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THE WHITE HOUSE
WASHINGTON

MR. PRESIDENT

THIS MEETING HAS RUN
ONE HOUR AS SCHEDULED.

YOU ARE DUE TO MEET WITH
DON RUMSFELD AND BILL
WALKER.

MEETING WITH
SECRETARY WEINBERGER

Saturday, May 17, 1975

10:15 A. M.

THE PRESIDENT HAS SEEN

A handwritten signature in dark ink, appearing to be 'd. g.', is written over the end of the typed text.

THE WHITE HOUSE

WASHINGTON

May 16, 1975

MEETING WITH SECRETARY WEINBERGER

Saturday, May 17, 1975

10:30 a.m. (1 hour)

The Cabinet Room

From: Jim Cannon *JC*

I. PURPOSE

Secretary Weinberger has requested this meeting to present the final HEW Title IX - Regulations on Sex Discrimination. This is not a decision meeting.

II. BACKGROUND, PARTICIPANTS & PRESS PLAN

- A. Background: Secretary Weinberger has formally submitted HEW's proposed regulation for implementation of Title IX of the Education Amendments of 1972 to you for approval. The regulation is highly controversial and Cap has requested this meeting so that he can provide you with the Department's rationale on some of the more explosive aspects. Following the meeting, we will prepare a final decision paper for you. (Attached is a more detailed memorandum concerning the regulation for your review.)
- B. Participants: Secretary Weinberger, Jack Marsh, Robert Hartmann, Jim Lynn, Paul O'Neill, Rod Hills, Jim Cannon and Dick Parsons, Pat Lindh.
- C. Press Plan: Meeting not to be announced.

III. TALKING POINTS

1. Cap, my staff tells me that you've done an admirable job in developing this regulation for implementing Title IX.
2. Cap - What will be the reaction of the women's groups to these regulations?
3. What impact will this have on inter-collegiate sports?

THE WHITE HOUSE

WASHINGTON

May 15, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: James M. Cannon 
SUBJECT: Final HEW Title IX Regulation on Sex Discrimination

As you know, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs or activities receiving Federal financial assistance. This law also directs all departments and agencies empowered to extend financial assistance to educational institutions to promulgate regulations implementing the non-discrimination requirement, and requires Presidential approval of any such regulation.

Secretary Weinberger has formally submitted HEW's proposed regulation for implementing Title IX to you for approval. With your approval, the regulation would take effect July 15, 1975, and would apply generally to the 1975-76 school year.

In his memorandum to you, attached at Tab A, the Secretary summarizes the background of the law and highlights the more controversial aspects of the Department's proposed regulation. An analysis of the entire regulation, with examples of its application, is attached at Tab B.

The final regulation, which has been "leaked" to the media, has aroused considerable controversy. Women's groups have urged you to reject several of its provisions as being too weak. (A brief analysis of the views of these groups is at Tab C.) The NCAA, on the other hand, has urged your rejection of the portion of the regulation dealing with intercollegiate athletics, which they feel is too onerous. (An analysis of NCAA's position is at Tab D.)

I believe that HEW has taken as even-handed an approach as possible to this regulation, with a few relatively minor exceptions.

1. The regulation would exempt from the general prohibition against discrimination in the award of financial aid foreign-endowed scholarships, such as the Rhodes.

This exemption is legally controversial and, in my view, unsound as a matter of policy. The same approach used for domestic sex-restricted scholarships, which is to pool them with all other available scholarship funds so that the scholarship program as a whole is administered in a non-discriminatory manner, should also cover foreign sex-restricted scholarships.

I recommend, therefore, that the regulation be revised so as to treat domestic and foreign scholarship aid in the same manner. This would not prohibit a school from participating in administering the Rhodes; it would merely require it to provide similar financial aid to female students seeking to study abroad.

The Department of Justice, the Counsel to the President and OMB concur in this recommendation.

2. The regulation does not currently require recipient institutions to undertake periodic self-evaluations to ensure that their programs and activities do not inadvertently discriminate against women. Given the new thrust of the Department's enforcement effort (discussed below) and the importance of this particular issue to women's groups, I recommend that a self-evaluation requirement for recipient institutions be included in the regulation.

The Counsel to the President concurs in this recommendation.

3. The regulation does not now apply to admissions to professional programs within private undergraduate schools. Many, including the Department of Justice, OMB and numerous women's groups, believe that the regulation ought to apply to such programs.

Since the statute is ambiguous in this regard, I believe that HEW, by adopting the more restrictive view, has acted reasonably. However, I do not endorse Cap's recommendation that you seek legislation resolving the issue in favor of the HEW regulation. It is one thing to adopt a narrow interpretation when faced with a vague statute; it is quite another to affirmatively advocate the narrow view.

I recommend that, in approving the regulation, you note the ambiguity and the need for narrow interpretation, and call upon the Congress to make clear its intent in this area.

The Counsel to the President concurs in this recommendation.

4. Cap has recommended that you direct the Domestic Council to convene HEW, Labor and EEOC to work out a common approach to prohibiting discrimination on the basis of sex in pension programs. This is extremely important, and I strongly endorse the thrust of the recommendation. However, I do not believe that the Domestic Council should spearhead the effort. The Equal Employment Opportunity Coordinating Council (EEOCC), consisting of representatives of Justice, Labor, EEOC, Civil Service and the Civil Rights Commission, is already working with HEW on this project.

I recommend that you direct the EEOCC to continue its efforts and to make recommendations to you on this issue by October 15, 1975.

The Counsel to the President concurs in this recommendation.

As a result of recent court action, a new issue -- one not addressed in Cap's February 28 memorandum -- has emerged in connection with the regulation. This issue is discussed in a more recent memorandum to you from Cap which is attached at Tab E. Basically, the situation is as follows:

HEW's current regulations regarding enforcement of various civil rights statutes provide that HEW will make prompt investigation whenever a complaint indicates a possible civil rights violation. As a matter of fact, however, HEW does not investigate all, or even most, complaints it receives, because it does not have the staff or resources to do so. Rather, the Department attempts to identify, on the basis of the complaints filed, egregious or systematic violators and to focus attention on them. Nevertheless, the Title IX regulation originally submitted to you for approval contained this complaint-oriented enforcement requirement.

