



Office for Civil Rights

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Message:

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All of you
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9/9/99 DRAFT ---- Single Sex Regulation ---- For Discussion Purposes Only

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PREAMBLE**Purpose of the Proposed Regulatory Amendments**

The Department proposes to amend its existing Title IX regulation, consistent with the purposes of the Title IX statute and subject to appropriate safeguards against discrimination, to provide greater flexibility to school districts and greater choice to elementary and secondary school parents regarding single-sex programs and activities. The proposed amendments are intended to support efforts of schools and school districts to improve educational outcomes for children, to assist school districts in responding to parents' desires for different pedagogical methods, and to provide public school parents with a diverse array of educational options.

Background

Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. 20 U.S.C. § 1681. The Title IX statute specifically exempts from its coverage admissions policies of non-vocational elementary and secondary schools, private undergraduate postsecondary institutions, and public undergraduate postsecondary institutions that have been single-sex from their establishment. The statute does not specifically prohibit single-sex classes or programs in coeducational schools.

question
date

Title IX is implemented by rules promulgated by agencies providing federal assistance to education programs and activities. 20 U.S.C. § 1682. The Department's current regulation issued by its predecessor agency the Department of Health, Education, and Welfare (HEW) became effective July 21, 1975. The regulation does not apply to the single-sex admission policies of non-vocational elementary and secondary schools, among other institutions exempted by the statute. 34 CFR 106.15. Accordingly, recipients can operate single-sex elementary and secondary schools consistent with Title IX. However, the regulation requires that where a local educational agency (LEA) operates a school for one sex, it must provide the other sex, pursuant to the same policies and criteria of admission, with comparable courses, services, and facilities. 34 CFR 106.35.

With limited exceptions, ~~however~~² the existing regulation prohibits recipients that operate coeducational schools from conducting single-sex classes, programs, or activities.¹ The

¹ The exceptions are if separation based on sex (1) results from the application of objective standards of physical ability, or vocal range or ability, 34 CFR 106.34(b), (d), and (f); (2) is in a physical education class involving contact sports or is in a class involving human sexuality, 106 CFR 106.34(c) and (e); (3) involves a program offered to pregnant students on a voluntary basis that is comparable to that offered non-pregnant students, 34 CFR 106.40(b); or (4) constitutes remedial affirmative action. 34 CFR 106.3. In addition, pursuant to an OCR policy determination, recipients may offer sex-segregated classes for students who object to coeducational classes on religious grounds. 43 Fed. Reg. No 84 (May 1, 1978).

regulation reflects congressional concerns that coeducational institutions were using sex-based policies and practices that reflected out-dated and stereotyped notions of the differences between the sexes and of the limited abilities of girls and women.

Summary of proposed changes to the Department's Title IX regulation

The proposed regulatory changes continue to treat schools and classes somewhat differently because of the statutory exemption for single-sex schools. In both cases, however, the proposed regulation is intended to increase flexibility, diversity, and choice consistent with the intent and purpose of Title IX. Recent attempts by school districts to experiment with single-sex programs, as well as recent congressional proposals regarding single-sex programs, reflect important and legitimate efforts to improve educational outcomes for all students. The purposes behind these programs often are not based on outdated notions regarding the limitations, or limited goals, of members of one sex. Rather the goal is to find new and better ways to help all students learn and succeed to high standards.

The three major proposed changes to the regulation can be summarized as follows –

The first, and most significant, change, relates to single-sex classes, programs, or activities in coeducational schools. The proposed regulation permits three separate options for operating single-sex classes, programs, or activities under Title IX. Each of these options requires the school district to meet standards that are consistent with constitutional standards used by the federal courts in cases involving gender classifications, *i.e.*, a school must demonstrate an exceedingly persuasive justification for the single-sex class, program, or activity. Whether a school's particular goals and factual circumstances satisfy the requirements of the regulation will need to be decided on a case-by-case basis.

Second, the proposed regulation clarifies the responsibilities of a school district that operates single-sex schools to provide equal educational opportunity to both sexes. The proposed regulation specifically outlines three options for school districts to meet this responsibility.

Third, the proposed regulation substitutes a requirement that educational opportunities for both sexes be "equivalent," rather than "comparable" in order to ensure equal educational opportunity. Moreover, the proposed regulation provides a more detailed definition of the factors to consider in determining equivalence. These changes do not alter the intent of the existing regulation, but clarify that, while a school district does not have to provide schools or programs that are identical, they must be equal in key aspects. These include admissions criteria, the quality and availability of curriculum, facilities, services and other benefits, and the qualifications and distribution of staff and faculty. The proposed definition also clarifies that schools and programs can be equivalent even if they do not share a single-sex admissions policy.

The proposed changes only apply to elementary and secondary schools. It is at these levels that the issues of flexibility, diversity, and choice are most prevalent, and where the current Title IX regulation unduly limits the discretion of educators to provide single-sex program choices.

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The proposed regulation would not amend or affect 34 CFR Part 106.3, which permits recipients to operate single-sex schools and classes in order to remedy discrimination, or to overcome the effects of conditions which have limited participation in educational programs or activities, based on sex.

Single-sex classes

Proposed regulation

The proposed regulation would permit single-sex classes, programs, or activities in coeducational schools in any one of the following circumstances:

- (my defn, an exceed zero just)*
- (1) To provide a diverse array of educational options, a school offers a single-sex class, program, or activity; the school also offers an equivalent single-sex class, program, or activity for the other sex; it offers an equivalent coeducational class, program, or activity; and admission to all three classes, programs, or activities is voluntary; or
 - (2) The school offers an equivalent single-sex class, program, or activity for each sex, without offering an equivalent coeducational class, program, or activity; and the school has an exceedingly persuasive justification for segregating based on sex; or
 - (3) The school offers a single-sex class, program, or activity for one sex, without offering a single-sex class, program, or activity for the other sex; the school provides an equivalent coeducational class, program, or activity for both sexes; admission to the single-sex class is voluntary; and the school has an exceedingly persuasive justification for offering the single-sex option only to one sex.

The proposed regulation would retain the existing provision regarding the permissibility of sex segregated physical education classes involving contact sports. Otherwise, however, the proposed regulation would not permit sex-segregated physical education activities. The provision requiring coeducational physical education classes was the subject of thorough debate at the time when the Title IX regulations were promulgated, see 108 Fed. Reg. 24133 (June 4, 1975), and stereotyping in physical education classes was a particular concern of Congress when it enacted Title IX. Nor does the proposed regulation permit sex-segregated vocational education classes. Congress was also specifically concerned with gender-based stereotyping in this area. See 118 Cong. Rec. 5806. To permit single-sex vocational education classes, programs, or activities would be inconsistent with congressional intent since Congress did not permit single-sex vocational education schools at the elementary and secondary level.

Finally, the regulation provides a definition of "equivalent" educational opportunities in the context of single sex classes, programs, and activities. Examples of classes, programs and activities that are and are not equivalent are provided below.

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Legal basis

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an interpretation of Title IX's consistent

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In contrast to its exemption for the admissions policies of elementary and secondary schools, Title IX does apply to class and program selections and assignments in coeducational elementary and secondary schools. Thus, schools must adequately justify the creation of a single-sex program to comply with Title IX. To ~~harmonize Title IX~~ with the Constitution, the Department proposes to permit single-sex classes, programs, or activities under standards that would satisfy the Equal Protection Clause of the Constitution. This means that a recipient must have an exceedingly persuasive justification for creating a single-sex program(s), and for not providing an equivalent single-sex program for the excluded gender, if it does not do so. It would also have to provide equivalent educational opportunities to both sexes.

Confusing hard to decipher pt.

The proposed regulations set out three options under which the Department believes that a school district may be able to meet these standards. When investigating Title IX complaints, OCR would evaluate on a case-by-case basis the recipient's justification for the single-sex class, program or activity. OCR would also examine whether equivalent educational opportunities are provided to both sexes. The framework for OCR's legal analysis would be as follows.

we believe women are inferior?

Courts have infrequently addressed the constitutionality of single-sex schools or classes. Nevertheless, the Supreme Court has provided general parameters for addressing gender-based classifications. The Constitution requires equal educational opportunity for men and women. However, sex is not a prohibited classification. Real differences between men and women can be used to support sex-based classifications as long as they do not create or perpetuate the inferiority of women. United States v. Virginia (VMI), 116 S. Ct. 2264, 2276 (1996). See also, Mississippi for Women v. Hogan, 102 S. Ct. 3331, 3338 (holding that in limited circumstance, gender-based classifications can be justified).

Gender classifications require an exceedingly persuasive justification. VMI, 116 S. Ct. at 2275. This means that gender classifications are permissible if they serve important governmental goals, and the means employed are substantially related to those goals. Id. The governmental justification must be genuine and must not rely on overbroad, unexamined stereotypes or generalizations about the different talents, capacities, or preferences of men and women. Id. See also Hogan, 102 S. Ct. 3337 (holding that sex-based classifications must be based on "reasoned analysis" rather than through the application of "traditional and often inaccurate assumptions" about the roles of men and women).

implemented?

