintain the facts as agreed upon by the parties. To ensure the parties are informed of the facts that OCR finds are not in dispute.

B. Role of Complainant and Recipient's Representative

- o To cooperate in responding to OCR's questions regarding facts that are important to the resolution of the complaint.
- o To provide accurate responses and to make a sincere effort to resolve or minimize any factual differences that may arise during the fact finding conference.

VI. Limitations on Obtaining Information

A. Actions Constituting Denial of Access

It is a clear denial of access to information when a recipient either explicitly or by its overall conduct:

1. refuses to permit OCR access to written or unwritten information, such as electronic storage media, microfilm, retrieval systems, photocopies, etc., and the recipient's facilities during the recipient's normal business hours;
2. refuses to permit OCR access to employees during recipient's normal business hours;
3. fails to provide information to which it has access if one of its employees refuses to do so or to provide access to information maintained exclusively by an employee in his/her official capacity; or
4. refuses to complete OMB-approved compliance and survey forms relevant to an investigation (e.g., OS/CR 532-1 and 532-2 survey forms).

B. OCR's Response to Refusals to Provide Data or Access to Witnesses

In instances where the recipient states an intent to refuse to provide OCR with requested information or access to records or witnesses, OCR will do the following:

1. Ascertain the exact basis for the recipient's refusal, and, where possible, attempt to explain OCR's authority or provide other information to address the recipient's concerns.
2. If the investigator still does not have access to the requested information, he/she should consult with regional legal staff (when on site, this should be done over the telephone whenever possible before the investigator leaves the recipient's premises). Where appropriate, OCR legal staff should discuss the refusal to provide information directly with the recipient's representative.

3. If such attempts are still unsuccessful, a letter should be prepared, in consultation with legal staff, setting forth OCR's authority to obtain access to the information and addressing as fully as possible any particular concerns expressed by the recipient.
4. Whenever the region determines that voluntary compliance cannot be achieved, the case should be referred for enforcement (See Section III).

TAB C

FREEDOM OF INFORMATION AND PRIVACY ACTS

I. General

The Freedom of Information Act (5 U.S.C. §552) (FOIA) gives the public a right of access to records of Federal agencies, including the records and files of OCR. The FOIA regulations of HHS are at 45 C.F.R. Part 5.

The Federal courts have jurisdiction over civil actions to enforce the FOIA. When agency personnel act arbitrarily or capriciously in withholding records that the FOIA required to be disclosed, Special Counsel investigations and employing agency disciplinary actions are authorized.

The Privacy Act of 1974 (5 U.S.C. §552a) regulates the collection, maintenance, use and dissemination of individual information in Federal agency "systems of records" from which information is retrievable by an individual's name or other individual identifier, such as OCR complaint files. The Privacy Act regulations of HHS are at 45 C.F.R. Part 5b.

The Privacy Act provides civil remedies in Federal court for aggrieved individuals, and 5 U.S.C. §552a(i) makes it a criminal misdemeanor, punishable by a fine of up to \$5,000, for "any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it."

II. Privacy Act

A. OCR Records are Exempt from Some Requirements

Under the Privacy Act, individuals generally have a right of access to information pertaining to them in government files. However, 5 U.S.C. §552a(k)(2) permits agencies by regulation to exempt from the general access provision records which are investigatory material compiled for law enforcement purposes. Under this authority, the HHS Privacy Act regulations, at 45 C.F.R. §5b.11, since May 10, 1984, have exempted OCR complaint files and log from the notification, access, correction and amendment requirements of the Act. 49 Federal Register 14107 (April 10, 1984). The exemption is qualified, in that if the material results in the denial of any

right, privilege or benefit to the individual, the individual will have access to the material (except to the extent necessary to protect confidential sources). This qualification may apply more frequently to 45 C.F.R. Part 85 cases than elsewhere.

Because of the §552a(k)(2) exemption, requests by individuals for access to information about them in OCR files are generally handled as FOIA requests (see below).

