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Women's Issues-Title IX [2]

Women's issues - Title IX

[redacted]

Edward W. Correia

07/31/98 01:29:49 PM

Record Type: Record

To: Charles F. Ruff/WHO/EOP, Elena Kagan/OPD/EOP, Lisa M. Brown/OVP @ OVP

cc: Christopher C. Jennings/OPD/EOP
Subject: Title IX

Chris Jennings and I had a conference call with representatives of the Catholic Hospital Association this morning. The Catholic Church has no moral objection to a medical procedure that is necessary to save a woman's life, even if, as a consequence, a pregnancy is terminated.

As we discussed earlier, there is a reasonable basis for concluding that Congress intended to require institutions covered by Title IX to provide abortions under those circumstances. Consequently, it appears that a regulation can be drafted that is consistent with Congressional intent on this point and that does not create a conflict with the teachings of the Catholic Church. I will convey this information to DOJ and work with them on drafting language. Please let me know if you have suggestions as to how we should proceed.

Women's issues - Title IX

Julie A. Fernandes
07/27/98 08:48:54 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Re: title ix harassment fix

According to Eddie, the Dpt. of Justice and the Dept. of Educ. are working on whether they can develop a regulatory or legislative fix to the Supreme Court case that limits damage liability for schools (and school districts) to cases where the school has actual knowledge of or deliberate indifference to the sexual harassment. The Dpt. of Educ. has authority to promulgate regs. that impose other duties on school districts, and Ed. and DOJ are trying to determine if they could do regs for this. Even if they could promulgate such regs, there is a question of what the remedy could be. Also, according to Eddie, it is unclear whether it is currently a violation of Title IX not to set up an internal mechanism for harassment complaints. Eddie said that the Ed./DOJ group has been meeting, and that he would find out where they are and let me know.

julie

Women's issues - Title IX

Julie A. Fernandes
08/06/98 05:18:17 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: Title IX and sexual harassment

Elena,
FYI. Yesterday, Eddie C. and I met with the DOJ and Dept. of Ed. to discuss where they are in developing leg. and/or reg. fixes for the Gebser decision. They are proceeding on three tracks:

1. The Dept. of Educ. is going to send a letter to Superintendants clarifying that the decision in Gebser does not change a school's obligations under Title IX re: sexual harassment (i.e., that school districts have to provide students with a discrimination-free environment as defined under their existing regulations). I am sending you a copy of the draft.

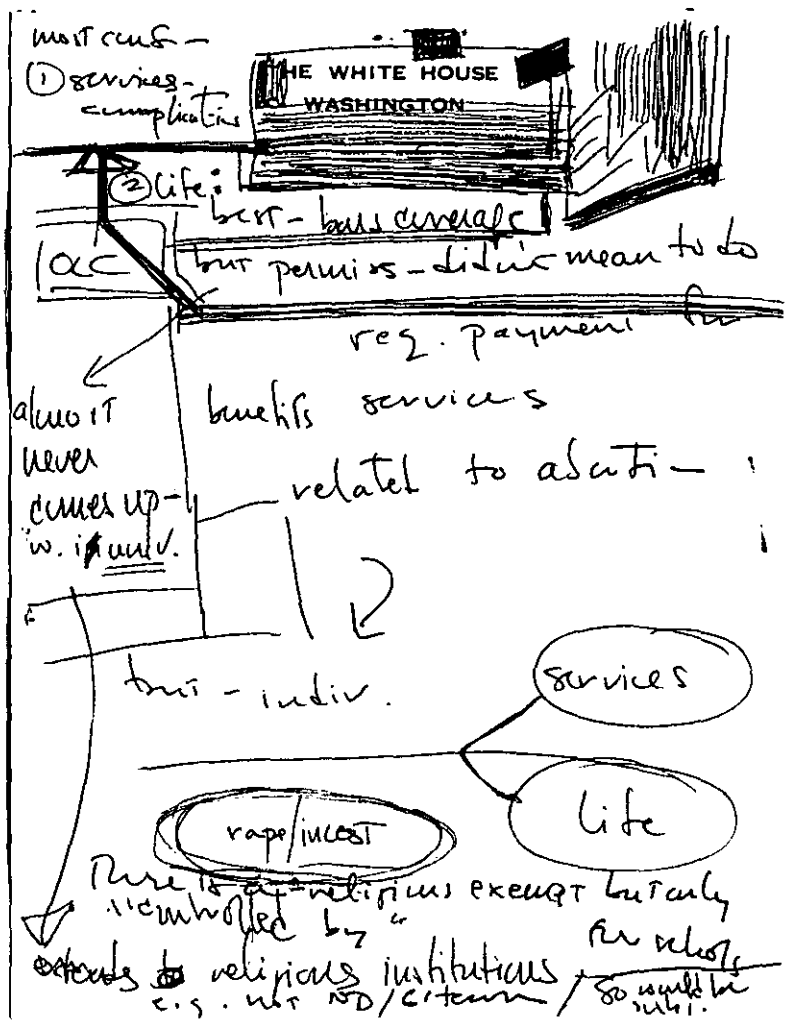
2. The Depts. of Educ. and Justice are continuing to work together to develop detailed guidance on a school district's Title IX obligations. They would like to issue this guidance in a couple of months. They will let us know when they have a draft.

3. The NAAG is putting out a guide to best practices in this area that will include a framework of how to understand harassment law generally (including racial, religious, and sexual harassment -- including sexual orientation harassment). They are scheduled to get this to DOJ soon, and are working to meet a publication deadline of the end of September. DOJ will share this draft with us when they receive it.

The advocacy groups want a legislative response to Gebser that will make it easier (b/c of possibility of money damages) for private plaintiffs to enforce Title IX. The National Women's Law Center has drafted legislation that would give students the same rights under Title IX that workers have under Title VII (except that this legislation, unlike Title VII, would not have damages caps). According to Justice and Ed., the groups want to try to attach this legislation to something this summer. The Depts. of Justice and Educ. are trying to decide whether the would recommend that we support this (or any other) legislative response to Gebser. They will keep us up to date as this process goes forward.

julie

Women's issues –
Title IX


THE WHITE HOUSE
WASHINGTON
services
life
rape/incest

Women's Issues - Title IX

July 24, 1998

MEMORANDUM FOR: CHARLES F.C. RUFF, ELENA KAGAN, JULIE FERNANDES

FROM: EDDIE CORREIA

SUBJECT: Title IX and Abortion

The Department of Justice will soon forward proposed new regulations regarding the application of Title IX. In general, Title IX bars gender discrimination by institutions that receive federal funds and provide educational programs. Many federal agencies do not now have such regulations even though they oversee covered programs. In addition to providing standards for agencies that do not have them, the regulations will address some statutory developments in the Title IX framework.

One issue that requires particular attention is the effect of Title IX on abortions and related services. The original Title IX regulations require that covered institutions treat pregnancy-related conditions, including abortions, in the same way as temporary disability. Thus, an institution cannot refuse to provide abortion services, or cover them under their health insurance plan, if they provide or cover other conditions stemming from temporary disabilities.

The Danforth Amendment

In 1988, when Congress was considering the "Grove City" legislation to clarify that the civil rights law apply to all activities of institutions receiving federal funds, the issue of Title IX's application to abortion became controversial. Congress adopted an amendment to the final Grove City bill, offered by Senator Danforth, which provides:

> Nothing in [Title IX] 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 an abortion.

The question is how this amendment applies in the following cases: 1) medical services

are required because of complications arising from an abortion; 2) an abortion is necessary to save the life of a woman; and 3) an abortion is necessary because of rape or incest. The National Women's Law Center has urged that the amendment be interpreted to exclude all these cases. (See Attachment A) The Department of Justice concludes that the best reading of the amendment is to exclude the first category and that a permissible reading of the amendment would exclude the second category. It has taken no position on the third category and it has not made a recommendation as to any interpretation.

Complications Arising from an Abortion

DOJ believes that there is a strong case for concluding that the Danforth amendment does not apply in the case of health services needed to treat complications arising from an abortion. While the text arguably covers these cases since they are "related to an abortion," the purpose of the amendment was to avoid forcing institutions to provide abortion-related services when doing so conflicts with their philosophy or moral beliefs. That concern is mitigated or absent entirely when the service itself is not an abortion. Second, the "penalty" provision of the amendment means that a covered institution cannot take an adverse action against someone because they have had an abortion. There is a strong argument that a refusal to provide an otherwise available service, simply because it is the result of an abortion, would be a penalty. Third, two statements by Members in the House, including one by Congressman Edwards, the House sponsor of the Grove City bill, indicate their understanding that the amendment did not apply to services in that situation. (See Attachment B)

Abortions Necessary to Save the Life of a Woman

DOJ is much less certain regarding the applicability of the Danforth amendment to abortions necessary to save the life of a woman. Interpreting the amendment to exclude this situation would require inferring an exception that is inconsistent with the clear text. The argument for doing so is based on various floor statements by individual Members. The NWLC points to an exchange between Senator Metzenbaum and Danforth. Metzenbaum said: "There is not even a life of the mother exception in the Danforth amendment. And a woman could be bleeding to death from pregnancy complications and under the Danforth amendment she could be denied a lifesaving abortion." Danforth responded: "[T]he characterization of the bill by the Senator from Ohio is completely erroneous and totally without foundation at all. It is a fabrication." While Danforth's comment could be interpreted to mean that the amendment was not intended to apply to any of the situations described by Metzenbaum, it is also subject to other interpretations. The comment by Metzenbaum is interspersed with several other criticisms of the amendment. Consequently, Danforth could have been objecting to any one of them, or to Metzenbaum's overall characterization of the amendment.

The NWLC also has argued that failing to infer an exception for this situation would constitute a "penalty" within the meaning of the penalty provision of the amendment. This argument may prove too much, however, since any denial of an abortion could be viewed as a

penalty.

Finally, there is an argument that comments by several Senators supporting the amendment reflected their understanding that the amendment was consistent with the Hyde amendment. At that time, the Hyde amendment barred federal funds for abortions, except in cases where the life of the woman is threatened or in cases of rape and incest. Arguably, then, these Senators viewed the Danforth amendment as implicitly excepting the same abortions that are excluded from the Hyde amendment prohibition. However, the statements can also be interpreted to mean that the speakers believed that the general approach of the Danforth amendment is the same as the general approach of the Hyde amendment, i.e., a woman may have a constitutional right to an abortion, but educational institutions (and federal taxpayers) should not be required to provide them. These comments, as well as the Metzenbaum-Danforth interchange, are shown in Attachment C.

Rape and Incest

The NWLC also argues that the amendment does not apply in cases of rape and incest. That argument is probably weaker than the other two situations, since the only bases for the claim are the general statements about consistency with the Hyde amendment described above. There is no floor statement that refers expressly to abortions in the case of rape or incest. DOJ did not address this exception.

II. Policy Considerations

The most direct -- and inevitable -- effect of the Danforth amendment is to preclude a Title IX requirement that a covered institution must provide abortions in the vast majority of cases where women choose them. A Title IX requirement applicable to complications arising from an abortion, abortions necessary to save a woman's life, and abortions in cases of rape and incest will arise much less frequently. The Department of Education has never received a complaint about a refusal to provide an abortion in these cases, but the absence of a complaint does not mean that the case could not arise or has never arisen in the past. Nevertheless, it is important to recognize that the open issues regarding the Danforth amendment, however they are resolved, will probably have an effect only in a very small number of cases. If the "exception" to the Danforth amendment is limited to complications arising from an abortion, the practical effect would be to require a small number of women who require a life-saving abortion, or who need an abortion because of rape or incest, to obtain services from another facility and to find another source of payment.

