COMMENTS TO THE
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
ON THE PROPOSED REGULATIONS OF TITLE IX OF
THE EDUCATION AMENDMENTS OF 1972

By

University of Oregon

These comments on the proposed regulations to Title IX of the Education Amendments of 1972 are submitted by the University of Oregon in response to invitation to comment by the Department of Health, Education and Welfare.

The comments reflect the collective views of functional organizations of the University community, including Student Services, Physical Education, and the Office of Affirmative Action, and the University's legal counsel.

Briefly, the University of Oregon's opinion is that:

1. The regulations, in general, are worthwhile for clarifying the applicability of Title IX, but care must be exercised in their formulation to prevent extension beyond the intended coverage of Title IX.

2. Better clarification is needed of the meaning of equal opportunity relative to participation in athletic activities and physical education.

3. Better clarification is needed of the conditions under which affirmative action is prescribed and the conditions under which remedial actions can be instituted.

4. Applicability to consideration of family status of students needs clarification, as well as the meaning of discrimination relative to residence.

5. Clarification is needed relative to the prohibition on aid by educational institutions to organizations which discriminate on the basis of sex.

6. The regulations should address sex stereotyping in texts.

7. Individual financial aid packages disbursed on the basis of sex should not be allowed. "Pooling" financial aids such that the total aid is distributed equally among males and females is not an acceptable alternative.

8. Retirement plans should provide equal periodic benefits to members of each sex.

3.

9. There should be a provision for private right of action to enforce Title IX.

These are discussed in detail on the following pages.

1. Intended Coverage of Title IX

Title IX prohibits sex discrimination in education programs and activities which receive Federal financial assistance. Section 901 states that "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." (emphasis supplied).

The guidelines respecting these provisions are notable in two respects. First, they decline to define "education program or activity" as those words appear in Section 901. Second, they appear, perhaps impermissibly, to expand the literal wording of Title IX by stating in Section 86.11 that the regulations apply "to each education program or activity which receives or benefits from Federal financial assistance." (emphasis supplied). Section 901 refers specifically only to an activity "receiving" Federal financial assistance. The regulations do not clarify further what constitutes "benefiting" from Federal financial assistance. Arguably, this extension of the regulations means that any university in which some component has received Federal financial assistance has thereby been "benefited," at least indirectly, in all of its operations.

This point is of particualr importance in the dispute concerning the coverage of intercollegiate athletics by Title IX. Opponents of such coverage have argued that such athletic programs typically receive no direct Federal assistance and that, therefore, they should be exempt from these proscriptions of Title IX and its implementing regulations. The Secretary of HEW has argued that Title IX should be construed similarly to the interpretation of language contained in Title VI of the Civil Rights Act of 1964. Section 902, 20 U.S.C. 1682 is explicit in stating that fund termination "shall be limited in its effect to the particular education program or activity" in which non-compliance has been found. The regulations in Section 86.62(c) echo this language. This is the so-called "pinpoint doctrine."

It would appear inconsistent to expand the coverage of Title IX to programs only indirectly "benefited" by Federal assistance to other programs and yet limit the fund termination remedy to the particular program receiving the assistance. Arguably the Congressional intent would be subverted by the more expansive reading. Certainly even the Title VI precedents upon which HEW purports to rely in framing the guidelines, e.g., Board of Public Instruction of Taylor County, Florida V. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969) argue for termination only of a particular "targeted" program, rather than the entire range of Federal programs received in the institution.

2. Clarification for Athletics and Physical Education

Section 96.38(b) requires a recipient to determine "at least annually" by a method "acceptable to the Director" (of OCR in HEW) in what sports members of each sex desire to compete. This type of student poll could, no doubt, be an important internal device for determining market demand for athletics.

However, imposition of this requirement as an aspect of Federal civil rights enforcement law raises several serious questions. First, it demonstrates a rather dramatic incursion by Federal authorities into internal university processes for determining program priorities. Second, it appears to suggest that those priorities are best determined on an annual student poll without a longitudinal examination of trends or priorities, let alone an inventory of realistic financial options from the given institution's perspective. Third, it does not spell out, specifically, the uses to which any such poll should be put. One implication, but only an implication, is that hiring and priority decisions must be made in accordance with such a poll. Fourth, an annual poll, if a mandatory technique for observance, would unquestionably greatly complicate hiring and spending decisions which must be made well in advance. Fifth, the requirement does not take into account the different consequences (if any) between "demand" for spectator as opposed to participant sports.

