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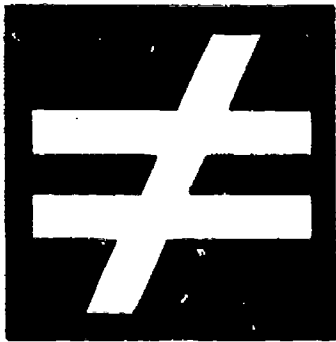
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ABSTRACT

The contents of this volume published by the Center for Law and Education, which was established to protect and advance the legal interests of the poor through research and action on the legal implications of educational policies, include the following articles: "Introduction" and "Sexism in Public Education: Litigation Issues," Susanne Martinez; "Sex Discrimination Against Students: Implications of Title Nine of the Education Amendments of 1972," Margaret C. Dunkle and Bernice Sandler; "Chapter 622: One State's Mandate," Regina Healy and Diane Lund, an examination of the first anti-sex discrimination legislation in the country, which was passed into law by the Governor of the Commonwealth of Massachusetts on August 5, 1971; "Kalamazoo: A Model for Change," Carol Ahlum, which examines the activities of the Committee to Study Sex Discrimination in the Kalamazoo Schools and the changes in school activities resulting from the actions of that committee; and "Judicial Standards for Determining Sex Discrimination," Paul Weckstein. Also included is a regular feature of the journal, "Notes and Commentary," which reviews current developments in the issues of sex discrimination, classification, corporal punishment, and student rights. (JM)



INEQUALITY IN EDUCATION

Number Eighteen
October 1974

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Introduction

Why should the issues of sex discrimination in the schools concern legal services attorneys, especially considering their limited time and resources? The answer lies both in facts about the clientele serviced by legal services agencies and the role of the school in socializing and molding citizens.

Data distributed by the United States Department of Labor indicates that forty percent of 1.8 million families with incomes below the poverty level in 1970 were headed by women. The median salary for women in the last census was \$4,977 compared to \$8,227 for men. It has been estimated that over half of today's high school girls will work full-time for up to thirty years, and ninety percent of these high school girls will be employed for other significant periods of time. Unless major changes are made in the educational options and opportunities available to these students, a vast majority will find themselves doomed to limited, low paying and marginal employment.

Schools are the primary vehicles in our society for socialization and career motivation. To the extent that public schools treat young women as second-class citizens, inferior to their male classmates and less worthy of expenditures of educational resources, women will continue to occupy the lower economic stratas of our society. Despite the widespread myth that young girls can look forward to a carefree married life supported by a male breadwinner, the facts are that the majority of women will work—and will work in economically disadvantaged jobs.

Legal services attorneys have an important and legitimate obligation to exert their efforts to break the cycle of poverty and low productivity generated, at least in part, by the failure of our schools to accord young women equal educational opportunities. Just as achieving equal educational opportunities in the public schools has been a vital and ground breaking issue for oppressed minorities, equal educational opportunities for women are a necessary ingredient to the attainment of equal justice and opportunity for members of both sexes.

Susanne Martinez

SEXISM IN PUBLIC EDUCATION: Litigation Issues

by Susanne Martinez

In 1974 it is almost inconceivable that a public school district would openly and blatantly exclude students from particular high schools because of their race, or deny minority students access to desirable vocational education programs because of the demand for such programs by nonminority students, or select learning materials which openly defame or ridicule members of a particular religion. Substitute the word sex, however, and such practices are not only commonplace, but openly performed and righteously defended. Young women throughout the country have been excluded from elite academic high schools,¹ denied access to 'masculine' vocational education programs² and confronted daily with school textbooks which portray them as placid, unimaginative and unproductive citizens.³

One of the most interesting phenomena about sexism in public education is the openness with which it is practiced. Whereas most school officials in the post-*Brown v. Board of Education* era of educational change have been hesitant to publicly rest their educational policies on overt racial grounds, school administrators are seemingly naive about the fact that it is illegal to condition the type of education a child receives on the basis of his or her sex. Legal services attorneys presently challenging racially discriminatory practices in the public schools can readily attest to the sophistication and complexity of many defendant strategies. Litigation in these cases has correspondingly become more difficult with increased reliance upon evidentiary presumptions and inferences derived from statistical data.