Another important consideration is the breadth of Title IX. There are many types of institutions that fall within Title IX's coverage. Virtually all institutions of higher education are covered. In addition, many teaching hospitals and other hospitals with an educational program are covered. While there is a "religious tenet" exception, it applies only to institutions that are "controlled by" religious organizations. In practice, this means that a religious organization itself

is setting policy. Georgetown, Notre Dame, and other universities affiliated closely with the Catholic Church, and teaching hospitals with the same affiliation, apparently do not fall within the exemption. (ED and HHS are confirming this.) However, based on our current understanding, whatever interpretation of the Danforth amendment we adopt will apply to those religiously-affiliated institutions.

There is obviously an argument for such a federal requirement since covered institutions receive federal funds and they have the option to refuse them. Moreover, making distinctions about health services based on whether they terminate pregnancy is inconsistent with the basic policy against gender discrimination. On the other hand, many Members of Congress may believe that the 1988 amendment was intended to prevent the federal government from imposing on public and private educational institutions a requirement that they provide abortions under any circumstances. Imposing such a requirement now could provoke a demand for a "conscious clause." If such a clause were adopted, the practical effect would be to eliminate the requirement for religiously-affiliated institutions. These constitute many of the institutions that do not provide these services voluntarily now.

e.g. like

ATTACHMENT A

Model Title IX Regulations for Federal Government Agencies and Departments

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

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

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

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

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

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

MODEL TITLE IX REGULATIONS FOR FEDERAL GOVERNMENT AGENCIES

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

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

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

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

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

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

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

134 Cong Rec H 565, *H581

I have heard the President wants to veto this bill. That, of course, is his right. But should he do so, we will override that decision. And that will be a good day, and a good outcome for so many of our people who depend on good government to open doors and promote individual opportunity.

But I cannot let this record stand without expressing my outrage, and my serious concern over the regrettable inclusion in this antidiscrimination bill, the discriminatory Danforth provision regarding reproductive rights for women in this country. Time and time again, the vagaries of the political process have presented a dilemma to supporters of civil rights who also are strong supporters of reproductive rights. We're forced to choose which of these principles is more important. In my mind they are the same. They are indivisable. Civil rights are very basic and very simple, and among them must be the right to reproductive freedom.

Instead of immediately rejecting the Grove City decision, the Congress has been tied up in knots, and civil rights have been held hostage, to the demands of some who would like to use the restoration legislation as an opportunity to further their goals of placing limits and restrictions on reproductive freedom.

We have watched a process for 4 years in which a powerful minority -- not one which represents the majority opinion of the people of this great Nation -- has stymied and hogtied the civil rights restoration legislation.

But today we have finally moved ahead, and because of the statements of authors of the Danforth amendment during consideration of S. 557, and only because of these statements and others which have been made by chief sponsors of the bill on the floor today, can I support this bill.

These statements have clarified what could have been a dangerous loophole in the Danforth provision. With regard to his amendment, the Senator from Missouri said, "The amendment says that *** a college *** is prohibited from discriminating against people who have had abortions or who are seeking abortions." And the Senator from California, a coauthor of the Danforth provision, also stated that the provision was drafted "to ensure that there could not be discrimination against women who either are seeking or have received abortion-related services."

These statements by the authors of the provision have precedence in setting the terms of legislative intent and history. And with their statements 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. I regret, however, and do strongly oppose, the further diminishment in access to safe and legal abortion included in this bill.

With assurances from the authors of the Danforth amendment, and with the clarification provided by 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. 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.

harm in order to prove that the plaintiffs were not otherwise qualified under section 504 for the job in question. These cases demonstrate that determining risk of harm in these situations is well within the capacity of the courts.

The amendment which we are enacting today concerning contagious diseases or infections thus logically and appropriately parallels current law governing the risk of harm from employing individuals with other kinds of handicaps. I am pleased that our desire to prohibit discriminatory employment policies which are medically unjustified is being preserve in such a way that the nature of the handicap does not lead to a greater leeway for discrimination. Although, as I have noted, this amendment is essentially unnecessary because it restates current law, I believe it can serve a useful clarifying function.

It is unfortunate in my view that the Senate failed to adopt an abortion-free bill. House sponsors of this legislation could have reported a bill with such an amendment in the 98th Congress. However, we knew that abortion was wrongly tied to this legislation, and therefore, we urged Senate sponsors to present us with a clean bill -- something they were unable to do.

I do not believe that the Danforth amendment belongs on this bill. But I will support the bill, including the amendment, because of the critically important statements made by Senator Danforth in describing its purpose and effect. He said, and I quote:

The amendment says that *** a college is prohibited from discriminating against people who have had abortions or who are seeking abortions. (135 Cong. Rec. S. 163, Jan. 27, 1988)

Senator Wilson, who had a role in drafting the amendment, said that it was drafted:

To ensure that there could not be discrimination against women who either are seeking or have received abortion-related services. (135 Cong. Rec. S. 227, Jan. 28, 1988)

Such assurance, that the Danforth amendment clearly prohibits any covered institution from discriminating against a woman who is seeking or has had an abortion, is critical to my support of this provision. 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 employee because she received or is seeking an abortion.

Finally, it is important to keep in mind not only what the Danforth amendment does, but what it does not do.

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 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.

I do not take the loss of health insurance to cover the costs of an abortion procedure lightly. Nor do I approve of the Danforth amendment's exclusion of

Attachment C

whether they want an abortion or do not. And I would encourage them to vote against the Danforth amendment.

I thank the Chair and I thank the majority leader.

Mr. DANFORTH. What I would like to do is ask unanimous consent to add two cosponsors and then proceed for 5 minutes.

Mr. BYRD. I have no problem with that, Mr. President, I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. BYRD. Mr. President, I ask unanimous consent that I may yield to the distinguished Senator from Missouri for not to exceed 5 minutes for the purpose of making a statement only and for the purpose of asking that additional cosponsors to the amendment be added.

The PRESIDING OFFICER. Is there objection? The Senator from Missouri.

Mr. DANFORTH. Mr. President, I ask unanimous consent that Senator WARNER, Senator PRESSLER—Senator THURMOND already is a cosponsor—Senator WARNER and Senator PRESSLER be added as cosponsors to the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DANFORTH. Mr. President, just responding to Senator PACKWOOD on the question: Do we want to change the law? Do I want to change the law? The answer to that question is, of course, no, I do not. The law has not yet been interpreted to require hospitals to preform abortions. The law has not yet been interpreted to provide that, for example, Georgetown University funds abortions, to my knowledge.

My position is that we do not want the law to be so construed in the future and the Dewey, Ballantine law firm has written a legal opinion that the law might be construed by a court or by an administrative agency to require a Georgetown University to perform abortions or to fund abortions.

That is the issue: prospectively, in the future, do we want to preclude a court from making such a decision or do we not? My view is that the Congress has never taken a position in the past that it is the position of the Government of the United States to use the power of the purse to coerce educational institutions or hospitals into either funding or performing abortions. Congress has never done that. To my knowledge, courts have not done that. The law now is not that hospitals must perform abortions. The law today is not that Georgetown University Hospital has to perform abortions. The law is not now, today, that Georgetown University has to pay for people's abortions.

My position is that we should make it clear in this bill that a Federal judge in the future or administrative agency in the future is not going to do that. We do not believe, as a matter of policy, that should happen.

Senator PACKWOOD cited a letter from the Justice Department on the effect on hospitals. He said it was outrageous. But the firm of Dewey, Ballantine reached precisely the same conclusion. And I quote again from the Dewey, Ballantine memorandum of law:

> The protections of title IX could be extended to a hospital's patients as well as to its students and staff. In that case the refusal to perform abortion services for the general public could also be considered sex discrimination in violation of title IX.

This is not just the Justice Department. This is the Dewey, Ballantine law firm that has given me the same legal opinion as to what a court can do if it pushes this legislation to its farthest extreme. I want to preclude that.

That is why I have offered the amendment. It will not change the law, but, instead, it is taking a very clear position that the Congress of the United States is not going to force hospitals and universities and colleges into doing something which, under the Hyde amendment, we do not do.

Under the Hyde amendment we have decided we are not going to fund abortions with the taxpayers' dollars. How can we be in a position in the Congress of the United States of deciding that a court is going to have a free run at compelling hospitals and universities and colleges in their health plans and in their medical services to do what we in Congress will not do?

What kind of quirky position would that be? This really would be the law. The bill in its present form, without the amendment, would open the door to wild changes in the status quo, in the opinion of this Senator.

The PRESIDING OFFICER (Mr. DIXON). The majority leader.

Mr. BYRD. Mr. President, I suggest the absence of a quroum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. Mr. President, I understand the distinguished Senator from South Carolina wishes to speak. It is not my desire to hold the floor long. I merely am trying to protect Senators for the moment who have amendments they are preparing.

Mr. President, I ask unanimous consent that I may yield to the distinguished Senator from South Carolina for not to exceed 10 minutes for the purpose of making a statement only, and that I be protected in my right to the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from South Carolina is recognized for not to exceed 10 minutes, while the right of the majority leader to the floor is protected.

Mr. THURMOND. Mr. President, I rise in support of this amendment.

The amendment that has been offered by the distinguished Senator from Missouri would merely establish that title IX of the Education Amendments of 1972 is to be neutral with respect to abortion.

Mr. President, each year Congress enacts provisions of law that prohibit the use of Federal dollars to perform abortions. This is our consistent policy and one which has been ruled constitutional by the Supreme Court. In light of this fact, it is ludicrous that there is a Federal regulation on the books that requires those who receive Federal financial assistance to make abortion services available.

One can hardly imagine anything more hypocritical than the Federal Government making an activity off limits for its own money at the same time it requires others to use their money for the same activity. Such hypocrisy should be erased from the regulations and any legislation that addresses title IX is an appropriate place to do so.

Clearly, the title IX regulations of the Department of Education on abortion do not reflect the intent of the Congress which approved that law, nor do they reflect the policy of the Congress today. It is simply ridiculous to describe, as these regulations do, the failure to provide abortion services as discrimination on the basis of sex.

Quite frankly, Mr. President, I am having a bit of a hard time understanding why it is so objectionable to remove this regulatory blunder from the books. I am not aware of anyone who has endorsed the policy that failure to provide abortion services is a form of sex discrimination. In fact, in a response to a written question submitted by Senator HATCH, Eleanor Smeal, president of the National Organization for Women, Inc., stated:

> To the best of my knowledge, NOW has not to date taken a policy position that the failure to provide abortion services is a form of sex discrimination.

In responding to the same question, Marcia D. Greenberger, managing attorney of the National Women's Law Center, stated:

> To the best of my knowledge and belief, the National Women's Law Center has never taken the position, as a matter of policy not the law, that failure to provide abortion services is a form of sex discrimination.

ever the administration is, whether or not to grant the religious exemption. It is perfectly possible to construe it very narrowly and simply not act on it or not grant the exemptions.

Mr. NICKLES. I do not know how many exemptions the Carter administration did or did not grant.

Mr. DANFORTH. I think it is zero or very close to zero.

Mr. NICKLES. I would not be surprised.

I think the Senator is making an outstanding comment. It is certainly not a policy that should change on administration philosophy.

Mr. DANFORTH. The Senator mentioned St. Anthony Hospital. Maybe it has a nursing program which would bring it within reach of this bill, conceivably. Does the Senator believe that the administrators of St. Anthony Hospital in Oklahoma should be in a position of going through an administrative officer of the Federal Government and begging for an exemption so that the hospital would not have to perform abortions? Is that the position we should put them in?

Mr. NICKLES. I think the Senator is making an excellent point. Administrators of hospitals have a lot of important work to do, and this should not be added, not to mention the fact of the litigation that this would expose them to. That is dollars and services and time that could be better used in servicing their patients, instead of fighting legal battles and class-action suits.

Mr. DANFORTH. Let us say that Georgetown Hospital would have to go to the Department of Education. It is demeaning and it is a tenuous position to be put into, if Georgetown University or St. Anthony Hospital, or St. Mary's Hospital in St. Louis, or whatever, has to go to a Federal bureaucrat and say: "Please, Mr. Bureaucrat, out of the kindness of your heart construe the religious exemption in a way that is beneficial to me."