The Department believes that the first option (equivalent single-sex program for both sexes, in addition to an equivalent coeducational program) is permissible under the Constitution ~~and therefore under our proposed regulations~~ if it is adopted for the purpose of offering a diverse range of educational options and if the enrollment among the single-sex and coeducational programs is voluntary for students (and parents). ~~This option is potentially burdensome for schools in terms of the numbers of facilities, teachers, and resources that are necessary to offer both single sex and coeducational programs for both sexes. However, it provides parents with a diverse array of educational options.~~ (See VMI, 116 S. Ct. at 2276 and n. 7) *Why this pt?*

All three options can be applied in circumstances that wd pass const'l review. The range of const'l

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The req't that
 the State's prerogative evenhandedly to support diverse educational opportunities.¹⁾ The goal of providing a diverse array of educational options is not an effort to limit the opportunities of a particular sex. Instead, it is intended to improve education choices and outcomes for all students. *Because each of the programs must be equivalent, the programs would not be based on impermissible stereotypes. Moreover, voluntary admissions to the programs ensures that students are not placed in programs based on overbroad generalizations about the needs or interests of members of one sex or the other. Thus, option 1 is substantially related to the important goal of providing parents a diverse array of educational options.* *means that this objective is an exc. pers. just. for option*

under the US Constn
 The second option (equivalent single-sex program for each sex, without a coeducational option) is also permissible, *but schools may have a more difficult evidentiary burden.* The Department believes that the second option can be substantially related to the goal of providing a diverse array of educational options, and other important *educational goals in certain circumstances*. For example, while this scenario does not provide parents with a full array of choices for their children (i.e., single-sex or coeducational), it provides the school with a greater diversity of choices in selecting education methodologies to improve educational outcomes, and gives the school districts the necessary flexibility to respond to parents' requests for single-sex programs when their children are not succeeding in the existing school program. *Q #3*

set
 This option requires the school to demonstrate an exceedingly persuasive justification for sex segregation. *The following are types of information that OCR would consider to be an adequate justification for sex-segregation under option 2:* *In addition to proving diversity of ed option, the following*

- *research of*
 A research study demonstrating that, due to developmental differences based on sex at certain grade levels, members of both sexes do better if educated separately. *indicating that no*
- *Evidence*
 A study demonstrating that single-sex classes at other schools of similar size and socioeconomic make-up, and at the same grade levels, resulted in improved performance on state assessments for both sexes. *To promote student perf for both sexes. See 116 S.Ct. @ 2276 (-1)*
- *To protect legit. interests*
 The single-sex class or program relates to a topic such as human sexuality where privacy for members of each sex is a key concern. *Such as where*

Of course, to be permissible, members of both sexes must be provided equivalent educational opportunities in a single-sex program. Option 2 is, thus, permissible because the school district provides single-sex education in an "evenhanded" fashion, *VMI*, 116 S. Ct. 2276 n. 7, and no one is denied equal educational opportunity. Moreover, since the programs would be equivalent, the justification for the programs would be the pedagogical benefits of single-sex education, not impermissible generalizations or stereotypes about the special needs or inherent limitations of one sex. *does this follow*

Thus, if a school can demonstrate a legitimate need for this type of educational flexibility, and where members of both sexes are provided equivalent educational opportunities, a school could

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demonstrate that option 2 is substantially related to the goal of providing a diverse array of educational options, or other important educational goals identified by the school. The school should consider whether its justification would be strengthened by having a plan to end the single-sex program if improvement is not shown, or to limit the program to those subject areas or grade levels where improvement is demonstrated.

The third option (single-sex program for one sex, equivalent coeducational program for the other sex) gives schools the greatest flexibility in responding to real educational needs and educational research, and to experiment with different educational methodologies to improve educational outcomes and provide educational options for parents. On the other hand, the third option likely raises the most difficult evidentiary burdens.

The third option is consistent w/ the US Const.

The Department believes that option 3 can be consistent with the VMI decision. This option allows a school to use single-sex education to respond to legitimate educational needs, see VMI 116 S. Ct. at 2276 (holding that sex-based classifications can be used to "advance full development of the talent and capacities" of people). Moreover, students of the other sex are provided with educational curricula, services, facilities, and staff that are fully equal in quality, range, and availability. Thus, this option is significantly different from the situation declared unconstitutional in VMI. There, the State relied on generalizations about the sexes to deny members of one sex a "unique," premier educational opportunity. *Id.* at 2276 n. 7, 2279, 2284. What was at issue in VMI is not that boys were provided a single-sex education, while girls were not, but that boys only were provided a school offering a unique, highly regarded educational method, high quality teachers, and an extensive network of alumni contacts. *Id.* at 2287.

Need Not True?

Nevertheless, *sex segregation and* to qualify under option 3 the school would be required to provide an exceedingly persuasive justification for why it is not providing the other sex with a single-sex program. While this hurdle is high, the Department believes that a school could provide appropriate evidence in support of option 3. For example, *understanding* by providing evidence of the particular need, and evidence of how that need is addressed by a single-sex program, the school can avoid relying on unexamined assumptions or stereotypes. Moreover, since admission to the single-sex program is voluntary, the school district is not making generalizations about the needs of that sex. Moreover, the regulatory requirement for an equivalent coeducational program for the other sex ensures that the school provides equal, nonstereotyped educational opportunity for both sexes.

for one sex (which does not exist for other)

⊗ obligation of 50/50

Out

We note that under the existing Title IX regulation schools can offer a single-sex program for one sex, without offering the other sex an equivalent single-sex or coeducational program, if the single-sex program constitutes remedial affirmative action. For example, under the existing regulation a school district could offer a single-sex science program for girls if it can demonstrate that its female students are disproportionately underrepresented in its highest level science courses, the girls are not taking the prerequisite courses and exams that would place them in such courses, and girls and women historically have been discouraged from taking advanced science classes or pursuing science professions.

The following are types of information that OCR would consider to be an adequate justification

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for offering a particular single-sex program only to one sex under option 3:

- A research study showing, that at the grade levels and subject matter for which the school has an all-girls program, most girls state that they find it difficult to speak up in class and ask questions when boys are present.
- A school district establishes a single-sex program as part of a plan to experiment with single-sex education as a means to address a high drop out rate for boys. The school's plan includes a detailed evaluation component, and a plan to establish a single-sex for girls with a reasonable time if the single-sex program for boys results in a reduced drop out rate.

Examples of equivalent classes, programs and activities

Title IX's exemption for single-sex schools recognizes that neither sex-segregation nor the establishment of single-sex programs or schools only for one sex is inherently inconsistent with equal educational opportunity. The key to ensuring equal educational opportunity is to ensure that each sex is provided a school or program that is equivalent – but not necessarily identical – in all key respects. Thus, even where a school demonstrates a need or problem primarily affecting one sex that it intends to address in a single-sex environment, Title IX still requires an equivalent educational program (apart from the single-sexness) for the other sex. The following examples are intended to illustrate programs that do and do not satisfy the regulatory definition of equivalent. These examples assume that the school has provided an adequate justification for the single-sex program.

Example 1 – Coeducational Middle School A offers several single-sex math and science classes for freshman and sophomore girls and several single-sex English and foreign language classes for freshman and sophomore boys. The single-sex math and science class is open to all girls at these grade levels, and the single-sex English and foreign language classes are open to all boys at these grade levels. There are slight but insignificant differences in curriculum, class size, and teacher quality (as measured by preparation and certification in the area of instruction) between the single-sex classes and the coeducational classes in the same subject matter. The school offers equal educational opportunities for boys and girls under option 3.

Example 2 – Middle School B offers middle school boys, on a voluntary basis, an innovative mentoring program in which boys are encouraged to develop a close, one-on-one relationship with an adult in the community who is not their parent or teacher. The school provides opportunities for community leaders to make presentations to the boys and provides regular opportunities within the school curriculum for the boys and mentors to meet as a group to discuss gang involvement, drug abuse, and other risk factors affecting boys in the community. The mentors regularly provide one-on-one counseling and other support services. For students that are not in the program, the school maintains a list of adult professionals who are willing to be mentors, but the school does not provide any other opportunities for mentoring of these students. The school is not providing equal educational opportunities for boys and girls.

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Single-sex schools

As to schools, the statutory exemption for the admissions policies of nonvocational elementary and secondary schools precludes OCR from regulating the single-sex admissions policies of these schools. On the other hand, Title IX requires that a school district ensure that when it chooses to offer single-sex schools to one sex, it must provide equal educational opportunities to the other sex. The proposed regulation clarifies Part 106.35 regarding the circumstances under which a school district meets this obligation under Title IX:

Proposed regulation

The proposed regulation would clarify that an LEA operating a single-sex school has three options for satisfying the requirement for equal educational opportunity:

- (1) An LEA offers a single-sex school for one sex; it also offers an equivalent single-sex school for the other sex; it offers an equivalent coeducational school; and admission to all three schools is voluntary; or
- (2) An LEA offers equivalent single-sex schools for each sex, without offering an equivalent coeducational school; or
- (3) A LEA offers a single-sex school for one sex, without offering a single-sex school for the other sex; admission to the single-sex school is voluntary; and the LEA provides an equivalent coeducational school.

Finally, the regulation provides a definition of "equivalent" educational opportunities in the context of single sex schools. Examples of schools that are and are not equivalent are provided below.

Legal basis

Congress expressly authorized federal agencies to implement Title IX through rules and regulations. 20 U.S.C. § 1682. Thus, while Congress precluded federal agencies from establishing admissions policies for exempted schools, at the same time it deferred to federal agencies further to determine the meaning of an equal educational opportunity in an LEA that chooses to establish one or more single-sex schools. The Department has determined that Title IX requirements are satisfied in the above-described circumstances. Under the proposed regulation, due to the statutory exemption, an LEA would not be required to justify to OCR the basis for its single-sex schools. Instead, the focus of the regulation is on whether both sexes are provided equivalent educational opportunities.

