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Divider Title: _____



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

SEP 22 1997

Ms. Ellen J. Vargyas
Legal Counsel
Equal Employment Opportunity Commission
1801 L Street, N.W., Room 6002
Washington, D.C. 20507

Ellen
Dear Ms. Vargyas:

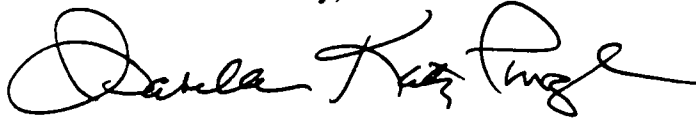
Pursuant to Executive Order 12067, we are submitting for review by the Equal Employment Opportunity Commission (EEOC) a draft notice of proposed rulemaking (NPRM) of a common rule prepared by the Department of Justice to implement Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681-1688. All of the 24 agencies that have federally assisted education programs and currently do not have a Title IX regulation are participating in this common rule. In addition, we intend that the four agencies that have Title IX regulations (the Departments of Education, Energy, Agriculture, and Health and Human Services) will modify their regulations to conform to the final version of the common rule.

We are providing this to you in draft form as we wish to receive the EEOC's views before the rule is submitted to the participating agencies for review. As you know, the common rule is based on the Department of Education's (ED's) Title IX regulations. To assist your review, our modifications to the ED regulation are reflected by shading for additions of new text and ~~strike-outs~~ for deletions of existing text. In addition, this draft does not include the portion of the common rule that includes each agency's adoption of the common rule text or agency-specific inserts. Agency-specific language will include designation of an agency official for various responsibilities identified in the common rule, such as approval of assurance forms and initial determinations of recipient compliance, and an agency's adoption of that portion of its Title VI regulations that addresses enforcement procedures. Two agencies that do not have Title VI regulations will include the text of procedures that are identical to other agencies' Title VI procedures.

We also are submitting this draft to the Department of Education for comment, and a similar draft has been submitted to the Office of Federal Register (OFR) for review of the notice's format and consistency with OFR requirements. In addition, you should note that this draft has not been formally reviewed by the Department's Office of Legal Counsel (OLC). We will inform you of any changes of substance rather than format. Given our interest in publication of this NPRM at the earliest possible date, and notwithstanding the potential for amendment to this draft, your prompt review of this draft would be appreciated greatly.

If you have any questions regarding this document, feel free to contact Merrily Friedlander, Chief, Coordination and Review Section, at 307-2222, or Jennifer Levin, an attorney in the Coordination and Review Section, at 305-0025.

Sincerely,

A handwritten signature in black ink, appearing to read "Isabelle Katz Pinzler". The signature is fluid and cursive, with the first name being the most prominent.

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

Enclosure



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

SEP 22 1997

Ms. Jamiene S. Studley
Acting General Counsel
Department of Education
600 Independence Avenue, S.W., Room 5400
Washington, D.C. 20202-2110

Dear Ms. Studley:

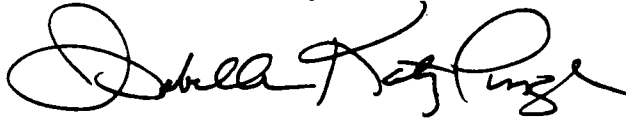
I have enclosed for your review a draft notice of proposed rulemaking (NPRM) of a common rule prepared by the Department of Justice to implement Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681-1688. All of the 24 agencies that have federally assisted education programs and currently do not have a Title IX regulation are participating in this common rule. In addition, it is intended that the Department of Education, and other three agencies that have Title IX regulations (the Departments of Energy, Agriculture, and Health and Human Services) will modify their regulations to conform to the final version of the common rule.

We are providing this to you in draft form as we wish to receive ED's views before the rule is submitted to the participating agencies for review. As you know, the common rule is based on your agency's Title IX regulations. To assist your review, our modifications to the ED regulation are reflected by shading for additions of new text and strike-outs for deletions of existing text. In addition, this draft does not include the portion of the common rule that includes each agency's adoption of the common rule text or agency-specific inserts. Agency-specific language will include designation of an agency official for various responsibilities identified in the common rule, such as approval of assurance forms and initial determinations of recipient compliance, and an agency's adoption of that portion of its Title VI regulations that addresses enforcement procedures. Two agencies that do not have Title VI regulations will include the text of procedures that are identical to other agencies' Title VI procedures.

We also are submitting this draft to the Equal Employment Opportunity Commission for comment pursuant to Executive Order 12067, and a similar draft has been submitted to the Office of Federal Register (OFR) for review of the notice's format and consistency with OFR requirements. In addition, you should note that this draft has not been formally reviewed by the Department's Office of Legal Counsel. We will inform you of any changes of substance rather than format. Given our interest in publication of this NPRM at the earliest possible date, and notwithstanding the potential for amendment to this draft, your prompt review of this draft would be appreciated greatly.