B. Privacy Act Notice to Complainants and Other Individuals Asked to Supply Information to OCR

OCR remains subject to other provisions of the Privacy Act, such as 5 U.S.C. §552a(e)(3), which requires a Federal agency to notify each individual whom it asks to supply personal information, on the form used to solicit the information, or on a separate form that can be retained by the individual, of: (i) the statutory authority for solicitation of the information and whether the individual's disclosure of such information is mandatory or voluntary; (ii) the principal purpose or purposes for which the information is intended to be used; (iii) the routine uses which may be made of the information; and (iv) the effects on the individual, if any, of not providing the requested information.

OCR meets this requirement by giving complainants and other individuals it asks to supply personal information a copy of the notice included in this Tab. The "routine uses" listed in the notice are those OCR published in 46 Federal Register 52625-52626 (October 27, 1981), repeated at 47 Federal Register 45514 (October 13, 1982) and still follows.

C. Accurate Accounting of Disclosures

The Privacy Act, at 5 U.S.C. §552(c)(3), also requires OCR to make and retain an accurate accounting of certain disclosures from OCR complaint records, including the date, nature and purpose of each disclosure to any person or to another agency, and the name and address of the person or agency to whom the disclosure is made.

The accounting requirement applies to all disclosures listed in 5 U.S.C. §552a(b), Conditions of Disclosure, with two exceptions: No accounting is necessary for disclosures to officers or employees of HHS who have a need for the record in the performance of their duties or for disclosures required by the FOIA.

III. Freedom of Information Act

A complainant, recipient or any member of the public may request release of OCR records under the FOIA. HHS policy, consistent with Presidential and Department of Justice guidelines, favors disclosure of records unless their production would adversely affect an

agency's ability to do its job or other protected interests (e.g. constitute an unwarranted invasion of personal privacy, or disclose trade secrets or privileged and confidential commercial or financial information). The Privacy Act permits any disclosure required by the FOIA.

OCR regional offices should forward FOIA requests to the Headquarters FOIA officer by the fastest means available (e.g. telefax) for processing. When submitting requested records to the FOIA officer for processing, the regional office should include a clean copy and a copy marked in pencil with any deletions recommended by the regional office based on one or more of the nine exemptions from mandatory disclosure in 5 U.S.C. §552(b).

The exemptions most frequently relied upon by OCR to withhold requested records, or portions thereof, are:

- Exemption 2 ("related solely to the internal personnel rules and practices of the agency");
- Exemption 4 ("trade secrets and commercial or financial information obtained from a person and privileged or confidential");
- Exemption 5 ("inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency");
- Exemption 6 ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); and
- Exemption 7 (recently amended) ("investigatory records compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis . . . , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be

expected to risk circumvention of the law,
or (F) could reasonably be expected to
endanger the life or physical safety of any
individual").

**NOTICE TO COMPLAINANTS AND OTHER
INDIVIDUALS ASKED TO SUPPLY INFORMATION
TO THE OFFICE FOR CIVIL RIGHTS**

Privacy Act

The Privacy Act of 1974 (5 U.S.C. §552a) requires OCR to notify individuals whom it asks to supply information that:

-- OCR is authorized to solicit information under:

(i) Federal laws barring discrimination by recipients of Federal financial assistance on grounds of race, color, national origin, disability, age, sex, religion under programs and activities receiving Federal financial assistance from the U.S. Department of Health and Human Services (HHS), including, but not limited to, Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Age Discrimination Act of 1975 (42 U.S.C. §6101 et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.), and Sections 794 and 855 of the Public Health Service Act;

(ii) Titles VI and XVI of the Public Health Service Act (42 U.S.C. §§291 et seq. and 300q et seq.) and 42 C.F.R. Part 124, Subpart G (Community Service obligations of Hill-Burton facilities);

(iii) 45 C.F.R. Part 85, as it implements Section 504 of the Rehabilitation Act in programs conducted by HHS; and

(iv) Title II of the Americans with Disabilities Act (42 U.S.C. §12131 et seq.) and Department of Justice regulations at 28 C.F.R. Part 35, which give HHS "designated agency" authority to investigate and resolve disability discrimination complaints against certain public entities.