Where sex rather than race is the factor in

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determining what educational opportunities are made available to a child, educators have been far more candid in expressing the basis for their discriminatory policies. Perhaps it is simply a reflection of a general societal insensitivity to the prevailing second-class citizenship of women, but school administrators have been relatively open in utilizing sex as the basis of educational decision-making. An example of the candor displayed by school administrators can be found in two recent suits against sex discrimination in public schools in California, *Della Casa v. Gaffney, supra* and *Berkelman v. San Francisco Unified School District, supra*.

The *Della Casa* case challenged a school district's practice of excluding female students from auto mechanics courses. The principal of the high school in which the plaintiff was a student was forthright in stating his reasons for excluding women from auto shop classes. His basis was:

It so happens that auto mechanics has been a male occupation. Whether or not we agree with this it is still predominantly a male occupation. If we open the regular school program to girls, then for each girl in the class a boy does not have a chance to enter. . . .⁴

Similar candor was displayed by school administrators in *Berkelman v. San Francisco Unified School District, supra*. *Berkelman* involved a challenge to the admission standards of an elite academic high school in San Francisco where the standards for admission of female applicants were significantly higher than for male applicants. When a group of female students with higher grades than admitted male students were denied admission, they filed suit in federal district court in San

Francisco. An assistant superintendent of the school district publicly justified the discriminatory admissions standards as necessary "to keep girls from overrunning [the special school]."5 The message communicated by the school administration in each case was that female students were somehow innately less worthy than male students.

This article will attempt to review some of the areas of sexism in education which have lent themselves to litigation challenges and to suggest other areas in public schools which should be examined. In almost every instance the legal challenges have been based upon constitutional arguments that the discriminatory practices violate female students' rights to equal educational opportunities under the Fourteenth Amendment or under applicable state statutory provisions.6 Utilization of the provisions of the Fourteenth Amendment to combat sex discrimination in state institutions and legal authority for these attacks have been discussed elsewhere at length and will not be repeated here.7 Similarly, the possible use of the Education Amendments of 1972 (Title IX) and the long awaited implementing regulations which appear to offer the promise of eradicating some of the overt practices of sex discrimination are discussed elsewhere in this issue.

Sex discrimination in education can generally be divided into two categories: (1) the most overt forms of discrimination, such as the exclusion of women from particular schools, classes, activities or other educational benefits, and (2) the more subtle forms of discrimination evidenced by the use of sexually biased textbooks, guidance counseling of women into 'acceptable' programs, differential expenditures of resources on male and female students and personnel staffing patterns. The overt forms of discrimination, naturally, present the most manageable issues for litigation.

Overt Sex Discrimination

In the past few years there have been at least three successful suits challenging the exclusion of women from elite academic schools. The first victory came in a challenge to the total exclusion of women from the University of Virginia, *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184 (E. D. Va. 1970). The court in *Kirstein* found that the University of Virginia offered educational opportunities unavailable at any other state-supported institution and held that

the exclusion of female students from the University on the basis of sex violated the Equal Protection Clause of the Fourteenth Amendment.8

A similar conclusion was reached in *Bray v. Lee*, 337 F. Supp. 934 (D. C. Mass. 1972). In *Bray v. Lee* female applicants for admission to Boston Latin, an elite academic high school, were required to have higher scores on the admission examination than male students. The school district justified the discriminatory admissions standards on the grounds that they had insufficient physical facilities to accommodate an equal number of girls and boys.9 The court rejected those arguments as justifying the discriminatory admissions standards and held:

Female students seeking admission to the Boston Latin School have been illegally discriminated against solely because of their sex and that discrimination has denied them their constitutional right to an education equal to that offered male students at Latin School. [*Id* at 937.]

In *Berkelman v San Francisco Unified School District*, *supra*, girls applying for admission to Lowell High School, the school district's only academic high school, were required to have higher grade point averages than were boys. A distinguishing factor in the *Berkelman* case was that the differential admission standard was adopted to maintain a 50-50 ratio between male and female students at the school.10 In *Kirstein* female students were totally excluded and in *Bray* the ratio of female to male students was 1-3. Nevertheless, the Ninth Circuit reversed the district court's ruling and found that: "...the use of higher admissions standards for female than for male applicants to Lowell High School violates the Equal Protection Clause of the Fourteenth Amendment."