School districts should be aware that constitutional requirements apply to public school districts

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operating single-sex schools. ~~Although OCR does not enforce the Constitution, we believe that the discussion above regarding the constitutionality of single-sex classes, programs, and activities may be useful to LEAs as they consider these requirements.~~

Examples of equivalent schools *ed off*

Example 1 -- School District A operates an all-girls middle school that offers an "alternative" program. The school emphasizes very small class size, mentoring opportunities, and daily one-on-one time between students and their teachers, and mentors. The school also uses portfolio assessments instead of grades. The required curriculum is based on core subjects and subject matter established by the school board. The school district also operates a coeducational middle school that teaches the same core curriculum taught in the all-girls school. Class size at the coeducational school is average to large and the classes offer a traditional format including final exams and little one-on-one contact during class. The school district does not offer boys and girls equivalent educational opportunities.

Example 2 -- Charter School B operates in School District B. It has been chartered by a group of local community leaders, business leaders, and philanthropists as an alternative to traditional public schools in the district. The school focuses primarily on mathematics and science and has obtained significant contributions from the business community in order to outfit the school with state-of-the-art laboratory and computer equipment. Enrollment is limited to boys, but is otherwise open. There are no other schools operating in the district that have a special focus on mathematics and science. School District B does not offer boys and girls equivalent educational opportunities.

Example 3 -- School District C operates an all-boys high school with a "hands on" curriculum that involves small classes, team projects, frequent "hands-on" experiments, projects and field trips, and portfolio assessments instead of grades. Admission is open to all high school boys in the school district. At the coeducational high school, students chose all courses after freshman year. While class size is somewhat larger, the difference is not significant. Course offerings are open to all students, and apart from certain core courses, students can choose their courses. Available courses include a significant number that utilize various aspects of the "hands on" approach. For instance, some classes concentrate on team projects, some offer frequent field trips, others offer portfolio assessments, and some classes offer all these. The school district offers boys and girls equivalent educational opportunities. However, if at the coeducational high school only students with a GPA of 3.0 and above can enroll in courses offering a "hands on" curriculum, the school district would not offer boys and girls equivalent educational opportunities.

Example 4 -- School District D establishes single-sex academies for grades 10-12. The schools are given identical resources and facilities, equivalent quality teachers and administrators, and offer an identical curriculum based on core courses in mathematics, science, English, and history. After several years, the boys school has developed a close relationship with local business and community leaders. Over time, these outside groups increasingly offer significant mentoring

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services to the students at the boys school, such as putting on educational programs for the students, and using their contacts to help the students obtain summer jobs, internships, and interviews with alumni of highly competitive colleges. The groups also joined together to raise and donate money to build a new sports complex at the boys school. The single-sex academies are no longer equivalent.

Example 5 -- School District E establishes single-sex academies for students in the seventh grade. The schools are given identical resources and facilities, equivalent quality teachers and administrators, and offer an identical curriculum based on core subject matter areas. As part of the operating plan for the academies, each school will add an additional grade each year. In addition, when the original class has reached the high school grade level, each school will offer several advance placement courses to qualified students. Both academies offer advanced placement calculus. The girl's academy also offers advanced placement English because a student survey indicated the most interest in this course. The boys academy offers advanced placement physics based on its survey results. Advanced placement physics and advanced placement English are also available in coeducational schools in the district. The educational opportunities offered boys and girls by the school district are equivalent because all students have the opportunity to take courses in the subject matter offered at the single-sex academies.

PROPOSED REGULATORY LANGUAGE

Replace existing sections 106.34 and 106.35 with the following:

106.34 Access to course offerings

- (a) Except as provided in paragraphs (b) and (c) of this section, a recipient may provide or carry out courses, programs, or activities separately on the basis of sex in the following circumstances:
- (1) To provide a diverse array of educational options, a school offers a single-sex class, program, or activity; the single-sex class, program, or activity is voluntary; the school also offers an equivalent single-sex class, program, or activity for the other sex; and it offers an equivalent coeducational class, program, or activity.
 - (2) A recipient offers equivalent single sex classes to members of each sex, without offering an equivalent coeducational class; and it has an exceedingly persuasive justification for segregating based on sex.
 - (3) A recipient offers a single-sex class to only one sex; it offers an equivalent coeducational class to the other sex; the recipient has an exceedingly persuasive justification for offering the single-sex option only to one sex; and admission to the single-sex class is voluntary.

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- (b) A recipient may not offer sex-segregated physical education classes or activities except during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
- (c) A recipient may not offer sex-segregated vocational, technical, home economics, industrial, or business classes, programs or activities.
- (d) Factors to consider in determining whether courses, programs, or activities are equivalent, as used in this section include whether the programs being compared are offered to students at the same age or grade level in the same school, and whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex), the quality and range of the curriculum, and the qualifications and ratio of faculty and staff.

106.35 Access to schools operated by LEAs

- (a) A local educational agency (LEA) that operates a nonvocational, single-sex school for members of one sex does not discriminate against students of the excluded sex if –
 - (1) The LEA also offers an equivalent single-sex school for the other sex; it offers an equivalent coeducational school; and admission to the single-sex schools is voluntary.
 - (2) The LEA does not offer an equivalent coeducational school, but offers equivalent single-sex schools for each sex.
 - (3) The LEA does not offer a single-sex school for the other sex, but the LEA provides an equivalent coeducational school for the other sex; and admission to the single-sex school is voluntary.
- (b) Factors to consider in determining whether a school is equivalent as used in this section, include whether the schools being compared are offered to students at the same age or grade level in the same geographic area and whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex); the quality, range, and availability of curricular and extracurricular activities; the quality, range and availability of facilities, services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.



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NUMBER OF PAGES TRANSMITTED (INCLUDING THIS SHEET)

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Draft 6/10/99

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10 CFR Part 5

SMALL BUSINESS ADMINISTRATION
13 CFR Part 113

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
14 CFR Part 1253

DEPARTMENT OF COMMERCE
15 CFR Part 8a

TENNESSEE VALLEY AUTHORITY
18 CFR Part 1317

DEPARTMENT OF STATE
22 CFR Part 146

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY
Agency for International Development
22 CFR Part 229

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22 CFR Part 508

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24 CFR Part 3

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DEPARTMENT OF DEFENSE
32 CFR Part 196

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
36 CFR Part 1211

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ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 5

GENERAL SERVICES ADMINISTRATION
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DEPARTMENT OF THE INTERIOR
43 CFR Part 41

FEDERAL EMERGENCY MANAGEMENT AGENCY
44 CFR Part 19

NATIONAL SCIENCE FOUNDATION
45 CFR Part 618

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

National Endowment for the Humanities
45 CFR Part 1171

Institute for Museum and Library Sciences
45 CFR Part 1182

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
45 CFR Part 2555

DEPARTMENT OF TRANSPORTATION
49 CFR Part 25

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

AGENCIES: Nuclear Regulatory Commission; Small Business Administration; National
Aeronautics and Space Administration; Department of Commerce; Tennessee Valley
Authority; Department of State; Agency for International Development; International
Development Cooperation Agency; United States Information Agency; Department of
Housing and Urban Development; Department of Justice; Department of Labor;
Department of the Treasury; Department of Defense; National Archives and Records

Administration; Department of Veterans Affairs; Environmental Protection Agency; General Services Administration; Department of the Interior; Federal Emergency Management Agency; National Science Foundation; National Endowment for the Arts, National Endowment for the Humanities, Institute for Museum and Library Sciences, National Foundation on the Arts and the Humanities; Corporation for National and Community Service; Department of Transportation.

ACTION: Notice of proposed rulemaking.

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

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

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

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

SUPPLEMENTARY INFORMATION:

Background

The purpose of this proposed common rule is to provide for the enforcement of Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681, *et seq.*) ("Title IX"), as it applies to educational programs and activities that receive Federal financial assistance from the agencies participating in this notice. Because the proposed standards to be established for the enforcement of Title IX are the same for all of the participating agencies, they are publishing this notice of proposed rulemaking jointly. The procedures for how an agency will enforce Title IX, including the conduct of investigations and compliance reviews, also follow the same structure; all agencies except the Department of the Treasury ("Treasury") and the National Archives and Records Administration ("NARA") are incorporating their respective procedures under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*) which are virtually identical among the agencies. Title IX is modeled after Title VI and the statutes have

the same statutory enforcement mechanisms. Although Treasury and NARA do not have Title VI regulations, both entities are establishing enforcement procedures, as set forth below, that are akin to other agencies' Title VI procedures for enforcement.

The final rule adopted by each agency will be codified in that agency's portion of the Code of Federal Regulations as indicated in this notice.

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

Additional Comment Information

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

Overview

As set forth in this proposed rule, the substantive nondiscrimination obligations of recipients, for the most part, are identical to those established by the Department of Education ("ED") under Title IX. See 34 CFR Part 106. ED's regulations are the model for this notice for several reasons: the history of public participation in the development and congressional approval of ED's regulations, ED's leadership role in Title IX enforcement, judicial interpretations of ED's regulations, recipients' familiarity with the regulations, and an interest in maintaining consistency of interpretation of regulations enforcing Title IX. The regulations, initially issued by the former Department of Health, Education, and Welfare (HEW) (and adopted by ED upon its establishment in 1980), are the result of an extensive public comment process and congressional review. HEW received and considered more than 9700 comments before drafting its final regulations. 40 FR 24128 (1975). Further, after the final regulations were issued, but before they became effective, Congress held six days of hearings to determine whether the regulations were consistent with the statute. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975).