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Sincerely,

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Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

Enclosure

cc: Ms. Norma Cantu
Assistant Secretary for Civil Rights

Draft 9/15/97

[DOUBLE SPACE DOCUMENT FOR FEDERAL REGISTER]

[ADD remaining participating agencies and CFR cite for reg in order of CFR volume]

DEPARTMENT OF STATE

22 CFR Part 146

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3

DEPARTMENT OF JUSTICE

28 CFR Part 42

DEPARTMENT OF LABOR

29 CFR Part 36

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 18

NUCLEAR REGULATORY COMMISSION

10 CFR Part 4

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1253

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 7

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 19

42

NATIONAL SCIENCE FOUNDATION

45 CFR Part 618

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

AGENCIES: Department of Commerce, Department of Defense, Department of Housing and Urban Development, Department of Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of Treasury,

Department of Veterans Affairs, Agency for International Development, Corporation for National & Community Service, Environmental Protection Agency, Federal Emergency Management Agency, General Services Administration, Institute for Museum and Library Sciences, National Aeronautics and Space Administration, National Endowment for the Arts, National Endowment for the Humanities, National Science Foundation, Nuclear Regulatory Commission, Small Business Administration, Tennessee Valley Authority, United States Information Agency.

ACTION: Notice of proposed rulemaking.

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

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

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

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

SUPPLEMENTARY INFORMATION:

Background

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

statutory enforcement mechanisms. Although Treasury and the USIA do not have Title VI regulations, they 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.

During the early 1980s, several agencies published notices of proposed rulemaking for Title IX, but the proposed rules were never issued as final rules. For example, on June 17, 1980, the Department of Justice published a notice of proposed rulemaking. *See* 45 Fed. Reg. 41001 (1980). **ADD** other agency citations. 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 the agencies, 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 role in Title IX enforcement, judicial interpretations of ED's regulations, familiarity by recipients, and an interest to maintain consistency of interpretation of regulations enforcing Title IX. The regulations, initially issued by the former Department of Health, Education, and Welfare (and adopted by ED upon its establishment in 1980), are the result of an extensive public comment process and congressional review. HEW received and considered more than 9700 comments before drafting its final regulations. Further, after the final regulations were issued, but before they became effective, Congress held five days of hearing to determine whether the regulations were consistent with the statute. *Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee 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 the agencies participating in 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, and 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 taken action with respect to or interpreted Title IX and various provisions of ED's regulations. For example, in 1974, Congress amended the statute because of its disagreement with provisions in ED's proposed rule. See 20 U.S.C. 1681(a)(6). As mentioned, Congress also held hearings prior to its approval of the final regulations by HEW. In addition, 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 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 reverse the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). See S. Rep. No. 64, 100th Cong., 2d Sess. 2, reprinted in 1988 U.S.C.C.A.N. 3, 3-4. The recipient community, Federal agencies, and the courts should continue to have the benefit and 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 an exact duplication of ED's regulations as this proposal addresses several statutory changes that are not reflected in the existing (but soon to be modified) ED regulation. 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 as 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, "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 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 gender

based discrimination, and that individuals have equal opportunities, without regard to gender, 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. All provisions of the regulation are to be interpreted consistent with existing case law.

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

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 regulation to conform to the statutory amendments to Title IX are addressed in this subpart. Section ____ .12 is amended to incorporate the expanded exemption for entities controlled by religious institutions. Under the CRRA, any 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. The exemption is no longer limited to only educational institutions that are controlled by religious organizations with tenets contrary to Title IX. Further, the exemption would apply to a particular program(s) operated by a recipient if this separate program is subject to religious tenets that are not consistent with Title IX. A recipient may apply for an exemption from the funding agency(ies). If a recipient has obtained an exemption from ED, such exemption may be submitted to another funding agency as a basis for an exemption from it.

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

A new section, ____ .18, addresses all other statutory amendments. See 20 U.S.C. 1681(a)(7)-(9), 1687, 1688. Three exemptions to Title IX's coverage are identified in ____ .18(a) based on amendments passed in 1976. 20 U.S.C. 1681(a)(7)-(9). Congress exempts activities undertaken by the American Legion to operate Boy's State, Girl's State, Boy's Nation, and Girl's 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, what is 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, supra*, which defined "program or activity" in restrictive terms. 465 U.S. at 572-74; S. Rep. No. 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 office, not the entire college. *Ibid*. The "program or activity" was the financial aid program. 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. 64, 100th Cong., 2d Sess. at 2-3, 11-16, *reprinted in* 1988 U.S.C.C.A.N. at 3-4, 13-18.

By statutory amendment, and as set forth in ____ .18(b), Congress restored the broad interpretation accorded the phrase "program or activity" prior to *Grove City College*. The provision addresses the scope of coverage for four broad categories of recipients; State or local entities, educational institutions, private entities, and an entity that is a combination of any of the aforementioned 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. 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 such operation is educational or academic in nature, are subject to Title IX's prohibition on discrimination. Thus, housing programs, a shuttle service, food service, and other commercial operations are covered by Title IX. 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. 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. 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 29 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. 64 at 20, *reprinted in* 1988 U.S.C.C.A.N. at 22 ("The bill defines 'program' in the same manner as 'program or activity,' and leaves intact the 'or part thereof' pinpointing language.").