Vocational Education

Another area of overt exclusion of women in which there has been litigation involves assignment of students to vocational education classes. In one unreported New York case, *Sanchez v. Baron*, *supra*, and two unreported California cases, *Della Casa v. Gaffney*, *supra*, and *Steward v. Della*, *supra*, successful challenges were made to the

exclusion of female students from auto shop, wood shop and metal shop classes. In each case, the respective school districts yielded before final judgment and consent decrees were entered. The school districts' inability to defend the discriminatory practices involved in the litigations is indicative of the lack of legal justification for those policies. Nevertheless, similar discriminatory assignment of students to vocational programs continues to exist unchallenged in many school districts.

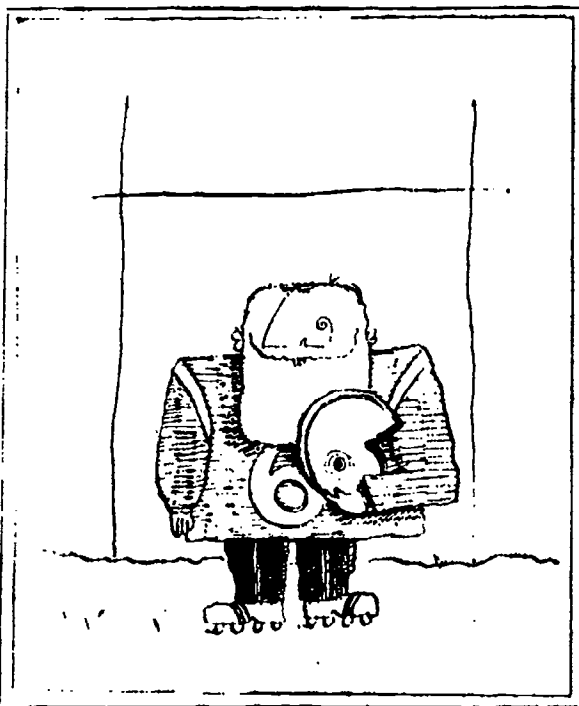
The real problem in vocational education is not that of the exclusion of women, a readily challengeable practice which was overturned in the *Sanchez, Della Casa* and *Steward* cases, but the more insidious counseling and tracking of female students into 'acceptable' vocational programs. The adoption and implementation of the HEW anti-sex discrimination guidelines will undoubtedly eliminate overt barriers to women in vocational education classes. Several approaches to the 'counseling' problem will be discussed *infra*.

Athletics

The greatest proliferation of sex litigation in education has surrounded that long-standing practice of excluding or discriminating against female students in school athletic programs. Women have routinely been denied the opportunity to enter interscholastic athletic competition, often the avenue to lucrative college scholarships and opportunities. In other instances where women are permitted to compete, their teams are often financed by candy sales while the male athletic teams are supported by generous allocations in the school budget.

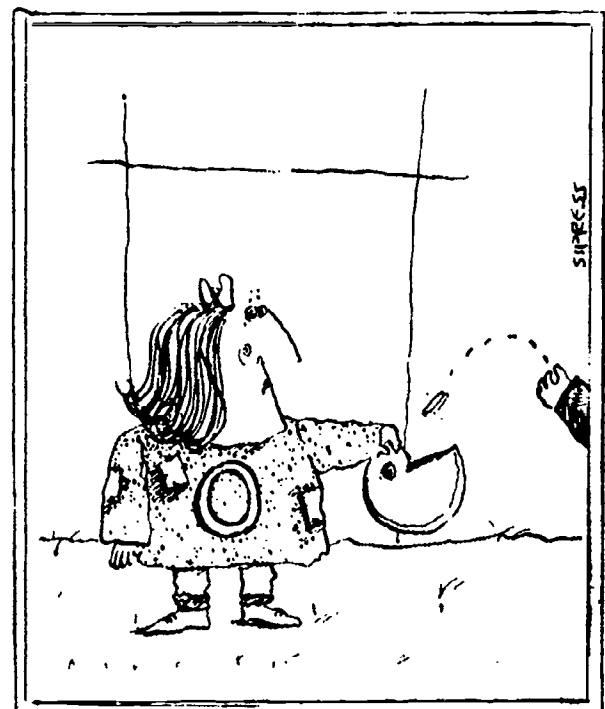
The existing structure of providing impressive athletic programs for male students while providing female students with either no programs or token programs is highly vulnerable to legal challenge. Challenges to such discrimination have generally fared well in the courts, particularly where the athletic competition involved is a non-contact sport such as skiing¹¹ or golfing¹²