An important aspect of the draft guidelines is that they specifically do <u>not</u> require equal <u>aggregate</u> expenditures by institutions for members of each sex. Section 86.38(f). However, the guidelines are silent on whether Title IX will be deemed to require equal <u>proportionate</u> expenditures. This is a point of considerable importance, and should be pursued in a search for greater clarity.

The entire question of equality in expenditures raises a fundamental point. Sports obviously vary in their dollar requirements for facilities, coaches, scholarship, travel and equipment. The expenditure proportion may bear no necessary relationship to the members or persons involved either as coaches or as participants. Obviously a sport such as basketball, with a limited number of participants, may nonetheless require heavy expenditures in capital construction for basketball courts if it is a priority sport at a given institution. On the other hand, a sport which gives considerably greater opportunities to individual participants such as lacrosse or soccer might well be accommodated for considerably less in capital outlay because existing sports facilities such as football fields could serve double-duty. Thus there is no easy equation between dollar expenditure and persons served or priorities given.

Questions of financing aside, there arise serious questions in measuring overall aggregate equality of athletic opportunity. There appears at this point to be no general agreement as to what constitutes equality for women in sports. A recent study by the Project on the Status of Women devoted extensive and thoughtful commentary to exploration of "separate but equal" as opposed to integration as techniques for establishing equal opportunity. Whether "contact sports" can be separated out from non-contact sports, whether competitive skill may be used as a criterion for separating

sexes, whether an institution must provide both single sex and unisex teams are all fundamental questions to which the guidelines give no answer. In part, these questions are not answered because our society, as a whole, has reached no uniform consensus on them. The status quo is hardly a model. Many women commentators strongly resist the view that women's intercollegiate athletics should adopt in toto many of the questionable practices which have led to the overt professionalism of male intercollegiate athletics.

In short, consideration of the guidelines will force our society itself to decide fundamental philosophical questions such as the meaning of equality, and fundamental policy questions such as the appropriate role to be accorded to the institution of intercollegiate athletics. No easy or uniform answers are likely to result. It may well be too early to precipitate them in this fashion.

In applying the guidelines to physical education, it is unlikely that physical education can be entirely separated from athletics on the basis that the latter is based on competitive skill whereas the former is not, which impression may be gained from the proposed regulations:

> "Where selection is based on competitive skill, athletics may be provided through separate teams for both males and females or through a single team . . . . The goal of the regulation in the area of competitive athletics is to secure equal opportunity for males and females while allowing schools and colleges flexibility in determining how best to provide such opportunity."

Physical education classes as well as athletics involve more than lectures and practice of fundamental skills. Once the fundamental skills are learned the next step is to put these skills together in competitive situations and this is where physical education is similar to athletics. Students learn to compete as hard as they can and they develop the desire to win. In this situation many women will be at a disadvantage in highly competitive games.

It has been suggested that if classes were organized only on a skill level, most of the women would enroll in the beginning classes, while men would enroll in the advanced classes, thereby solving the problem. However, proper enrollment in beginning and advanced classes should be based on knowledge and background in the activity and the beginning course should stress basic knowledges and fundamental skills. The women with a good background in basketball who wished to avoid the unequal competition with men would probably enroll in the beginning course and would be bored listening to, and practicing, beginning fundamentals.

There are many activities that lend themselves to co-ed participation. At the University of Oregon we have co-ed physical education classes in Archery, Badminton, Bicycle Touring, Canoeing, Fencing, Golf, Horseback Riding, Karate, Mountaineering, Mountain Hiking, Rock Climbing, Sailing, Swimming, Skiing, Table Tennis, Tumbling, Tennis and Yoga. A few classes probably would not work as well if co-ed.