The Dewey, Ballantine opinion pointed out very clearly that the religious exemption can be very tightly construed and it is not right—I think the Senator will agree—it is just not right to put religious hospitals or hospitals that are affiliated with universities in the position of pleading for an exemption which can be granted or denied at the discretion of the administrative officer.

Mr. NICKLES. I think the Senator is exactly correct.

Again when you think of the issue and how important it is to various institutions to take the issue of abortion in Georgetown or I mentioned St. Anthony's, and I am sure again all Senators have other similar type institutions, the issue is so important to a lot of their strong beliefs, that we are not talking about a minor issue of whether or not something is approved, an insurance claim or something. We are talking about very significant changes in policy that should not really be at the whim of any particular administration as it changes from time to time.

Why in the world would we in Congress mandate the hospitals that they have to provide services and fund services, whether it be insurance or provide those services, when we in Congress through the Hyde amendment say we are not going to fund them, we did not fund abortions with Federal taxpayers' dollars, but yet we would be requiring those institutions to provide that service?

Mr. President, the final point I want to make—and we have a lot of people, probably a strong majority in this body who would like to see this piece of legislation pass—I am confident that if the Danforth amendment does not pass, that the Civil Rights Restoration Act of 1987 will not become law.

I do not know if it has been read or not, but I will read to you comments that the President has stated, which gives me a great deal of confidence that the President will veto the bill if the Danforth amendment is not passed.

On July 30, 1987, he addressed persons active concerning the Grove City issue and I will read what the President had to say. This is President Reagan on July 30, 1987. He said:

> I want, third, to restate our firm opposition to the so-called "Grove City" legislation sponsored by Senator Kennedy. This bill—S. 557—would mean that hospitals and colleges receiving federal funds, even those with religious affiliations, would be open to lawsuits if they failed to provide abortions. In other word, the legislation would virtually force these institutions to provide abortion on demand.

The President goes on:

> I don't mind telling you, this one really touches my temperature control. I don't want to get started, but let me just say this. As far as I'm concerned, every member of Congress should oppose this pro-abortion federal intrusion. * * *

He goes on to say:

> We support an amendment offered by Senator Danforth—an amendment that would eliminate the pro-abortion aspects of that legislation. As I said before, this Administration will oppose any legislation that would require individuals or institutions—public or private—to finance or perform abortions.

Mr. President, I am confident that if the Danforth amendment is not agreed to, the President will veto this entire bill.

So for the proponents of this legislation, I would think that they would like to see the Danforth amendment, which would just guarantee those institutions the right to perform abortions or the right not to perform abortions, agreed to.

Mr. President, I conclude my statement. Again, I would urge the adoption of the Danforth amendment.

I think if we fail to adopt the Danforth amendment, it would be a very serious mistake.

Mr. President, I yield the floor and suggest the absence of a quorum.

Mr. PACKWOOD addressed the Chair.

The PRESIDING OFFICER. Would the Senator from Oklahoma withhold that last motion?

The clerk will call the roll.

Mr. PACKWOOD. I asked for recognition, Mr. President.

He yielded the floor.

Mr. NICKLES. No. I suggested the absence of a quorum.

The PRESIDING OFFICER. The Senator from Oklahoma has suggested the absence of a quorum.

The clerk will call the roll.

Mr. WEICKER. Mr. President, will the Senator yield for a parliamentary inquiry?

I would like to have the record read back.

Mr. DANFORTH. Regular order is correct.

Mr. WEICKER. The Senator yielded the floor and then said he suggested the absence of a quorum.

I would like the record read back.

Mr. PACKWOOD. I believe the Senator from Connecticut is right. The Senator from Oklahoma had yielded the floor.

Mr. NICKLES. No. I suggested the absence of a quorum.

Mr. PACKWOOD Could we have the RECORD read?

The PRESIDING OFFICER. I understand that. The quorum call is in progress. The Senator from Oregon is recognized.

Mr. DANFORTH. I object.

The PRESIDING OFFICER. Objection has been heard.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. PACKWOOD. Mr. President, I ask to dispense with the further proceedings under the call of the quorum.

Mr. DANFORTH. I object.

The PRESIDING OFFICER. Objection is heard.

The assistant legislative clerk resumed the call of the roll

Mr. METZENBAUM. Mr. President, I ask unanimous consent that the quorum call be suspended.

Mr. DANFORTH. I object.

The PRESIDING OFFICER. There is objection heard. The clerk will continue to call the roll.

The legislative clerk resumed the call of the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 3]

Adams	Inouye	Reid
Byrd	Kennedy	Stennis
Danforth	Metzenbaum	Weicker
Dixon	Nickles	Wirth
Hatch	Packwood	

It is not just a substitute or different words for the same thing. It undoes what my amendment tries to do.

Now, Mr. President, I would be absolutely delighted to work with the majority leader and with people on the other side, and just get a vote at some time certain on my proposition. I really think I am entitled to that, to the basic proposition of whether we want to compel organizations, institutions, to either fund or provide abortions that they do not want to do. I am willing to do it. I would suggest some Senators are missing tonight. We can do it, say, at noontime, 1 o'clock, 2 o'clock tomorrow, have a time certain, not get bogged down in a lot of amendments, a lot of procedural rigmarole, and that would be my suggestion to the majority leader.

Mr. BREAUX. Mr. President, will the Senator yield for a question?

Mr. DANFORTH. Of course.

Mr. BREAUX. I would like to ask a question because I am really not certain of the answer, in the sense that I have heard there are some areas that would be affected by the Senator's amendment that are outside of the confines of the existing bill that the Senate is now considering, that there would be existing regulations in fact that are in place, that the bill does not address in any way.

If the amendment of the Senator from Missouri were in effect adopted then changes would be made in those existing regulations that the bill does not address. Can the Senator comment on that?

Mr. DANFORTH. Yes; I would be happy to comment on it. There was no law until 1972. In 1972 Congress passed the title IX of the Education Act. Title IX was passed a year before Roe versus Wade was decided. Clearly there was no intention at the time for Congress to mandate abortions or insurance coverage of abortion.

In 1975, the Department of Health, Education, and Welfare promulgated a regulation and that regulaton equated the unwillingness to perform abortions with sex discrimination. That issue, to my knowledge, was never litigated. The law was really unformed. Then came the Grove City case and the effect of the Grove City case was to moot out those regulations because it so narrowly interpreted title IX that it really had no effect that is pertinent to the situation we are in now.

The position that is taken by Dewey, Ballantine—and I recommend the memorandum and the opinion to any Senator who is interested—the position that is taken by Dewey, Ballantine is that the combination of enacting a law which would tend to put our stamp of approval on title IX and ratify the regulations promulgated by HEW and apply title IX institutionwide and in fact even to hospitals that are not in themselves affiliated with colleges and universities which have some sort of teaching program, such as a nursing program, that that combination of events, that cluster of events, would open the door for a court to create an interpretation which is not now the law and which has not been the law.

It has never been the case before that it could be argued that Georgetown University Hospital could be forced to perform abortions. According to the Dewey, Ballantine law firm, that could be argued, and there is a reasonable possibility that a court would so hold. So that really is the issue.

The issue is not changing some prior law. The issue is acting now to prevent a bizarre result, which the Dewey, Ballantine law firm and the Department of Justice have both said and the American Hospital Association have all said, as a matter of fact, is a reasonable likelihood to occur.

Mr. BREAUX. If the Senator will yield for a following question, I do not want to delay the Senate on this matter, but my agreement with the Senator from Missouri is that this bill should be abortion neutral in the sense we do not make any declaratory judgments one way or the other on the abortion issue. But I think what I am getting from the author of the amendment is that by adopting his amendment, he is in fact recommending and perhaps mandating some changes in how abortion is treated in some of these institutions. So, to me it seems that he is taking it out of the area of neutral and abortion neutral because he is in fact making some changes in some other areas of how abortion is handled.

It seems to me it is hard to argue that it is abortion neutral if in fact changes are required by the Senator's amendment.

Mr. DANFORTH. But I believe it is abortion neutral because it really is not now the law that says a church-related hospital can be compelled to perform abortions. After the HEW decision regulation in 1975 which equated sex discrimination with the refusal to fund abortions in health plans, it is true that some colleges and universities changed their health plans and some terminated their health plans. The matter was never litigated; at least I think that that is correct, that the matter was never litigated. But it really seems to me that as far as the law is concerned Congress has never acted to state that the refusal of a private party to fund abortion is sex discrimination. Congress has never done that.

To the contrary, Congress has said with respect to Federal funds in the Hyde amendment, that we are not going to be in the business of funding abortion. So I really do not believe that it is fair to say that the present state of the law or that the state of the law before the Supreme Court decided the Grove City case was one that compelled unwilling institutions to either perform abortions or to finance abortions.

Mr. BREAUX. I thank the Senator.

Mr. LUGAR. Mr. President, I rise to speak on behalf of the amendment offered by the senior Senator from Missouri. I am pleased to be a cosponsor of this important amendment which has been carefully written to ensure that the bill before us, if enacted into law, will not be construed in a manner adverse to human life.

Mr. President, some may argue that this amendment is not needed. For this reason, it is suggested that current policy on the termination of pregnancies will not change. I wish this were true. Sadly—it is not.

Under the current regulatory policy governing Federal assistance for education, schools receiving Federal assistance have been required to make abortion services available to students and to employees. No exemption is allowed—unless a school can prove that they are controlled by a religious body. As a result, the regulations have been used to force institutions to provide abortions against clear moral conscience, and in violation of the historical convictions of many independent institutions which have been established on religious principles.

Whatever a Senator may feel about the merits of this particular regulatory policy, all must agree that it is controversial and divisive. Until now, that controversy has at least been limited to educational institutions. If the current legislation does not assure abortion neutrality, the controversy which now attends Federal policy in the area of education will be spread to every other area of public policy endeavor. Therefore, I ask my colleagues, and I ask the American people:

Is that what we intend to do with enactment of this bill?

Is that what we should do?

For me it is clear that we should not.

This body is deeply divided on the issue of abortion. This body is divided, and the American people are divided. The debate has gone on for a long time. But as long as the American people are so obviously divided, we as representatives of the people must not coerce private individuals or private institutions into providing abortions.

Those who wish to provide abortion services, are currently free to do so. I do not agree with those who do. I think they are wrong. But they are permitted by law to do as they choose. The bill before us, unless it is amended to ensure abortion neutrality, will deny the influence of conscience on the abortion issue -to institutions worthy of our most profound respect.

used as a way to force institutions to either fund or to provide them.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, it is critical that my colleagues recognize that the Weicker-Kennedy-Metzenbaum-Packwood amendment is nothing but an empty shell. This particular amendment states only that the act, S. 557, shall not be interpreted to require individuals or institutions to perform or pay for abortions. But, as the distinguished Senator from Missouri has so cogently stated, it is the existing regulations under title IX that must be addressed. S. 557 does, in fact, broaden the coverage of title IX and, consequently, S. 557 expands the coverage of the abortion regulations.

You cannot read the bill without recognizing it expands the law as it existed 1 day before Grove City. But it is the application of the regulations under title IX that must be changed and only the Danforth amendment brings about that change. That is a fact.

Mr. WEICKER. Would the distinguished Senator yield for just one question?

Mr. HATCH. I would be delighted.

Mr. WEICKER. The distinguished Senator from Utah—I thank him for yielding for a question—sees only the Danforth amendment.

Mr. HATCH. That is right.

Mr. WEICKER. Does the distinguished Senator from Utah agree that the regulations could be changed by the executive agency itself?

Mr. HATCH. The answer to that is the agency might change them, but there will be instant litigation to reenforce them, and we do not know what would happen.

But also, the second answer to that is, not only may the agency change them, but a subsequent administration may harden them or make them more difficult.