CENTRAL HIGH SCHOOL
BOY ATHLETE OF THE YEAR



ROCKY SMITH COLLECTED 15 VARSITY LETTERS FOR THE BOYS' TEAMS THIS YEAR AND A FULL ATHLETIC SCHOLARSHIP TO STATE U.

CENTRAL HIGH SCHOOL
GIRL ATHLETE OF THE YEAR



JUDY JONES COLLECTED \$17.30 CENTS FOR THE PURCHASE OF VARSITY LETTERS FOR NEXT YEAR'S GIRLS' TEAMS...

Cartoon by David Sipress

and where there is no program at all for women students. Some courts, however, have suggested that a separate but equal athletic program would find judicial approval.¹³ Requiring equal financial support for women's athletic programs would constitute a major upheaval in most school district budgets. Yet, a more equitable allocation of resources is essential to providing equal opportunities for both male and female students.

Scholarships

One area of overt discrimination against women which has not yet been touched is the distribution of scholarships and awards. In many instances, scholarships are offered to high school students on the basis of sex. Where private organizations award such scholarships, it may be difficult to engage in a direct attack without the requisite state action. However, there are certainly grounds to prevent public schools and their employees from participating or assisting such agencies in distributing benefits in a discriminatory fashion. Frequently school counselors and administrators are asked to assist in choosing scholarship or award recipients and actively participate by recommending students, soliciting applications, and in some cases, actually selecting the beneficiaries. If a private organization asked for help in awarding scholarships only to white students, presumably many school districts would decline to participate. Willingness, however, to award scholarship only to boys is prevalent and constitutes involvement in discriminatory activity which should not be permitted in public schools.

There will, of course, be considerable opposition to making these benefits equally available to female students. But without equal access to monetary benefits, female students will continue to be denied equal educational opportunities. Moreover, as talented young women are permitted to participate on an equal basis with male students in athletic competition, the wealth of athletic scholarships and grants distributed by the leading universities around the country should also be distributed more equally between male and female athletes.¹⁴ Any program supported or sponsored by public schools which allocates opportunities or benefits on the basis of sex should be closely scrutinized to ascertain the underlying legality of the distinctions maintained.

Covert Sex Discrimination

It is naturally more difficult to deal with the more subtle forms of sex discrimination commonplace in our school systems. For example, even in districts with no overt sex-based policies in curriculum assignment, female students frequently find themselves placed in curricula deemed 'acceptable' for girls. Vocational programs leading to high paying blue collar occupations are filled with male students while female students are assigned to secretarial courses.¹⁵ Similarly, in academic curricula female students are assigned to life sciences while male students take physics and chemistry. Some guidance counselors candidly admit they steer young women toward stereotyped jobs like secretary or nurse.¹⁶