The regulations should allow flexibility in assigning these types of physical education classes. The flexibility would not be that women could not enroll in courses designed primarily for men, or vice versa, rather, all classes could be open to men and women, but in some instances classes could still be designated primarily for males or females, according to skill and strength levels.

The proposed regulation is very vague concerning the status of intramural sports and includes all extra curricular activities under the mandatory co-educational structure. However, the intramural sports program is competitive athletics, but classified as intra-school athletics as contrasted with the inter-school (varsity) program. Certainly the goal of securing "equal opportunity for males and females" should apply in both of these athletic programs.

3. Affirmative Action and Remedial Action

Section 86.23(a) states that recipients may be required to undertake additional recruitment efforts directed primarily toward members of one sex in order to remedy past discrimination. The uncertainty generated between required equality of treatment by sex and the special requirement of "remedial" action in these contexts will no doubt be the source of continuing confusion and difficulty in the administration of Title IX.

Section 86.3(a) requires that recipients who have previously discriminated on the basis of sex must take such "remedial action" as is necessary to overcome the effects of past discrimination, while Section 86.3(b) provides that in the absence of prior discrimination, a recipient may take "affirmative action" to overcome effects of conditions which resulted in limited participation by members of one sex. It is not clear whether these sections, especially 86.3(b) are meant to control all subsequent sections where there is no language to the contrary. These

provisions arguably conflict with Section 901 of Title IX, 20 U.S.C. Section 1681(b):

> "nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number of percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area . . . ."

If an institution takes affirmative action without a formal "finding" of past discrimination, it risks accusations of reverse discrimination on one hand, or, on the other hand a strong argument that it has implicitly confessed liability for discrimination. Many institutions may find this dilemma intolerable to confront.

The regulations should state a firm and definite requirement for remedial action on evidence of underrepresentation of women, or for educational programs from which women have been traditionally excluded or in which they have been traditionally discouraged from participating.

Section 86.35 prohibits limitation of financial assistance on the basis of sex. Again, there is uncertainty generated between requirements for equality of treatment by sex and the need for remedial action to overcome the effects of past discrimination. (see item 7 for further discussion of financial aid.)

4. Family Status Considerations and Residence Requirements

Section 86.21(c)(4) includes a new requirement relating to pre-admission inquiries about the marital status of an applicant for admission. It prohibits inquiring whether an applicant is "Ms., Miss, or Mrs." If this provision is retained, undoubtedly the admissions application forms of all institutions will require immediate revision.

It has been argued by some that state institutions which limit admissions of out-of-state residents may be deprived of an important basis upon which to determine a student's residence. Contrarily it has also been argued that the regulation does not restrict such inquiries if they are phrased so as not to differentiate on the basis of sex.

The regulations need to be clarified to define the specific prohibition. It would seem that any inquiry of marital status would discriminate against women more than men. Women have traditionally be required to take the domicile of their spouse. Also, it is likely that for financial aid purposes, more weight might be given to the earning power of a male spouse than a female spouse.

While we agree that inquiries about marital status may have discriminatory overtones, the statement in Section 86.31(b)(1) that an institution shall not apply any rule concerning the domicile or residence of a student or applicant appears to be overly restrictive. Taken literally, this would negate the policy of preferred treatment, in terms of admissions and tuition, for residents. Also, it is unclear what is meant by "applicant."

In reference to housing, Section 86.32 deals generally with housing and prohibits application of different rules or regulations, different fees or requirements or different services on the basis of sex. It is clear from Section 907 of Title IX, 20 U.S.C. Section 1686 that separate living facilities may be maintained for different sexes.

In reference to married students housing, what is meant by the cryptic reference to "housing provided only to married students" in Section 86.32(a): Can married student housing be provided to married couples on a basis less expensive than that available for single students who live in dormitories? Must institutions make the housing available to divorced parents with children? Unmarried persons? Many universities have typically used inexpensive married student housing as a method of indirect subsidy to graduate students. Must this policy be altered? If so, how? The guidelines are opaque on this issue.

It would seem that universities should continue to provide housing assistance to students who have family responsibilities. But perhaps the regulations, if interpreted correctly, should prohibit such assistance on the basis of marital status. Head of household may be a more equitable basis. In this way, single women with children would not be penalized.