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

received any benefit or service related to a legal abortion." 20 U.S.C. 1688.

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

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

1
See 134 Cong. Rec. S227 (daily ed. Jan. 28, 1988) (In response to Sen. Metzenbaum's charge that discriminatory treatment would follow adoption of the Danforth amendment, and criticism that the amendment failed to account for abortions that are necessary to save the life of the mother, 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.").

2
This provision is consistent with the Danforth provision and congressional intent. Statements of numerous senators and representatives, including Sen. Danforth and other sponsors, reiterate the plain meaning of the prohibition, and equate the imposition of penalties as one form of discriminatory treatment against women who have sought or will seek an abortion. *See* 134 Cong. Rec. S163 (daily ed. Jan. 27, 1988) (statement of Sen. Danforth) ("In fact, it is prohibited — hospitals, colleges, universities — from *discriminating* against people who have had abortions or who are seeking abortions. So it does not intend to authorize, in fact, it prohibits, *penalties* against people who have

Finally, in order to conform ED's existing text to that aspect of the Danforth amendment that does not require or prohibit a recipient from providing services or payment for an abortion, a specific reference to ____ .18(c)(1) is added to the following four provisions: ____ .21(c)(3), ____ .39, ____ .40(b)(4), and ____ .57(c).

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

made their own choice for abortion.") (emphasis added); 134 Cong. Rec. S227 (daily ed. Jan. 28, 1988) (statement of Sen. Wilson) ([The second sentence of the Danforth amendment] was language that I and others insisted be in there, precisely to ensure that there could not be *discrimination* against women who either are seeking or have received abortion-related services.") (emphasis added).

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

course offerings, access to schools operated by local education agencies, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, consideration of marital and parental status, and athletics. The proposed regulations do not cover a recipient's use of particular textbooks or curricular materials. The time frames identified in section ____ .41(d), which address athletic programs, only apply if the recipient also does not receive funding from the Department of Education; otherwise, such recipient is expected to have complied with the time frames as interpreted for 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.

Subpart F addresses the agency's respective procedures for implementation and enforcement of Title IX. For those agencies that have regulations to implement Title VI, such procedures will be adopted and incorporated by reference. Title 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 of minor consequence. For two agencies that do not have Title VI regulations, the Treasury and USIA, the specific text is set forth herein. The proposed text for Treasury and USIA are also virtually the same as existing regulations for other agencies. To the extent an agency has regulations, based on other statutes, that address nondiscrimination on the basis of sex in programs or activities that receive Federal financial assistance, such regulations remain in force and are not affected by this regulation.

Applicable Executive Orders and Regulatory Certifications

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

This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The Attorney General has determined that this rule is a "significant regulatory action" under Executive Order 12866, § 3(f), Regulatory Planning and Review and, accordingly, this rule has been reviewed by the Office of Management and Budget.

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 a new standard of liability and requires that recipients establish grievance procedures and take other action, a substantial number of entities already are subject to other agency's 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, 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 Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities because all of the entities that are subject to these regulations are already subject to Title IX, and a substantial number of entities already are subject to the Title IX regulations of other agencies.

The recordkeeping requirements described in the proposed rule are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR part 1320. Accordingly, these proposed information collection requirements are being submitted to OMB for review pursuant to the Paperwork Reduction Act. Comments on the proposed information requirements should be submitted to: Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503. Attention: Desk Officer for the Department of Justice.

Text of the Proposed Common Rule

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

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

- § ____ .1 Purpose and effective date.
- § ____ .2 Definitions.
- § ____ .3 Remedial and affirmative action and self-evaluation.
- § ____ .4 Assurance required.
- § ____ .5 Transfers of property.
- § ____ .6 Effect of other requirements.
- § ____ .7 Effect of Employment opportunities.
- § ____ .8 Designation of responsible employee and adoption of grievance procedures.
- § ____ .9 Dissemination of policy.
- § ____ .10 [Reserved]
- § ____ .11 Application.
- § ____ .12 Educational institutions and other entities controlled by religious organizations.
- § ____ .13 Military and merchant marine educational institutions.
- § ____ .14 Membership practices of certain organizations.
- § ____ .15 Admissions.
- § ____ .16 Educational institutions eligible to submit transition plans.
- § ____ .17 Transition plans.
- § ____ .18 Statutory amendments.
- § ____ .19-20 [Reserved]
- § ____ .21 Admission.
- § ____ .22 Preference in admission.
- § ____ .23 Recruitment.
- § ____ .24-30 [Reserved]
- § ____ .31 Education programs and activities.
- § ____ .32 Housing.
- § ____ .33 Comparable facilities.
- § ____ .34 Access to course offerings.
- § ____ .35 Access to schools operated by LEAs.
- § ____ .36 Counseling and use of appraisal and counseling materials.
- § ____ .37 Financial assistance.
- § ____ .38 Employment assistance to students.
- § ____ .39 Health insurance benefits and services.
- § ____ .40 Marital or parental status.
- § ____ .41 Athletics.
- § ____ .42 Textbooks and curricular material.
- § ____ .43-50 [Reserved]
- § ____ .51 Employment.
- § ____ .52 Employment criteria.
- § ____ .53 Recruitment.
- § ____ .54 Compensation.
- § ____ .55 Job classification and structure.
- § ____ .56 Fringe benefits.