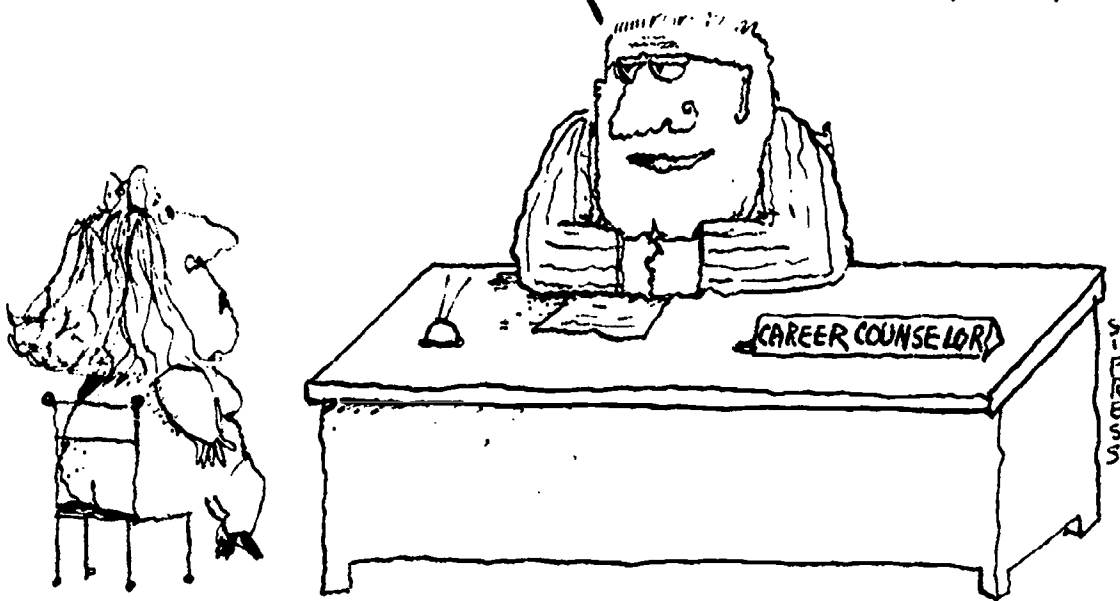
Vocational Testing and Counseling

A manageable target for challenging stereotyped vocational counseling of young women is the commonly used vocational interest tests. Guidance counselors use the results of these standardized examinations in determining possible career patterns of students. Some of these tests have discernable sex biases. For example, in the widely used Kuder DD Occupational Interest Survey, occupational scores are based on the degree of agreement between the students' responses on the test and responses of satisfied people in particular occupations and college majors. Male students are rated on 77 occupations and 29 college majors while female students are rated on 57 occupations and 27 college majors. Some occupations are reported only for males and some only for females.¹⁷ Examples of these are:

Reported for Females Only	Reported for Males Only
bank clerk	banker
beautician	building contractor
dental assistant	electrician
dietician	minister
nurse	osteopath
office clerk	policeman ¹⁸
primary school teacher	

An explanation for the differential reporting is that there may be too few women in some occupations to obtain a statistically sound norm

There are enormous opportunities for a young girl today... first of all, how fast can you type?



Cartoon by David Sipress

upon which to base the score. And yet, continued utilization of a discriminatory testing device obviously perpetuates the existing employment discrimination against women. While it may be difficult to evaluate the precise impact of these vocational tests, at least one author has said:

It is not unreasonable to suggest that these interest inventories initially developed in the 1930's have gone along with the rest of the trends in American society to limit the career possibilities considered by women. These measures now lag behind the general trend to end discrimination and stereotyped, biased views of various groups in American society.¹⁹

Test materials with inherent racial biases have been banned from public schools, *Larry P. v. Riles*, 343 F Supp. 1306 (N.D. Calif. 1972). Testing materials with sexual biases similarly should be eliminated from school programs.

Textbooks

School textbooks present another example of a subtle, yet discernable sexism. The familiar

Dick and Jane elementary readers, depicting the Janes as passive, spiritless creatures and the Dicks as the adventuresome, creative leaders, communicate the stereotypical image of females²⁰ at a tender age. Numerous writers have documented the blatant biases against females which are commonplace in school texts.²¹ Some states have enacted legislation requiring that public school texts be purged of such defamatory material and that affirmative material descriptive of the contributions of members of both sexes be added.²² While these statutory provisions can be used to demand exclusion of sexually biased texts from schools, there has been relatively little implementation or enforcement of the provisions.²³ Litigation has already been used to challenge acceptance of racially defamatory and imbalanced school texts.²⁴ Similar efforts should be made to expunge materials of sexual biases.

Economic Expenditures

Discriminatory allocation of economic resources is another issue which needs to be examined. How do the expenditures for women's athletic programs compare with men's? In San

Francisco, the budgeted amount for women's sports programs in junior and senior high schools constituted a mere 6 percent of the amount allocated to men's programs.²⁵ The San Francisco situation is not at all unusual. In some school districts, men's athletic teams are outfitted with elaborate uniforms while women's teams wear standardized gym uniforms.²⁶