In March of this year, the U. S. District Court for the District of Columbia declared that HEW has a duty to commence prompt enforcement action upon all complaints of racial discrimination in violation of Title VI of the Civil Rights Act (Adams v. Weinberger). The decision was based, in part, on the current HEW Title VI regulation. The effect of this holding, if not reversed, will be to require HEW to commit most of its Office for Civil Rights staff to investigation of the few complaints involved in the case, to the neglect of others.

Cap is concerned that, unless HEW changes its enforcement regulations to reflect the actual practice, the Department will become swamped with individual complaints which it will be unable to handle and will soon be unable to meet its overall responsibilities in protecting civil rights.

Therefore, he has recommended that HEW develop and publish for comment a new, consolidated civil rights procedural regulations applicable to all of the Department's civil rights enforcement responsibilities.

This is a good idea. The problem comes in coordinating the new, consolidated enforcement procedure with promulgation of the Title IX regulation.

Cap has recommended that the enforcement provisions of the Title IX regulation reflect the new non-complaint-oriented posture of the Department. This recommendation is based primarily on the fact that the Department is currently being sued for failure to investigate several hundred complaints which have been filed under Title IX. Cap would like to avoid an Adams-like decision in this case, and he believes that promulgating the Title IX regulation with the "new" language regarding enforcement will help in this regard.

The Counsel to the President and OMB recommend that the Title IX regulation be submitted to Congress as originally submitted to you (with the "old" language regarding enforcement). They feel that inclusion of the "new" enforcement provisions in the Title IX regulation is inconsistent with simultaneous publication of the consolidated procedure for enforcement of all other civil rights statutes for comment. Moreover, since the consolidated procedure will no doubt be regarded as a weakening of the Federal role in civil rights enforcement, the surprise inclusion of its provisions in the final Title IX regulation, without an opportunity to comment thereon, will be deeply resented by women's groups.

I tend to agree with Counsel's office and OMB, although I am sympathetic to Cap's predicament. I suggest you give special attention to this issue in your meeting with Cap.

Finally, the Education Amendments of 1974 require regulations such as the Title IX regulation to lie 45 days before Congress before taking effect, during which time Congress may pass a concurrent resolution of disapproval to any portion thereof. The constitutionality of this requirement is under review by the Attorney General and the Counsel to the President. Pending the outcome of this review, the Attorney General, the Counsel to the President and HEW's General Counsel have recommended that the Title IX regulation be submitted to Congress under protest, thereby preserving our legal options.

RECOMMENDATION

I recommend that you:

1. Approve the Title IX regulation as submitted, with the following changes:

a) foreign-endowed scholarships will be treated in the same manner as domestic-endowed scholarships.

Agree _____ Disagree MEY

b) recipient institutions will be required to make periodic self-evaluations.

Agree _____ Disagree MEY - ?

c) with the "old" enforcement provisions, pending adoption of the consolidated procedure.

Agree _____ Disagree MEY - ?

2. Not submit legislation amending Title IX to conform to the regulation.

Agree MEY Disagree _____

3. Direct the EEOCC to work with HEW to develop a single approach to the issue of pension contributions and benefits and to report to you by October 15, 1975.

Agree MEY Disagree _____

4. Issue a statement with your approval, acknowledging the importance of the regulation to women, thanking HEW, calling upon the Congress to clarify its intent in several critical areas, and announcing your direction to EEOCC.

Agree MEY Disagree _____

5. Direct HEW to submit the regulation to Congress under protest.

Agree _____ Disagree MEY



THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D. C. 20201

FEB 28 1975

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Final Title IX Regulation on Sex Discrimination

When I presented and discussed various education issues in December, you indicated a desire for a meeting to discuss the final regulation for administration and enforcement of Title IX of the Education Amendments of 1972 at the time I was ready to submit them formally to you for approval, as required by law. This memorandum summarizes the background of, and major issues in, the proposed final regulation. The final regulation and the preamble to the regulation are attached at Tab A. I request the meeting be scheduled as soon as it is convenient for you.

BACKGROUND

The Law. With little legislative history, debate or, I'm afraid, thought about difficult problems of application, the Congress enacted a broad prohibition against sex discrimination in any education program or activity receiving Federal financial assistance with a few specific exceptions. The law is attached at Tab B. The sponsors saw Title IX as an enactment to close a statutory loophole in Title VI of the Civil Rights Act which did not cover sex. Since that time and particularly since our proposed regulation emerged, Congress has discovered many of the specific implications of their handiwork. While there has been much rhetoric about what the Department should or should not do with its regulations, the Congress has with our urging passed only one amendment excluding social fraternities and sororities and certain youth groups such as the Girl and Boy Scouts.

At the same time, however, some applications of the law which I have felt we could not escape, given the plain meaning of the statute, will undoubtedly provoke further consideration of changes by the Congress.

The regulation process. The Department published a proposed regulation on June 20, 1974. More than 9,700 comments were received from institutions, associations, professionals, women's groups, students and parents. The comment period closed October 15, 1974. The law requires

Page 2 The President

you to approve the final regulations. (In addition, the Education Amendments of 1974 (Section 509(a)(2) of P.L. 93-380) require regulations such as these to lie 45 days before the Congress during which time the Education Amendments purport to authorize Congress to pass a concurrent resolution of disapproval. You asked the Attorney General for an opinion on the constitutionality of this section in your signing statement which is still under study. Pending receipt of this opinion, we have determined it is prudent to submit all education regulations to Congress under protest, for the 45-day period until the constitutional issue is definitely determined. The Justice Department and Phil Areeda have concurred with this procedure.) The regulations would be effective July 1, 1975, an important date to meet because it is the beginning of a school year.