In addition, under Executive Order 12250, the Department of Justice is responsible for the "consistent and effective implementation" of several civil rights laws, including Title IX. Using the ED regulation as the basis for this common rule promotes consistency and efficiency not only for agencies but for the recipient community. ED is the lead agency for enforcement of Title IX through its guidance,

interpretations, technical assistance, investigative expertise, and resources committed. As the vast majority of recipients of Federal assistance from the identified agencies also receive assistance from ED, recipients should be subject to a single set of obligations with respect to Title IX.

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

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

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

Summary of Regulation

As stated, Title IX prohibits discrimination on the basis of sex in educational programs or activities that receive Federal financial assistance. Specifically, the statute states that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with specific exceptions for various entities, programs, and activities. 20 U.S.C. 1681(a). This statute was modeled after Title VI, which prohibits discrimination on the basis of race, color, and national origin in all programs or activities that receive Federal financial

assistance. The goal of Title IX is to ensure that Federal funds are not utilized for and do not support sex-based discrimination, and that individuals have equal opportunities, without regard to sex, to pursue, engage or participate in, and benefit from academic, extracurricular, research, occupational training, employment, or other educational programs and activities. For example (and without limitation), subject to exceptions described in this regulation, Title IX prohibits a recipient from discriminating on the basis of sex in: student admissions, scholarship awards and tuition assistance, recruitment of students and employees, the provision of courses and other academic offerings, the provision of and participation in athletics and extracurricular activities, and all aspects of employment, including, but not limited to, selection, hiring, compensation, benefits, job assignments and classification, promotions, demotions, tenure, training, transfers, leave, layoffs, and termination. See North Haven, 456 U.S. at 521 (stating that Title IX "must [be] accord[ed] . . . a sweep as broad as its language" to realize goals of eliminating discrimination and promoting equal opportunity); Cannon v. University of Chicago, 441 U.S. 677, 709 (1979) (concluding that an implied private right of action was necessary for Title IX's full enforcement); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992)¹ (concluding that sexual harassment violates Title IX's proscription against sex discrimination). Of course, Title IX prohibits discrimination on the basis of sex in the operation of, and the provision or exclusion of benefits by, education and training programs conducted by noneducational institutions, including, but not limited to, prisons, museums, job training institutes, and for profit and nonprofit organizations. Thus, for example, this regulation will apply to such diverse activities as education programs run by state and local park districts receiving funds from the Department of Interior, state and local boater education programs funded the Coast Guard, state and local courses in how to start a small business funded by the Small Business Administration, and state and local courses in planning how to deal with disasters funded Federal Emergency Management Agency.

It should be noted that we have retained sections from the ED regulation that impose deadlines for action by recipients. For example, section ____ .110 includes a deadline for educational institutions to conduct a self-evaluation and section ____ .225 includes a timetable for completion of transitions by an educational institution eliminating its single-sex status. We have included these and other provisions to allow for the possible but rare instance where such sections may continue to be relevant for certain recipients. If a recipient of assistance from a participating agency also receives funding from ED or another agency with an existing Title IX regulation, however, the deadlines, as interpreted by ED or the other agency's regulation, as applicable, continue to govern. Further, to the extent a recipient has conducted an evaluation or

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

established procedures to conform to the ED or another agency's Title IX regulation, the recipient need not repeat such action in order to conform to the regulations adopted by the participating agencies. For example, if a recipient has established grievance procedures, it need not modify such procedures or establish other procedures to comply with these regulations in the absence of guidance or instructions from a participating agency that modification or other action is necessary. Similarly, if a recipient already has conducted a self-evaluation under Title IX, it need not conduct a new self-evaluation as a result of receiving funds from a participating agency, but need only take action if such evaluation or implementation is found to be incomplete or not in compliance with the regulations.

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

The definition of "educational institution" refers to a "local education agency." The term "local education agency" has been recodified at 20 U.S.C. 8801(18), and this change has been made to the definition of "educational institution."

The reference in the definition of "Federal financial assistance" to "agreements" includes "cooperative agreements" by agencies.

Section __.110, entitled "Remedial and affirmative action and self-evaluation," is modified slightly by adding the phrase "consistent with law." This entire regulation, of course, should be interpreted consistent with governing legal decisions. Given recent, numerous decisions by the Supreme Court and lower courts concerning affirmative action, agencies should consult with the Department of Justice regarding interpretations of this section.

A few matters should be noted with respect to assurances. First, the method or practice of awarding Federal financial assistance varies among the participating agencies. Some, but not all agencies, require a formal application for Federal assistance prior to any award, and such applications will contain the assurances required by § __.115 of the proposed regulation. Other agencies award assistance through instruments where the formal agreement or contract of assistance is the only document executed by the recipient. In the latter instance, the agreement or contract will include, as a condition of the award, the required assurances of § __.115. The presence of an assurance in a contract, agreement, or document other than "application," wherein the execution of such document includes the assurance of compliance as a condition of the award, satisfies § __.115. Second, § __.115(b)'s reference to Federal financial assistance "extended to provide real property or structures thereon, . . . or to provide personal property," should be understood to include the

provision of assistance to aid in the acquisition and/or improvement of such property. Finally, in order to maintain consistency among agencies regarding the text of the assurance for compliance with Title IX, we modified § ____ .115(c) to include the uniform text of the assurance. This text may be modified at the discretion of, or upon application by an agency and approval by, the Office of Management and Budget. In addition, the actual text may be included in, as mentioned, a final contract or agreement, or in a standard form that includes assurances relating to other obligations.

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

Modifications of ED's existing regulations to conform to the statutory amendments to Title IX are addressed in this subpart. Section ____ .205 is amended to incorporate the expanded exemption for entities controlled by religious institutions. Under the CRRA, the exemption is no longer limited to educational institutions that are controlled by religious organizations with tenets contrary to Title IX. Instead, any educational operation of an entity may be exempt from Title IX due to control by a religious organization with tenets that are not consistent with the provisions of Title IX. See 20 U.S.C. 1687. Further, the exemption would apply to a particular education program operated by a recipient if this separate program is subject to religious tenets that are not consistent with Title IX. If a recipient has obtained an exemption from ED, such exemption also may be submitted to another funding agency as a basis for an exemption from the second funding agency.

While it is not expected that many educational institutions will have a transition plan, we have retained the text of sections ____ .225 and ____ .230. In addition, the text of ____ .225 has been slightly modified to require that any transition plans be submitted solely to the Department of Education.

A new section, ____ .235, addresses all other statutory amendments. See 20 U.S.C. 1681(a)(7)-(9), 1687, 1688. Three exemptions to Title IX's coverage are identified in ____ .235(a) based on amendments passed in 1976. 20 U.S.C. 1681(a)(7)-(9). Congress exempts activities undertaken by the American Legion to operate Boys State, Girls State, Boys Nation, and Girls Nation, and any promotional activity or selection of participants for such programs by educational institutions. 20 U.S.C. 1681(a)(7). In addition, father-son and mother-daughter activities that are sponsored by educational institutions are similarly exempt from coverage, with the condition that if such activities are conducted, reasonably comparable activities must be provided for students of the opposite sex. 20 U.S.C. 1681(a)(8). Third, educational institutions may provide scholarships or other benefits to persons who participate in single-sex contests where personal appearance is a basis for reward, commonly referred to as "beauty pageants." 20 U.S.C. 1681(a)(9).

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

By statutory amendment, and as set forth in ____ .235(b), Congress restored the broad interpretation accorded the phrase "program or activity" prior to Grove City College. The provision addresses the scope of coverage for four broad categories of recipients: State or local entities, educational institutions, private entities, and entities that are a combination of any of those groups. The scope of coverage is no longer limited to the exact purpose or nature of the Federal funding. If, for example, a State or local agency receives Federal assistance for one of many functions of the agency, all of the operations of the *entire* agency are subject to the nondiscrimination provisions of Title IX. 20 U.S.C. 1687(1)(A). Further, if the aid is distributed to an entity or unit of government that subsequently distributes the assistance to a second agency, the entire agency to which the assistance was initially allocated is subject to Title IX. See 20 U.S.C. 1687(1)(B); S. Rep. No. 100-64, at 16, reprinted in 1988 U.S.C.C.A.N. at 18. With respect to educational institutions, it is critical to remember that *all* of the operations of the institution, whether or not an operation is educational or academic in nature, are subject to Title IX's prohibition on discrimination. Thus, for example, housing programs, a shuttle service, food service, and other commercial operations are covered by Title IX if any part of the entity is a recipient of Federal funds. The degree of coverage of private entities, such as private corporations and partnerships, will vary depending on how the funding is provided, the principal purpose or objective of the entity, and/or how the entity is structured (e.g., physically separate offices or plants). All of the operations of private businesses that are principally engaged in education, health care, housing, social services, or parks and recreation are considered a "program or activity" for purposes of Title IX. 20 U.S.C. 1687(3)(A)(ii). S. Rep. No. 100-64 provides numerous other examples of the scope of coverage with regard to each category of recipient, and readers are referred to this material. S. Rep. No. 100-64, at 16-20, reprinted in 1988 U.S.C.C.A.N. at 18-22.

Finally, it is important to note that the restored, broad interpretation of "program or activity" does not in any way alter the requirement of 20 U.S.C. 1682 that a proposed or effectuated fund termination be limited to the particular program(s) "or

part thereof" that discriminate(s), or, as appropriate, to all of the programs that are infected by the discriminatory practices. See S. Rep. No. 100-64, at 20, reprinted in 1988 U.S.C.C.A.N. at 22 ("The bill defines 'program' in the same manner as 'program or activity,' and leaves intact the 'or part thereof' pinpointing language.").

