Date: December 12, 1975

From: Office of the University Counsel
and Vice Chancellor for Legal Affairs

Subject: Title IX Regulations II

On July 21, 1975, a new regulation governing non-discrimination on the basis of sex in institutions of higher education became effective. A copy is attached for your information. These regulations apply to all educational programs receiving federal financial aid through the Department of Health, Education and Welfare.

The regulation is based on Title IX of the Education Amendments of 1972, which provides 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. . .".

A previous Memorandum to Presidents (Vol. 75 No. 16, August 7, 1975) described the mandatory procedures which all campuses must establish to deal with self-evaluation, notification and grievances. Questions with respect to these procedures should be directed to the Assistant Vice Chancellor for Affirmative Action. The following comments are designed to clarify the substantive legal requirements of the regulations.

Admission and Recruitment

Preference may not be given to members of one sex, either male or female, in the admissions process. This precludes ranking of applicants separately by sex, or prescribing numerical limitations on the proportion of one sex which may be admitted. Tests which invidiously exclude disproportionate numbers of one sex may not be employed unless such tests predict academic success and alternative, nondiscriminatory tests are unavailable.

Inquiries regarding an applicant's marital status are not permitted. This will require elimination of all Mrs./Miss designations on application forms. Colleges may not apply
rules concerning marital status or parental status which treat applicants differently on the basis of sex. Pregnancy, childbirth and termination of pregnancy may not be used to exclude applicants for admission. Recruitment at schools with students of primarily one sex may be conducted only if the net effect of such recruitment does not result in discrimination on the basis of sex.

Administration of Education Programs

A campus receiving HEW financial aid may no longer offer any course or activity separately on the basis of sex. This includes physical education, vocational, home economics and industrial courses. Although all programs are expected to be integrated immediately, physical education classes must be brought into compliance "as expeditiously as possible," with full compliance expected no later than July 21, 1978. Codes of conduct, curfews, dress regulations, or residency requirements may not discriminate on the basis of sex.

Where students are required or permitted by the institution to participate in programs which are operated independently of the University, the campus must develop procedures to assure itself that the operators of such programs will comply with the Title IX regulations (40 Fed. Reg. 24141, 45 CFR §86.31).

If a campus provides housing, it must be made available to members of both sexes on a comparable basis, both as to cost and quality. Where housing is provided to married members of one sex, it must be provided on a similar basis to married members of the opposite sex.

The University may not allocate or withhold benefits, including scholarships and financial aids, on the basis of sex. A limited exception has been created by wills, trusts, or acts of a foreign sovereign. Hence, the limitation will be honored providing that the net distribution of the whole fund available to the institution does not discriminate on the basis of sex.

The exception may be applied if students are first selected for awards through nondiscriminatory criteria and not on the basis of availability of sex-restricted funds. The sex-restricted and nonrestricted funds from other sources must then be matched to the eligible students so that members of one sex are not denied awards for which they were selected by the non-discriminatory criteria (40 Fed. Reg. 24142, 45 CFR §86.37).
Counseling

Career and program counseling assistance must treat the sexes equitably. If, for example, certain courses attract a disproportionate number of the members of one sex, the college must assure itself that the disparity is not due to sex-biased testing or counseling (40 Fed. Reg. 24141, 45 CFR §86.36). Materials used in counseling must be the same for both sexes, unless the use of such materials is essential to eliminate sex bias.

Athletics

The treatment of intercollegiate, intramural and course athletics in the regulation is extensive. All physical education classes must be integrated with respect to sex as expeditiously as possible. Within classes, however, student participation in contact sports, such as wrestling, boxing, rugby, ice hockey, football and basketball may be separated into groups based solely on objective tests of skill.

Contact sports on intercollegiate, club, or intramural levels may be organized into separate teams on the basis of sex. In addition, where selection for teams is based on competitive skill, separate teams may be maintained. Where only one team is operated for a noncontact sport, members of the other sex, if their athletic opportunities have previously been limited, must be allowed to compete for membership on that team.

The regulation requires equal athletic opportunity for both sexes and indicates the factors which will be considered in determining compliance. These include provisions of equipment and supplies, travel and per diem allowances, availability, assignment and compensation of tutors and coaches and scheduling of games and practice time (40 Fed. Reg. 24142, 45 CFR §86.41).

Employment in Education Programs

If each unit of the University is in compliance with present New York and Federal law, any changes required by this section relate only to procedural matters, not substance. The regulation generally prohibits discrimination based on sex in federally aided programs in areas of recruitment, advertising, hiring, promotion, tenure, termination, rates of pay, job classification, leaves of absence, pregnancy leaves, continuing education and any other term, condition or privilege of employment. Pay rates must be equal for jobs which require equal
skill, effort and responsibility, and jobs must be open to both sexes, with no designation of jobs for males or females only, unless sex is a bona fide occupational qualification.