MAJOR ISSUES

The comments received raised seven major issues. None of them came as a surprise, since they were the most difficult issues we faced in formulating the proposed regulations. Each of these issues is summarized below and further amplified in the attached preamble (Tab A). Given the paucity of legislative specification and history, several of my recommendations in the proposed regulation could be usefully buttressed with legislative amendments to Title IX, consistent of course with the Fifth and Fourteenth Amendments.

1. Physical Education Classes and Sex Education

The proposed regulation provided that no class, including those in physical education, be offered separately on the basis of sex, except that separation within any class (e.g., health, physical education) during sessions on sex education is permitted. A majority of the comments requested a modification of our position with regard to physical education, and reflected some confusion over the sex education exception.

The final regulation also allows separation by sex within physical education classes where students are engaging in contact sports. This approach will satisfy the majority of the concerns expressed in the comments, is the preferable policy, and is legally supportable. In addition, the sex education exception was further defined to clarify that separate classes in that area would be permissible, and that the Department was not requiring that sex education be taught at all. I am advised that additional separation

Page 3 The President

of the sexes in classes beyond that provided by the regulation could not be supported by the statute, as it now stands.

The final regulation also allows for a three-year adjustment period where necessary to comply fully with the requirement for nondiscriminatory physical education classes. Women's groups probably will protest, and may test this delay in court.

2. Domestic Scholarships and Financial Assistance

The proposed regulation prohibited institutions from administering scholarships designated for members of one sex. The financial aid section of the final regulation has been modified so as to allow nondiscriminatory "pooling" of sex-restricted endowed scholarships. The majority of the comments on this issue requested the allowance of nondiscriminatory "pooling" of sex-restrictive scholarships because financial resources presently available from endowed scholarships would be jeopardized. The concept of "pooling" would require an institution to award financial aid on the basis of criteria other than sex. Once those students eligible for financial aid became identified, the financial aid office would award the aid from both sex-restrictive and non sex-restrictive sources. If there were not sufficient non sex-restrictive sources to finance aid for members of a particular sex, the institution would be required to obtain the funds from other sources or award less funds from the sex-restrictive sources.

3. Foreign Scholarships

The proposed regulation excepts from the general prohibition against discrimination in the award of financial aid, foreign-endowed scholarships, such as the Rhodes, even though administered by domestic colleges and universities. The comments were almost unanimous in opposition. My recommendation, however, which has been followed in final regulation, is that domestic institutions should be allowed to assist in the administration of sex-restrictive scholarships which were created by foreign wills and trusts. The legislative history is silent on this issue, and it seems to me wiser to presume that Congress intended to leave the regulation of foreign wills to the governments under whose

Page 4 The President

laws they were established. I cannot believe Congress intended to forbid colleges to administer the Rhodes scholarship just because the Rhodes' will in 1902 restricted the scholarship for men. However, my conclusion will probably be tested in court, and I recommend we ask Congress to make it clear that foreign scholarships are exempt.

4. Exemption of Private Undergraduate Professional Schools

Title IX specifies that only certain educational institutions are covered by Title IX with regard to admissions: "institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education." Thus, the statute does not cover the admissions policies of private undergraduate institutions. Congress did not address the conflict between professional schools, which are covered, and private undergraduate schools, which are exempt, that occurs in fields such as engineering, architecture, and education offered by private undergraduate schools.

General debate on Title IX, however, indicated that Congress' primary goal in the legislation was to eliminate discrimination in areas which would affect an individual's career and employment opportunities. The legislative history on the question of exempting the admissions policies of private undergraduate schools indicates that Congress was also concerned that the private financial resources of such schools not be jeopardized and, therefore, that all private undergraduate institutions be exempt. (Another set of regulations which we will issue shortly under amendments to the Public Health Service Act mandate nondiscrimination in admissions in private undergraduate schools in health fields, such as nursing.)

The proposed regulation defined "professional" institutions so as to include only those above the undergraduate level. I recommend leaving the final regulation as it was proposed. The Congress evidently had two concerns but did not specifically anticipate the situation which requires a choice to be made between them. The Executive, lacking guidance, can go either way.

5. Pension Benefits

The treatment of this issue is made complex by the fact that there already exist within the government two agencies which are administering policies and regulations concerning the question of pension benefits. The Department of Labor's Office of Federal Contract Compliance is responsible for the coordination of the enforcement of Executive Order 11246, and HEW has been delegated limited authority for the enforcement of that Order with respect to educational institutions. In addition, the Equal Employment Opportunity Commission (EEOC) is responsible for the enforcement of Title VII of the Civil Rights Act of 1964 which also involves provision of pension benefits.

Page 5 The President

EEOC requires employers to provide employee pension benefits which pay out the same periodic benefits to men and women regardless of whether the employer would be required to contribute more to the pension plan for female employees because of the longer life expectancy of women. OFCC gives employers the option of providing equal contributions to pension plans for both men and women employees while allowing unequal periodic payments, or of providing equal periodic payments but permitting unequal contributions. However, the Department of Labor has published in the Federal Register a notice proposing to amend the OFCC regulation to conform with the EEOC approach in this respect.

Our proposed regulation followed the Labor Department's present position on the issue of fringe benefits in order to maintain the status quo among programs administered by HEW and for the purpose of soliciting comment. The preamble to our proposed regulation discussed both the EEOC and the Labor Department alternatives, plus a third approach which would require both equal contributions and equal periodic benefits by mandating the use of unisex actuarial tables. In their comments, women's groups and some institutions opposed the position in our proposed regulation, while TIAA (the Teachers Insurance Annuity Association) and a large number of colleges favored it.

The attached final regulation maintains the proposed approach, namely, allowing employers the option of providing equal contributions or equal periodic benefits. Thus, the regulation conforms to the present Labor Department position, but not with that of EEOC. Unfortunately, we cannot bring the EEOC and Labor Department approaches into conformity simply through our Title IX regulation.