- § ____ .57 Marital or parental status.
- § ____ .58 Effect of state or local law or other requirements.
- § ____ .59 Advertising.
- § ____ .60 Pre-employment inquiries.
- § ____ .61 Sex as a bona-fide occupational qualification.
- § ____ .62-70 [Reserved]
- § ____ .71 Procedures.

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

SUBPART A—INTRODUCTION

§ ____ .1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by ~~Pub.L. 93-568, 88 Stat. 1855~~ (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. ~~This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub.L. 93-380, 88 Stat. 484.~~ The effective date of this part shall be 30 days after final publication.

§ ____ .2 Definitions.

As used in this part, the term:

(a) "Title IX" means title IX of the Education Amendments of 1972, Pub. L. 92-318, ~~86 Stat. 343 (except sections 904 and 906 thereof)~~, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, ~~except sections 904 and 906 thereof; by section 412 of Pub. L. 94-482, 90 Stat. 2234; and by Section 3 of Pub. L. 100-259, 102 Stat. 28~~ 20 U.S.C. 1681, 1682, 1683, 1685, 1686, ~~1687, 1688~~.

(b) "~~Department~~" means the Department of Education.

(c) "~~Secretary~~" means the Secretary of Education.

(d) "~~Assistant Secretary~~" means the Assistant Secretary for Civil Rights of the Department. ~~Designated agency official means (to be inserted by agency).~~

(e) "~~Reviewing Authority~~" means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in

~~cases arising under this part.~~³

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

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

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

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

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

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

(3) Provision of the services of Federal personnel.

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

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

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

³ This definition is specific to ED's enforcement procedures only.

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

(f) "Educational institution" means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

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

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

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

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

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

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

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

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

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

(k) "Institution of vocational education" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or

institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(l) "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.

(m) "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.

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

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

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

(a) Remedial action. If the Assistant Secretary ~~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 Assistant Secretary ~~designated agency official~~ deems necessary to overcome the effects of such discrimination.

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

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

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

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

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

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

§ ____ .4 Assurance required.

(a) General. Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the ~~Assistant Secretary~~ designated agency official, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the ~~Assistant Secretary~~ designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § ____ .3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the ~~Assistant Secretary~~ 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. The ~~Director~~ designated agency official will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§ ____ .5 Transfers of property.

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

§ ____ .6 Effect of other requirements.

(a) Effect of other Federal provisions. The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

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

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

§ ____ .7 Effect of employment opportunities.

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

§ ____ .8 Designation of responsible employee and adoption of grievance procedures.

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

the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

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

§ ____ .9 Dissemination of policy.

(a) Notification of policy.

(1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the ~~Assistant Secretary~~ designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § ____ .8, or to the ~~Assistant Secretary~~ 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 this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers;

(ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) Publications.

(1) Each recipient shall prominently include a statement of the policy described in

paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

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

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

SUBPART B—COVERAGE

§ ____ .11 Application.

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

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

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

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

§ ____ .13 Military and merchant marine educational institutions.

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

§ ____ .14 Membership practices of certain organizations.

- (a) Social fraternities and sororities. This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.
- (b) YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls. This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.
- (c) Voluntary youth service organizations. This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ ____ .15 Admissions.

- (a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.
- (b) Administratively separate units. For the purposes only of this section, §§ ____ .16 and ____ .17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.
- (c) Application of Subpart C. Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.
- (d) Educational institutions. Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.
- (e) Public institutions of undergraduate higher education. Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

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

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

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

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

(b) Provision for transition plans. An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the Secretary ~~of the Department of Education~~ as described in § ____ .17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

§ ____ .17 Transition plans.

(a) Submission of plans. An institution to which § ____ .16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

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

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

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

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

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

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

(c) Nondiscrimination. No policy or practice of a recipient to which § ____ .16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) Effects of past exclusion. To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § ____ .16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 18. Statutory Amendments

This section, which applies to all provisions of this part, addresses statutory amendments to Title IX.

(a) This part 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 awards 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:

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

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

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

(3)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship;

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

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

(B) 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

(C) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of 20 U.S.C. § 1681 to such operation would not be consistent with the religious tenets of such organization. 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 of activity, subject to this part if the college, university or other institution receives or

Benefits from Federal financial assistance

(c)(1) Nothing in this part shall be construed to require or prohibit any person or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, services, and the use of facilities at the behest of the mother will be mandated for the program established in terms of to address complications related to an abortion as set forth in this section.