Third, ____ .235(c) reflects the "abortion neutrality" provision in the CRRA, commonly referred to as the Danforth amendment, which provides: "Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion." 20 U.S.C. 1688.

The first sentence of the Danforth amendment is incorporated in subsection ____ .235(c)(1), which states that recipients are not required to provide or pay for any benefit or service related to an abortion. Consistent with congressional intent,² however, this provision does not allow recipients of Federal assistance to deny medical procedures, benefits, services, or the use of facilities if necessary to save the life of a pregnant woman, or for medical complications arising from or related to an abortion.

The second sentence of the Danforth amendment is incorporated in ____ .235(c)(2). In addition, this subsection makes it clear that, consistent with the Danforth amendment, the regulations prohibit discrimination against, exclusion of, or denial of benefits to, a person because that person has obtained, sought, or will seek an abortion. This prohibition applies to any service or benefit for an applicant (for

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

enrollment or employment), student, or employee.³

Finally, in order to conform ED's existing text to that aspect of the Danforth amendment that does not require or prohibit a recipient from providing services or payment for an abortion, a specific reference to ____ .235(c) is added to the following provisions: ____ .300(c)(3), ____ .440, ____ .445(b)(4), and ____ .530(c).

³ This provision is consistent with the Danforth amendment and congressional intent. Statements of numerous senators and representatives, including Sen. Danforth and other sponsors, reiterate the plain meaning of the prohibition, and treat the imposition of penalties as one form of discriminatory treatment against women who have sought or will seek an abortion. See 134 Cong. Rec. 242 (1988) (statement of Sen. Danforth) ("In fact, it is prohibited — hospitals, colleges, universities — from *discriminating* against people who have had abortions or who are seeking abortions. So it does not intend to authorize, in fact, it prohibits, *penalties* against people who have made their own choice for abortion.") (emphasis added); *id.* at 353 (statement of Sen. Wilson) ([The second sentence of the Danforth amendment] was language which I and others insisted be in there, precisely to ensure that there could not be *discrimination* against women who either are seeking or have received abortion-related services.") (emphasis added).

Other members of Congress agreed with the Danforth amendment because of the specific inclusion of language prohibiting discrimination. E.g., 134 Cong. Rec. 2945 (1988) (statement of Rep. AuCoin) ("And with their statements [by Sen. Danforth and Wilson, as quoted above] clarifying that this legislation before us today expressly prohibits, and does not in any way permit, discrimination against women who have had or are seeking abortions, I can support this bill."); *id.* at 2948 (statement of Rep. Edwards). See also *id.* at 2935 (statement of Rep. Jeffords) ("The second sentence of the amendment will ensure that a woman is not denied scholarships, promotions, extracurricular activities, student employment or any other benefits because she has received or is seeking an abortion."); *id.* at 2945 (statement of Rep. AuCoin) ("With assurances from the authors of the Danforth amendment, and with the clarification provided by the floor leaders today, it is now clear that this legislation prohibits discrimination based on a person's decision regarding abortion -- in scholarships, in housing, in extracurricular activities, in student or faculty hire and tenure, and in other benefits offered to students or employees under title IX."); *id.* at 2948 (statement of Rep. Edwards) ("Whether it be scholarships, promotions, extracurricular activities, student employment or any other benefits offered to students or employees, under title IX benefits cannot be withheld from a student or employees because she received or is seeking an abortion.").

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

Subpart D addresses nondiscrimination on the basis of sex in education programs and activities. Specific areas covered in this subpart are housing, access to course offerings, access to schools operated by local education agencies, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, consideration of marital and parental status, and athletics. The proposed regulations do not cover a recipient's use of particular textbooks or curricular materials. The time frames identified in section ____ .450(d), which address athletic programs, apply only if the recipient also does not receive funding from the Department of Education; otherwise, such recipient is expected to have complied within the time frames established by the ED regulation.

Subpart E covers the prohibitions of discrimination on the basis of sex in employment in educational programs and activities. Specific aspects of employment that are addressed include hiring and employment criteria, recruitment, compensation, job classification and structure, promotion and termination, fringe benefits, consideration of marital or parental status, leave practices, advertising, and preemployment inquiries as to parental and marital status. The subpart also includes a provision to exempt actions where sex is a bona fide occupational qualification. Section ____ .525(b)(2), which concerns the provision of fringe benefits, is modified slightly in order to conform to principles established by the Supreme Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*. The Supreme Court has held that fringe benefit plans may not require higher contributions from women than from men to receive the same benefits. See City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978). Further, benefit plans may not provide lower benefits to women who made the same contributions as men. See Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983).

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

For those agencies that have regulations to enforce Title VI, such procedures will be adopted and incorporated by reference. Titles VI and IX address discrimination

in Federally assisted programs and have identical statutory enforcement schemes. The administrative enforcement procedures in Title VI regulations are virtually identical among the participating agencies, and differences are minor. For the Department of the Treasury and NARA, the specific text is set forth herein since neither have a Title VI regulation. In addition, pursuant to Reorganization Plan No. 2 of 1977, the U.S. Information Agency (USIA) continues to be subject to, and incorporates, the Department of State's Title VI enforcement procedures, as set forth herein. See 43 FR 15371 (1978). Further, the Corporation for Community and National Service, which is the successor to ACTION, is subject to the Title VI regulations promulgated by ACTION. See National and Community Service Trust Act of 1993, Pub. L. No. 103-82, § 203(c)(2), 107 Stat. 785, 892; 45 CFR Part 1203. It also should be noted that some agencies, based on other Federal laws, have promulgated regulations that similarly prohibit discrimination on the basis of sex in programs that receive Federal financial assistance. In the absence of a specific agency adoption, it should be understood that such existing regulations remain in force and are unaffected by this regulation.

Applicable Executive Orders and Regulatory Certifications

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

This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The participating agencies have determined that this rule is a "significant regulatory action" under Executive order 12866, § 3(f), Regulatory Planning and Review, yet it is not "economically significant" as defined in § 3(f)(1), and, therefore, the information enumerated in § 6(a)(3)(C) of the order is not required. Pursuant to Executive order 12866, this rule has been reviewed by the Office of Management and Budget (OMB).

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

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

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

Paperwork Reduction Act of 1995

Sections __.110, __.115, and __.230 contain information collection requirements. As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), the Department of Justice, on behalf of the participating agencies, has submitted a copy of these sections to the OMB for its review.

Collection of Information: Self-Evaluations

A recipient educational institution is required within one year of the effective date of these regulations to evaluate its current services, policies, and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel in connection with the recipient's education program or activity to determine whether they meet the requirements of Title IX, and to the extent the requirements are not met, to make the required modifications. In addition, recipients are to maintain this self-evaluation on file for at least three years following completion of the evaluation, and to provide to the designated agency official upon request, a description of any modifications and remedial steps made under the self-evaluation requirements. These requirements are the most efficient means of self-evaluation and recordkeeping.

Nearly all educational institutions affected by this provision have already complied or are required to comply with this provision under Title IX regulations promulgated by the U.S. Department of Education. The number of recipient educational institutions that have not previously complied or are required to comply is estimated as less than ten. The public reporting and recordkeeping burden for this collection of information for those remaining recipients is estimated to be thirty hours in order to conduct self-evaluations. This burden is incurred when a recipient is required to evaluate their current services, policies, and practices for compliance with Title IX. It should be noted that this calculation does not include the number of

recipients which are already required to do self-evaluations under Title IX regulations promulgated by the U.S. Department of Education.

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

Respondents		5
Responses	x	1
Hours per respondent	x	6

Annual reporting burden		30 hours

Collection of Information: Assurances of Compliance

These regulations require applications for Federal financial assistance for an education program or activity to be accompanied by an assurance from the applicant or recipient that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these regulations. Completing this form is the clearest, most effective, and least burdensome means of placing a recipient on notice of its obligations to comply with Title IX.

The public reporting and recordkeeping burden for this collection of information for all participating agencies is estimated to be 22,738 hours in order to read and complete the assurance form. This burden is incurred when an applicant or recipient completes an application for Federal financial assistance from a participating agency for the first time or if there is a break in continuity of assistance from such agency. It is estimated that approximately 25% of recipients seek assistance from more than one Federal agency; thus, the Department of Justice estimates that assurances would be required an average of 1.25 times rather than once, per recipient. It should be noted that this calculation does not include the number of recipients at agencies, including the Departments of Commerce, Interior, and Labor, which already use OMB assurance forms or other assurance forms previously approved by OMB that include text regarding compliance with Title IX.

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

Respondents		107,000
Responses	x	1.25
Hours per respondent	x	.17 (10 minutes)

Annual reporting burden		22,738 hours

Collection of Information: Transition Plans

A recipient educational institution is required to submit a transition plan if it has admitted students of only one sex as regular students as of June 23, 1972, or admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965. The transition plan requirements listed in this rule are the most efficient means of preparing transition plans and the related recordkeeping.

All educational institutions affected by this provision have already complied or are required to comply with this provision under Title IX regulations promulgated by the U.S. Department of Education. There are no new educational institutions anticipated that would fall into this category. The public reporting and recordkeeping burden for this collection of information for recipient educational institutions is therefore estimated to be zero hours in order to develop transition plans. This burden is incurred when a recipient is required to develop and implement a transition plan. It should be noted that this calculation does not include the number of recipients which are already required to do transition plans under Title IX regulations promulgated by the U.S. Department of Education.