As you know, EEOC is an independent agency and, therefore, is not directly under your control. However, because of the potentially wide impact on employers arising out of this inconsistency in Federal regulations, I recommend that you direct the Domestic Council to convene HEW and Labor, in conjunction with EEOC, to develop immediately a single approach to this issue. Any necessary amendments to existing regulations could then be made. The attached preamble to the Title IX regulation anticipates such action on your part.

6. Discrimination in Curricula

This is the issue which many women's groups consider to be the most important under Title IX. The proposed regulation did not cover discrimination in textbooks and other curricular materials on the ground that such coverage would raise grave constitutional problems concerning the right of free speech

Page 6 The President

under the First Amendment, and would result in a very undesirable intrusion by the Federal Government in the active operation of local public schools.

Many of the comments argued that HEW need not involve itself in the examination of textbooks themselves. These comments proposed that HEW require school districts which mandate the use by teachers of certain approved teaching materials in elementary and secondary schools to include in internal approval procedures methods for ensuring that such materials as a whole do not reflect discrimination on the basis of sex. These commentators suggested that the criteria for determining what is discriminatory should be left to local control. Almost all comments agreed that curricula at the higher education level be excluded from coverage.

Although I recognize the seriousness of this problem at the elementary and secondary school level, it is my opinion that it should be resolved by local school authorities and that the Department should make technical assistance available, if requested. I do not believe that Title IX should be read as reaching this problem and, therefore, the final regulation explicitly provides that nothing in the regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials by local schools. This will be an unpopular result for many women's groups.

7. Athletics

Although certainly not the most important educational subject under Title IX, this issue has raised the most public controversy and involves some of the most difficult policy and legal points.

The proposed regulation required each institution to provide equal opportunity in its athletic program for members of both sexes. Institutions were allowed to offer teams separately where membership is based on competitive skill. This preserves all-male football teams, etc.

The Department received substantial comment on this issue. These comments generally fell into three categories: those filed by women's groups, such as the National Organization for Women (NOW), those filed by women's athletic organizations, such as the Association for Inter-Collegiate Athletics for Women (AIAW), and those filed by many colleges and by the men's athletic organizations, such as the National Collegiate Athletic Association (NCAA).

NOW suggests that the "separate but equal" concept is inappropriate for any civil rights regulation and that open access should be required for all athletic teams with one exception. Where women are effectively excluded from open teams (where skill in the given sport is the criteria, it is still

Page 7 The President

conceded by all that open competition for a tackle football team would result in an all-male team), separate teams should be provided for them on the basis that the training and sports traditionally available to women have been limited and that provision of separate teams until such time as the training gap is closed would best fulfill the purposes of the Act. The AIAW suggests that separate men's and women's programs be allowed under all circumstances and that institutions be required to provide proportionate funding for each program. AIAW is opposed to what it calls the "commercialism" of men's athletics and wants to be allowed to use the money allocated for women to provide opportunities for more women instead of expending large sums for recruiting and scholarships. The NCAA argues that athletics are not covered by Title IX because athletics receive no Federal financial assistance. They also argue that, if athletics are covered, revenue-producing sports should be exempted because they support all other sports and institutions cannot afford to offer sports to women on the same scale as men.

The HEW General Counsel, as well as the Department of Justice's Office of Legal Counsel, advised me that athletics are a part of the education program and activity of an institution, whether or not the athletics department itself received Federal funds, and athletics are, therefore, covered by Title IX. An amendment to the Education Amendments of 1974 was introduced by Senator John Tower on the floor of the Senate specifically exempting from Title IX revenue from revenue-producing intercollegiate athletics. The "Tower Amendment" was deleted by the conference committee and was, in effect, replaced by the so-called "Javits Amendment" (see Tab C). The Javits language, which was enacted, requires that HEW's Title IX regulation contain reasonable provisions on intercollegiate athletics taking into account "the nature of the particular sport." Any legal doubt that athletics are covered has thus been resolved, although I must say the Javits Amendment is not particularly helpful for any other purpose. Certainly, the Javits Amendment would not appear to provide a basis under the statute for exempting revenue-producing sports or their revenues from coverage. Therefore, if Congress wants to exempt athletics, they will have to do so by changing the law.

I propose in the final regulation that the equal opportunity approach of the proposed regulation should remain because it provides flexibility while requiring that, where interest exists in having a women's team, women be afforded access to that sport on the same terms as men as to athletic facilities, travel allowance, and the like.

The question of athletic scholarships, most, if not all, of which are not based upon the financial need of the student, is not treated in the athletics section. Rather, it is treated in the section on financial aid (see also items 2 and 3 above). That section in the proposed regulation provides that separate financial assistance for members of each sex may be

provided as part of separate athletic teams to the extent that such a practice conforms to the portion of the athletics provision of the regulation allowing sex-restrictive teams. The financial assistance section of the final regulation continues the provision just mentioned but adds a further point: that a reasonable number of athletic scholarships must be awarded to men and women in proportion to the number of men and women participating in interscholastic or intercollegiate athletics.

The final regulation follows the proposed regulation by providing that equal aggregate expenditures for men's and women's programs is not required. However, to clarify some confusion on the issue, it states that failure to provide necessary expenditures for female teams may be considered in assessing equality of opportunity for members of each sex. The final regulation is also more specific, listing the sort of matters which will be taken into account in assessing whether an institution is providing equal opportunity. Finally, the final regulation provides for adjustment periods for institutions to bring their athletics programs into compliance similar to those provided with respect to physical education (see item 1 above). Accordingly, elementary schools must comply as swiftly as possible but no later than one year after the effective date of the regulation, while secondary and post-secondary schools must comply within three years of that date. You may want to consider asking Congress for specific authority to support phase-in periods granted by the regulation.