(2) Nothing in this section shall be construed to require a person to be employed by any person or individual because such person or individual has sought or received any benefit or service related to a legal abortion. According to subpart (C) of this section no person shall be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any program or activity, including occupational training, employment or other educational program or activity, operated by a recipient which receives or benefits from Federal financial assistance because such individual has sought or received, or is seeking a legal abortion, or any benefit or service related to a legal abortion.

SUBPART C—DISCRIMINATION ON THE BASIS OF SEX IN ADMISSION AND RECRUITMENT PROHIBITED

§ ____ .21 Admission.

(a) **General.** No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ ____ .16 and ____ .17.

(b) **Specific prohibitions.**

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

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

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

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

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education

program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

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

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

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

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

(4) ~~Subject to § 8(c)(1) of this part~~ Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

§ ____ .22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students 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 this subpart.

§ ____ .23 Recruitment.

(a) Nondiscriminatory recruitment. A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § ____ .3(a), and may choose to undertake such efforts as affirmative action pursuant to § ____ .3(b).

(b) Recruitment at certain institutions. A recipient to which this subpart applies shall

not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

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

§ ____ .31 Education programs and activities.

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

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

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- (5) 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 which 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, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) Programs not operated by recipient.

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

(2) Such recipient;

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

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

§ ____ .32 Housing.

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

(b) Housing provided by recipient.

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

(2) Housing provided by a recipient to students of one sex, when compared to that

provided to students of the other sex, shall be as a whole:

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

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

(c) Other housing.

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

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

(i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

§ _____.33 Comparable facilities.

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

§ _____.34 Access to course offerings.

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

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

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

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

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

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

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

§ ____ .35 Access to schools operated by LEAs.

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

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

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

§ ____ .36 Counseling and use of appraisal and counseling materials.

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

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

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

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

§ ____ .37 Financial assistance.

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

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

(b) Financial aid established by certain legal instruments.

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

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

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

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

and

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

(c) Athletic scholarships.

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

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § ____ .41.

§ ____ .38 Employment assistance to students.

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

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

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

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

§ ____ .39 Health and insurance benefits and services.

~~Subject to 18(C)(1) of this part,~~ In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

§ _____.40 Marital or parental status.

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

(b) Pregnancy and related conditions.

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

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

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

(4) ~~Subject to 18(c)(1) of this part, a~~ recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

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

§ _____.41 Athletics.

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

offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

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

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

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary ~~is authorized~~

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

§ ____ .42 Textbooks and curricular material.

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

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

§ ____ .51 Employment.

(a) General.

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

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

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

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

discriminating on the basis of sex in violation of this part.

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

- (1) Recruitment, advertising, and the process of application for employment;
- (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation, and changes in compensation;
- (4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;
- (5) The terms of any collective bargaining agreement;
- (6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;
- (7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;
- (8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;
- (9) Employer-sponsored activities, including social or recreational programs; and
- (10) Any other term, condition, or privilege of employment.

§ ____ .52 Employment criteria.

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

- (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and
- (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ ____ .53 Recruitment.

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

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

§ ____ .54 Compensation.

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

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

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

§ ____ .55 Job classification and structure.

A recipient shall not:

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

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

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § ____ .61.

§ ____ .56 Fringe benefits.

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

not subject to the provision of § ____ .54.

(b) Prohibitions. A recipient shall not:

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

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

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

§ ____ .57 Marital or parental status.

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

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

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

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

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

(d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of

time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

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

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

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

§ ____ .59 Advertising.

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

§ ____ .60 Pre-employment inquiries.

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

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

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

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

in a locker room or toilet facility used only by members of one sex.

SUBPART F—PROCEDURES ~~(INTERIM)~~

§ ____ .71 Reserved.

~~The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, Part 101. ~~BUDDHIST~~~~

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Divider Title: _____

Draft 8/14/97

An Agreement Between All Executive Departments and Agencies that Conduct Federally Assisted Programs to Delegate to the Department of Education, the Department of Health and Human Services, and the Department of Veterans Affairs Certain Title VI and Title IX Compliance Responsibilities with Respect to Certain Educational Institutions

A. Purpose

Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d et seq ("Title VI"), prohibits discrimination on the basis of race, color, and national origin in programs or activities that receive Federal financial assistance. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq ("Title IX"), similarly prohibits discrimination on the basis of sex in education programs or activities that receive Federal financial assistance. Section 1-207 of Executive Order 12250 authorizes the Attorney General to initiate cooperative programs and agreements between Federal agencies to promote the effective enforcement of, inter alia, Titles VI and IX, and similar laws that prohibit discrimination in Federally assisted programs and activities. See, also, 28 C.F.R. §§ 42.401-415 (Coordination regulation with respect to Title VI). This agreement will promote the consistent and coordinated enforcement of Titles VI and IX by delegating certain enforcement authority for *jointly* funded educational institutions to the Department of Education, Department of Health and Human Services, and the Department of Veterans Affairs, as set forth herein. In addition, efficiency of enforcement activities will be increased and burdens on recipients, beneficiaries, and Federal agencies will be reduced as all agencies will share data on recipient compliance and eliminate duplicative agency efforts.