-- Disclosure of information to OCR by individuals who are not themselves recipients of federal financial assistance is voluntary, but 18 U.S.C. §1001 (quoted below) should be noted. Other effects of not providing requested information would be indirect. For example, individuals employed or participating in assisted programs may be disadvantaged by sanctions imposed on a recipient of HHS assistance for failing to provide OCR with needed information, and if you are the complainant or an alleged injured party, failure to provide information may preclude OCR from making a compliance determination or securing relief from which you might benefit.

-- The principal purpose for which OCR intends to use requested information is to determine and secure compliance with the above-mentioned Federal anti-discrimination laws.

-- Routine uses of OCR investigative information include: (i) review of files by the Department of Justice, the Equal Employment Opportunity Commission or other Federal and State agencies when necessary to complete an investigation, enforce the statutes or assure proper coordination; (ii) disclosures to OCR contractors who are required to maintain Privacy Act safeguards with respect to such records; (iii) disclosure to a congressional office from the record of an individual in response to an inquiry made at the request of the individual; and (iv) disclosures to the Department of Justice to permit effective defense of litigation provided such disclosure is compatible with the purpose for which the record was collected.

Under 5 U.S.C. §552a(k)(2) and the HHS Privacy Act regulations at 45 C.F.R. §5b.11, OCR complaint records have been exempted as investigatory material compiled for law enforcement purposes from certain Privacy Act access, amendment, correction and notification requirements. The exemption is qualified, in that if the material results in the denial of any right, privilege or benefit to the individual, the individual will have access to the material (except to the extent necessary to protect confidential sources).

Freedom of Information Act

A complainant, the recipient or any member of the public may request release of OCR records under the Freedom of Information Act (5 U.S.C. §552) (FOIA) and HHS regulations at 45 C.F.R. Part 5. Exemptions to mandatory FOIA disclosure requirements allow OCR to withhold trade secrets or privileged and confidential commercial or financial information, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, investigatory records (to the extent specified in 5 U.S.C. §552(b)(7)) and other records whose release would adversely affect the agency's ability to do its job. The Privacy Act permits any disclosure required by the FOIA.

Fraud and False Statements

Federal law, at 18 U.S.C. §1001, authorizes prosecution and penalties of fine or imprisonment for conviction of "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry".

DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE FOR CIVIL RIGHTS

AUTHORIZATION FOR RELEASE OF INFORMATION

TO THE OFFICE FOR CIVIL RIGHTS

I hereby authorize the United States Department of Health and Human Services Office for Civil Rights (OCR) to receive material and information about me pertinent to an investigation or review of compliance with Federal civil rights statutes or regulations. This release includes, but is not limited to, personnel records and medical records.

Please check one of the following blocks and sign below:

☐ CONSENT - I have read and I understand the above. I understand that I am not required to authorize this release and do so voluntarily.

☐ CONSENT DENIED - I have read and I understand the above. I do not authorize OCR to receive material and information about me.

SIGNATURE: _____ DATE: _____

NAME: _____
(Please print)

ADDRESS: _____

DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE FOR CIVIL RIGHTS

AUTHORIZATION FOR THE OFFICE FOR CIVIL RIGHTS

TO REVEAL A COMPLAINANT'S OR OTHER INDIVIDUAL'S

IDENTITY OR IDENTIFYING INFORMATION

I have received and understand the Notice to Complainants and Other Individuals Asked to Supply Information to the Office for Civil Rights (OCR).

I understand that, it may become necessary for OCR, in the course of its responsibilities as a Federal civil rights agency, to reveal my identity or identifying information about me to persons at the institution under investigation or to other persons or institutions.

I am also aware of the obligations of OCR under the Privacy Act and Freedom of Information Act, which also may require OCR to reveal my identity and identifying information about me.

In addition, I understand that the Department of Health and Human Services' (HHS) regulations prohibit any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

Please check one of the following blocks and sign below:

☐ CONSENT- I have read and I understand the above and authorize OCR to reveal my identity and identifying information about me.