So the fact that we have regulations in existence does not necessarily stop them from being changed one way or the other, and it does not change the litigation that would ensure that would reenforce them.

I call to the attention of the distinguished Senator from Connecticut, my friend, his comments made before the committee, which I thought were unique.

Let me do that in just a second, but let me just say this: Danforth solves this problem. It is an abortion-neutral amendment. It seems to me that it is a fair amendment. It does not impose Roe versus Wade on anybody nor does it stop Roe versus Wade from having its full force and effect. In short, if the Weicker - Kennedy - Packwood - Metzenbaum amendment passes, then colleges, hospitals, State government agencies and others would be forced to pay for or perform abortions. Only the Danforth amendment corrects this gross inconsistency under Federal law, whereby the Federal Government refuses to fund abortions.

Under the Hyde amendment, the Federal Government refuses to fund abortions, but under this bill as it is written now, colleges, hospitals, and others will be forced to fund or perform abortions. This is an important thing.

Let me just say in that regard, when we debated this matter before the committee, the distinguished Senator from Connecticut, my friend and a person for whom I have a great deal of respect, he said this. Just for the RECORD I will state:

> If you take Federal funds, you cannot deny a person an abortion. The reason why you cannot deny a person an abortion is it is legal in the United States of America. The reason why it is legal is we do not run the Nation by virtue of our individual consciences. We run by virtue of the constitutional system. That is the answer, pure and simple. And it is not going to change.
>
> The fact is——

This is the distinguished Senator from Connecticut——

> The fact is that the law of the United States of America says that abortion in certain circumstances is legal. Period. That is it . . . that is exactly what the law states . . . I just repeat, so that it is relatively simple, that if someone wants to take Federal funds that you cannot deny the rights of a person under the law. That is it. This in no way impinges upon your individual conscience * * * as I said before * * *.

Senator HUMPHREY then said: "Will the Senator yield for a question?" Does the Senator wish to require Catholic University to perform abortions?"

It probably would have been better for him to have used Notre Dame University, so let us substitute Notre Dame.

Senator WEICKER said: "No, I certainly do not want Catholic University"—or in this case Notre Dame University—"to be required to perform them. The fact is that if Catholic University wants to take Federal funds, they cannot deny—they are not forced to perform them, but they cannot deny an abortion if it is requested."

Once my amendment went down, the preceding amendment went down to defeat—we only had 39 votes, although that is a significant vote——

Mr. WEICKER. Would the Senator yield? Catholic University has an exemption.

Mr. HATCH. That is the point I was going to make personally. Let me just make that point. The reason my amendment was so important before is because under the law as written in this Grove City bill that may pass the floor today, I do not know—under that law, any institution controlled by a religious organization is exempt if its tenets conflict with title IX.

There are only two who make that a requisite in the whole country today out of thousands of schools and hundreds of religious schools. They are Brigham Young University and Catholic University, because they are the only ones completely controlled by religious institutions. All the others are now going to be subject to title IX regulations superseding their own religious tenets—it is just that simple—with the defeat of the Hatch amendment the last time.

I do not think people realize that. This bill is so broadly drafted that, frankly, bureaucrats, with their hostility to religious beliefs, will be trampling all over religious beliefs in these schools.

I think the distinguished Senator from Connecticut would have answered the same way had it been Notre Dame.

Is that correct?

Mr. WEICKER. To respond to the distinguished Senator from Utah, and, again, I can only respond as I did before, exemptions can be granted and they are granted.

Mr. HATCH. Not pursuant to this bill without my amendment.

Mr. WEICKER. And they are granted. And they have been granted to all religiously controlled institutions as far as the public is concerned. So, again, I think you have stated your point articulately and I hope I have mine. But I again have to repeat underlying all of this, yes, to say that Roe versus Wade is not involved is to say that a portion of the law of the land does not have any bearing on what happened after title IX was enacted. I think it certainly does. And that is the law of the land, regardless of how some would like to have it changed.

In terms of, No. 1, the application of title IX is specific to students and employees, and not the public. What those nonreligiously controlled institutions are trying to do is get around this business by having a lay board of trustees and they do not come under the law. These are matters which, quite frankly, really we are not getting into insofar as trying to reestablish what the law was.

I appreciate the speculations of the distinguished Senator from Utah. All I am trying to do is to make sure that what the law was prior to the Grove City case will be the law again with that one point on the definition of program activity being cleared up.

Mr. HATCH. Frankly, that cannot be the case the way this bill is written.

Let me say this, and I will substitute Notre Dame University for Catholic University because Catholic University would be exempt. They do have an exemption, as does Brigham Young University, the only two schools in the country that will have the exemption

if this bill passes both Houses of Congress and is signed into law, which I doubt will happen. So we are going through an exercise here.

Mr. HUMPHREY stated, "Will the Senator yield for a question? Is the Senator willing to substitute Notre Dame to perform the abortion? They will be subject to this law when it passes."

Mr. WEICKER said, "No, I certainly do not want Notre Dame University required to perform them. The fact is that if Notre Dame wants to take Federal funds they cannot deny." He goes on to say, "They cannot be forced to perform them. They cannot deny the abortion if it is requested."

I said, "It is a lot more than that. Under those title IX abortion regulations they have to provide it regardless of their religious beliefs. If those regulations stay in force and effect, and there is no way it seems to me they do not, and this bill passes in its present form, then Catholic institutions that are not owned and controlled by that church but nevertheless affiliated with the church are going to have to provide abortions as a matter of fact to their students. That is, I think, an abomination and I think it flies in the face of religious freedom."

Mr. HARKIN said, "Will the Senator yield? I take it if they don't take Federal money then they don't have to."

I said, "Senator, there is hardly any entity of any size in this world today that does not take Federal money either directly or indirectly. There is hardly a school in this country today that does not indirectly or directly take Federal funds."

Mr. WEICKER said, "That comment, of course, is the essence of the entire argument of this legislation. If you are going to discriminate, you do so with your own money and on your own hook. You do not do so with Federal funds. That underlies everything we are doing here today."

I take it that Roe versus Wade is the law of the land, a constitutional law of the land, and, therefore, it has to be imposed on these schools whether they like it or not, and, frankly, will be imposed whether they have any regulation or not.

Mr. WEICKER. Will the Senator yield?

Mr. HATCH. Let me finish my statement. I would like not to be interrupted and I would like to be able—if you will do it on your own time, I will be happy to yield.

Mr. WEICKER. Sure. I would just comment to assuage the very misgivings the distinguished Senator from Utah has, and they are obviously based on fact, from my own lips, to assuage those doubts being exactly the purpose of this amendment that is before us now.

Now, granted, other misgivings that he has relative to the regulatory agency are addressed by the distinguished Senator from Missouri in his amendment. But what I am saying, and the Senator will certainly agree, is that this amendment is very clear. The very point raised in committee cannot happen, cannot happen, by virtue of this amendment, at least as far as the law is concerned.

It can still happen under regulations, which is the reason why the Senator from Missouri has his amendment.

Mr. HATCH. Your point is Roe versus Wade is the constitutional law of the land and supersedes regulations. Is that your position?

Mr. WEICKER. It certainly is. Roe versus Wade is the law of the land.

Mr. HATCH. Then even this law, which is a statutory law, even your amendment, that does away with your amendment because the precedent that Roe versus Wade would take being the constitutional law of the land would overrule your own amendment.

Mr. WEICKER. Is the Senator amending Roe versus Wade?

Mr. HATCH. This amendment is abortion neutral and ends the issue, if the Senator is wrong that Roe versus Wade would take precedence. If Roe versus Wade does, then both of these amendments would be unconstitutional.

I do not agree with that.

Be that as it may, the Senator may be right.

S. 557 raises serious questions as to the requirements of public and private institutions with regard to the provisions of abortion services. Let me say at the outset that there has been a great deal of confusion regarding the relevance and importance of an abortion neutral amendment to S. 557 which Senator DANFORTH has brought to the floor.

To begin, it is appropriate to discuss the abortion neutral amendment that has been offered by Senator DANFORTH. The amendment reads as follows:

> Nothing in this Title 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 because such person has received any benefit or service related to a legal abortion.

It is hard to believe anybody would vote against that amendment if, in fact, we are trying to go back to pre-Grove City.

The language of the amendment is clear. It would not prohibit any public or private institution from providing abortion services; such institutions would have the option to provide abortion services if they deem such services appropriate and desirable. However, these institutions would not be required to provide abortion services when the provision is against the conscience of the institution. I think that is a fair position.

What we must recognize is that this is not a question of whether one should be able to have an abortion—the Danforth amendment in no way prohibits institutions from providing abortions if they so choose. Rather, the question is whether the Federal Government has the right to force these institutions to pay for or perform abortion services even if to do so is against religious belief or conscience. That is the issue here.

Frankly, there is a glaring irony in the effect of this bill. On the one hand Congress has consistently prohibited the use of Federal funds for the performance of abortions under the Hyde amendment and yet under this bill, institutions that receive Federal assistance would be required to pay for or provide abortions.

Specifically, the regulations at issue, 34 CFR 106.41 and 106.57 require that:

> A recipient shall treat . . . 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 programs or activity.

That is pretty stark stuff.

It is important to note the S. 557 and its accompanying legislative history render these regulations even more egregious than they were before the bill was proposed. First, the proponents have interpreted these regulations as meaning that failure to perform or provide for abortion services is a form of sex discrimination. While this assumption has been argued on the State level in connection with litigation involving State equal rights amendments, this is the first time that abortion has been linked to sex discrimination with regard to these regulations or in connection with Federal legislation, generally.

Second, S. 557 expands the scope of title IX and thereby expands the scope of the existing regulations and the opportunity for future action consistent with the misinterpretation that failure to perform or provide abortion services is a form of sex discrimination. For example, the proponents of the bill have acknowledged that the bill would extend title IX coverage to any off-campus hospital which has any teaching program, such as medical students, nursing students or residents.

In short, under S. 557, any university with students receiving federally subsidized grants or loans will be required to apply the abortion regulations in all of its operations. If a university has a teaching hospital and its students or employees receive medical care at the hospital, it would be required to provide abortion services on

the same basis as any other medical service. Even a nonuniversity hospital receiving Federal assistance could be required to provide for abortions if it conducts any education programs. Under this bill, that is how far it has been expanded. It is not taking us back simply to pre-Grove City.

In fact, in hearings before the Senate Labor and Human Resources Committee, James J. Wilson, city counselor of the city of St. Louis, MO, stated that S. 557 would not only overturn a Missouri State law that treats abortions differently from other medical procedures but also would invalidate the contractual relationship between the city of St. Louis and Regional Hospital which specifically prohibits abortions being performed by Regional with respect to any patients of the city.

The Missouri State Statue, 376.805 R.S.Mo. 1986, provides in pertinent part, "No health insurance contracts, plans or policies * * * shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium." The proponents of S. 557 such as the American Civil Liberties Union [ACLU] and Planned Parenthood have publicly conceded that under the bill, the mandatory abortion regulations would cover all educational activities of any teaching hospital. In other words, they concede that hospitals would be required to provide coverage of abortions in the health benefit plans which they offer to the teaching staff and others connected with the teaching program.

Thus, the bill conflicts with Missouri State law prohibiting coverage for elective abortions in group health plans. Moreover, hospitals, such as Regional that have a staffing or teaching relationship with a nearby medical school would be required to provide abortion services, thereby invalidating contractual arrangements such as that between St. Louis and Regional Hospital. There is tremendous controversy in this country surrounding the issue of abortion and those who oppose abortion hold a sincere respect for the right of life of unborn children. To call a failure to perform or provide abortion services sex discrimination is heinous.

