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SUPPLEMENT ON TITLE IX

SUMMARY OF ISSUES BEING RAISED BY WOMEN’S GROUPS

CONCERNING THE PROPOSED REGULATIONS FOR TITLE IX

OF THE EDUCATION AMENDMENTS OF 1972

ISSUES PERTAINING TO PARTICULAR SECTIONS OF THE REGULATIONS (The numbers refer to specific sections of the regulations)

0 86.2 (m) and (n) Coverage of Private Undergraduate Professional and Vocational Schools: Title IX exempts admission to private undergraduate institutions, but prohibits discrimination in admission to vocational and professional schools at all levels of education. The proposed regulations exempt all schools which fall into both categories -- schools which are both private undergraduate and vocational or professional schools, such as schools of engineering, architecture or business. Women’s groups note that the Act itself is silent as to whether or not such programs are exempted from the admissions requirements of Title IX, and are requesting that the Secretary’s policy decision to exclude them from the admissions requirements be reversed.

0 86.3 (a) and (b) Remedial Action and Affirmative Action: The regulations require remedial action by institutions which previously discriminated; affirmative action is optional on the part of the institution in terms of overcoming effects of conditions which have resulted in limited participation by one sex. It is not clear whether the institution or HEW (or both) determine whether or not remedial action is required, or if a formal finding of discrimination is necessary for an institution to develop a remedial program. No self-evaluation by the institution is required to assess past discrimination. In the absence of self-evaluation women’s groups claim that institutions will not be fully aware of discriminatory practices or policies that may inadvertently exist.

No written plan of affirmative action is required, although affirmative "efforts" are required in athletics "with regard to members of a sex for which athletic opportunities previously have been limited."

0 86.8 Designation of Employee: Each recipient must appoint an employee to coordinate compliance efforts, including investigation of complaints. The regulation does not require that there be written procedures for resolution of complaints or that records be kept. There is no requirement that released time be given to the employee for performance of these duties.

0 86.21 (b) Admissions of Part-Time and Older Students: There are no prohibitions concerning treatment of part-time or older students. Since many women attend school part-time and/or at a later age because of family responsibilities, women claim that restrictive policies concerning age or part-time attendance (including restrictions on part-time financial aid) have a disproportionate and discriminatory impact on women. Women’s groups are asking that specific mention be made of part-time students and policies and practices that affect such students.

0 86.23 Recruitment, Remedial and Affirmative Action in Admissions: Remedial action may be required, but the regulations do not state the conditions under which it would be required (see comments and recommendations above under 86.3 (a) and (b)). No assessment is required, nor is any definition of past discrimination given. No self-evaluation by the institution is required. Affirmative action is optional; it is required only for previously single-sex institutions. A clear understanding of the limits and essential contents of remedial and affirmative action is necessary to give guidance concerning Title IX compliance.

0 86.31 Remedial and Affirmative Action in Programs and Activities: Remedial and affirmative action is specifically mentioned in the previous section concerning admissions (86.23). It is not mentioned in this section regarding treatment of students other than in the section on athletics (86.38). Although Subpart A-Introduction does state that remedial action is required when the institution has previously discriminated in an education program or activity, no mention of this occurs in this section, nor is affirmative action suggested. No self-assessment is required.

* For a more detailed analysis of issues raised by women’s groups, see The Congressional Record, July 18, 1974, E4863-4869, which contains a critique of the proposed Title IX regulations prepared by Rep. Bella Abzug and the Women’s Equity Action League (WEAL). This can be obtained by writing your Representative or Senator.

(continued on page 14)
SUMMARY OF ISSUES (continued)

- **86.31 (c) (2) Programs Not Operated by Recipients Which Are Part of the Recipients Educational Activities:** The regulations require that recipients develop and implement a procedure to insure non-discrimination against applicants, students and employees. However, there is no time limitation within which this should be accomplished, nor do the regulations require that the procedures be in writing.