B. Parties to this Agreement

Participating agencies are agencies that provide Federal financial assistance and will delegate certain civil rights compliance responsibilities to the Departments of Education (ED), Health and Human Services (HHS), and Veterans Affairs (VA). Specifically, participating agencies are: _____ (list agencies). ED, HHS, and VA are a "participating agency" in those circumstances where ED, HHS, or VA delegate responsibilities to each other.

C. Delegation

1. By this agreement, and subject to paragraphs (C)(2)-(3), participating agencies will delegate to ED specific enforcement duties regarding Titles VI and IX, and similar laws that prohibit discrimination in Federally assisted programs, (other than Section 504 of the Rehabilitation Act of 1973, as amended), the enforcement duties delegated to ED are enumerated below in Section D, and encompass programs involving elementary and secondary education systems, and institutions and institutions of higher education and vocational education that receive Federal assistance from both ED and any participating agency at the time of the alleged discrimination ("designated ED recipients"). As appropriate, similar duties are delegated for any educational institution subject to this paragraph that applies for Federal

assistance from a participating agency and which currently receives Federal assistance from ED ("designated ED applicants").

2. By this agreement, and subject to paragraphs (C)(1) and (C)(3), participating agencies will delegate to HHS specific enforcement duties regarding Titles VI and IX, and similar laws that prohibit discrimination in Federally assisted programs, (other than Section 504 of the Rehabilitation Act of 1973, as amended), the enforcement duties delegated to HHS are enumerated below in Section D, and encompass programs involving schools of medicine, dentistry, nursing, other health-related schools that receive Federal assistance from both HHS and any participating agency at the time of the alleged discrimination ("designated HHS recipients"). As appropriate, similar duties are delegated for any entity that applies for Federal assistance from an agency and which currently receives Federal assistance from HHS ("designated HHS applicant").

3. By this agreement, and subject to paragraphs (C)(1)-(2), participating agencies will delegate to VA specific enforcement duties regarding Titles VI and IX, and similar laws that prohibit discrimination in Federally assisted programs, (other than Section 504 of the Rehabilitation Act of 1973, as amended), the enforcement duties delegated to the VA are enumerated below in Section D, and encompass programs involving proprietary educational institutions (*i.e.*, private, for profit, non-college degree granting institutions that provide technical and skilled training) that receive Federal assistance from both the VA and any participating agency at the time of the alleged discrimination ("designated VA recipients"). As appropriate, similar duties are delegated for any entity that applies for Federal assistance from an agency and which currently receives Federal assistance from VA ("designated VA applicant").

4. ED and HHS shall consult and determine, on a case-by-case basis, which agency will investigate a complaint that alleges discrimination occurred in a school of medicine, dentistry, or other health-related school, as well as the educational institution at large.

5. This agreement does not alter, amend, or otherwise affect any existing delegation agreements between participating agencies and HHS under Title VI with respect to medical facilities and noneducational institutions.

6. This agreement does not alter, amend, or otherwise affect any agreements between agencies with respect to the enforcement of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.

7. This agreement does not alter, amend, or otherwise affect the requirements of the Department of Justice/Equal Employment Opportunity Commission (EEOC) regulation concerning procedures for handling complaints of employment discrimination filed against recipients of Federal financial assistance, commonly referred to as the "Title VI/Title VII rule." 28 C.F.R. §§ 42.601-42.613, 29 C.F.R. §§ 1691.1-1697.13. Complaints filed with a

participating agency alleging that a recipient of Federal financial assistance engaged in employment discrimination remain subject to the Title VI/Title VII rule, and therefore will be referred directly to the EEOC by a participating agency.

D. Duties of ED, HHS, and VA as Delegates

The participating agencies assign the following enforcement duties to ED, HHS, or the VA, as appropriate, with respect to designated ED/HHS/VA recipients, respectively, as defined in Section C, and/or other entities as specifically defined. Specifically, ED, HHS, and VA shall:

1. Maintain complete files on all activities undertaken pursuant to this agreement, including the compliance status of designated ED/HHS/VA applicants and recipients as determined by complaint investigations, post-approval reviews, and other actions taken to investigate, address, or resolve noncompliance.

2. Receive and review complaints alleging that designated ED/HHS/VA recipients have discriminated in the operation of programs or activities in violation of Titles VI and IX; attempt to obtain information necessary to make complaints complete, where appropriate; and investigate complete complaints that are not patently frivolous or otherwise without merit. The manner of investigation shall be at the discretion of ED/HHS/VA. Upon request by a participating agency, ED/HHS/VA shall provide the requesting agency copies of correspondence with the designated ED/HHS/VA recipient.