Students in colleges covered by title IX have already been compelled to support abortions for other students through mandatory student fees. In the case of *Erzinger* v. *Regents of the University of California*, the Superior Court for San Diego County relied in part on title IX for its decision rejecting the student's claim that the university could not compel them to support the abortions of other students through mandatory student fees. As the court stated:

> exclusion of medical care in connection with termination of pregnancies might very well and probably would violate Federal law, Title IX of the 1972 Higher Education Amendments * * * (Erzinger v. Regents of the University of California, No. 458599, Superior Court San Diego, Franklin B. Orfield, J., presiding, at pp. 63-64.)

Moreover, there is strong reason to believe that the mandatory abortion coverage resulting from enactment of S. 557 will go beyond coverage of students and employees. As drafted, S. 557 decimates a significant existing limitation on the scope of the title IX abortion regulations—that is, section 901 which provides that the statute applies only to "educational" activities is altered by S. 577, section 901 would exclude noneducational operations of otherwise covered hospitals from regulation. S. 557, effectively abolishes that limitation by providing that "all of the operations" of an entity engaged in the health care business will be covered in their entirety. This indicates that if a hospital is covered at all under title IX, S. 557 will assure that even its treatment of patients from the general public will be subject to the abortion regulations. As drafted, "all of the operations of" listed entities, would include health care institutions whenever a health care institution receives any Federal aid. Certainly, it would run counter to the entire thrust of the bill to limit the application of title IX, and the abortion regulations, to only a hospital's "educational activities." No one contends that the act's other requirements will be limited to students or employees.

In fact, the coverage of this issue has still further ramifications. If a health care institution receiving Federal financial assistance is part of a larger chain, all other institutions in that chain are covered even if none of the other institutions receive Federal assistance. Clearly, S. 557 expands abortion requirements dramatically.

The proponents have suggested that Congress or the administration need merely rescind the regulations in order to correct the concerns raised by this issue. Mr. President, that is an insufficient solution to a serious problem. These regulations were promulgated in 1974 and therefore, have been on the books for the last 14 years. Any rescission would be met immediately with litigation in an attempt to reinstate the regulations. The abortion regulations represent one agency's view of what is required by title IX.

Administrative revocation of those regulations would not bar a court from deciding that the interpretation of the law reflected in the regulations was valid nonetheless and required by the statute. Absent congressional amendment in the form of the Danforth abortion neutral amendment, future administrations could easily reinstate the egregious regulations. Departmental regulations do not provide binding interpretations of Federal law. Judicial interpretations of Federal statutes do. In any event, S. 557 effectively codifies the title IX abortion regulations, which would place them beyond mere administrative revocation. In short, congressional action is required at this time to correct the proabortion effects of S. 557.

It may be useful to point out the views of the proponents of S. 557 on this issue. During the Senate Labor and Human Resources Committee markup of S. 557, on May 20, 1987, Senator WEICKER stated:

> Just for the record, I'll state, if you take Federal funds, you can't deny a person an abortion. The reason why you can't deny a person an abortion is, it's legal in the United States of America. The reason why it's legal is we don't run the nation by virtue of our individual consciences, we run by virtue of a constitutional system. That's the answer pure and simple, and it isn't going to change * * *. It's relatively simple. If someone wants to take Federal funds, then they can't deny the rights of an American under the law. That's it. This in no way impinges on your individual conscience, as I said before * * *. No, I certainly do not want Catholic University required to perform them. The fact is, if Catholic University wants to take Federal funds * * * they can't deny—they're not forced to perform them—they can't deny an abortion if its requested.

Mr. President it is outrageous and inconsistent to disallow the use of Federal funds for abortions on the one hand and to require those receiving Federal funds to pay for or provide abortions on the other hand. It is essential that we accept the Danforth abortion-neutral amendment and correct this glaring problem posed by S. 557.

Let me just add one other sentence. There are those who think that they will be supporting a prolife position by supporting the Weicker-Kennedy-Metzenbaum-Packwood amendment. That is not so. The only position on the floor this day that can solve this problem is going to be the Danforth amendment. So we are asking all Senators who have concerns in this area to vote against the Weicker-Kennedy-Packwood-Metzenbaum amendment. We think that it does more harm to the debate and problem than it does any good, and certainly it seems to me does not solve the problems that we are trying to address here today. It certainly does not solve the expansive nature of this bill, that expands the law way beyond what anybody thought it was back in 1984, before the Grove City decision occurred.

Let me just give 5 minutes to the distinguished Senator from New Mexico, and then turn the balance of my time over to the distinguished Senator from Missouri.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. First, I am not a Senator who believes that we ought to leave the Grove City decision alone. I

have cosponsored legislation to overrule the narrow interpretation of the Supreme Court with reference to institutions. I was an original cosponsor of BOB DOLE's bill of the 98th Congress, and the Senator from Oregon quite properly noted that I was nodding on that part—and that part only—of his discussion about institutionwide coverage versus a narrow interpretation.

Second, I am fully aware that this is not and should not be a discussion of whether or not we agree with Roe versus Wade. I think my record is pretty clear; I do not like the decision, but I am not the Supreme Court. I am a member of the legislative branch.

Third, it should be eminently clear that the law of the land is that the U.S. Government will not pay for abortions. That is the Hyde amendment. We have had that before us enough times where, regardless of how close the vote, it is pretty clear that the Congress of the United States—and I hope and assume constitutionally; nobody has taken that issue to the Supreme Court—has said "You will not spend taxpayers' money for abortion." I assume that is an appropriate exercise of our legislative authority. That is point three. We will not pay for abortion as a matter of decision of the Federal Government.

We had a choice, to borrow the jargon of the day, and Congress elected and exercised its right to choose, and we said we do not pay for them. That is No. 3.

Fourth, if you believe that the Grove City decision is too narrow, you ought to be down here on the floor trying to enact a bill with legislative language that will be passed, be signed by the President, and that will substantially ameliorate the narrow interpretations of the Supreme Court regarding civil rights. Those are my four positions.

Let me take the last one first. I want the last one to happen. In my humble opinion, there is no chance that it is going to happen unless the issue of abortion and civil rights is resolved. I just do not see how, since it has held the House up for 3 years. Can you imagine the President of the United States signing a bill with the Weicker-Kennedy-Metzenbaum language in it and the rest of this bill as it is, with the very first legal opinion out of the box saying you have, by this legislation, substantially expanded the coverage, and thus the scope for litigation, under civil rights of title IX of the Education Act as interpreted by departmental regulations. Can you imagine the President signing that? Can you imagine a veto being sustained by the U.S. Senate and the U.S. House? I just do not believe there is a chance of that.

Now, Mr. President, it seems to me to be—I was going to say the height of hypocrisy, but let me make it a little bit more mellow—it seems to me to be extremely ironic that we will not pay for abortions, exercising our free choice and voting, and we are about to say here today that institutions out there in the United States, principally medical schools doing a fantastic job for American health, doing research, that we are sitting up here saying that an awful lot of them, if they get a little tiny bit of Federal money, there is a real chance, says this legal opinion, that in spite of the Metzenbaum-Weicker-Kennedy language, there is going to be a coercive effect of this new bill. We are drawing on their decisions regarding their choice to say, "We do not choose to perform abortions. There is somebody up the street that might. There is some hospital down the road that might. But we do not."

As a matter of fact, it is a civil rights issue, a pro-choice issue, in my opinion. In this case, it happens to be the same decision that those who are pro-life or right-to-life have come to with reference to their position on this bill.

Mr. President, it is very easy for me—and I have the greatest respect for the Senator from Oregon, who sits here, and the Senator from Ohio, who is over there.

The PRESIDING OFFICER. The Senator's 5 minutes have expired.

Mr. DOMENICI. Will the Senator yield me 5 additional minutes?

The PRESIDING OFFICER. The Senator from New Mexico is recognized for an additional 5 minutes.

Mr. DOMENICI. It is very simple for me to see what is occurring. Let me couch it this way: Those who say vote for Metzenbaum are asking us to dodge the issue instead of deciding the issue. That is a very, very simple point—dodge the issue and be able to say that, as to the four corners of this new legislation we have addressed the issue. But as a matter of fact you cannot separate title IX of the Education Act from this. So we are not deciding the issue. We have grown notorious as a Congress for not deciding issues. We have grown to the point where our people expect litigation from our legislation because we do not want to decide in clear, plain English language.

I hope those in this body who think they are going to dodge instead of deciding this issue will at least listen to part of this morning's debate because it is unequivocal to this Senator that this legislation before us has in mind affecting title IX of the Education Act in some way or another.

Now, we would be told to not worry about it, it is something else, just worry about the four corners of this bill—dodging the issue instead of deciding it so those who think we are saying to our institutions, our medical schools and derivatives of those medical schools, "We are protecting you because we adopted this language and if you do not want to perform abortions, you are not harming anyone, you are not violating Roe versus Wade, they can go somewhere else and have them." If they think they are going to tell people that is what we decided, they dodged it. And they will have people litigating from now until it finally gets to the Supreme Court—on average 5 years—while people out there are saying what does it mean with reference to title IX, which now has a broadened institutional effect according to the very first legal opinion out of the box.

And I do not think anybody asked them how to decide. Let us send it to five more lawyers, even if we got a three-to-two decision—three lawyers, good ones saying we agree with this one and two do not—it is precisely the point the Senator from New Mexico is making. Let us make it clear. I guarantee my fellow Senators, if you are going to vote for the Metzenbaum-Weicker-Kennedy amendment, and say we made it clear, we protected the choice of institutions to deny abortions because nobody is hurt, you really have not, you have dodged it.

I thank the Senator for yielding.

The PRESIDING OFFICER. Who yields time?

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, how much time is left?

The PRESIDING OFFICER. The proponents have 20 minutes; the opponents have 14 minutes and 51 seconds.

Mr. PACKWOOD. I yield 10 minutes to the Senator from Ohio.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, let us not confuse the issue. Let us not say that which is not so is so, and let us not say that that which is so is not so.

The manager of the bill, Senator HATCH, in opposition, talks about the expansion of the rights and the obligations of medical schools. The committee report addresses itself to that issue. It says "title IX covers only students and employees and does not reach the public at large." How the Senator from Utah can come to the conclusion that it reaches the public at large in spite of that interpretation by the committee report is difficult for me to understand. The language goes on to state that, "therefore, claims that the bill would require hospitals to provide abortion services to the general public are false."

Yet in spite of that, a member of the committee comes on the floor and says it just is not so. Then we hear the very strong argument made by our friend from New Mexico, who says we want

have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Tennessee [Mr. GORE], is necessarily absent.

I also announce that the Senator from Delaware [Mr. BIDEN] is absent because of illness.

I further announce that, if present and voting, the Senator from Tennessee [Mr. GORE] would vote "yea."

Mr. SIMPSON. I announce that the Senator from Kansas [Mr. DOLE] is necessarily absent.

I also announce that the Senator from Alaska [Mr. MURKOWSKI] and the Senator from Wyoming [Mr. WALLOP] are absent on official business.

I further announce that, if present and voting, the Senator from Wyoming [Mr. WALLOP] would vote "nay."

The PRESIDING OFFICER (Mr. WIRTH). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 55, nays 40, as follows:

[Rollcall Vote No. 8 Leg.]

YEAS—55

Adams	Glenn	Packwood
Baucus	Graham	Pell
Bentsen	Harkin	Pryor
Bingaman	Heflin	Riegle
Bradley	Heinz	Rockefeller
Breaux	Hollings	Rudman
Bumpers	Inouye	Sanford
Burdick	Kassebaum	Sarbanes
Byrd	Kennedy	Sasser
Chafee	Kerry	Simon
Chiles	Lautenberg	Simpson
Cohen	Leahy	Specter
Cranston	Levin	Stafford
D'Amato	Matsunaga	Stevens
Daschle	Metzenbaum	Weicker
Dixon	Mikulski	Wilson
Dodd	Mitchell	Wirth
Evans	Moynihan	
Fowler	Nunn	

NAYS—40

Armstrong	Grassley	Nickles
Bond	Hatch	Pressler
Boren	Hatfield	Proxmire
Boschwitz	Hecht	Quayle
Cochran	Helms	Reid
Conrad	Humphrey	Roth
Danforth	Johnston	Shelby
DeConcini	Karnes	Stennis
Domenici	Kasten	Symms
Durenberger	Lugar	Thurmond
Exon	McCain	Trible
Ford	McClure	Warner
Garn	McConnell	
Gramm	Melcher	

NOT VOTING—5

Biden	Gore	Wallop
Dole	Murkowski	

So the amendment (No. 1393) was agreed to.