- **86.35 (a) (1) Financial Assistance:** The regulations prohibit single sex scholarships, fellowships, etc. (See following section for exemptions.) The introductory material preceding the regulations states that "There may be appropriate remedial action in this area, including temporarily considering a student's sex in awarding financial aid." Women's groups feel that this provision should be incorporated into the regulations themselves.

- **86.35 (a) (2) Exemption for Rhodes Scholarships:** Scholarships, fellowships, etc. established by foreign wills, trusts, etc., including foreign governments, are exempt from the provisions prohibiting single sex financial awards. Women's groups are expected to oppose this exemption, which would allow institutions to continue to participate in the nomination and selection of men only for Rhodes Scholarships. They are likely to point out that several institutions, including Harvard and the University of Minnesota, have nominated outstanding women for Rhodes Scholarships and that these women were rejected solely on the basis of their sex.

- **86.36 Gynecological Care, Health, Insurance Benefits and Services:** The proposed regulations forbid discrimination in health, insurance benefits and services. Institutions may (but are not required to) provide benefits or services which may be used by a different proportion of students of one sex, such as family planning services. Although Section 86.37 (b) (2) requires that disabilities related to pregnancy be treated as any other temporary disability (in terms of insurance, services and other benefits), there is no requirement that gynecological problems be treated the same as other temporary disabilities. Therefore, institutions could provide health services for men's urological problems but not for women's non-pregnancy related gynecological difficulties. Women are likely to press for a requirement to treat gynecological problems the same as any other physical problems, to the extent that health services, insurance benefits and other services are offered.

- **86.35 (d) Athletic Scholarships:** The regulations allow athletic scholarships for each sex when there are separate teams for members of each sex. The regulations are not clear as to whether the total number of such single sex scholarships must be equal (or comparable), or what is required when there are no separate teams for each sex. Thus there is little guidance for institutions or women's groups.

- **86.38 (b) Determination of Athletic Interest:** The proposed regulations require an annual determination to determine student interest, as an aid in planning affirmative efforts. HEW officials have stated that the "determination" need not be a survey but could be in the form of an advisory committee, although the the regulations themselves are not specific on this point. Women's groups are likely to press for a survey rather than any other type of "determination" of interest. They claim that such a survey would more truly reflect what women's interests are. They also note that it might be in the institutions own self interest to utilize the results of a survey -- particularly when it showed lack of interest -- as a justification for a lack of programming in particular areas.

- **86.38 (c) Athletics and Affirmative Efforts:** The recipient is required to make affirmative efforts when athletic opportunities have previously been limited. No assessment of past opportunities is required. No examples of "affirmative effort" are given. No remedial action is required. Women's groups are likely to call for written affirmative action plans.

- **86.38 (c) (1) Informing Students of Equal Athletic Opportunities:** The regulations require institutions to inform students of equal athletic opportunities. No particular method is suggested or required, nor is there a time period within which this must be done. Notification is not required to be written. Notification is required only for the members of the sex for which athletic opportunities have been limited.

- **86.38 (c) (2) Support and Training Activities in Athletics:** Institutions are required to "provide support and training activities [for members of a sex for which athletic opportunities have been limited] designated to improve and expand their capabilities and interests to participate in such opportunities." No guidance is given to institutions as to the kinds of support and training activities that might be undertaken by institutions. No written plan of support or training is required. (See comment under 86.38 (c).)

- **86.38 (d) Equal Opportunity in Athletics:** The regulations require institutions to make affirmative efforts to "equalize opportunities for members of both sexes, taking into consideration the determination" made by the institution. No guidance is given to the institution as to what constitutes "equal opportunities." Without such guidance, institutions and women's groups are likely to be forced into an adversary role as they grope for new ways of handling sports programs. Women's groups are likely to press for a definition
of "equal opportunity" to be incorporated in the regulations, and that such a definition include, but not be limited to, the following:

- selection of sports and levels of competition; recruitment efforts; provision of equipment and supplies; scheduling of games and practices; travel and per diem allowance; award of athletic scholarships; opportunity to receive coaching and instruction; awarding of letters and other sports awards; provision of coaches and instructors; provision of locker-rooms; facilities for practice or competition; provision of medical and training facilities, services and programs; provision of uniforms; provision of intramural and recreational opportunities; provision of publicity.