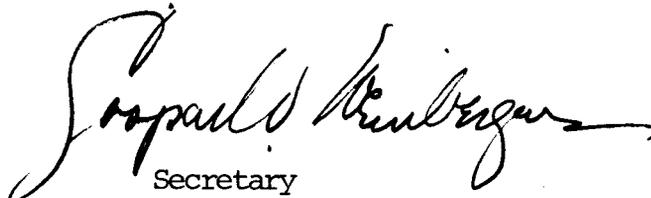
OTHER SIGNIFICANT PROVISIONS

There are other provisions in the final regulation which may be controversial or arouse public interest. These include the prohibition against separating, suspending, terminating or otherwise treating differently pregnant students or teachers without their consent; prohibiting discrimination on the basis of sex in the application of dress and grooming codes; prohibiting institutions from assisting another party which discriminates on the basis of sex, such as honor societies, professional sororities and fraternities (Congress exempted, at our urgent request, social fraternities and sororities from Title IX in §3(a) of 93-568); requiring institutions to validate admission and hiring tests which have an adverse impact on members of one sex; and requiring student and employee health insurance and disability plans to include coverage for pregnancy, childbirth and termination of pregnancy.

Page 9 The President

CONCLUSION

When we meet, I shall be glad to discuss the issues presented by the regulation with you in detail.


Secretary

cc: Vice President

Attachments

TAB A - Final Title IX Regulation and Preamble to Regulation

TAB B - Copy of Title IX Statute

TAB C - Javits Amendment

B

SUMMARY OF PROVISIONS OF THE REGULATION

It applies, with certain exceptions, to all aspects of education programs or activities carried on by Federally assisted school districts, institutions of higher learning, or others receiving Federal financial aid. Generally, it covers admissions, treatment of students, employment and procedures.

Entirely exempt from coverage under Title IX are military institutions at both the secondary and higher education level, and religious schools to the extent that provisions of the regulations would be inconsistent with religious tenets.

Also exempt are the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Camp Fire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth services organizations.

Admissions

Provisions of the regulations dealing with admissions policies apply to vocational, professional, and graduate schools and to most institutions of public undergraduate education after June 24, 1973.

The admissions provisions do not apply to preschool training, elementary schools, secondary schools (except vocational schools), private undergraduate education institutions and their undergraduate professional schools, or those public undergraduate education institutions that have traditionally and continuously been single sex.

However, even institutions whose admissions are exempt from coverage must treat all students without discrimination once they have admitted members of both sexes.

The provisions dealing with admissions also extend to recruitment policies and the administration of sex-biased tests. They prohibit such practices as separate ranking of applicants, sex-based quotas, and discrimination on the basis of marital status or on the basis of pregnancy. And, in addition, schools covered under the regulations that have discriminated on the basis of sex in the past must take remedial action to eliminate these practices.

Examples:

-- A school may not give admissions tests that channel students into a certain course of study on the basis of sex.

-- A graduate school may not require women to have a higher grade point average than men (although a private undergraduate school could do so).

-- A nonprofessional school which in the past had deliberately limited the number of females in its entering classes to, for example, 15 per cent, is required to abandon that limitation and may be required to launch special recruitment efforts to attract a greater number of female applicants.

Treatment

While the provisions covering admissions exempt certain kinds of institutions, all schools are required to treat students equally without regard to sex once they are admitted. This applies to recipient preschools, elementary and secondary schools, vocational schools, colleges, and universities at the undergraduate, graduate and professional levels, as well as other agencies, organizations and individuals receiving funds for education programs and activities. It covers access to and participation in courses, organizations and athletics, benefits, financial aid, and use of facilities.

Examples:

-- Classes may not be offered exclusively for men or exclusively for women. Men should be free to enroll in home economics classes if they wish and women should be free to sign up for shop and drafting.

-- While requiring coeducational classes, the regulations do allow separation of students by sex within physical education classes during competition in wrestling, boxing, ice hockey, football, basketball, and other sports involving bodily contact. Schools otherwise must comply fully with the regulation and as soon as possible. In the case of elementary schools, they must be in full compliance no later than one year from the effect date of the regulations; in the case of secondary and postsecondary schools no later than three years. During the grace periods, while making necessary adjustments, any classes or activities which are separate must be comparable for members of each sex.

-- Classes in sex education must be coeducational, but the law also allows separate sessions in sex education for boys and girls at the elementary

and secondary school level during times when the materials deal exclusively with human sexuality. There is, of course, nothing in the law or the regulations requiring schools to conduct sex education classes. This is a matter for local determination.

-- Men and women shall not be discriminated against on the basis of sex in counseling. Generally, a counselor may not use different materials in testing or guidance based on the student's sex unless this is essential in eliminating bias or unless the materials cover the same occupations and interest areas. Also, if a school finds that a class contains a disproportionate number of one sex, it must be sure that this has not occurred as a result of sex-biased counseling or materials.

-- Men and women are nondiscriminatorily eligible for benefits, services and financial aid. Where colleges administer scholarships designated exclusively for one sex or the other, the scholarship recipients should initially be chosen without regard to sex. Then when the time comes to get the money, sex could be taken momentarily into consideration in selecting which trust the money would come from. Scholarships established under a foreign trust are exempt.

-- Men and women are subject to the same rules of behavior and nondiscrimination in rules of appearance. Where dress codes exist, it is suggested that they be stated in general standards, such as neatness and appropriateness, rather than in sex-specific terms.

-- Single sex housing is permitted, but if there are curfews for women's dorms, they must be the same as for men's. Residents of the dorms may determine their own hours, and, in that instance, hours may vary from one building to the next. The housing provision does not in any way hinder adoption of security measures to protect students.

Athletics

In the area of athletics, the goal is to secure equal opportunity for males and females, while allowing schools and colleges flexibility in determining the best way to provide this opportunity. Athletics include interscholastic, intercollegiate, club or intermural programs.

Where selection is based on competitive skill or the activity involved is a contact sport, there may be separate teams provided for males and females or there may be a single team open to both sexes. However, the institution must determine whether the teams offered reflect the interests

and abilities of both sexes. If separate teams are offered, a recipient institution may not discriminate by sex in providing equipment or supplies or in any other way. This does not necessarily mean equal funding. Clearly, it is possible for equality of opportunity to be provided without exact equality of expenditure. But the entire school allocation of athletic scholarships and school athletic opportunity and encouragement programs would be viewed for comparability.