☐ CONSENT DENIED - I have read and I understand the above and do not want OCR to reveal my identity or identifying information about me.

SIGNATURE: _____ DATE: _____

NAME: _____
(Please Print)

ADDRESS: _____

TAB D
INFORMATION ABOUT
OCR'S COMPLAINT RESOLUTION PROCEDURES³

I. Complaint Evaluation

OCR begins by evaluating complaints. OCR's objective in complaint evaluation is to determine whether or not OCR can proceed to complaint resolution. OCR cannot proceed to complaint resolution under a variety of circumstances, for instance, where OCR has no jurisdiction (i.e., the entity complained against is not a "recipient" of HHS assistance or otherwise covered by other laws enforced by or delegated to OCR); where a complaint is not timely; where another agency has already reached a binding decision; or where the person alleged to be injured declines to cooperate in OCR's investigation.

OCR will actively work with complainants and examine other sources of information to ensure that the agency has sufficient information to evaluate complaints appropriately. OCR staff will provide appropriate assistance to complainants who may need help in providing information OCR needs.

It is expected that complainants will also work actively with OCR to ensure that OCR has the information needed; OCR can initiate complaint resolution only for those complaints for which sufficient information has been provided.

Generally, OCR will take action only with respect to those complaints that have been filed within 180 calendar days of the last act of alleged discrimination, or where the complaint alleges a continuing discriminatory policy or practice. If a complaint is not filed in a timely manner, the complainant may request to have the filing time extended, which may be granted only under limited circumstances.

Reminder

A complainant (or alleged injured party) may bring a court action against a recipient to redress alleged discrimination regardless of OCR's determination or resolution of the case. A complainant may wish to consult an attorney about his/her right to pursue a private cause of action, any applicable statutes of limitations (i.e.

³These procedures do not apply to disability discrimination complaints regarding programs or activities conducted by the U.S. Department of Health and Human Services (HHS), which are covered by 45 C.F.R. Part 85.

requirements that certain types of lawsuits must be brought within a specified period of time), and other relevant considerations. OCR cannot and does not provide complainants with legal advice or representation in such matters.

II. Complaint Resolution

OCR has a variety of tools for resolving complaints. These include: early complaint resolution, predetermination resolution, agreements for corrective action, and enforcement. Any approach, or combination of approaches, may be initiated at any time and multiple approaches may be used to resolve any complaint.

a. Early Complaint Resolution

Early complaint resolution provides the parties involved the opportunity to immediately resolve the allegations prompting the complaint. If the complainant and the recipient are willing to utilize this approach, OCR will work with the parties to facilitate resolution of the complaint. OCR does not sign, approve, or endorse any agreement reached between the parties; however, OCR will assist both parties in understanding pertinent legal standards and possible remedies.

OCR does not monitor any agreement reached between the parties in ECR, but if the recipient does not follow through on the agreement, the complainant may refile the original complaint.

b. Predetermination Resolution

OCR's investigations continue until such time as OCR can achieve an appropriate resolution of the complaint allegations under OCR regulatory standards. OCR may use a variety of investigation and negotiation techniques, which may include informal fact finding methods (e.g., joint discussions with the complainant and recipient) to establish the facts and if possible, resolve the complaint on mutually agreeable terms.

Any predetermination resolution agreement will specify the action, if any, to be taken by the recipient to resolve each complaint allegation. Implementation of such agreements will be monitored by OCR.

c. Other Ways Complaints Can be Resolved Without a Violation Finding

OCR may also consider a complaint resolved when any of the following occur:

- If the complaint has been investigated by another agency and the resolution of the complaint meets OCR standards;

- If OCR determines that the evidence is insufficient to support a finding of a violation;
- If the complainant withdraws his or her complaint;
- If OCR obtains information indicating that the allegations raised by the complaint have already been resolved.

d. Complainant's Questions/Concerns about Complaint Resolution

OCR is committed to ensuring that every complaint is appropriately resolved. If the complainant objects to OCR's determination, she or he may, within 30 days of the date of OCR's letter, submit a "Complainant's Request for Review" (form attached) to the OCR Headquarter's Office. After review, the OCR Headquarter's Office will notify the complainant of its decision within 90 days from the receipt of the request. If further investigation or other resolution action is warranted, the recipient will also be notified.