86.38 (e) Equal Opportunity and Separate Teams for Each Sex: The regulations mention separate teams for each sex only in the context of not discriminating on the basis of sex in the provision of necessary supplies, equipment or in any other manner. No guidance is given as to when an institution should or may provide single sex or mixed teams. There is no guidance concerning the participation of women on men's teams when they meet the skill levels required. The following recommendations are being suggested by several women's groups for guidance as to when teams may be separate or integrated:

1. A recipient may in any sport at any level of competition operate or sponsor separate teams for each sex for which members of the team are selected on a basis of competitive skill, provided that the teams are treated without discrimination on the basis of sex.

2. If a recipient operates or sponsors separate teams for each sex in any sport at any level of competition, and if there are insufficient members of either sex available to form a viable team for members of that sex, such recipient shall operate or sponsor a single team in that sport at the same level of competition, for which members of each sex are selected on the basis of competitive skill and without discrimination on the basis of sex.

3. In making the determination about single sex and mixed teams, an institution shall consider such things as the number of athletic opportunities for each sex, the level of opportunities for participation by each sex, the selection of sports available to each sex, and the skill level required for the particular sport.

4. If a recipient operates or sponsors a single team in any sport at any level of competition for which members are selected on the basis of competitive skill and without discrimination on the basis of sex, and if members of one sex are substantially excluded on the basis of skill from that team, the recipient shall provide, instead of a single sex team, separate teams, provided sufficient members of each sex choose to participate therein to form a viable team for members of that sex.

5. If not enough persons of one sex are interested in a sport to form a viable team, opportunities for participation must be developed for that sex, such as intramural, club and extra-curricular activities; skills workshops; or special instruction, as part of the affirmative action program.

6. If separate teams are maintained, and if opportunities for competition are not equal for reasons beyond the control of the institution (such as an insufficient number of teams at other institutions available for competition), members of the team with limited opportunities must be allowed to play on the team that has better opportunities, provided that selection for that team is on the basis of ability and without discrimination on the basis of sex.

86.38 (f) Equal Expenditures in Athletics but Required for Each Sex: The regulations state that equal aggregate expenditures for athletics are not required for members of each sex. However, in the introductory section preceding the regulations, this section is interpreted as not requiring equal aggregate expenditures for members of each sex or equal expenditures for each team. The introductory statement is inconsistent with the actual regulation 86.38 (f). Several women's groups are suggesting that where separate teams exist in the same sport, expenditures should be equal on a per capita basis, unless the institution can show that the different expenditure rate is related to non-discriminatory factors beyond the institution's control. Nothing in the section would be interpreted to allow differences in equipment, supplies, facilities, recruiting, opportunities for coaching and instruction, scholarships and per diem allowances; nor would the regulations be interpreted as prohibiting equal aggregate expenditures for both sexes.

Subpart E Employment, General: The introduction preceding the regulations states that an employer who complies with Subpart E would be in compliance with both Title VII of the Civil Rights Act of 1964 and Executive Order 11246 (with the exception of pensions), even where the latter provisions differ from each other. The statement is likely to be misconstrued as implying that compliance with Subpart E excuses the recipient from the affirmative action requirements of Executive Order 11246. Moreover, the sections covering pregnancy are not consistent with Title VII.

86.41 (a)(1) Part-Time Employees and Fringe Benefits: The regulations specifically mention and cover permanent part-time employees. Part-time employees would be required to be paid fringe benefits when they are permanent and when an institution's female permanent employees are predominantly part-time, or when the part-time permanent employees are disproportionately female. The introductory material preceding the regulations defines "permanent" as "any employee who is expected to work or has in fact worked at least one semester at half-time or half-time equivalent." The Secretary has specifically requested comments on this.