In determining whether equal opportunities are available, such factors as these will be considered:

- whether the sports selected reflect the interests and abilities of both sexes;
- provision of supplies and equipment;
- game and practice schedules;
- travel and per diem allowances;
- coaching and academic tutoring opportunities and the assignment and pay of the coaches and tutors;
- locker rooms, practice and competitive facilities;
- medical and training services;
- housing and dining facilities and services; and
- publicity.

In the case of athletics, like physical education, elementary schools will have up to a year from the effective date of the regulations to comply and secondary and postsecondary schools will have up to three years.

Examples:

-- In contact sports or where competitive skills are a criterion for team membership, schools and colleges are free to provide either separate teams for men and women or single teams open to both sexes. It is required that separate teams have comparable supplies, equipment and access to facilities.

-- Where men are afforded opportunities for athletic scholarships, the regulations require that women also be afforded these opportunities. However, the number of scholarships to be provided to each sex depends on such things as the number of players involved. Specifically, the regulation provides: "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."

-- Locker rooms, showers and other facilities provided for women have to be comparable to those provided for men.

Campus Organizations

Membership practices of social fraternities at postsecondary institutions are exempt from the regulations. Also exempt are the membership practices of the Y. W. C. A., Y. M. C. A., Girl Scouts, Boy Scouts, Camp Fire Girls and voluntary youth services organizations traditionally limited to one sex and principally for those under age 19.

However, if any of these organizations conduct educational programs which receive Federal funds; e. g., Head Start, those programs are subject to the provisions of Title IX.

Textbooks

Following the pattern set by the proposed regulations, one area that is specifically excluded from the final regulations is the issue of discrimination in textbooks and other curricula materials. The Department continues to recognize that sex stereotyping in curricula is a serious matter, but stands by its original conviction that any specific regulatory prohibition in this area raises grave constitutional questions under the First Amendment. The Department believes that local education agencies must deal with this problem in the exercise of their traditional authority and control over curriculum and course content.

However, the Department will increase its efforts, through the Office of Education, to provide technical assistance to local education agencies interested in working to eliminate sex bias from educational materials. In addition, HEW representatives have already met with representatives of major publishing companies to alert them to the possible presence of sex stereotyping in their publications. Many acted on their own in the past, issuing guidelines to their staffs. Others are now taking corrective action. State boards of education and individual school districts are also to be encouraged to develop such materials whenever possible.

Employment

The regulations pertaining to employment cover all employees in all institutions, both full-time and part-time, except for those in military schools. In doing so, they go down a well-established path, since the

provisions closely follow the policies of the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance. Specifically, they call for the application of Title IX's prohibition of discrimination to employment, recruitment policies, standards of compensation, promotion, tenure, job classification, fringe benefits, marital or parental status, advertisements of job openings, and pre-employment inquiries. Exceptions may be made for a very narrow range of positions in which sex may be considered a bona fide occupational qualification -- locker room attendant, for example.

Examples:

-- A school or college must provide equal pay to male and female employees performing the same work in connection with the institution's educational program or activities.

-- A school may not inquire about a job applicant's marital status or whether he or she is a parent.

-- ~~Pregnancy and disabilities related to pregnancy must be regarded as "temporary disabilities" for all job-related purposes. In general, personnel policies -- including those covering leaves of absence for child care -- must be nondiscriminatory.~~

Enforcement

The enforcement effort will essentially consist of responding to selected complaints (or other information) lodged with DHEW's Office for Civil Rights and making occasional spot checks. The enforcement procedures are drafted in a manner which will permit the Department to annually establish enforcement priorities for Title IX rather than requiring prompt investigation of every complaint filed. This will enable the Department to take account of its overall civil rights enforcement obligations under other provisions of law by providing more flexibility in designing an effective enforcement program. In those cases where action will not be taken with respect to a specific complaint, the Department will be required to notify the complainant of this fact and of other agencies of Federal, State or local government to which he or she can turn.

Where violations are determined to have occurred, the emphasis will be on seeking voluntary compliance. If attempts at voluntary compliance fail, enforcement action may be taken:

1. by administrative proceedings to stop Federal financial assistance until the institution is in compliance; or

2. by other means authorized by law, including referral of the matter to the Department of Justice with a recommendation that court proceedings be initiated.

POSITION OF WOMEN'S GROUPS

A coalition of women's groups has communicated to you their opposition to several provisions of the final HEW regulation. Several of their objections have already been resolved. Others have been recommended for your consideration (e. g., eliminating the exemption for foreign scholarships and requiring institutional self-evaluation). The remaining objections include:

Athletics

Women's groups take the position that the provisions of the regulation relating to athletics virtually assure continued discrimination against, and severely limit opportunities for, girls and women in athletic programs offered by institutions subject to Title IX.

These groups feel that the current regulation would permit schools to abolish, or refuse to offer, contact sport programs for girls and would permit schools to continue to offer athletic scholarships only for sports restricted to males.

(Note: This position is drastically overstated, and the regulation has been modified to make it clear that the over-riding obligation of a school is to provide comparable athletic opportunity for men and women on the basis of interest.)

Pension Benefits

Actuarial tables used to determine disbursement of pension benefits are often based on sex. Women's groups feel that utilization of sex-based actuarial tables discriminates against them, in violation of Title IX. They also feel that the regulation, which would allow employers to participate in plans which require either equal periodic benefits or equal contributions, permits such discrimination. They have recommended that the regulation be modified to prohibit employers from participating in a pension plan which does not require equal contributions and equal periodic benefits.

(Note: The effect of this recommendation would be to place HEW at odds with both the Labor Department and EEOC on this issue.)

Admissions to Private Undergraduate Professional Schools

The regulation currently excludes from coverage the professional portion of any private undergraduate institution of higher education. This means that non-public institutions of higher education training people for careers

in such fields as business, architecture, teaching and engineering can continue to discriminate in the admissions process on the basis of sex. The women's groups feel that this is precisely what the Congress intended to proscribe in including "professional schools" under Title IX. Therefore, they recommend that this exemption be deleted.