Mr. WEICKER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. METZENBAUM. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1392

(Purpose: To ensure that the bill does not require that persons, or public or private entities receiving Federal funds perform abortions)

The PRESIDING OFFICER. Under the previous order, the Senator from Missouri is recognized for the purpose of offering an amendment pursuant to the unanimous-consent agreement of last night. The time will be evenly divided between now and 2 o'clock.

Mr. DANFORTH. Mr. President, I call up my amendment.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Missouri (Mr. DANFORTH) proposes an amendment numbered 1392.

At the appropriate place add the following: Notwithstanding any provision of this act or any amendment adopted thereto.

NEUTRALITY WITH RESPECT TO ABORTION

SEC. 909. Nothing in this title 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.

The PRESIDING OFFICER. Recognizing the Senator from Missouri, the Chair will once again ask that Senators who wish to converse please retire to the Cloakrooms. The Senate will be in order.

The Senator from Missouri.

Mr. DANFORTH. Mr. President, I ask unanimous consent that Senator NICKLES be added as a cosponsor of this amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DANFORTH. Mr. President, during the last vote, a number of Senators came up to me and asked my thoughts on how that vote should go, and my response was it did not make any difference. So I know that some Senators who intend to vote for my amendment voted for the Metzenbaum amendment, some Senators who intended to vote for my amendment voted against the Metzenbaum amendment. My own view, as I stated on the floor during the debate on the Metzenbaum amendment, was that it was very much like a motion to instruct the Sergeant at Arms. It was a rollcall vote, but it had no content at all. It was a rollcall vote that purported to touch on the question of whether or not the Government is going to mandate abortions, but in point of fact it did not in any sense prevent the Government or some court from mandating abortions or abortion coverage. It did not provide any cover whatever for Senators who voted on it. Some people might say, "Well, is it some sort of compromise? Was the Metzenbaum-Weicker amendment some kind of compromise on the issue before us?" The answer is no, it was not any compromise. It was not half a loaf. It was not a slice. It was not a crumb. It was an absolute zero. It did not matter whether it was cast or not, because it had absolutely no legal effect on the issue that has been raised by my amendment.

That is not simply my conclusion. When the language of the Metzenbaum amendment was available, I asked for two opinions, one from the Justice Department and one from the Dewey, Ballantine law firm. I received both of those legal opinions today. Both of them stated that from the standpoint of the basic question of whether or not abortions or abortion coverage is going to be mandated, the Metzenbaum amendment had no legal effect.

The Dewey, Ballantine opinion, which is dated January 27, after setting forth the Metzenbaum amendment, states, "Based on our review of this proposed amendment, we conclude that it would not solve the problem identified in our earlier memorandum. The proposed amendment declares the Civil Rights Restoration Act itself does not require the funding or performance of abortions. It is silent, however, on the possibility, which was the subject of our earlier letter and memorandum, that title IX and regulations promulgated under its authority could require the funding or performance of abortions. Moreover, since the Civil Rights Restoration Act would overturn the Supreme Court's decision in the Grove City case and thus extend the reach of title IX, the danger would remain, despite the proposed amendment, that institutions duly brought under the authority of title IX would also be required to fund or perform abortions for students, employees, and even the general public as described in our earlier letter."

Mr. President, the State of the bill as it now exists before the Senate, with the Metzenbaum-Weicker amendment which was just added, is that it remains a very live possibility that an administration or a court could require hospitals to perform abortions and could require health plans of colleges or universities to fund abortions.

Now, if that is the result that we want, if we want that possibility to stay alive, then the thing to do is to vote against the Danforth amendment. If it is the decision of the Senate of the United States to leave it up to a Federal judge, to enter an order requiring abortions performed at Georgetown University Hospital, to require abortion coverage under the health plan at Notre Dame University, and so on, if that is the intention of the Senate, let us leave it open. Let us reaffirm the regulations under title IX and kick the buck to the courts.

If, on the other hand, it is the position of the Senate that we should preclude that possibility in a court decision or in a future regulation, then we should adopt the Danforth amendment. That is the very simple issue before us. Regulations under title IX of the education amendments identified sex discrimination with the refusal to perform or to provide abortions. The bill in its present form expressly ratifies those regulations. No language in a committee report to the contrary undoes the expressed language in the bill itself. So if we in the Senate want to ratify a regulation that identifies refusal to perform abortions with sex discrimination, and if we want to extend that interpretation throughout universities, to university hospitals, to hospitals that have internship programs flowing out of those universities, and to other hospitals which have any teaching program at all, if we want that kind of expanded interpretation, then vote against the Danforth amendment.

I think it would be an absolute outrage for the Senate, the Congress to force on Georgetown or Notre Dame or the city of St. Louis or wherever a policy that under the Hyde amendment we do not support ourselves. We do not fund abortions. We have made that decision. I do not understand why the Senate at this point should force even church-related colleges and hospitals to do what we will not do ourselves.

Mr. President, I yield 2 minutes to the Senator from Texas.

The PRESIDING OFFICER. The Senator from Texas is recognized for 2 minutes.

Mr. GRAMM. Mr. President, I will be brief. What we have seen here is exactly the same kind of sham that has outraged the American people for years about this greatest of deliberative bodies. We have a clear-cut issue before us. The issue is as simple as any issue can be: Do we want to make it clear that under title IX, with the expansion that is being contemplated, Baylor University and Notre Dame do not have to fund abortions or to perform abortions in their medical facilities?

Now, you can beat all around the bush. You can try to confuse the issue all you want. You can say, well, let us leave it undetermined as it is in the current law. But when you get down to the bottom line, when you vote on the Danforth amendment, there is only one issue: Do we want to leave it open to some Federal judge to come along and say to Baylor University or Notre Dame or St. Mary's or any other private, church-related college in America that although the fundamental teachings of your church are totally opposed to abortion, we are going to force you to fund abortion and we are going to force you to conduct abortions?

Now, the great paradox is that the Congress will not even fund abortion under Medicaid unless the life of the mother is in danger, and yet here we have a clear-cut attempt to force church-related institutions to do what we have prohibited under Medicaid. So you can try to make this a technical question. You can cloud it and go back home and say we were neutral on this subject; it was unclear before. We left it unclear.

The point of this amendment is that it ought not be unclear. There ought to be no doubt in anyone's mind that Baylor University should not be forced to fund something they fundamentally oppose. If you vote against this amendment, you are voting against that basic guarantee.

I yield the floor.

Mr. METZENBAUM. Does the Senator from Texas understand that——

The PRESIDING OFFICER. The time of the Senator from Texas has expired. Who yields time?

Mr. HATCH. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 9 minutes 44 seconds.

Mr. HATCH. Let me yield 2 minutes.

The PRESIDING OFFICER. The time is under the control of the Senator from Missouri, Senator DANFORTH.

Mr. DANFORTH. Mr. President, I yield—how long would the Senator like?—2 minutes to the Senator from Nebraska.

The PRESIDING OFFICER. The Senator from Nebraska is recognized for 2 minutes.

Mr. EXON. I thank my friend from Missouri. I thank the Chair.

Mr. President, this is one of those votes in the U.S. Senate for which it is extremely easy for this Senator to cast and support the Danforth amendment. The case has been adequately made in previous arguments before this body. And I will not attempt to rehash those statements. Suffice it to say unless the Danforth amendment becomes law we are leaving an unanswered question that should not be left unanswered in this very, very important civil rights legislation.

I hope that all of the Members of this body will recognize and realize that the Danforth amendment is very simple, it is very straightforward. It simply says that we should not be in a position of forcing any institution regardless of its association to do something for which the fundamental tenets of that institution—and fundamental beliefs that many of us share—should not be put in jeopardy on a whim of one Federal judge at some time in the future.

It is a clarifying amendment. It states clearly what we should do. I appeal to all of my colleagues to support the Danforth amendment. It will do nothing in the opinion of this Senator, and legal scholars that I have talked with, to harm or weaken the amendment that we are going to vote on, the bill itself, which has to do with civil rights. I hope we will pass the Danforth amendment.

The PRESIDING OFFICER. The time of the Senator has expired. Who yields time?

Mr. DANFORTH. Mr. President, I reserve the balance of my time.

The PRESIDING OFFICER. Who yields time?

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, first I would like to point out to my friend from Texas that Baylor University is specifically exempted under the religious tenet exemption. So his argument in connection with that university is not applicable.

Second, I want to point out that if you vote for our amendment, the Packwood - Kennedy - Weicker - Metzenbaum amendment, you will be undoing that amendment 100 percent because that amendment provides that "Notwithstanding any other provision of the law or any other provision in this bill." So if you voted with us and now you vote for the Danforth amendment, you've totally turned around. It would be a 100-percent change in vote. I hope those who have seen fit to stand with us by 55 votes will see fit to reject the Danforth amendment.

The big question is whether we are going to have a civil rights bill or an abortion bill. We have made it clear in our previously offered amendment now in the bill that this is a civil rights bill and we do not want it to be encumbered with abortion issues.

If you vote for the Danforth amendment, you will have voted for language that totally negates the impact of our amendment, or at least language which would appear to do so on its face. That is the intent of the Danforth amendment. I hope it does not. But I am afraid that it will.

The amendment offered by the Senator from Missouri is also problematic because it does not preclude the imposition of a penalty on a woman if she has a legal abortion. The amendment says nothing in the preceding sentence "* * * shall be construed to permit a penalty to be imposed on any person * * * because such person * * * has received any benefit or service related to a legal abortion."

That language is extremely unclear. It says nothing in the amendment that permits a penalty but the language does not prohibit a penalty or discrimination against a woman who has had an abortion. For example, a woman who has had an abortion or who has been counseled for abortion

can be excluded from scholarship programs, student employment, or even enrollment in classes. The Danforth amendment not only permits this discrimination but it also may encourage institutions to treat women differently because they exercise their constitutional right.

If we pass this amendment, we sanction discrimination against women who exercise their constitutional right. So this civil rights bill which we have introduced to expand the civil rights of all people would sanction discrimination against women. So I think it is fair to say that a vote for the Danforth amendment is a vote for discrimination against women. We say that is inappropriate.

Another problem with the Danforth amendment is that it changes title IX to permit discrimination against women as the medical services provided to them. The Danforth amendment says that "Nothing in this title 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."

This language means that if a university provides a medical service and that service has doctors who are ethically required to counsel patients on medical options, it would not be discrimination to fail to counsel pregnant women on all options. What we say when we pass the Danforth amendment is that women are not victims of discrimination when they are denied all information about their options including the option of abortion.

The discrimination that the Danforth amendment sanctions is the kind of discrimination that reduces women to less than full human beings because it denies women the information they need to make an important medical decision.

There is not even a life of the mother exception in the Danforth amendment. And a woman could be bleeding to death from pregnancy complications and under the Danforth amendment she could be denied a life-saving abortion. A man who is bleeding to death can be saved. That, to me, is discrimination against women.

We have already said we do not want to do anything about abortion. We have indicated we want to move forward with the Grove City legislation situation. I would hope that my colleagues would not undo the impact of the amendment which we just passed. That is what this amendment would do. But much more important than that, this amendment would permit discrimination against women in this country.

How inappropriate, how wrong it would be to include in a civil rights bill language which would authorize the discrimination against all women. We must defeat the Danforth amendment.

Mr. DANFORTH addressed the Chair.

The PRESIDING OFFICER. The Chair would remind the gallery that they are here as guests of the Senate.