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

Respondents		0
Responses	x	1
Hours per respondent	x	8

Annual reporting burden		0 hours

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

The Department of Justice will consider comments by the public on these proposed collections of information in --

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the participating agencies, including whether the information will have a practical use;
- Evaluating the accuracy of the participating agencies' collective estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to

respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

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

Text of the Proposed Common Rule

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

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

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

Subpart A--Introduction

- § ____ .100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any

education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations shall be 30 days after publication of the final rule.

§ .105 Definitions.

As used in these Title IX regulations, the term:

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

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

Applicant means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

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

Educational institution means a local educational agency ("LEA") as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

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

- (1) A grant or loan of Federal financial assistance, including funds made available for:
 - (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
 - (ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
- (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the

Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

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

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

Institution of graduate higher education means an institution that:

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

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

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

Institution of undergraduate higher education means:

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

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

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

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

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

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

Student means a person who has gained admission.

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

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

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

§ ____ **.110 Remedial and affirmative action and self-evaluation.**

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

(b) **Affirmative action.** In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964-1965 Comp., p. 339; as amended by Exec. Order No.

11375, 3 CFR, 1966-1970 Comp., p. 684; as amended by Exec. Order No. 11478, 3 CFR, 1966-1970 Comp., p. 803; as amended by Exec. Order No. 12087, 3 CFR, 1978 Comp., p. 230; as amended by Exec. Order No. 12107, 3 CFR, 1978 Comp., p. 264.

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

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

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

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

(d) Availability of self-evaluation and related materials. Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§ ____ .115 Assurance required.

(a) General. Every application for Federal financial assistance for any education program or activity shall as a condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § ____ .110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

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

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

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

(c) Form. (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient "will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: . . . Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681-1683, 1685-1688)."

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

§ ____ .120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§ ____ .205 through ____ .235(a).

§ ____ .125 Effect of other requirements.

(a) Effect of other Federal provisions. The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964-1965 Comp., p. 339; as amended by Exec. Order No. 11375, 3 CFR, 1966-1970 Comp., p. 684; as amended by Exec. Order No. 11478, 3 CFR, 1966-1970 Comp., p. 803; as amended by Exec. Order No. 12087, 3 CFR, 1978 Comp., p. 230; as amended by Exec. Order No. 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) Effect of State or local law or other requirements. The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or

profession.

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

§ .130 Effect of employment opportunities.

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

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

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

(b) Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§ .140 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 its educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in

education programs and activities extends to employment therein, and to admission thereto unless §§ ____ .300 through 310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § ____ .135, or to the designated agency official.

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

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

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

(2) A recipient shall not use or distribute a publication of the type described in this paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) Distribution. Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

Subpart B--Coverage

§ ____ .200 Application.

Except as provided in §§ ____ .205 through ____ .235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives or benefits from Federal financial assistance.

§ 205 Educational institutions and other entities controlled by religious organizations.

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

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

§ 210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 215 Membership practices of certain organizations.

(a) Social fraternities and sororities. These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls. These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) Voluntary youth service organizations. These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 220 Admissions.

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

(b) Administratively separate units. For the purposes only of this section, §§ _____.225 and _____.230, and §§ _____.300 through _____.310, each administratively separate unit shall be deemed to be an educational institution.

(c) Application of §§ _____.300 through _____.310. Except as provided in paragraphs (d) and (e) of this section, §§ _____.300 through _____.310 apply to each recipient. A recipient to which §§ _____.300 through _____.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of such sections.

(d) Educational institutions. Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ _____.300 through _____.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) Public institutions of undergraduate higher education. §§ _____.300 through _____.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ _____.225 Educational institutions eligible to submit transition plans.

(a) Application. This section applies to each educational institution to which §§ _____.300 through _____.310 apply that:

- (1) Admitted students of only one sex as regular students as of June 23, 1972; or
- (2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) Provision for transition plans. An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ _____.300 through _____.310 unless it is carrying out a transition plan approved by the Secretary of Education as described in § _____.230, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

§ _____.230 Transition plans.

(a) Submission of plans. An institution to which § _____.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

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

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

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

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

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

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

(c) Nondiscrimination. No policy or practice of a recipient to which § _____.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ _____.300 through _____.310 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 § _____.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ _____.235 Statutory amendments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

sole proprietorship--

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

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

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

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

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

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

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

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

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

§ _____.300 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 §§ _____.300 through _____.310 apply, except as provided in § _____.225 and _____.230.

(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 §§ _____.300 through _____.310 apply shall not:

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

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

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

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

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ _____.300 through _____.310 apply:

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

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

(3) Subject to § _____.235(c), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

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

§ ____ .305 Preference in admission.

A recipient to which §§ ____ .300 through ____ .310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ ____ .300 through ____ .310.

§ ____ .310 Recruitment.

(a) Nondiscriminatory recruitment. A recipient to which §§ ____ .300 through ____ .310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § ____ .110(a), and may choose to undertake such efforts as affirmative action pursuant to § ____ .110(b).

(b) Recruitment at certain institutions. A recipient to which §§ ____ .300 through ____ .310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ ____ .300 through ____ .310.

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

§ ____ .400 Education programs and activities.

(a) General. Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives or benefits from Federal financial assistance. Sections ____ .400 through ____ .455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ ____ .300 through ____ .310 do not apply, or an entity, not a recipient, to which §§ ____ .300 through ____ .310 would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in §§ ____ .400 through ____ .455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex;

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

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

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

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

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

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

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

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

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

cooperative employment and student-teaching assignments.

(2) Such recipient:

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

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

§ ____ .405 Housing.

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

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

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

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

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

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

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

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

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

§ 410 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.

§ 415 Access to course offerings.

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

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

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

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

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

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

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

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

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

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

§ .425 Counseling and use of appraisal and counseling materials.

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

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

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

§ .430 Financial assistance.

(a) General. Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

- (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

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

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

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

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

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

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

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § _____.450.

§ _____.435 Employment assistance to students.

(a) Assistance by recipient in making available outside employment. A recipient

that assists any agency, organization, or person in making employment available to any of its students:

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

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

(b) Employment of students by recipients. A recipient that employs any of its students shall not do so in a manner that violates §§ _____.500 through _____.550.

§ _____.440 Health and insurance benefits and services.

Subject to § _____.235(c), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ _____.500 through _____.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ _____.445 Marital or parental status.

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

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

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

(3) A recipient that operates a portion of its education program or activity separately

for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) Subject to § ___.235(c), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

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

§ ___.450 Athletics.

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

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

(c) Equal opportunity. (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

- (i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (ii) The provision of equipment and supplies;
- (iii) Scheduling of games and practice time;
- (iv) Travel and per diem allowance;
- (v) Opportunity to receive coaching and academic tutoring;
- (vi) Assignment and compensation of coaches and tutors;
- (vii) Provision of locker rooms, practice, and competitive facilities;
- (viii) Provision of medical and training facilities and services;
- (ix) Provision of housing and dining facilities and services;
- (x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

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

§ 455 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.

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

§ ____ .500 Employment.

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

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

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ ____ .500 through ____ .550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

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

(b) Application. The provisions of §§ ____ .500 through ____ .550 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.

§ ____ .505 Employment criteria.

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

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

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

§ ____ .510 Recruitment.

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

(b) Recruitment patterns. A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ ____ .500 through ____ .550.

§ ____ .515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of

sex:

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

§ ____ .520 Job classification and structure.

A recipient shall not:

- (a) Classify a job as being for males or for females;
- (b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or
- (c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § ____ .550.

§ ____ .525 Fringe benefits.

(a) "Fringe benefits" defined. For purposes of these Title IX regulations, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § ____ .515.

(b) Prohibitions. A recipient shall not:

- (1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;
- (2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or
- (3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ .530 Marital or parental status.

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

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

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

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

(c) Pregnancy as a temporary disability. Subject to § .235(c), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

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

§ .535 Effect of state or local law or other requirements.

(a) Prohibitory requirements. The obligation to comply with §§ .500 through .550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

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

§ ____ .540 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.

§ ____ .545 Pre-employment inquiries.

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

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

§ ____ .550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ ____ .500 through ____ .550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart F--Procedures

§ ____ .600 Notice of covered programs.

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

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

weak teaching that, despite good intentions, can result from a teacher's lack of opportunity to acquire the knowledge and skill needed to help students master the curriculum.

(4) The Federal Government established the Dwight D. Eisenhower Professional Development Program in 1985 to ensure that teachers and other educational staff have access to sustained and high-quality professional development. This ongoing development must include the ability to demonstrate and judge the performance of teachers and other instructional staff.

(5) States should evaluate their teachers on the basis of demonstrated ability, including tests of subject matter knowledge, teaching knowledge, and teaching skill. States should develop a test for their teachers and other instructional staff with respect to the subjects taught by the teachers and staff, and should administer the test every 3 to 5 years.

(6) Evaluating and rewarding teachers with a compensation system that supports teachers who become increasingly expert in a subject area, are proficient in meeting the needs of students and schools, and demonstrate high levels of performance measured against professional teaching standards, will encourage teachers to continue to learn needed skills and broaden teachers' expertise, thereby enhancing education for all students.

(c) PURPOSES.—The purposes of this section are as follows:

(1) To provide incentives for States to establish and administer periodic teacher testing and merit pay programs for elementary school and secondary school teachers.