Prior to submitting the Complainant's Request for Review form to OCR Headquarters, the complainant should also feel free to contact the regional office to discuss any questions she or he may have regarding the case.

III. Violation Letters of Findings and Enforcement

If a complaint involving a violation of a statute or regulation is not otherwise resolved, OCR will issue a violation letter of findings specifying the factual findings and the legal basis for the violation(s). If OCR is unable to obtain voluntary compliance, enforcement action is authorized, either by administrative proceedings to terminate Federal financial assistance or by referral to the Department of Justice for litigation.

IV. Additional Information

a. Prohibitions Against Intimidation or Retaliation

A recipient of HHS assistance or a covered entity may not intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone who has either taken action or participated in an action to secure rights protected by the civil rights statutes enforced by OCR. If any individual believes that he or she is being harassed or intimidated by a recipient because of the filing of a complaint or participating in the resolution of it, a complaint alleging such harassment or intimidation may be filed with OCR.

b. Fraud and False Statements

Complainants, recipients and others should know that Federal law, at 18 U.S.C. §1001, authorizes prosecution, and penalties of fine or imprisonment upon conviction, of "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.

c. Complaint Information and Records

OCR gathers, maintains and disseminates complaint information and records in accord with Federal law, including the Freedom of Information Act (5 U.S.C. §552) ("FOIA"), the Privacy Act (5 U.S.C. §552a) and HHS regulations at 45 C.F.R. Parts 5 and 5b. OCR requests for information during an administrative action or investigation involving specific individuals or entities are not subject to advance approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. §3501 et seq). See 5 C.F.R. §1320.3.

Complainants and other individuals OCR asks to supply personal information are given a separate form containing a notice under the Privacy Act. Under 5 U.S.C. §552a(k)(2) and 45 C.F.R. §5b.11, OCR complaint records have been exempted as "investigatory material compiled for law enforcement purposes" from certain access, amendment, correction and notification requirements of the Privacy Act.

A complainant, the recipient or any member of the public may request release of OCR records under the Freedom of Information Act (5 U.S.C. §552) (FOIA) and HHS regulations at 45 C.F.R. Part 5. Exemptions to mandatory FOIA disclosure requirements allow OCR to withhold trade secrets or privileged and confidential commercial or financial information, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, investigatory records (to the extent specified in 5 U.S.C. §552(b)(7)) and other records whose release would adversely affect the agency's ability to do its job. The Privacy Act permits any disclosure required by the FOIA.

COMPLAINANT'S REQUEST FOR REVIEW

I wish to request a review of the determinations made by the Department of Health and Human Services Office for Civil Rights (OCR) in my complaint against _____ (OCR # _____).

Check reason:

I believe OCR's investigation was incomplete because:

_____ OCR did not consider important evidence (describe below)

_____ OCR failed to interview important witnesses (provide below names, phone numbers and the information the witnesses would provide)

_____ OCR's determination is contrary to or unsupported by the evidence (explain below)

_____ OCR improperly applied or interpreted the law or applicable regulations (explain below)

_____ Other action that OCR took or failed to take (explain below what the action was and how it affected OCR's determinations)

I contacted the regional office and discussed the following matters regarding the case:

Signed: _____ Date: _____

Address: _____

TAB E

SPECIAL COMPLAINT HANDLING PROCEDURES

Statutory and regulatory provisions impose special complaint handling steps for certain cases.

I. AGE DISCRIMINATION CASES

Complaints that are not resolved by FMCS or that are reopened because of a violation of the mediation agreement are investigated by OCR.