3. Issue written letters of findings of compliance or of noncompliance that (a) advise the designated ED/HHS/VA applicant or recipient and, where appropriate, the complainant of the results of the post-approval review or complaint investigation; (b) provide recommendations, where appropriate, for achieving voluntary compliance; and (c) offer, where appropriate, the opportunity for the designated ED/HHS/VA recipient to engage in negotiations for achieving voluntary compliance. The governor of the State in which the designated ED/HHS/VA applicant or recipient is located also will be notified if the letter of findings of noncompliance is made pursuant to a statute requiring that the governor be given an opportunity to secure compliance by voluntary means. ED/HHS/VA shall provide simultaneously a copy of its letter(s) of findings of noncompliance to the referring participating agency and to the Assistant Attorney General for Civil Rights.

4. If compliance by a designated applicant or recipient cannot be voluntarily achieved, notify a participating agency of this determination within 5 business days. If only ED/HHS/VA has authority to pursue a fund suspension, denial, or termination consistent with 42 U.S.C. § 2000d-1 or 29 U.S.C. § 1682, it may proceed consistent with its regulations. ED/HHS/VA and a participating agency should consult with each other as to an appropriate course of enforcement action. It is expected that the participating agency and ED/HHS/VA will agree on how to proceed to secure compliance by the designated ED/HHS/VA recipient.

a. If ED/HHS/VA and the participating agency agree, refer the matter to the Assistant Attorney General, Civil Rights Division, Department of Justice, for review and appropriate judicial action.

b. If both ED/HHS/VA and the participating agency have authority to pursue a fund suspension, denial, or termination consistent with 42 U.S.C. § 2000d-1 or 29 U.S.C. § 1682, and if ED/HHS/VA and the participating agency agree to initiate such action, the agencies shall determine whether an administrative hearing, if requested by the designated ED/HHS/VA recipient, will be conducted jointly or by one agency on behalf of both. The designated ED/HHS/VA recipient shall be notified of the agencies' proposed action, and whether an administrative hearing, if desired, will be conducted jointly or by one agency on behalf of both.

i. If the designated ED/HHS/VA recipient does not request a hearing, ED/HHS/VA will render a final decision pursuant to its regulations and, within 10 days of such decision, notify the participating agency and the Assistant Attorney General, Civil Rights Division, Department of Justice, of such decision, and the reasons therefor.

ii. If an administrative hearing is conducted, within 5 business days of a decision issued after such hearing, ED/HHS/VA will notify the Assistant Attorney General, Civil Rights Division, Department of Justice (and the participating agency if such agency did not participate), of the outcome of the hearing, the reasons for such decision, and of any action taken against, or intended, with regard to the designated ED/HHS/VA recipient. In addition, ED/HHS/VA will render a final decision pursuant to its regulations and, within 10 days of such decision, notify the participating agency and the Assistant Attorney General, Civil Rights Division, Department of Justice, of such decision, and the reasons therefor.

c. If ED/HHS/VA and the participating agency cannot agree on a course of action, the agencies will notify the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice of such disagreement. Pursuant to Executive Order 12250, the Civil Rights Division will seek to resolve the dispute between the agencies in a manner satisfactory to both agencies.

5. Upon request of a participating agency, ED/HHS/VA shall provide letters of findings for any complaint referred to ED/HHS/VA by a participating agency. In addition, upon request, a participating agency shall be provided copies or reasonable access to inspect and review files maintained by ED/HHS/VA with respect to designated recipients.

6. Continue or perform reviews of designated ED/HHS/VA applicants consistent with paragraph (D)(3), when significant or unique issues arise during inquiries by the participating agency.

7. Conduct post-approval reviews of the programs or activities of certain designated ED/HHS/VA recipients pursuant to a schedule established by ED/HHS/VA, and notify the participating agency of the schedule as it pertains to them, and results thereof.

8. By November 15, or within 45 days of a request by a participating agency, whichever is later, provide an oral or written summary of all actions taken with respect to referrals by a participating agency during the prior fiscal year.

E. Duties of a Participating Agency

A participating agency shall:

1. Within 10 days of receipt of a complaint, determine whether the entity(ies) involved are designated ED/HHS/VA recipient(s), and if so, refer such complaint to ED/HHS/VA, as appropriate. In addition, if sufficient information is provided in the complaint, the participating agency shall notify ED/HHS/VA whether the specific program(s) involved receives Federal financial assistance from the participating agency. If ED/HHS/VA provides supplemental information to the participating agency regarding the nature of the investigation, the participating agency shall determine whether it provides Federal assistance to the specific program(s) in issue within 20 days of a request by ED/HHS/VA.

2. Upon request by ED/HHS/VA, provide ED/HHS/VA, as appropriate, with information, technical assistance and training necessary for it to perform the duties delegated under this agreement. This information may include, but is not limited to:

- a. compliance information solely in a participating agency's possession or control;
- b. data on recipients' program operations, including eligibility requirements and/or actual participants; and
- c. any material in a participating agency's possession that is relevant to an evaluation of a designated recipient's compliance or noncompliance with Titles VI and/or IX.