The Senator from Missouri.

Mr. DANFORTH. Mr. President, the characterization of the bill by the Senator from Ohio is completely erroneous and totally without foundation at all. It is a fabrication. My amendment expressly says, "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."

I yield 2 minutes to the Senator from California.

The PRESIDING OFFICER. The Senator from California is recognized for 2 minutes.

Mr. WILSON. Mr. President, at the risk of being rude, the Senator from Ohio has flatly misstated the contents of the Danforth provision. The language just read by the Senator from Missouri was language which I and others insisted be in there, precisely to ensure that there could not be discrimination against women who either are seeking or have received abortion-related services.

You could have voted for or against the Metzenbaum amendment. You could have voted for it as simply being a truism, as Mr. DANFORTH said, without content, or voted against it as being a sham aimed at trying to persuade people that it would suffice and that there was no need for the Danforth amendment. There is need for the Danforth amendment.

To focus momentarily on the strict legal question, the amendment by Senator METZENBAUM stated that the bill does not require abortion, but it does not reach the offending regulation which gives rise to the need for the Danforth amendment. That need continues to exist, even with the Metzenbaum amendment in it. The Metzenbaum amendment is without content. The Danforth amendment is required to prevent a travesty.

I am prochoice, but I will be hanged if I can see my way or want the Congress of the United States to be on record as imposing upon someone who conscientiously objects to providing or funding abortion, as something morally repugnant to him or to her or to their institution, to be compelled by a Federal bribe to do so. That is wrong. We should not leave the law unclear.

The argument has been made that we should go back to what it was before Grove City. It is not what the law was. The question is what the law should be. It should be clear.

The PRESIDING OFFICER. The time of the Senator has expired.

Who yields time?

The Senator from Missouri has remaining 4 minutes and 37 seconds. The Senator from Ohio has remaining 12 seconds.

If neither side yields time, the time available will be counted equally against both sides.

Mr. DANFORTH. Mr. President, I yield 1 minute to the Senator from Texas.

The PRESIDING OFFICER. The Senator from Texas is recognized for 1 minute.

Mr. GRAMM. Mr. President, I want to respond to the Senator from Ohio.

First, is he aware that Baylor University waited 9 years to get an exemption? They currently have an exemption. But, as we are all aware, under the law, a new Secretary could come into office, do an investigation, and deny them that exemption.

Let me give the names of some Texas colleges that are religion affiliated that have asked for exemptions, and that for one reason or another did not get them: The Dallas Theological Seminar, Lubbock Christian College, University of Dallas, Southwestern Assemblies of God College, Concordia Lutheran College.

I ask my colleagues: Do we really want to leave any doubt as to whether Lubbock Christian College should have to conduct and/or pay for abortions if that is against the tenets of their religious beliefs? That is the issue here, and I urge my colleagues to focus on that.

The PRESIDING OFFICER. The time of the Senator has expired.

Who yields time?

Mr. DANFORTH. Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator reserves the remainder of his time. If neither side yields, the time will be counted equally against both sides.

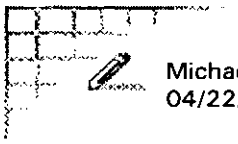
Mr. DANFORTH. Mr. President, I yield 1 minute to the Senator from Utah.

Mr. HATCH. Mr. President, purely and simply, this is a question of funding for abortion. Access to abortion is not affected by the Danforth amendment.

The fact is, Mr. President, that the Weicker-Metzenbaum amendment does not solve the problem which is raised here today by Senator DANFORTH. Are we going to force all colleges and many other institutions to pay for or perform abortions despite any decision of conscience or religious belief to the contrary? That is what the Danforth amendment addresses, pure and simple.

Again, the Danforth amendment merely eliminates the coercion factor. Colleges and hospitals and other institutions will be free to provide for abortions if they want to, if they choose to, even under this amendment. But the

Women's issues -
Title IX



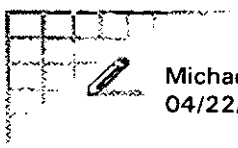
Michael Cohen
04/22/98 02:06:55 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc:
Subject: Title IX

Could you print this out and give it to Elena in case she hasn't seen it. It will make our telephone call, if and when it occurs, faster.
---------- Forwarded by Michael Cohen/OPD/EOP on 04/22/98 02:03 PM ----------



Michael Cohen
04/22/98 11:39:54 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Title IX

In case we wind up playing phone tag, here's the basic story as I understand it now:

1. ED/OCR will be sending a letter to Bowling Green U., articulating a compliance standard for "substantial proportionality" in the awarding of athletic scholarships to male and female athletes. OCR's standard is that it won't seek remedial ation in cases where the $ discrepancy (unexplained by appropriate factors) is less than 1 full scholarship.

2. OCR contends (1) that this is really no change from it past practices; (2) this might be criticized by women's groups as too soft and inconsistent with past practices, because it is less stringent than an "exact proportionality".

3. However, Eddie Correia and I, after review ED's material, believe they are actually tightening the enforcement standard. In the past, ED would accept as much as a 3% variation from exact proportionality, depending upon the circumstances. Eddie thinks ED is right on the law on this move, but has little doubt that this is a tightening of the standard.

4. ED is planning on applying this standard to the current school year. ED claims it notified the 25 schools of this standard verbally in November. It will ask schools found out of compliance for this current school year to award additional scholarships, retrospectively, for this school year. ED has not completed its investigations, so we do not know how many or which particular schools would be affected.

5. Eddie is trying to reach the appropriate people at Justice to get their view of the situation. We don't have their input yet.

6. At a minimum, I suspect that if ED/OCR releases these letters tomorrow as planned, the Administration will be criticized in some quarters, including in part but clearly not limited to the higher ed community, for its heavy handed approach, at least for applying the standard to this year rather than next.

This will also no doubt fuel additonal critiques, like the one in yesterday Wall Street Journal, from Jessica Gavora (a Lamar Alexander aide) about pending Title IX regulations from the Justice Department. Gavora argues that the proposed regs would now require equal participation in academic programs as well as athletic programs, thereby screwing up academic programs as well as scientific and medical research programs.

I haven't yet had a chance to get on top of the Justice regs. According to Eddie, they are a separate issue--though clearly easily linked in the press.

7. Other constituencies will presumably be pleased with OCR's action, and concerned about any effort to weaken it.

That's why we need to talk.

Women's issues - Title IX

U.S. Department of Justice
Civil Rights Division

Coordination and Review Section *Washington, D. C. 20530*

TO: Robert L. Weiner
Senior Counsel

At your request, I have enclosed the most recent versions of the following materials:

1. Notice of proposed rulemaking (NPRM) of the common rule on Title IX;

2. the Department of Justice's agency adoption form, which will be part of the NPRM (Separate adoption forms will be prepared for each agency participating in the common rule); and

3. draft executive order prohibiting discrimination on the basis of race, color, national origin, and sex in federally conducted education programs.

Jennifer Levin
Civil Rights Division
U.S. Department of Justice
305-0025

Jen —

Please look through to make sure it's OK. Remind me to tell you about the meeting you missed today.

Elena

Draft 12/30/97
[DOUBLE SPACE DOCUMENT FOR FEDERAL REGISTER]

NUCLEAR REGULATORY COMMISSION
10 CFR Part 4

SMALL BUSINESS ADMINISTRATION
13 CFR Part 113

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
14 CFR Part 1253

DEPARTMENT OF COMMERCE
15 CFR Part 8a

TENNESSEE VALLEY AUTHORITY
18 CFR Part 1317

DEPARTMENT OF STATE
22 CFR Part 146

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

UNITED STATES INFORMATION AGENCY
22 CFR Part 508

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
24 CFR Part 3

DEPARTMENT OF JUSTICE
28 CFR Part 42

DEPARTMENT OF LABOR
29 CFR Part 36

DEPARTMENT OF THE TREASURY
31 CFR Part 28

DEPARTMENT OF DEFENSE
32 CFR Part 196

DEPARTMENT OF VETERANS AFFAIRS
38 CFR Part 18

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 7

GENERAL SERVICES ADMINISTRATION
41 CFR Part 101-6

DEPARTMENT OF THE INTERIOR
43 CFR Part 17

FEDERAL EMERGENCY MANAGEMENT AGENCY
44 CFR Part 19

NATIONAL SCIENCE FOUNDATION
45 CFR Part 618

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

National Endowment for the Humanities
45 CFR Part 1171

Institute for Museum and Library Sciences
45 CFR Part 1182

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
45 CFR Part 2555

DEPARTMENT OF TRANSPORTATION
49 CFR Part 25

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

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

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

ACTION: Notice of proposed rulemaking.

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

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

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

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

SUPPLEMENTARY INFORMATION:

Background

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

indicated in this notice.

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

Additional Comment Information

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

Overview

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

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

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

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

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

Summary of Regulation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The first sentence of the Danforth amendment is incorporated in subsection ___.18(c)(1), which states that recipients are not required to provide or pay for any benefit or service related to an abortion.

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

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

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

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

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

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

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

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

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

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

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

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

Applicable Executive Orders and Regulatory Certifications

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

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

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

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

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

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

Paperwork Reduction Act of 1995

Section ___.4 contains information collection requirements. As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), the Department of Justice, on behalf of the participating agencies, has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Assurances of compliance.

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

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

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

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

Respondents	_____	
Responses	x	1.25
Hours per respondent	x	.25 (15 minutes)
	---	---
Annual reporting burden	_____	

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

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

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

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

Text of the Proposed Common Rule

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

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

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

§ ____.51 Employment.
§ ____.52 Employment criteria.
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§ ____.62-70 [Reserved]

Subpart F-Procedures

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§ ____.72-90 [Reserved]

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

Subpart A--Introduction

§ ___.1 Purpose and effective date.

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

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

§ ____.2 Definitions.

As used in these Title IX regulations, the term:

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

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

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

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

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

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

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

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

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

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

(3) Provision of the services of Federal personnel.

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

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

Institution of graduate higher education means an institution that:

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

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

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

Institution of undergraduate higher education means:

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

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

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

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

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary

purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

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

Student means a person who has gained admission.

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

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

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

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

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

(b) Affirmative action. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964-1965 Comp., p. 339.

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

the effective date of these Title IX regulations:

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

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

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

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

§ ____.4 Assurance required.

(a) General. Every application for Federal financial assistance for any education program or activity shall as a condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § ____.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

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

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

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

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

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

§ ____.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§ ___.11 through ___.20.

§ ____.6 Effect of other requirements.

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

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

(c) Effect of rules or regulations of private organizations. The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any

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

§ ____.7 Effect of employment opportunities.

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

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

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

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

§ ____.9 Dissemination of policy.

(a) Notification of policy. (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless §§ ___.21 through 30 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § ____.8, or to the designated agency official.

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

(i) Local newspapers;

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

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

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

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

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

§ ___.10 [Reserved]

Subpart B--Coverage

§ ____.11 Application.

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

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

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

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

§ ____.13 Military and merchant marine educational institutions.

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

§ ____.14 Membership practices of certain organizations.

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

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

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

§ ____.15 Admissions.

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

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

unit shall be deemed to be an educational institution.

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

(d) Educational institutions. Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ ___.21 through ___.30 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) Public institutions of undergraduate higher education. §§ ___.21 through ___.30 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

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

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

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

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

(b) Provision for transition plans. An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ ___.21 through ___.30 unless it is carrying out a transition plan approved by the Secretary of Education as described in § ____.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

§ ____.17 Transition plans.

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

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

transition plan shall:

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

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

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

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

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

(c) Nondiscrimination. No policy or practice of a recipient to which § ____.16 applies shall result in treatment of applicants to or students of such recipient in violation of §§ ___.21 through ___.30 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

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

§ ____.18 Statutory amendments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.

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

§§ ___.19 through ____.20 [Reserved]

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

§ ____.21 Admission.