The prohibitions against discriminatory testing are similar to those in student admissions, and such tests or criteria may only be applied if they are valid predictors of success in employment and if nondiscriminatory alternatives do not exist.

No employment action may be based upon marital status or parental status of an applicant or employee, and an employee or applicant may not be excluded from employment or discriminated against due to pregnancy or related conditions. Such conditions must be treated as any other temporary disability for job connected purposes.

Enforcement

The enforcement procedures under Title IX are temporary at this time. What is known presently is that the University must establish grievance procedures for resolution of student and employee complaints (40 Fed. Reg. 24139, 45 CFR §86.8). This subject will be treated in a forthcoming University advisory.

Each campus must appoint at least one employee to coordinate compliance efforts including investigation of complaints pursuant to the regulation. Notice must be given that this employee is available to answer questions concerning Title IX.

As noted in the Memorandum to Presidents of August 7, 1975, campuses must individually notify their constituents and those with whom they do business that they do not discriminate on the basis of sex in educational programs, activities, or employment, and that they are required by Title IX not to discriminate in such a manner. Those who must be notified include applicants for admission and employment, students, sources of applicant referral and unions which hold collective bargaining agreements with the campus and the University. This notice must appear in newspapers operated by each campus, alumni and student groups, local newspapers, and in materials such as catalogs, bulletins, applications and notices used in connection with recruitment.

There is a possibility that future enforcement of all civil rights laws will be consolidated under one procedure. However, for the present, all compliance procedures will follow those applicable to Title VI under the Civil Rights Act of 1964 (45 CFR §80.6 - §80.11 and Part 81).
Persons who believe that they have been discriminated against may file complaints with the Department and allege non-compliance. The Office of the University Counsel should be immediately notified if formal proceedings are instituted. The Department must investigate all complaints and attempt to bring about compliance informally. If such informal means fail, then the college must be given a hearing. In the event of such formal proceedings against the University or any state-operated unit thereof, the Office of the University Counsel will appear and defend. In certain instances the Secretary of Health, Education and Welfare can be asked to review the findings of the hearing examiner.

The Title VI regulations require each campus to maintain records of its self-evaluation and other records which will allow the Department to determine whether the campus has complied with the civil rights laws and rules. The Department will periodically review the University's practices for compliance.

Walter J. Relihan, Jr.

Attachment

cc: Affirmative Action Officers

This memorandum addressed to:

Presidents, State-operated Campuses
Presidents, Community Colleges
Deans, Statutory Colleges

Copies for information only to:

President Rose
Mr. Barlow
RULES AND REGULATIONS

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

Sec. 86.31 Education programs and activities.
86.32 Housing.
86.33 Comparable facilities.
86.34 Access to course offerings.
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86.36 Counseling and use of appraisal and counseling materials.
86.37 Financial assistance.
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Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

86.51 Employment.
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86.62-86.70 [Reserved].

Subpart F—Procedures

86.71 Interim procedures.

Subpart G—Introduction

§ 86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-388, 88 Stat. 385 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-388, 88 Stat. 484. The effective date of this part shall be July 1, 1975.


§ 86.2 Definitions.

As used in this part, the term—


(b) "Department" means the Department of Health, Education, and Welfare.

(c) "Secretary" means the Secretary of Health, Education, and Welfare.

(d) "Director" means the Director of the Office for Civil Rights of the Department.

(e) "Reviewing Authority" means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this Part.

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

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

(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 the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

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

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

(j) "Educational institution" means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 781), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

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

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

(2) Awards any degree in a profession that provides the first professional degree (regardless of whether the first professional degree in such field is awarded in 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.

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

(1) An institution offering at least two but not less than four years of college level study beyond the high school level, leading to a baccalaureate degree or an associate degree, or which offers credits or a certificate toward a baccalaureate degree; or

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

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

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

(n) "Institution of vocational education" 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.

(p) "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.

(q) "Student" means a person who has received admission.

(1) "Transition plan" means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Educational Amendments of 1972, under which special or vocational institutions participate in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

S 86.3 Remedial and affirmative action and self-evaluation.

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

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

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

(i) Develop and maintain policies and procedures for the handling of complaints of sex discrimination in connection with recruitment of students, and employment of both academic and non-academic personnel in a manner that will ensure that such complaints shall not be denied.

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

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may result 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 Director upon request, a description of any modifications made pursuant to subparagraph (c)(ii) and any remedial steps taken pursuant to subparagraph (c)(iii). (Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.4 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 recipient or applicant satisfactory to the Director that each education program or activity operated by the applicant or recipient to which this part applies will be operated in compliance with this part.