The parties will be encouraged to resolve all age discrimination issues through informal fact finding methods, which include joint or separate discussions with the complainant and recipient, to establish the facts and, if possible, and settle the complaint on mutually agreeable terms. OCR will put any agreement in writing and have it signed by the parties as well as by the Regional Manager.

If resolution is not achieved through informal investigation, OCR will develop formal findings and attempt to secure voluntary compliance.

A complainant may file a civil action if 180 days have elapsed since the Complainant filed the complaint and OCR has made no finding. When this occurs, OCR shall promptly advise the complainant of this fact and advise the complainant of his or her right to file a civil action for injunctive relief. In addition, the complainant should be advised that:

1. The complainant may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;
2. A complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint;
3. Before commencing the action, the complainant shall give 30 days notice by registered mail to the Secretary, the Attorney General of the United States, and the recipient;
4. The notice must state: the alleged violation of the Act; the relief requested; the court in which the complainant is bringing the action; and whether or not attorney's fees are being demanded in the event the complainant prevails; and
5. The complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

II. PART 85 COMPLAINTS

Investigators should review 45 C.F.R. Part 85 whenever processing a complaint involving an HHS conducted program or activity. Complaint processing under this part requires the following:

- Employment complaints are processed in accordance with 29 C.F.R. §1613 and HHS Instruction 1613-3.
- All other complaints should be handled within 180 days of the receipt of a complete complaint.
- A letter of finding must contain:
 - (1) Findings of fact and conclusions of law;
 - (2) A description of a remedy for each violation found;
 - (3) A notice of the right to appeal.
- Notice is required to the Architectural and Transportation Barriers Compliance Board (Access Board) if the complaint alleges that a building or facility subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. §4151-4157) is inaccessible. A copy of the OCR letter of findings in such cases will be provided to the Access Board for information purposes. OCR and the Access Board investigations should be coordinated where possible.

If the regional office determines that its investigation of a Part 85 complaint will exceed the 180-day time frame, the Regional Manager should notify the Associate Deputy Director, Office of Program Operations. Headquarters will then assume the responsibility of requesting an extension from the Department of Justice.

Letters of Findings to complainants should contain the following paragraphs to provide the notice of the right to appeal:

If you are not satisfied with this determination, you must file any appeal of the findings of fact and conclusions of law or remedies within sixty days of your receipt of this letter to:

Associate Deputy Director
Office of Program Operations
Office for Civil Rights
330 Independence Ave. S.W.
Room 5039, Cohen Building
Washington, DC 20201

OCR may extend the time for filing for good cause. Decisions on such appeals shall not be heard by the person who made the initial decision. OCR shall notify the complainant of the results of the appeal within sixty days of the receipt of the request. If OCR determines that it needs additional information from the complainant, it shall have sixty days from the date it receives the additional information to make its determination on the appeal.

The complainant should also be advised that (1) in the case of noncompliance by an HHS component agency with Part 85, OCR will undertake appropriate action to assure compliance and (2) in the event OCR and the component agency are unable to agree on a resolution of any particular matter, the matter will be submitted to the Secretary for resolution.

Final agency action on Part 85 complaints may be subject to judicial review under the Administrative Procedures Act (5 U.S.C. §701 et seq.)

III. COMPLAINTS INVOLVING BLOCK GRANT RECIPIENTS

The nondiscrimination provisions of certain HHS block grants require Notice to the chief state official (Governor) when OCR finds a violation by a State agency or other entity receiving a payment of HHS block grants.

Establishing Liaison

The OCR Director will establish the initial contact with each Governor's office and request that an official be designated to work with OCR. Once a designee has been named, the OCR Regional Manager will contact that individual to arrange for an orientation session which highlights:

- o The procedures that OCR will utilize in implementing the 60-day provisions of the block grant legislation.
- o OCR's policies (including case handling practices and procedures), typical issues which OCR investigates and typical remedies/corrective actions which OCR requires.
- o Procedures for notifying the Governor's office of sensitive or controversial cases.
- o Alternatives for involving the Governor, the recipient, the complainant, and OCR in negotiations during the 60-day period.