(2) To encourage States to establish merit pay programs that have a significant impact on teacher salary scales.

(3) To encourage programs that recognize and reward the best teachers, and encourage those teachers that need to do better.

(d) STATE INCENTIVES FOR TEACHER TESTING AND MERIT PAY.—

(1) AMENDMENTS.—Title II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6601 et seq.) is amended—

(A) by redesignating part D as part E;

(B) by redesignating sections 2401 and 2402 as sections 2501 and 2502, respectively; and

(C) by inserting after part C the following:

**"PART D—STATE INCENTIVES FOR
TEACHER TESTING AND MERIT PAY**

**"SEC. 2401. STATE INCENTIVES FOR TEACHER
TESTING AND MERIT PAY.**

"(a) STATE AWARDS.—Notwithstanding any other provision of this title, from funds described in subsection (b) that are made available for a fiscal year, the Secretary shall make an award to each State that—

"(1) administers a test to each elementary school and secondary school teacher in the State, with respect to the subjects taught by the teacher, every 3 to 5 years; and

"(2) has an elementary school and secondary school teacher compensation system that is based on merit.

"(b) AVAILABLE FUNDING.—The amount of funds referred to in subsection (a) that are available to carry out this section for a fiscal year is 50 percent of the amount of funds appropriated to carry out this title that are in excess of the amount so appropriated for fiscal year 1999, except that no funds shall be available to carry out this section for any fiscal year for which—

"(1) the amount appropriated to carry out this title exceeds \$600,000,000; or

"(2) each of the several States is eligible to receive an award under this section.

"(c) AWARD AMOUNT.—A State shall receive an award under this section in an amount that bears the same relation to the total amount available for awards under this sec-

tion for a fiscal year as the number of States that are eligible to receive such an award for the fiscal year bears to the total number of all States so eligible for the fiscal year.

"(d) USE OF FUNDS.—Funds provided under this section may be used by States to carry out the activities described in section 2207.

"(e) DEFINITION OF STATE.—For the purpose of this section, the term 'State' means each of the 50 States and the District of Columbia."

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect on October 2, 1999.

(e) TEACHER TESTING AND MERIT PAY.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a State may use Federal education funds—

(A) to carry out a test of each elementary school or secondary school teacher in the State with respect to the subjects taught by the teacher; or

(B) to establish a merit pay program for the teachers.

(2) DEFINITIONS.—In this subsection, the terms "elementary school" and "secondary school" have the meanings given the terms in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

HUTCHISON AMENDMENT NO. 2291

Mr. COVERDELL (for Mrs. HUTCHISON) proposed an amendment to the bill, H.R. 2646, supra; as follows:

At the end, add the following:

**TITLE —EQUAL EDUCATIONAL
OPPORTUNITY**

SEC. ____01. EQUAL EDUCATIONAL OPPORTUNITY.

Subsection (b) of section 6301 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7351) is amended—

(1) in paragraph (7), by striking "and" after the semicolon;

(2) in paragraph (8), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(9) education reform projects that provide same gender schools and classrooms, as long as comparable educational opportunities are offered for students of both sexes."

NOTICES OF HEARINGS

COMMITTEE ON LABOR AND HUMAN RESOURCES

Mr. JEFFORDS. Mr. President, I would like to announce for information of the Senate and the public that a joint hearing of the Senate Committee on Labor and Human Resources and the House Committee on Education and the Workforce will be held on Wednesday, April 22, 1998, 10:30 a.m., in SD-106 of the Senate Dirksen Building. The subject of the hearing is "Proposed Individuals With Disabilities Education Act Regulations." For further information, please call the committee, (202) 224-5375.

COMMITTEE ON LABOR AND HUMAN RESOURCES

Mr. JEFFORDS. Mr. President, I would like to announce for information of the Senate and the public that a joint hearing of the Subcommittee on Public Health and Safety, Senate Committee on Labor and Human Resources and Subcommittee on Health and Environment, House Committee on Commerce will be held on Thursday, April 23, 1998, 2:30 p.m., in SH-216 of the Senate Hart Building. The subject of the hearing is The Gift of Life: Increasing

Bone Marrow Donation and Transplantation. For further information, please call the committee, (202) 224-5375.

**AUTHORITY FOR COMMITTEE TO
MEET**

SUBCOMMITTEE ON YOUTH VIOLENCE

Mr. COVERDELL. Mr. President, I ask unanimous consent that the Subcommittee on Youth Violence, of the Senate Judiciary Committee, be authorized to meet during the session of the Senate on Monday, April 20, 1998, at 10:30 a.m. to hold a field hearing at the Court of Common Pleas, Juvenile Court, 16th floor, 800 Broadway, Cincinnati, OH 45020 on: "Juvenile Courts of the 21st Century: Violent & Repeat Offenders."

The Presiding Officer. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

**FROSTBURG STATE UNIVERSITY'S
CENTENNIAL ANNIVERSARY**

• Mr. SARBANES. Mr. President, I rise today to commemorate one of Maryland's finest state institutions, Frostburg State University, on the occasion of its Centennial Anniversary.

Since its founding in 1898, Frostburg State University has been a primary component of the greater Frostburg community. Although small towns are often identified merely as extensions of the school in their midst, it is more the case that Frostburg State is a true extension of the town of Frostburg. In fact, the people of Frostburg themselves raised the funds that were used to buy the land on which the institution is located. This symbiotic relationship is one in which the Frostburg community provides the support system for the school and in turn, is enriched by the school and its students.

This unique relationship dates back to when the University was a small local teacher training institution named the State Normal School at Frostburg. Upon completing their training, students often stayed in the area and taught at regional elementary schools. This tradition of community participation continued as the school evolved into a State Teachers College in 1935 and finally, a multipurpose institution, Frostburg State University, in July of 1987, becoming a member of the University of Maryland System the following year.

While the commitment to teacher training remains at the core of Frostburg State's mission, the University has expanded its curriculum significantly to include the arts and sciences, professional and pre-professional programs, and graduate programs including business, psychology and biology training. Enrollment has grown from an initial class of 57 to over 5,200, and the University's degree program now requires four years of study.


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LEGISLATIVE ACTIVITIES
U.S. Senate Roll Call Votes
105th Congress - 2nd Session (1998)

as compiled through Senate LEGIS by the Senate Bill Clerk under the
direction of the Secretary of the Senate

Vote Number: 89 **Bill Number:** H.R.2646
Vote Date: April 21, 1998, 3:24 PM
Amendment Number: S.AMDT.NO. 2291
Title: Hutchison Amdt No.2291
Req. for Majority: 1/2 **Result:** Amendment Agreed
to

Available Reports

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Vote Summary

Yea	Nay	Present	No Vote
69	29	0	2

Alphabetical by Senator

Abraham (MI)Yea	Feingold (WI)Nay	Lugar (IN)Yea
Akaka (HI)Nay	Feinstein (CA)Yea	Mack (FL)Yea
Allard (CO)Yea	Ford (KY)Nay	McCain (AZ)Yea
Ashcroft (MO)Yea	Frist (TN)Yea	McConnell (KY)Yea
Baucus (MT)Nay	Glenn (OH)Nay	Mikulski (MD)Yea
Bennett (UT)NV	Gorton (WA)Yea	Moseley-Braun (IL)Nay
Biden (DE)Nay	Graham (FL)Yea	Moynihan (NY)NV
Bingaman (NM)Yea	Gramm (TX)Yea	Murkowski (AK)Yea
Bond (MO)Yea	Grams (MN)Yea	Murray (WA)Nay
Boxer (CA)Yea	Grassley (IA)Yea	Nickles (OK)Yea
Breaux (LA)Yea	Gregg (NH)Yea	Reed (RI)Nay
Brownback (KS)Yea	Hagel (NE)Yea	Reid (NV)Yea
Bryan (NV)Yea	Harkin (IA)Nay	Robb (VA)Yea
Bumpers (AR)Nay	Hatch (UT)Yea	Roberts (KS)Yea
Burns (MT)Yea	Helms (NC)Yea	Rockefeller (WV)Yea
Byrd (WV)Yea	Hollings (SC)Nay	Roth (DE)Yea
Campbell (CO)Yea	Hutchinson (AR)Yea	Santorum (PA)Yea
Chafee (RI)Yea	Hutchison (TX)Yea	Sarbanes (MD)Nay
Cleland (GA)Nay	Inhofe (OK)Yea	Sessions (AL)Yea
Coats (IN)Yea	Inouye (HI)Nay	Shelby (AL)Yea
Cochran (MS)Yea	Jeffords (VT)Yea	Smith (NH)Yea
Collins (ME)Yea	Johnson (SD)Nay	Smith (OR)Yea
Conrad (ND)Yea	Kempthorne (ID)Yea	Snowe (ME)Yea
Coverdell (GA)Yea	Kennedy (MA)Nay	Specter (PA)Yea
Craig (ID)Yea	Kerrey (NE)Nay	Stevens (AK)Yea
D'Amato (NY)Yea	Kerry (MA)Nay	Thomas (WY)Yea
Daschle (SD)Nay	Kohl (WI)Nay	Thompson (TN)Yea
DeWine (OH)Yea	Kyl (AZ)Yea	Thurmond (SC)Yea
Dodd (CT)Nay	Landrieu (LA)Yea	Torricelli (NJ)Yea
Domenici (NM)Yea	Lautenberg (NJ)Nay	Warner (VA)Yea
Dorgan (ND)Nay	Leahy (VT)Nay	Wellstone (MN)Nay
Durbin (IL)Nay	Levin (MI)Nay	Wyden (OR)Nay
Enzi (WY)Yea	Lieberman (CT)Yea	
Faircloth (NC)Yea	Lott (MS)Yea	