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

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this Part is not obliterated 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.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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

(a) Designation of responsible employee.

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

(b) Complaint procedure of recipient.

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) Notification of policy.

(1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such a manner, as the Director finds necessary to apprise such persons of the protections against discrimination as set forth in title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereof unless Subpart C does not apply to the recipient, and such notice concerning the application of title IX and this part to such recipient may be required to the employee designated pursuant to § 86.8.

(2) Each recipient shall make the initial notification required by paragraph (a) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumni, or alumni groups; (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: (i) Each bulletin, catalog, or application form which makes information available to any person of a type described in paragraph (a) of this section, or which it makes available to any person, by text or illustration, that such recipient, or any person with whom it is in connection with the recruitment of students or employees, does not discriminate on the basis of sex. Each recipient shall further distribute without discrimination on the basis of sex each publication described in paragraph (a) of this section. As provided in paragraph (a) of this section, such treatment is permitted by this part.

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

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

§ 86.12 Educational institutions controlled by religious organizations.

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

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)
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§ 86.16 Educational institutions eligible to submit transition plans.
(a) Application. This section applies to each educational institution to which Subpart B applies.
(b) Admitted only students of one sex as regular students as of June 23, 1972; or
(c) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular student, students of the sex not admitted prior to June 23, 1965.

(b) Provision for transition plans. An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.17 Transition plans.
(a) Submission of plans. An institution to which § 86.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) Content of plans. In order to be submitted to the United States Commissioner of Education, a transition plan shall:
(1) State the name, address, and Federal Identification Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed; and
(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 or soon to be 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 and be admitted to, and enter each class during the period covered by the plan.

(c) Rights of applicants. No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) Effects of past exclusion. To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which enumerate the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.18-86.20 [Reserved]

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

§ 86.21 Admission.
(a) General. No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, as excepted in §§ 86.16 and 86.17.

(b) Specific prohibitions.
(1) In determining whether a person satisfies any policy or criterion for admission, or in making an admission decision, a recipient to which this subpart applies shall not:
(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;
(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or
(iii) Otherwise treat one individual differently from another on the basis of sex.

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

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:
(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;
(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;
(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other 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 additional inquiry is used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.
(a) General. A recipient to which this subpart applies shall give preference to applicants for admission, on the basis of sex, only if such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.
(a) Non-discriminatory recruitment. A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.31(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.31(b).

(b) Recruitment at certain institutions. A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.31(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.31(b).

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

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

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

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

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

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

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

(5) Discriminate against any person in the application of any rules of appearance;

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

(7) Perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates in the provision of any aid, benefit, or service to students or employees;

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

(c) Assistance administered by a recipient. (1) An educational institution to study at a foreign institution. A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution: Provided, A recipient educational institution may administer or assist in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provide, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

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

(2) For a recipient:

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

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 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) Housing provided by others. (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy, assignment, or use of housing provided by another.

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

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

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.33 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.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 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 and secondary levels, all pupils shall have the opportunity to 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, tennis, or similar activities.

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

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

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 Access to schools operated by L.E.A.s.

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

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

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

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.36 Counseling and use of appraisal and counseling materials.