Women's groups are expected to support this provision, despite the cost factors involved. They claim that institutions already pay fringes for men with two or more 'part-time' assignments as is the case in joint appointments. Women's groups are also concerned that an exemption for part-time employees in the area of fringe benefits could set a precedent in allowing further exemptions for part-time and other employees as well.
However, not all fringe benefits can readily be pro rated, e.g., health insurance, and certain life insurance policies. Women's groups are suggesting that where fringe benefits cannot readily be provided on a proportional basis, employers should offer to pay a proportional amount if the employee wished to pay the remaining amount necessary to obtain full coverage.

- 86.46 (b) (2) Equal Pensions: As currently written, the regulations would permit either equal contributions or equal benefits. Thus, a pension plan such as TIAA -- which requires equal contributions for each sex but pays less per month to women -- would be permissible. Similarly, men often receive less life insurance than women for the same amount of money because of the same actuarial tables. This provision is in line with the Equal Pay Act but would put employers in violation of Title VII of the Civil Rights Act of 1964, which requires equal benefits, regardless of the amount of contributions made by the employer. Since virtually all employers are covered by Title VII, and only some by Title IX, institutions may be misled into thinking that they are in compliance with all federal requirements by following Title IX regulations.

The pension issue is one of the most controversial issues concerning the employment of women. The Secretary has requested comments on three alternatives:

(1) Benefits or contributions should be equal.

(2) Benefits should be equal on a periodic basis, whether or not the contributions are equal.

(3) Benefits and contributions should be equal and based on a unisex or single actuarial table for both sexes combined.

Women's groups claim that current single sex actuarial tables are a sex-based classification, and therefore are inherently discriminatory. They note that minorities have an even shorter life expectancy than whites, but minorities do not collect higher pensions based on that fact. They also point out that unequal pension benefits disproportionately affect minority women, whose life expectancy is less than that of white males and white females. In spite of this fact, minority women do not receive a higher pension as do white males because of their lower life expectancy.

Women's groups generally do not support option 2 (equal benefits regardless of contributions), because it would perpetuate sex based classifications. These added costs might fall disproportionately on those institutions with the highest number of women employees. A unisex table (similar in concept to the uni-race tables now in use) is supported by women's groups. (Note: contrary to suggestions implied in the introductory materials preceding the proposed regulations, a uni-sex table would not violate Title VII.)

- 86.47 (e) (1) Pregnancy and Notification to Employer: The regulations require that an employee cannot be forced to begin pregnancy leave if her physician certifies that she is able to work. The regulations also state that the pregnant woman must notify the employer 120 days prior to the expected birth of a child. This provision treats pregnancy differently from other temporary disabilities and would violate the Sex Discrimination Guidelines of Title VII. Women's groups are likely to point out that men are not required to notify employers 120 days before elective hernia or prostate surgery or other elective procedures.

Moreover, such a regulation would be a hardship on women who have not read the regulations. Although Title IX forbids employers from discriminating, this portion of the proposed regulations puts an unrealistic requirement on the employee. Institutions following the proposed regulation might be liable to charges of discrimination under Title VII.

- 86.47 (e) (1) and (2) Pregnancy and Physician Certification: The regulations (as mentioned above) state that an employee cannot be forced on maternity leave if her physician certifies in writing that she is capable of performing her duties. Similarly, the employer cannot require the leave to be longer than two weeks after the physician certifies in writing her ability to perform the job. (For an exception to this regulation, see next section.)

These provisions also treat pregnancy differently from other temporary disabilities and violate the Sex Discrimination Guidelines of Title VII. A physician's certification of ability to work is generally not required for any other temporary disabilities (such as a broken leg or gall bladder) upon return to work.

Women's groups are suggesting that physician certification to return to work not be required unless such certification is required of all other temporary disabilities.