(a) General. No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ ___.21 through ___.30 apply, except as provided in §§ ____.16 and ____.17.

(b) Specific prohibitions. (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ ___.21 through ___.30 apply shall not:

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

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

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

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

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ ___.21 through ___.30 apply:

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

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

(3) Subject to § ___.18(c), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

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

inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ ____.22 Preference in admission.

A recipient to which §§ ___.21 through ___.30 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ ___.21 through ___.30.

§ ____.23 Recruitment.

(a) Nondiscriminatory recruitment. A recipient to which §§ ___.21 through ___.30 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § ____.3(a), and may choose to undertake such efforts as affirmative action pursuant to § ____.3(b).

(b) Recruitment at certain institutions. A recipient to which §§ ___.21 through ___.30 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ ___.21 through ___.30.

§§ ___.24 - ___.30 [Reserved]

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

§ ____.31 Education programs and activities.

(a) General. Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives or benefits from Federal financial assistance. Sections ___.31 through ___.50 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ ___.21 through ___.30 do not apply, or an entity, not a recipient, to which §§ ___.21 through ___.30 would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in §§ ___.31 through ___.50, in

providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

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

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

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

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

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

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

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

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

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

(2) Such recipient:

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

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

§ ____.32 Housing.

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

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

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

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

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

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

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

(A) Proportionate in quantity; and

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

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

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

§ ____.33 Comparable facilities.

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

§ ____.34 Access to course offerings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ ____.37 Financial assistance.

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

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

(2) Through solicitation, listing, approval, provision of facilities, or other services,

assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

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

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

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

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

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

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

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

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

§ ____.38 Employment assistance to students.

(a) Assistance by recipient in making available outside employment. A recipient that assists any agency, organization, or person in making employment available to any

of its students:

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

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

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

§ ____.39 Health and insurance benefits and services.

Subject to § ___.18(c), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ ___.51 through ___.70 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ ____.40 Marital or parental status.

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

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

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

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the

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

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

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

§ ____.41 Athletics.

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

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

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

(i) Whether the selection of sports and levels of competition effectively

accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

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

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

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

(x) Publicity.

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

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

§ ____.42 Textbooks and curricular material.

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

§§ ____.43 through ___.50 [Reserved]

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

§ ____.51 Employment.

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

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

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ ___.51 through ___.70, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

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

(b) Application. The provisions of §§ ___.51 through ___.70 apply to:

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

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

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

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

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth,

false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

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

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

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

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

§ ____.52 Employment criteria.

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

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

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

§ ____.53 Recruitment.

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

(b) Recruitment patterns. A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ ___.51 through ___.70.

§ ____.54 Compensation.

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

sex:

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

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

§ ____.55 Job classification and structure.

A recipient shall not:

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

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

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

§ ____.56 Fringe benefits.

(a) "Fringe benefits" defined. For purposes of these Title IX regulations, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § ____.54.

(b) Prohibitions. A recipient shall not:

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

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

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

§ ____.57 Marital or parental status.

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

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

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

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

(c) Pregnancy as a temporary disability. Subject to § ___.18(c), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

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

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

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

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

§ ____.59 Advertising.

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

§ ____.60 Pre-employment inquiries.

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

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

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

A recipient may take action otherwise prohibited by §§ ___.51 through ___.70 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

§§ ___.62 - ___.70 [Reserved]

SUBPART F--PROCEDURES

§ ____.71 Notice of covered programs.

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

§§ ___.72- ___.90 [Reserved]

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

DEPARTMENT OF JUSTICE

28 CFR part 42

AG Order No.

RIN 1190-AA28

FOR FURTHER INFORMATION CONTACT: Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, Department of Justice, P.O. Box 66560, Washington, D.C. 20036-6560, (202) 307-2222.

List of Subjects in 28 CFR Part 42

Administrative practice and procedure, Age discrimination, Aged, Blind, Buildings and facilities, Civil rights, Colleges and universities, Education, Educational facilities, Educational research, Educational study programs, Elementary and secondary education, Equal educational opportunity, Equal employment opportunity, Grant programs - Education, Individuals with disabilities, Investigations, Loan programs - Education, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination, Student aid, Women.

Janet Reno
Attorney General

For the reasons stated in the preamble, the Department of Justice proposes to amend 28 CFR part 42 as follows:

PART 42-NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES

1. Subpart J, consisting of §§ 42.801 through 42.890 (§§ ___.1 through ___.90), is added to part 42 as set forth at the end of the common preamble to read as follows:

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

Sec.

42.831 Education programs and activities.
42.832 Housing.
42.833 Comparable facilities.
42.834 Access to course offerings.
42.835 Access to schools operated by LEAs.
42.836 Counseling and use of appraisal and counseling materials.
42.837 Financial assistance.
42.838 Employment assistance to students.
42.839 Health and insurance benefits and services.
42.840 Marital or parental status.
42.841 Athletics.
42.842 Textbooks and curricular material.
42.843-42.850 [Reserved]

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

42.851 Employment.
42.852 Employment criteria.
42.853 Recruitment.
42.854 Compensation.
42.855 Job classification and structure.
42.856 Fringe benefits.
42.857 Marital or parental status.
42.858 Effect of state or local law or other requirements.
42.859 Advertising.
42.860 Pre-employment inquiries.
42.861 Sex as a bona fide occupational qualification.
42.862-42.870 [Reserved]

Procedures

42.871 Notice of covered programs.
42.872 Enforcement procedures.
42-873-42.890 [Reserved]

Authority: 5 U.S.C. 301; 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

2. The designations for Subparts A-F as set forth in the common rule are removed.

3. In § 42.802 (§ ___.2) in the definition of "designated agency official," the brackets and text within brackets are removed and "the Assistant Attorney General, Civil Rights Division" is added in its place.

4. In § 42.802 (§ ___.2) in the definition of "Title IX regulations," the brackets and text within brackets are removed and "§§ 42.801 through 42.890" is added in its place.

5. Section 42.872 (§ ___.72) is added to read as follows:

§ 42.872 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) ("Title VI") are hereby adopted and applied to this subpart. These procedures may be found at 28 CFR 42.106 through 42.111.

Draft 12/30/97

Executive Order _____

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

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

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

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

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

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

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

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

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

NOW, THEREFORE, to promote economy and efficiency in government procurement of supplies and services[4], to enforce the Constitution and laws of the United States, and to achieve equal opportunity in federally conducted education and training programs, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including section ___ of title __, United States Code[5]; sections 471, et seq., including section 486, title 40, United States

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

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

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

Code[6]; section 7301, title 5, United States Code[7]; and section 301, title 3, United States Code, it is hereby ordered as follows:

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

1-101. No individual shall, on the basis of race, color, national origin or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in[8] an education or training program or activity of any Executive department or agency[9] conducted in the United States, the territories, the possessions, the Commonwealths of Puerto Rico and of the Mariana Islands, and as set forth in Subsection 1-102.

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

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

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

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

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

Section 2. *Definitions*.

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

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

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

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

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

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

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

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

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

COMPLIANCE WITH EXECUTIVE ORDER ____

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

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

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

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

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

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

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

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

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

competitive acquisition contracts expected to equal or exceed $100,000.[15]

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

Section 4. *Exemptions from coverage*.

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

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

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

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

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

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

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

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

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

Section 5. *Administrative enforcement*.

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

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

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

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

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

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

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

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

a. cancellation or termination of contracts with such contractor;

b. refusal to enter into future contracts with such contractor until it is satisfied that the contractor will comply with the rules, regulations, and procedures issued or adopted pursuant to this order;

c. any other action as may be appropriate.[19]

Section 6. *Implementation and Agency Responsibilities*.

6-601. Within 180 days of the issuance of this order, the Attorney General shall publish in the Federal Register such rules, regulations, policies, or guidance[20], as deemed appropriate by her, to be followed by all executive departments and agencies.[21] The Attorney General shall address:

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

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

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

a. the scope of education programs and activities subject to and exempt from coverage by this order, in addition to those identified in Sections 2 and 4;

b. examples of discriminatory conduct;

c. applicable legal principles;

d. provisions to be included in contracts;

e. enforcement procedures with respect to complaints against employees and contractors;

f. remedies;

g. requirements of an agency's annual report as set forth in Section 7;

h. and such other matters as deemed appropriate.

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

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

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

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

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

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

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

Section 7. *Annual Report.*

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

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

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

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

days of the end of the preceding year's activities.[26] Subsequently, reports shall be submitted every three years, within 90 days of the end of each 3 year period.

Section 8. *General Provisions.*

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

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

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

Section 9. *Judicial Review.*

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

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[26] Several Executive orders require that annual reports be submitted.

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

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

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

Women's Issues - Title IX

1 page of multiple attachments included

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

FORCE MANAGEMENT POLICY

AUG 25 1997

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

Dear Ms. Friedlander:

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

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

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

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

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

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

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

We anticipate being able to provide missing DoD Component reports to you by August 29, 1997. It is suspected, however, that there may have been some education programs which may still have been missed, just as there have been some reported twice in the attached information. For example, we believe that there may be covered programs in the Joint Staff, Under Secretary of Defense (Policy), Under Secretary of Defense (Comptroller), and the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence). Therefore, an additional internal survey will be initiated, and we hope to be able to share those results with you by September 19, 1997. As mentioned earlier, expanded and updated DDR&E information will not be available until October 31, 1997.

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

Thank you for your cooperation in this most important matter.

Sincerely,

F. Pang

Attachments:
As stated

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

Index

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

1 of 2 sets of attachments included

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

FORCE MANAGEMENT POLICY

SEP 1 1997

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

Dear Mr. Lee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Francis M. Rush, Jr.
Acting Assistant Secretary

Attachment:
cc (with attachment):
General Counsel, DoD
David Ogden, Esquire
Counselor to the Attorney General
Loretta King, Esquire
Deputy Assistant Attorney General (Civil Rights)

Name of Agency: National Guard Bureau Counterdrug Directorate

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

Name of Agency: National Guard Bureau

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

Women's Issues - Title IX

DRAFT

In Reply Refer To:
OEO/Policy/Civil Rights

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

Dear Mr. Lee:

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

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

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

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

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

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

Sincerely,

John Berry
Assistant Secretary
Policy, Management and Budget

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN 8 1998

Memorandum

To: Assistant Secretary - Policy, Management and Budget

From: Assistant Secretary - Indian Affairs

Subject: NPRM: Title IX

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

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

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

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

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

Women's issues - Title IX

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

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

1. HUD: Statutory requirement of Congressional notification prior to publication of NPRM — Go ahead w/ start reg.

2. Interior: Related issues of consultation with Native American community and resolution of whether Title IX applies to tribally-run schools — Call - tell them to start.

3. Current draft of NPRM (based on ED Title IX regulation) includes "affirmative action" (see attachment) — consistent w/ law

4. WH assistance requested to expedite OMB review and approval of text (EO 12866 gives OMB up to 90 days to review the proposed rule, in practice, OMB generally responds in 60 days) — call Sally

5. OMB/Paperwork Reduction Act: WH assistance may be requested to resolve any new issues raised by OMB on compliance with the Paperwork Reduction Act

6. After OMB approval, WH assistance may be requested to ensure agencies that have not yet approved NPRM do so speedily upon receipt of final version (Commerce, DOJ, Labor, DOT, and NASA)

7. Summary of edits to current draft of NPRM (preamble)

Draft Executive Order

1. Summary of edits to current draft of EO

2. Unresolved issues with coverage of DOD programs: exemption for "military" and continued operations of programs for non-DOD employees
   Proposed text: "Nothing in this order amends, supplements, or subtracts from an individual's protections and remedies under the Uniform Code of Military Justice, 10 U.S.C. Chapter 47."

3. Views on what should be in Executive order v. subsequent guidance/regulation

4. Views on coverage of contractors

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

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

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

(b) Affirmative action. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964-1965 Comp., p. 339.

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

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

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

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

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