3. As part of pre-approval reviews of designated ED/HHS/VA applicants seeking Federal assistance from a participating agency, the participating agency shall contact ED/HHS/VA, as appropriate, to determine the status of compliance of the applicant. In addition, if the participating agency's queries indicate the existence of noncompliance with Title VI and/or Title IX, it shall immediately consult with ED/HHS/VA, as appropriate, to determine which agency shall pursue the matter. It is expected that unique or significant issues will be referred to ED/HHS/VA for investigation or review. A participating agency shall supply all information collected and necessary for ED/HHS/VA to undertake such a review.

4. When ED/HHS/VA has notified the designated ED/HHS/VA applicant or recipient in writing that compliance cannot be achieved by voluntary means and ED/HHS/VA has

referred the matter to a participating agency, a participating agency shall make an independent compliance determination, and consult with ED/HHS/VA, as appropriate. If only the participating agency has authority to pursue a fund suspension, denial, or termination consistent with 42 U.S.C. § 2000d-1 or 29 U.S.C. § 1682, it may proceed consistent with its regulations. ED/HHS/VA and a participating agency should consult with each other as to an appropriate course of enforcement action. It is expected that the participating agency and ED/HHS/VA will agree on how to proceed to secure compliance by the designated ED/HHS/VA recipient.

a. If ED/HHS/VA and the participating agency agree, refer the matter to the Assistant Attorney General, Civil Rights Division, Department of Justice, for review and appropriate judicial action.

b. If both ED/HHS/VA and the participating agency have authority to pursue a fund suspension, denial, or termination consistent with 42 U.S.C. § 2000d-1 or 29 U.S.C. § 1682, and if ED/HHS/VA and the participating agency agree to initiate such action, the agencies shall determine whether an administrative hearing, if requested by the designated ED/HHS/VA recipient, will be conducted jointly or by one agency on behalf of both. The designated ED/HHS/VA recipient shall be notified of the agencies' proposed action, and whether an administrative hearing, if desired, will be conducted jointly or by one agency on behalf of both.

i. If the designated ED/HHS/VA recipient does not request a hearing, the participating agency will render a final decision pursuant to its regulations and, within 10 days of such decision, notify ED/HHS/VA and the Assistant Attorney General, Civil Rights Division, Department of Justice, of such decision, and the reasons therefor.

ii. If an administrative hearing is conducted, within 5 business days of a decision issued after such hearing, the participating agency will notify the Assistant Attorney General, Civil Rights Division, Department of Justice (and ED/HHS/VA if such agency did not participate), of the outcome of the hearing, the reasons for such decisions and of any action taken against, or intended, with regard to the designated ED/HHS/VA recipient. In addition, the participating agency will render a final decision pursuant to its regulations and, within 10 days of such decision, notify ED/HHS/VA and the Assistant Attorney General, Civil Rights Division, Department of Justice, of such decision, and the reasons therefor.

c. If ED/HHS/VA and the participating agency cannot agree on a course of action, the agencies will notify the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice of such disagreement. Pursuant to Executive Order 12250, the Civil Rights Division will seek to resolve the dispute between the agencies in a manner satisfactory to both agencies.

F. Sharing of Data and Joint Activities

1. Apart from the responsibilities and obligations set forth in Sections D and E, ED/HHS/VA and a participating agency shall share data on the status of compliance with Titles VI and IX and similar statutes of all known applicants and recipients, as requested by the other. Prior to any participating agency awarding assistance to an applicant, it shall consult with ED/HHS/VA, as appropriate, to determine whether there are any outstanding findings of noncompliance, conditions for the continued receipt of funds, or other facts that may affect an award, or conditions attached thereto. ED/HHS/VA shall respond to a request, which may be oral or in writing, within ___ days, either orally or in writing.

2. Upon agreement, ED/HHS/VA and a participating agency may conduct jointly any activity set forth in Sections D and E that is designated to be performed by one such agency. For example, ED and a participating agency may jointly conduct investigations of complaints, post-approval reviews of designated recipients or others, or pre-approval reviews. The authority of either agency to act independently is not altered or otherwise affected by jointly conducting any activity described herein.

3. ED/HHS/VA shall provide all letters of finding of noncompliance of recipients, whether or not such entities are designated ED/HHS/VA recipients, to all participating agencies.

G. Duties Unaffected by this Agreement

A participating agency will conduct investigations of complaints, pre-award reviews, and post-award reviews as appropriate for all nondesignated ED/HHS/VA applicants and recipients.

H. Effect on Prior Delegation

This agreement supersedes and replaces delegation agreements, and portions thereof, between participating agencies and ED/HHS/VA with respect to Title VI and Title IX as they apply to educational institutions.

I. Review and Modification

The provisions of this agreement shall be reviewed by all agencies one year after implementation to determine whether modification is desired. Any modification shall be by written mutual agreement of all parties. This agreement shall remain in effect until a superceding agreement is executed.

J. Approval

This agreement shall be approved by appropriate representatives of all agencies before publication in the Federal Register.

[List names/titles of heads of participating agencies]