- 86.47 (e) (2) Pregnancy-Maternity Leave and Teachers: The regulations allow institutions to force a woman who takes a leave for pregnancy or childbirth -- no matter how short the leave -- to remain on leave until the beginning of the first full academic term following her physician's certification that she is able to work. The provision also treats pregnancy differently from other temporary disabilities and violates the Sex Discrimination Guidelines of Title VII. Other disabilities, such as hernias, prostate surgery, broken limbs, etc. may keep persons off the job for several weeks, yet they will be allowed to return without being forced to wait for the beginning of the next academic term. Moreover, women's groups claim that the provision is badly written; a woman who took two days' off because of pregnancy could be forced to stay on leave until the next semester began.

PROCEDURES: SUBPART F

General Comments: Women's groups are concerned with the lack of due process and other rights for parties who file complaints under Title IX. They note that institutions who disagree with HEW's findings can request a formal administrative hearing; complainants who disagree cannot request a hearing nor do they have any right of appeal.
While the procedures in Subpart F are generally more cognizant of complainant's rights than those in Title VI of the Civil Rights Amendment (which forbids discrimination on the basis of race, color and national origin, and which Title IX is patterned after) institutions are subject to the requirements of both Acts. Inconsistencies between the procedures of both Acts will be a hardship on institutions as well as causing confusion, should a minority female file simultaneous charges of race and sex discrimination under both Acts.

86.61 (b) Compliance Reports: Recipients are required to keep "such records" and submit "timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the Director may determine to be necessary." This regulation is vague and does not tell institutions what kinds of records they should keep, in what form the records should be kept, and how long records should be kept. Women's groups are suggesting that required records concerning students include admissions and applicant data, recruitment materials for all programs, and student participation data in in-house programs.

86.62 (b) Notification of Complaints: The complainant must be notified "promptly" that the complaint has been received, but there is no requirement that the recipient or applicant for federal funds be notified. Since months or years may elapse before an investigation is begun, institutions will not have the opportunity to resolve discrimination problems before a compliance review because they will not necessarily know that a complaint has even been filed against them. This also violates due process considerations.

86.62 (d) Notification of Investigations and Results: Complaining parties are notified only after the investigation is finished. If a finding of noncompliance is made, the complainant is notified, but there is no requirement that the details of the letter of finding of noncompliance be given to the complainant. Complainants are not notified when an investigation is being conducted, nor are students and employees notified.

Women's groups claim that the lack of notification that an investigation is being planned or carried out may deprive HEW of useful information needed for fair and accurate investigations. They note that notification after an investigation may cause more delay and further investigation because complainants often have information in addition to that contained in the formal allegations.

86.62 (d) Investigations and Letters of Findings: There is no time limit on how soon a letter of finding must be sent after an investigation. Under HEW's enforcement of Executive Order 11246, the time between investigations and a letter of finding has often been a matter of years; indeed some investigations have never been followed by a letter of finding either clearing the recipient, or finding it in noncompliance.

Women's groups are worried that similar delays may occur under Title IX.

86.64 (a) Opportunity for Hearings: Only the applicant or recipient can request hearing when HEW makes a determination. Should complaining parties disagree with HEW's findings, there is no process whatsoever whereby they can obtain a formal hearing to appeal the decision.

Women's groups claim this violates individuals' rights to due process. Furthermore, they note that nothing in Title IX prohibits the establishment of formal appeal procedures for complaining parties which would parallel those available to recipients and applicants.

GENERAL ISSUES:

Textbooks and Curriculum: This area is not covered by the proposed regulations, although earlier drafts of the regulations required that institutions set up procedures for the evaluation of textbooks and curriculum for sex bias. HEW is concerned about infringements of freedom of speech. The Secretary of HEW has specifically requested comment on this issue. Women's groups claim that many departments have existing mechanisms to review curriculum and textbooks and that procedures to evaluate sex bias could readily be incorporated into them. Women's groups also feel that procedures should be developed to handle specific complaints about sex bias in textbooks and curriculum.

Examples of Discrimination: The proposed regulations have very few examples of what is allowed or prohibited, although some examples were included in a Fact Sheet distributed by HEW. (The Fact Sheet was not published in the Federal Register, however, and therefore has questionable legal standing.) Institutions will lack guidance if examples of permissible and prohibited practices are not incorporated into the regulations themselves.

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