Textbooks

The women's groups point out that pervasive sex bias in textbooks is one of the most widespread and damaging forms of discrimination in education. They are extremely concerned that the regulation provides no form of coverage for sex bias for elementary and secondary textbooks. They recommend that the regulation be modified to require local school districts to establish a procedure for reviewing textbooks and other course materials to ensure that they are free from sex bias.

NCAA POSITION

The NCAA, et al, believe that intercollegiate sports do not fall within the purview of Title IX since they are not "a . . . program of activity receiving Federal financial assistance." They, therefore, urge that the Title IX regulation be modified so as to exempt sports from coverage thereunder.

(Note: HEW, the Department of Justice and the Counsel to the President are agreed that intercollegiate sports, as a subject matter, are covered by Title IX. As to the validity of the NCAA position regarding a particular sport program, the regulation leaves the question of applicability to case-by-case determination.)

Short of a total exemption for sports, the NCAA recommends that the regulation be modified so as to: (1) exempt the revenue produced by intercollegiate activities from coverage; and (2) eliminate the requirement that scholarships be made available to men and women on a proportional basis. Without these changes, the NCAA argues, the regulation will ultimately destroy intercollegiate sports and thereby eliminate the principal source of funds for all athletic programs.

To illustrate: Assume it costs a school \$500,000 a year to field a football team and that that team generates \$750,000 in revenue. The first \$500,000 of that \$750,000 is plowed back into the football team and the remainder is used to fund the rest of the school's athletic activities. If, on the other hand, a school is required to divide the money equally (or approximately equally) between men's and women's sports, the school will have to cut back on the football program. This will result in smaller gates, which will result in less revenue to split between men's and women's sports, and so on, until the whole thing grinds to a halt.

(Note: There is some merit to the NCAA argument. While the regulation does not require equal expenditures for men's and women's sports, it will require most schools to spend more for women's sports than they are spending now. The problem is that the concept of equal opportunity in sports may be inconsistent with the current economics of intercollegiate sports.)



April 21, 1975

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Revision of Title IX Regulation and Need to Develop Consolidated Procedural Regulation for Departmental Civil Rights Activities

The articulation of a reasonable and responsible enforcement role for the Department with regard to individuals alleging violations of civil rights requirements within our jurisdiction has become urgent in light of recent events. The Supplemental Order in Adams v. Weinberger issued recently by the United States District Court for the District of Columbia declared that HEW "has a duty to commence prompt enforcement activity upon all complaints or other information of racial discrimination in violation of Title VI...." The Court established a schedule by which HEW is required to act in resolving complaints or taking appropriate enforcement action. In effect, this court order required HEW to become complaint-oriented with regard to its enforcement activities under Title VI. The order, unless reversed on appeal, will necessitate rapid action on existing complaints and expeditious processing of future complaints involving elementary and secondary education in the 17 southern and border states specifically referred to in the order.

In addition to the Supplemental Order in Adams, this Department, together with the Department of Labor, has been sued by the Women's Equity Action League (WEAL) and others which have charged HEW, among other things, with failure to investigate and resolve several hundred individual complaints of employment discrimination in violation of Executive Order 11246 and Title IX. My approach since I came to the Department has been to try to secure willing compliance with the law even if that took a little longer. However, unless the Department is able to establish that it is taking the necessary action concerning these complaints presently on hand, the WEAL case is likely to

result in a court order requiring that action be initiated and completed within specified and relatively short time frames. This would require a much more coercive approach and more frequent withholding of federal funds that I wish to do.

Under a memorandum agreement between the Department of Labor and Equal Employment Opportunity Commission (EEOC), most individual employment discrimination complaints under the Executive Order filed with HEW have, since March 1972, been referred to the EEOC. This practice is not consistent with published regulations under E.O. 11246 or with published procedures in the Department's General Administration Manual. The EEOC has a current employment discrimination backlog of over 100,000 cases.

Present Policy and Procedures

Currently, the Title VI regulation (published by HEW and other Departments) provides for the filing of complaints and states that HEW "will make a prompt investigation whenever a...complaint ...indicates a possible" violation of the regulation. The final Title IX regulation, which we have submitted to you, contains similar language, and the Preamble encourages the filing of complaints. These regulations provide complainants with a status almost equal to that of a party in negotiations between the Department and a recipient of federal financial assistance, or in an administrative proceeding aimed at termination of that assistance.

Although both the Title VI and Title IX regulations provide for Departmental action on individual complaints, neither statute specifically requires us to take such action. Executive Order 11246, on the other hand, specifically states that "[T]he Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor...." The Executive Order regulations issued by the Department of Labor (as well as the implementing HEW procedural regulation) explicitly require HEW action on individual complaints within specified time frames.

Although these civil rights regulations appear to place the Department in a role in which we effectively guarantee individual complainants prompt action toward investigating and resolving the violations which they allege, we do not, and have not, in fact, operated in such a manner with respect to complaints. Department enforcement priorities are set annually in terms of general enforcement objectives, information on hand is reviewed (reports, complaints, etc.), and then a schedule of proposed reviews is set. An individual complaint is nearly always acknowledged within a year of our receipt of a complaint, and some effort is made to review its merits. In the course of conducting routine compliance reviews as well as in making specific complaint investigations, the Department is able to act on many, if not most, of the individual complaints received within a year or two of its receiving them.

The inaccuracy of the representation of the HEW role in its regulations lies in their apparent guarantee of "prompt" action, which we do not in fact afford. It is critically important that HEW regulations fully and fairly inform the public on how we intend to operate with respect to remedying individual complaints. The courts will hold us to whatever we publish.