5. Aid to Discriminatory Organizations

One of the specific prohibitions of the regulations refers to discrimination by "assisting an agency, organization, or person which discriminates on the basis of sex in providing aid, benefit or services to students or employees." This raises the issue of providing budget allocations, office space or meeting rooms for use by such organizations as University Feminists, Panhellenic, Faculty Women's Club, AAUW, and others.

The fact sheet circulated by HEW indicated that:

> ". . . A recipient educational institution would be prohibited from providing financial support for an all-female hiking club, an all-male language club, or a single-sex honorary society. However, an organization whose membership was restricted to members of one sex could adhere to its restrictive policies and operate on the campus of the recipient university, if it received no support or housing from the university and did not operate in connection with the university's education program of activity."

This provision would severely restrict student organizations. Perhaps provision could be made that would allow groups whose purpose was wholly concerned with something other than "discrimination" to continue to use space, services, etc.

Is the use of facilities and provision of registration of organizations considered giving "aid or services" to such organizations?

6. Sex Stereotyping in Texts

One major difference in this set of guidelines from an earlier draft is omission of the entire question of curriculum and course content. There is no question that both the sex stereotyping of text and reference books and the sometimes abusive treatment of women and male teachers has constituted a major complaint of women's groups. Nonetheless, there exist serious questions respecting academic freedom involved in any Federal attempt to regulate or control this particular problem of in-classroom treatment.

The Department recognized that sex stereotyping is a serious problem, but explicitly declined to include specific regulatory provisions because of the grave constitutional problems posed by the First Amendment. See 39 Fed. Reg. at 22230.

To totally refrain from addressing the issue, however, is also not satisfactory. If regulatory statements cannot be made, at least guidelines referencing studies of sex stereotyping in texts and delineating methods to avoid the stereotyping or overcome its discriminatory effects could be given.

7. Financial Assistance

HEW has specifically invited comment on the applicability of the prohibition of financial assistance on the basis of sex. The guidelines, as written, would appear to outlaw single-sex scholorships, prizes, and awards. An alternative proposed by HEW for consideration is to "pool" financial aids such that the total financial aid received by members of one sex is equivalent to that received by the other.

It is our opinion that "pooling" is not a satisfactory procedure. Discriminatory features of individual financial aid packages would still exist. Except for remedial action and aid based on need (financial and cultural disadvantaged-based), individual financial aid packages on the basis of sex should not be allowed.

8. Retirement Plans

We favor a requirement that retirement annuity benefits to members of each sex shall be equal, rather than just a requirement that equal contributions be made by employees regardless of payout. Insurance companies traditionally base annuity payments on actuarial tables. The facts are, however that the life expectancy of the majority of men and women falls

within the same "bell" of the curve, although a slightly broader one than an individual one for each sex. Approximately 16% of the women fall above the "bell" and 16% of the men fall below the "bell". This broader bell should be used to calculate expected payout period and required contributions, thus avoiding a differentiation based on sex.

9. Private Right of Action

Section 86.63(c) implements the statutory requirement in Section 902 of Title IX that the accused institution be given a hearing prior to any order suspending, terminating, or refusing to award or continue Federal financial assistance. The law requires, first that the Director advise the applicant or recipient of its failure to comply with the law in order to seek voluntary compliance; second, that there be a finding on the record after opportunity for a hearing of failure to comply with requirements of the law; and third, that 30 days have expired after the HEW Secretary has filed a written report with each Committee of the respective Houses of Congress having legislative jurisdiction over the program involved.

There is no provision for a private right of action to enforce Title IX. In view of the type of remedy conferred by the legislation, it would also seem unlikely that the existence of a private remedy could be "implied" by a Federal court. However, as the law develops, this could be a type of proceeding subject to intervention by parties affected by allegedly discrimiantory action on a particular educational institution. Moreover, the Department of Health, Education and Welfare apparently contemplates the issuance of procedural regulations for Title IX sometime in the future, and the draft guidelines state that amicus curiae participation will be included in such procedural regulations. We would concur in this procedure.