By Vote

-Yeas-Nays-No Vote-

--- YEAs 69---

Abraham (MI)	Faircloth (NC)	McCain (AZ)
Allard (CO)	Feinstein (CA)	McConnell (KY)
Ashcroft (MO)	Frist (TN)	Mikulski (MD)
Bingaman (NM)	Gorton (WA)	Murkowski (AK)
Bond (MO)	Graham (FL)	Nickles (OK)
Boxer (CA)	Gramm (TX)	Reid (NV)
Breaux (LA)	Grams (MN)	Robb (VA)
Brownback (KS)	Grassley (IA)	Roberts (KS)
Bryan (NV)	Gregg (NH)	Rockefeller (WV)
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Byrd (WV)	Hatch (UT)	Santorum (PA)
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Coats (IN)	Hutchison (TX)	Smith (NH)
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D'Amato (NY)	Lieberman (CT)	Thompson (TN)
DeWine (OH)	Lott (MS)	Thurmond (SC)
Domenici (NM)	Lugar (IN)	Torricelli (NJ)
Enzi (WY)	Mack (FL)	Warner (VA)

--- NAYs 29---

Akaka (HI)	Ford (KY)	Lautenberg (NJ)
Baucus (MT)	Glenn (OH)	Leahy (VT)
Biden (DE)	Harkin (IA)	Levin (MI)
Bumpers (AR)	Hollings (SC)	Moseley-Braun (IL)
Cleland (GA)	Inouye (HI)	Murray (WA)
Daschle (SD)	Johnson (SD)	Reed (RI)
Dodd (CT)	Kennedy (MA)	Sarbanes (MD)
Dorgan (ND)	Kerrey (NE)	Wellstone (MN)
Durbin (IL)	Kerry (MA)	Wyden (OR)
Feingold (WI)	Kohl (WI)	

--- Not Voting 2---

Bennett (UT)	Moynihan (NY)
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SINCE - SEX -

- WHERE ARE WE:
- WHERE TO GO:

□ WHERE IS FLOUS ON THIS
ISSUE?

□ WHAT'S ON PROCESS

— CAN DAVID BICK →

OCK - WANTS TO
BUILD AN ACCEPTABLE
RATIONAL TO SUPPORT
NT SCHOOL

OCK - OF FOR ONE
SEX OR OTHER SINGLE
SEX SO LONG AS
COMPARABLE OPPORTUNITY
ADVANCE — DESIRABLE
POSITION

DOJ - NOT CONSTITUTIONAL

POTUS / FLOUS / AILET -
SUPPORTIVE

Talking Points Regarding
Sen. Hutchison's proposed Amendment to Title VI of the Elementary and Secondary
Education Act¹
Re: Single-Sex Schools and Classes
8/26/98 11:00 a.m. draft

1. We support the goal of increased educational opportunity in a range of public education contexts, including single sex educational schools and classes, provided that there is no discrimination when such opportunities are provided.
2. The Hutchison Amendment is unnecessary because Title IX currently allows for comparable single-sex schools.
3. The Hutchison Amendment also is unnecessary because the U.S. Department of Education is currently working on modifications to its Title IX regulations (which date back to 1975) in order to provide more flexibility for schools that seek to offer single-sex classes and programs.
4. The Hutchison Amendment is unwise and confusing.
 - The Amendment will create an anomaly in which schools could use Title VI federal—but not other federal or state and local—funds when establishing certain single sex classes and programs.
 - The Amendment will create significant administrative burdens on courts and ED's OCR to "trace" funds as a condition of determining whether schools, classes and programs are established in accordance with federal law.
5. A change in the long-standing civil rights standard governing the establishment of single-sex classes and programs should be the product of careful deliberation. It should not be addressed as a rider to an appropriations act.
 - The regulatory process—which includes the opportunity for extensive notice and comment by interested parties—can ensure a thoughtful approach to an emerging issue.
 - If Congress is not satisfied with the regulatory result, Congress may pursue legislative options, at that point with the benefit of input received through the regulatory process.

¹ The ESEA is a state-administered block grant program.

Question and Answer

- Q1. What does comparability mean in the context of establishing “comparable” single-sex opportunities for girls and boys?
- A1. Comparability involves an assessment of the kind and quality of facilities, courses, and services provided to students of both genders. As part of its effort to provide more meaningful guidance to schools in this area, ED contemplates further clarification of this term as part of its regulatory proposal, which will be subject to public notice and comment in the near future.

**ANALYSIS OF PROPOSED HUTCHISON
“SAME GENDER” AMENDMENT**

The Amendment

“Nothing in Public Law 93-318, as amended, shall be construed to prohibit the use of funds made available under this title for education reform projects that provide same gender schools or classrooms, as long as comparable educational opportunities are offered for students of both sexes.”

Overview of Proposed Amendment

1. Such a Significant Proposal Warrants Careful Consideration.
 - Proposal could have significant implications for Title IX, and raises issues that are too important to be attached merely as a rider to an appropriations bill.
2. The Proposal Does Not Provide For Evaluation of Project Results.
3. The Proposal Applies Only to Title VI ESEA Funds Appropriated in this Appropriations Act—Not to Other Federal Funds or State and Local Funds.
4. The Scope of the Amendment is Unclear.
 - The Hutchison amendment purports to permit school systems to use Federal funds to support “education reform projects” that involve single sex classrooms, but provides no definition of an education reform project, leaving the scope of the authority unclear for local, State, and Federal administrators.

Strategic Options

1. Oppose the amendment.
 - Inappropriately attached to an appropriations bill
 - Insufficient time for thoughtful debate and consideration
2. Support the amendment.
 - Provides for limited experimentation with single-sex programs
3. Substitute legislation that would establish funding for research and a pilot program under ED programs.
 - Provides for experimentation with single-sex programs under controlled circumstances with opportunity to evaluate effectiveness of programs
4. Substitute legislation that would modify Title IX and import constitutional protections.
 - Addresses the issue forthrightly, and establishes a comprehensive legislative standard to address an emerging issue

The Framework for this amendment

The amendment is intended to apply only to Title VI, ESEA funds, even though the ultimate effect would alter Title IX law.

■ Use of Title VI ESEA funds.

■ Advantages:

- Would allow schools to experiment with single sex education in a more limited manner.

■ Disadvantages:

- Would create an anomaly in which schools could use Title VI federal, but not other federal or state and local funds for such purposes; could raise questions about the use of Title VI funds (which were intended only for supplementary activities).
- Questionable in light of Administration position that Title VI program should terminate.
- Would create significant administrative burdens on courts and ED OCR to “trace” funds as a condition of determining whether schools implementing such programs were in compliance with Title IX.

- It is not clear how useful the authority would be to school districts because of the statutory prohibition on A supplanting.≡ Title VI funds may be used only for A supplementary≡ activities and services, and it is not clear that merely educating boys and girls in separate programs is supplementary to the school system=s obligation to educate them in the first place.
 - Title VI—a state-administered block grant—is not an appropriate vehicle for establishing a program to experiment and study single-sex education.
- Amending Title IX.
- Advantages:
 - Would provide maximum flexibility for experimentation by authorizing schools to use state and local funds (and other federal funds) as well.
 - Analytically, the cleanest and easiest to understand. Avoids difficult interpretive issues that amending Title VI would present.
 - Eliminates a Title IX interpretation that (as to classes) is believed by some to be breached, causing disrespect for the law.
 - Eliminates across-the-board prohibitions (as to classes) that prevent the examination of a particular situation and decisions about the legal sufficiency of such programs.
 - Disadvantages:
 - Would constitute a sweeping change in the meaning of Title IX; could pose the risk of opening up Title IX to further amendment in less constructive ways.

Funding Research and Limited Pilot Projects

- Advantages:
 - Conveys interest in pursuing single-sex education opportunities, while ensuring a more deliberative approach in resolving the issue.
- Disadvantages:
 - Unlikely to arrive at one comprehensive research-based answer to the question about the value of single-sex education. Existing research is

mixed, and the fact-specific contexts in which the issue arises suggests the difficulty of arriving at any one conclusion for all circumstances.

Specifications for Alternative Language:

Possible language to amend Title IX:

A single sex program may be offered by any public elementary or secondary school, except for vocational classes, if:

[a] It is not based on and does not further stereotyping based on sex and does not stigmatize students of either gender; and

[b] It is:

1. part of diverse educational programs, and school/district provides opportunity for comparable single-sex programs for the other gender; or
2. there are educational needs/problems particular to students of one gender in the school/district, the single-sex program is designed to address those needs/problems, and the single-sex program does not adversely affect the educational opportunities of students of the excluded gender.
 - Under [b][1], the school's offering of equal options to promote diversity would provide the basis for establishing "an exceedingly persuasive justification."
 - Under [b][2], the school must be able to show that it has "an exceedingly persuasive justification" for setting up single-sex programs and that the separation by sex was "substantially related" to achieving the educational objectives. E.g., school would have to demonstrate that one sex was performing poorly when compared to the other sex or otherwise had particular needs not experienced by the other sex ; that the school tried or considered other educational options to address the unequal learning; and that establishing a single-sex classroom does not have an adverse effect on students of the other sex .

Students have the option of a co-ed program.

Parents must provide authorization for their children to be placed in a single-sex program.

Any school offering single-sex programs must evaluate the effectiveness of the program.