- o The obligations which States and other recipients have to comply with other OCR-enforced statutes - i.e., Hill-Burton, Titles VII and VIII of the Public Health Services Act, etc.

Any agreements reached during these discussions should be confirmed either by letter or, if appropriate, in a Memorandum of Understanding (MOU).

Special Note: The HHS Regional Director should be notified in advance and kept apprised of any contact/negotiations with governor's offices.

Notification to the Governor

Whenever a block grant recipient has been found in noncompliance, the Governor must be sent a letter of notification which transmits a copy of the letter of findings to the recipient. (Note: Letters of findings that include violation of nondiscrimination provisions not covered by the block grant statutes (e.g. Hill Burton) should include a statement that OCR will not initiate negotiations until the Governor has completed efforts to obtain voluntary compliance with the block grant provisions). The regional office should contact the Governor's office within a reasonable time period to offer technical assistance in formulating a corrective action plan.

Negotiation Procedures for Block Grant Cases

Negotiations with block grant recipients following a letter of findings are significantly different than for other recipients because OCR must offer the Governor a reasonable period not to exceed 60 days to secure voluntary compliance. Besides playing a technical assistance role, OCR may be invited to participate in joint negotiations or negotiate directly with the recipient. During the 60-day period, the role taken by OCR should be at the Governor's discretion.

Corrective Action Plans

Whenever the Governor submits a proposed remedy which meets OCR standards, the regional office should prepare a written agreement for signature by the recipient. The agreement may contain an acknowledgement by the Governor that OCR discharged its obligation to notify and request him or her to secure compliance with the applicable statute or regulation and that such notification and request need not be repeated in reference to a violation of the agreement.

If the Governor submits a proposed remedy (initial or revised) which does not meet OCR standards, the regional office should send the

Governor a letter which discusses the reasons for this assessment and again offer technical assistance.

After the 60-day period has expired with no or an insufficient proposed remedy offered, OCR should notify the Governor's office in writing that, in accordance with the Act, the responsibility for securing compliance now rests with OCR.

The regional office should inform the Governor's office of the results of OCR's negotiations.

If at any time the Governor's office advises the regional office that voluntary compliance cannot be secured, OCR must confirm this decision in writing and proceed with formal compliance actions. The regional office may limit the scope of the negotiations with the recipient if OCR has been involved in the Governor's negotiations.

Governor Refutes Letter of Warning

If the Governor responds to the notice and letter of findings by submitting information and/or comments with the intention of altering OCR's determination, the regional office must respond by letter as soon as possible as to its disposition of this information or comments.

TAB B: Part 86 Title 45 CFR

Code of federal regulations

Public Welfare

45

PARTS 1 TO 199

Revised as of October 1, 1988

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



Part 86

particular matter, such matter will be submitted to the Secretary for resolution.

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

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- 86.3 Remedial and affirmative action and self-evaluation.
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- 86.71 Interim procedures.

SUBJECT INDEX TO TITLE IX PREAMBLE AND REGULATION

APPENDIX A—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [EDITORIAL NOTE]

SOURCE 40 FR 24128, June 4, 1975, unless otherwise noted.

Subpart A—Introduction

- § 86.1 Purpose and effective date.

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855.

and sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

§ 86.2 Definitions.

As used in this part, the term—

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

(b) "Department" means the Department of Health and Human Services.

(c) "Secretary" means the Secretary of Health and Human Services.

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

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

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

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

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

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

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

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

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced

for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(r) "Transition plan" means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under

which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 573, 574; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative action and self-evaluation.

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

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

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

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

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

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

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the

Director upon request, a description of any modifications made pursuant to paragraph (c) (2) of this section and of any remedial steps taken pursuant to paragraph (c) (3) of this section.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682) [40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.4 Assurance required.

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

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

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

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

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or re-

ipient's subgrantees, contractors, sub-contractors, transferees, or successors in interest.

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

§ 86.5 Transfers of property.

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

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

§ 86.6 Effect of other requirements.

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

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

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

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the

eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

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

§ 86.7 Effect of employment opportunities.