Elite academic schools which exclude or discriminate against female students also frequently receive more than their fair share of the economic resources of a school district. Expensive laboratories and resource centers—unavailable to the excluded female students—constitute substantial financial drains on the school budgets. While challenges to allocation of economic resources between school districts generally have lost considerable impetus as a result of the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278 (1973), the doctrine enunciated in that decision does not imply similar acceptance of *racially* imbalanced allocation of economic resources nor *sexually* imbalanced allocations. School districts would be hard-put to come up with cogent arguments to support differential expenditures on the basis of students' race or sex.²⁷

Finally, young women do not need to read biased textbooks to learn about the inferior status of women in this society; they need only observe the staffing patterns prevalent in their schools. Despite the fact that the vast majority of teachers are women, there are only five or six school districts with female school superintendents. Only a handful of senior and junior high schools are headed by women. Just as efforts to obtain equal educational opportunities for minority students have been accompanied by a recognition of the importance of minority persons in leadership positions in schools, advocates of educational opportunities for females must seek to develop leadership models for young women. It is unlikely that the public school's role in perpetrating the biased and stereotypical role of girls and women can significantly change unless women are equally represented in important and visible decision-making positions.

Footnotes

¹ *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972) (Boston Latin High School); *Berkelman v. San Francisco*

Unified School District, _____ F.2d _____ (9th Cir. 1974). Other major cities such as New York and Philadelphia have had similar policies excluding girls from elite academic high schools or assigning them to separate academic high schools.

² *Della Casa v. Gaffney*, Civil Action No. 171673 (San Mateo Supr. Ct., stipulated judgment filed April 11, 1973) (auto shop); *Steward v. Della*, Civil No. 134173 (Contra Costa Supr. Ct. 1973) (wood shop); *Sanchez v. Baron*, Civil No. 69-C-1615 (Jan. 6, 1971) (metal shop).

³ E.g., "Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles," 24 *Hastings Law Review* 1191, 1199 (May 1973).

⁴ Letter from Thomas J. Gaffney, Principal, South San Francisco High School, dated August 24, 1972, attached as Exh. "B" to complaint in *Della Casa v. Gaffney*, *supra*.

⁵ Ralph Kauer, Assistant Superintendent, San Francisco Unified School District, Associated Press Dispatch, September 22, 1971. [See the Notes and Commentary section in this issue for a further discussion of *Berkelman*.]

⁶ For example, the plaintiffs in *Della Casa v. Gaffney*, *supra* and *Steward v. Della*, *supra* relied upon provisions of the California Constitution which specifically prohibited discrimination on the basis of sex in any program leading to employment. The plaintiffs argued that exclusion of women from vocational education programs fell within the prohibition of that section of the California Constitution. Other provisions of the California Education Code which called for equal treatment of all students were also relied upon. Unfortunately, the issues were never adjudicated since the school districts in each case agreed to stipulated judgments in favor of the plaintiffs.

⁷ E.g., "Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles," *supra*.

⁸ A similar challenge to the exclusion of males from an all-female college in South Carolina failed, however, partly on the basis of the fact that the plaintiffs conceded that the all-female college to which they sought admission had the same curriculum and educational opportunities available in other state-supported institutions with open admissions policies, *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd per curiam* 401 U.S. 951 (1971). The *Williams* case read in comparison with the *Kirstein* case seems to apply a pre-*Brown v. Board of Education* 'separate but equal' doctrine to sex exclusions. The fact that the *Williams* case involved men, an undisadvantaged group, attempting to secure access to an all-female college may also have been an unexpressed problem in the case. In any event, the *Williams* case clearly did not contain the most sympathetic factual situation to present the issue. Other cases in the early 1960's also upheld exclusion of women from all-male colleges, e.g., *Heaton v. Bristol*, 317 SW 2986, *cert. denied* 359 U.S. 2301 (1958), *Allied v. Heaton*, 336 SW 2d 251, *cert. denied* 364 U.S. 517 (1960), but should not be considered as dispositive in light of the tremendous

change in judicial attitude towards sex under the Fourteenth Amendment in the past few years, *Reed v. Reed*, 401 U.S. 74 (1971), *Frontiero v. Richardson*, _____ U.S. _____, 93 S.Ct. 1764 (1973).

9 The argument advanced by the school district was somewhat circular. The district created physical facilities which had insufficient seats for the qualified women and then attempted to justify its discriminatory practices on the grounds that the facilities were insufficient.