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

(b) Use of appraisal and counseling materials. A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate or reduce sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex.
use of a counseling test or other instru-
ment results in a substantially dispropor-
tioneate number of members of one sex 
in any particular course of study or clas-
sification, the recipient shall take such 
action as is necessary to assure itself 
that such disproportionate 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 dis-
proportion is not the result of discrimi-
nation on the basis of sex in counseling 
or appraisal materials or by counselors.
§ 86.37 Financial assistance.
(a) General. Except as provided in 
paragraphs (b) and (c) of this section, 
in providing financial assistance to any 
student, a recipient shall not:
(1) On the basis of sex, provide different 
amount or types of such assistance, limit 
eligibility for such assistance which is of 
availability to any sex, or otherwise dis-
fere nt criteria, or otherwise discriminate; 
(2) through solicitation, listing, ap-
propriation of facilities or other services, 
assist any foundation, trust, 
agency, organization, or person which 
provides assistance to any of such recip-
ients in a manner which dis-
creminates on the basis of sex; or (3) 
apply any rule or assist in application of 
any rule concerning eligibility for such 
assistance which treats persons of one 
sex differently from persons of the other 
sex with regard to marital or parental status.
(b) Financial aid established by cer-
tain legal instruments. (1) A recipient 
aman or administer in the administra-
tion of scholarships, fellowships, or 
other forms of financial assistance 
established pursuant to domestic or foreign 
wills, trusts, bequests, or similar legal 
instrum ents or by acts of a foreign govern-
ment which requires that awards be 
made to members of a particular sex 
alone or in any permutations; 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 sub-
paragraph (b)(1) of this paragraph, 
recipients shall develop and use procedures 
under which:
(i) Students are selected for award 
of financial assistance on the basis of non-
discriminatory 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 subparagraph 
(b)(1) of this paragraph; and
(iii) No student is denied the award 
for which he or she was selected under 
subparagraph (b)(1) of this paragraph.
§ 86.38 Employment assistance to stu-
dents.
(a) Assistance by recipient in making 
available outside employment. A recipient 
which assists any agency, organiza-
tion or person in making employment 
available outside of the school or 
otherwise discriminates; 
(b) Employment of students by recip-
ients. A recipient which employs any of 
its students shall not so do in a manner 
which violates Subpart E.
§ 86.39 Health, and insurance benefits 
and services.
In providing a medical, hospital, acci-
dent, or life insurance benefit, service, 
policy, or plan to any of its students, a 
recipient is required of an individual 
which is not a physician that the student is 
physically and emotionally able to continue participa-
tion in the normal educational program 
or activity as long as such a certification 
is required of all students for other phys-
ical or emotional conditions requiring 
the attention of a physician.
§ 86.40 Athletic scholarships.
(a) General. A recipient shall not 
discriminate against any student, or exclude any stu-
dent from its educational program or 
activity, including any class or extra-
curricular activity, on the basis of such 
scholarship, pregnancy, childbirth, false 
pregnancy, termination of pregnancy or 
recovery therefrom, unless the student 
quits voluntarily to participate in a separate portion of the program or activity of the recipient.
(b) Separate athletic scholarships or grants-in-aid. 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 pro-
portion to the number of students of each 
sex participating in interscholastic or 
intercollegiate athletic activities.
(2) Separate athletic scholarships 
or grants-in-aid for members of each sex 
may be provided as part of separate ath-
etic teams for each sex to the extent consistent with this para-
graph and § 86.41 of this part.
(3) Special teams. Notwithstanding 
the requirements of paragraph (a) of 
this section, a recipient may operate or 
sponsor separate athletic teams for mem-
bers of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. How-
ever, where a recipient operates or spon-
sors a team in a particular sport for 
members of one sex but operates or spon-
sors a team in a particular sport for 
members of the other sex, and athletic opportunities for 
members of that sex have previously been 
limited, members of the excluded 
sex must be allowed to try-out for the 
team offered unless the sport involved is a contact sport. For the purposes of this 
part, contact sports include boxing.
wrestling, rugby, ice hockey, basketball, and other sports the purpose of major activity of which involves bodily contact.

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

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

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Opportunity to use 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.

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 Director may consider the failure to provide necessary funds for one sex to assure equality of opportunity for members of each sex.

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

§ 86.42 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.

§ 86.43-86.50 [Reserved]

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

§ 86.51 Employment.

(a) General. (1) No person shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance, in a nondiscriminatory manner and shall not limit, segregate or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

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

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

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

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

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

(2) Hiring, upgrading, promotion, consideration for and award of tenure, de-mo, 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 agreements;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for the care of 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 scholarships and leaves of absence for purposes of training;

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

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

§ 86.52 Employment criteria.

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

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

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

(See Sec. 901, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.53 Fringe benefits.

(a) "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 provided to employees, or has been found to have in the past discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effect of discrimination on the basis of sex in violation of this subpart.

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

(c) Maintain or establish separate programs, seniority lists, career ladders, or tenure systems based on sex.

(See Sec. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.54 Compensation.

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

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

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

(See Sec. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.55 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;

(c) Maintain or establish separate programs, seniority systems, career ladders, or tenure systems based on sex (See Sec. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.56 Fringe benefits.

(a) "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 made available to employees, or has been found to have in the past discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effect of discrimination on the basis of sex in violation of this subpart.

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

(c) Maintain or establish separate programs, seniority lists, career ladders, or tenure systems based on sex.

(See Sec. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)
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§ 86.58 Effect of State or local law or other requirements.

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

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

(See 29 U.S.C. 796; 30 U.S.C. 1601, 1602)

§ 86.59 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.

(See 29 U.S.C. 796; 30 U.S.C. 1601, 1602)

§ 86.60 Pre-employment inquiries.

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

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

(See 29 U.S.C. 796; 30 U.S.C. 1601, 1602)

§ 86.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characteristics 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.

(See 29 U.S.C. 796; 30 U.S.C. 1601, 1602)

§§ 86.62-86.70 [Reserved]

Subpart F—Procedures [Interim]

§ 86.71 Interim procedure.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80-81 and 45 CFR Part 81.