Recommended Action

I believe strongly that if the regulations are not changed in this respect, the Department will become increasingly swamped by complaints which it will be unable to handle and will soon be unable to meet its overall responsibilities in protecting civil rights. I think that the best plan is to remove the present procedural section (Subpart F) from the final Title IX regulation which I have submitted to you and substitute short-form procedures which will govern during an interim period. Then, concurrent with the publication of the Title IX regulation, I believe that we should publish a proposed consolidated HEW civil rights procedural regulation which will meet the needs of the various statutes to which it will apply, as well as to Executive Order 11246.

While this approach raises difficult problems of coordination, I believe that we must make clear to the public that the Executive is not abdicating its responsibilities, or applying uneven efforts, to eliminate discrimination based on sex as compared to race or other factors. The Attorney General under delegated authority must approve changes in the HEW Title VI regulation, the procedural part of which would be included in our proposed consolidated regulation. Because Department of Labor regulations control the activities of HEW and other agencies under the Executive Order, the Secretary of Labor would have to change present DOL regulations, or exempt HEW from those aspects which deal with individual complaints, in order for the proposed consolidated HEW regulation to be effective across the board. (As you know, complaints of sex discrimination in employment in higher education institutions can be filed under Title IX, the Executive Order, or both. A change in the procedural regulation under the former, but not the latter, would have a significant effect because of the greater scope of Title IX, but would continue some of the present confusion as to this Department's primary enforcement role.)

I will discuss this matter with the Attorney General and the Secretary of Labor in the near future. I understand that both will be asked to submit comments to you on the major substantive issues of Title IX as well as the procedural matters raised in this memorandum. I hope they will agree that the consolidated procedural regulation (covering Title VI, Title IX, and the Executive Order) be published in proposed form for public comment at the same time as the final Title IX regulation.

If you do not believe that my suggested course of action is advisable at this time with respect to the Executive Order after receiving recommendation from others, but have no objection with respect to Title VI, I would still recommend publication of a consolidated procedural regulation in proposed form for public comment contemporaneously with the final Title IX substantive regulation, making clear, of course, that the provisions would not be applicable to E.O. 11246. In that event, I would hope that Secretary Dunlop and I would continue discussions on the Executive Order program, including an effort to achieve agreement on a mutually satisfactory procedural regulation which we could recommend to you, and that the preamble to the proposed consolidated procedural regulation in the Federal Register would indicate that those discussions were taking place.

Less Desirable Alternatives

If neither of the above alternatives is agreeable to you, you may wish to consider other courses of action. Although I have no recommendation at this time, the options which have been presented for my consideration include:

- (1) Publish the Title IX regulation as it was previously submitted to you (including the procedural provisions); or
- (2) Amend the Title IX regulation as it was previously submitted to you to make its procedural provision reflect accurately existing Departmental procedures for civil rights enforcement.

Under either option, the Preamble could state that changes in the Department's regulations implementing Title VI and E.O. 11246 will be made, subject to final recommendations of the Attorney General and the Secretary of Labor or that such changes are being discussed with them, depending on your decision.

If we were to amend the Title IX regulation alone at this time and were only able to indicate that similar changes were being discussed with the Attorney General and the Secretary of Labor, this would be viewed by many as weakening our commitment to eliminate sex discrimination.

Factors to be Considered

In considering my recommendation, and other options, the following factors should be considered:

- (1) Public Perception and Need to Coordinate. We must avoid the impression that the Department is pulling back on enforcement of the civil rights laws in general, and Title IX in particular. (As you may know, the Title IX package which I previously transmitted to you has been leaked to and printed in its entirety in a major educational journal.) Because of the overlap in enforcement responsibilities among various Departments and duplication in coverage among different programs, HEW cannot act alone.

(2) Court Cases. The Adams and WEAL cases require urgent action. If we just let things alone and fail to change our regulations (an option which I have not suggested for consideration) and are unable to resolve individual complaints promptly, which is the situation now, the district courts will be setting the Department's priorities and forcing budget decisions. Also, a much more rigid, inflexible enforcement will be required, and the Administration will be blamed by much of the public for many unpopular decisions.

(3) Increased Backlog of Complaints. With the issuance of the Title IX regulations, as well as sex discrimination regulations under the Public Health Service Act, regulations concerning discrimination against the handicapped, and other regulations which the Department will shortly publish, HEW would expect a significant increase in the number of individual complaints unless the procedural regulation for each is changed.

(4) Availability of Federal Administrative Remedy. If the complaint procedures are substantively changed across the board as I have recommended so as to eliminate mandatory treatment of complaints by HEW, the only recourse available at the Federal level for redress of employment discrimination complaints will be the EEOC. The EEOC's jurisdiction does not extend to students' rights or employment at the elementary and secondary level, both of which are covered by Title IX. Accordingly, redress of individual complaints would have to be sought through the courts or, in some states, through state human rights commissions.

Grievance Procedure

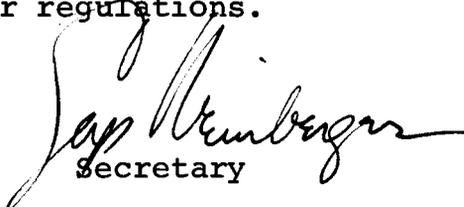
A final aspect of the pending Title IX regulation should be noted for your information. The regulation as previously submitted includes a provision which requires recipients to establish grievance procedures:

A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited

by this Part. The Office for Civil Rights may defer action on complaints submitted pursuant to Section 86.72(b) of the Part in cases where the complainant has not utilized grievance procedures established by a recipient.

Under the proposed procedural change which I have suggested in this memorandum, the second sentence of this section would be eliminated in Title IX. The basic requirement that recipients establish grievance procedures would remain, and HEW would consider the existence of grievance machinery in a compliance review under Title IX. I believe that it is desirable national policy to have in place at the local level the mechanisms for the resolution of complaints without precluding individuals from exercising their right to bring complaints to the attention of the Federal Government. The Title IX regulation would not attempt to define the type or nature of grievance procedures that must be established by recipients, leaving that decision for the time being to the discretion of the recipient.

There is no such grievance machinery requirement in the current Title VI or Executive Order regulations.


Secretary