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

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

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

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

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

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

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations

holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a) (1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

- (i) Local newspapers;
- (ii) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and
- (iii) Memoranda or other written communications distributed to every student and employee of such recipient.

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

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

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

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

Subpart B—Coverage

§ 86.11 Application.

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

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

§ 86.12 Educational institutions controlled by religious organizations.

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

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

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

§ 86.13 Military and merchant marine educational institutions.

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

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

§ 86.14 Membership practices of certain organizations.

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

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

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

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

§ 86.15 Admissions.

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

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.16 and 86.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

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

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

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institutions of undergraduate higher education.

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682) (40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975)

§ 86.16 Educational institutions eligible to submit transition plans.

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

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

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

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

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

§ 86.17 Transition plans.

(a) *Submission of plans.* An institution to which § 86.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

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

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

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

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

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

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

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

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

to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682) (40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975)

§ 86.18—86.20 [Reserved]

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

§ 86.21 Admission.

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

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

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

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

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

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

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

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student

or applicant which treats persons differently on the basis of sex;

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

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

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

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

§ 86.22 Preference in admission.

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

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

§ 86.23 Recruitment.

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

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily

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or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

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

§§ 86.24—86.30 [Reserved]

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

§ 86.31 Education programs and activities.

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

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

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

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

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

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

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

(6) Apply any rule concerning the domicile or residence of a student or

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applicant, including eligibility for in-state fees and tuition;

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

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

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

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

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such re-

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recipient which this part would prohibit such recipient from taking; and

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

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

§ 86.32 Housing.

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

(b) *Housing provided by recipient.*

(1) A recipient may provide separate housing on the basis of sex.

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

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

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

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

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

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

§ 86.33 Comparable facilities.

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

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

§ 86.34 Access to course offerings.

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

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

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

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

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

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be

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conducted in separate sessions for boys and girls.

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

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

§ 86.35 Access to schools operated by LEAs

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

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

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

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

§ 86.36 Counseling and use of appraisal and counseling materials

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

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

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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.

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

§ 86.37 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 which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

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

(2) To ensure nondiscriminatory awards of assistance as required in

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

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

[40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.38 Employment assistance to students.

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

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

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

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

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

§ 86.39 Health and insurance benefits and services.

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

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

§ 86.40 Marital or parental status.

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

(b) *Pregnancy and related conditions.* (1) A 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 so long as such a certification is required of all students for other physical or emotional condi-

tions requiring the attention of a physician.

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

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

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

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

§ 86.41 Athletics

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by 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 this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

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

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

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

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

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

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

(10) Publicity.

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

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)
(40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975)

§ 86.42 Textbooks and curricular material.

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

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

§§ 86.43—86.50 [Reserved]

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

§ 86.51 Employment.

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

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

(3) A recipient shall not enter into any contractual or other relationship

which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

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

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

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

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

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

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

(5) The terms of any collective bargaining agreement;

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

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

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

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

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

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

§ 86.52 Employment criteria.

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

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

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

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

§ 86.53 Recruitment.

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

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

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

§ 86.54 Compensation.

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

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

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

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which are performed under similar working conditions.

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

§ 86.55 Job classification and structure.

A recipient shall not:

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

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

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.61.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)
[40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 86.54.

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

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

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal 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 which establishes different optional or compulsory retirement ages based on sex or which otherwise dis-

criminate in benefits on the basis of sex.

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

§ 86.57 Marital or parental status.

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

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

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

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

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

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

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

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

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

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

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

§ 86.59 Advertising.

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

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

§ 86.60 Pre-employment inquiries.

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

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

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

§ 86.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that

§ 86.71

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

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

§§ 86.62—86.70 [Reserved]

Subpart F—Procedures [Interim]

§ 86.71 Interim procedures.

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

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

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EDUCATION PROGRAMS**

EDITORIAL NOTE For the text of these
guidelines, see 45 CFR Part 80, Appendix B.
[44 FR 17168, Mar. 21, 1979]