10 It was suggested that the percentage of males to females at Lowell would shift to roughly 60% female and 40% male if equal admissions standards were utilized for male and female applicants.

11 *Brendan v. Independent School Dist.*, 342 F. Supp. 1224 (D. Minn. 1972).

12 *Reed v. Nebraska Athletic Assn.*, 341 F. Supp. 252 (D. Neb. 1972).

13 *Haas v. South Bend Community School Corp.*, 289 NF 2d 475.

14 Billie Jean King, the women's tennis champion, testified before a Senate education subcommittee last year that some 50,000 men annually earn a college education through athletic scholarships while fewer than 50 women in the entire nation obtain any such assistance.

15 For example, at San Francisco's vocational high school, the courses available to female students are commercial art, drafting, dry cleaning, electronics, food preparation, power sewing and restaurant services (waiter/waitress training). Male students have available such courses as aircraft mechanics, construction crafts and automotive mechanics. Female students seeking to enroll in a traditionally 'male' trade course may be admitted if they are persistent, but are openly discouraged, *see*, "Sex Discrimination in the San Francisco Unified School District: A Limited Review," an unpublished paper by Jean Wilcox, 3rd Year Student, Golden Gate Law School. [See also, Shirley McCune, "Vocational Education: A Dual System," 16 *Inequality in Education* 28, March 1974.]

16 Interview with Walter Phillips, Supervisor, Counseling, San Francisco Unified School District, "Sexism in Schools," *San Francisco Examiner*, March 7, 1973.

17 The instruction manual for the Kudar DD test graciously states that "in addition to scores under the headings marked WOMEN, women will have scores under headings marked MEN in selected occupations and college majors where men predominate but opportunities for women are increasing."

18 "Sexism in San Francisco Unified School District," *supra*.

19 Tittle, "The Use and Abuse of Vocational Tests." *And Jill Came Tumbling After: Sexism in American Education*, 243 (Dell, 1974).

20 The "Janet and Mark" series from Harper & Row, the Basic Reading Program adopted in California for first grade texts, does not differ much from the old Dick and Jane readers, *see*, Kidd, "Now You See, Said Mark," *New York Review of Books*, Sept. 3, 1970, p. 36.

21 For example, the study published by the New Jersey chapter of NOW, "Dick and Jane as Victims: Sex Stereotyping in Children's Readers" and "Look Jane Look. See Sex Stereotypes," *And Jill Came Tumbling After: Sexism in American Education* 159 (Dell, 1974).

22 Section 9240 of the California Education Code provides, "When adopting instructional material for use in the schools, governing boards shall include only instructional materials which accurately portray the cultural and racial diversity of our society, including: (a) the contributions of both men and women in all types of roles, including professional, vocational and executive roles." Section 9243 of the California Education Code provides that governing boards shall not adopt any textbook which contains "any matter reflecting adversely upon persons because of their race, color, creed, national origin, ancestry, sex or occupation."

23 "Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles," *supra*, at 1222. An administrative complaint has recently been filed with the California Department of Education to force implementation of the anti-sexism provisions of the California Education Code, *In re the Adoption of Non-Discriminatory Instructional Materials*, filed June 13, 1974 by nine minority and women's organizations.

24 Several years ago the NAACP Legal Defense Fund prepared a civil rights suit in Louisiana for a mandatory injunction to compel the state Department of Education to list information concerning the Afro-American and other minority groups represented in the Louisiana school system, in their state approved textbook, *Hubbard v. Tannehill*, Eastern District, Louisiana.

25 Correspondingly, the athletic program for women in San Francisco schools consists of two activities (volleyball and gymnastics) for the entire district while the men's athletic program consists of 16 to 17 teams *per* school, "Sex Discrimination in San Francisco Unified School District: A Limited Review," *supra*.

26 "Sexism in Schools," *San Francisco Examiner*, March 7, 1973.

27 For example, differential expenditures in funding predominately Chicano elementary schools were challenged in *Mission Coalition Organization v. San Francisco Unified School District*, Civ. No. C-70-2627 (N.D. Calif., 1970). The suit was voluntarily dismissed after the school district's court ordered integration plan eliminated the identifiable Chicano elementary schools. *Cf.* *Swatt v. Painter*, 339 U.S. 629 (1950) (unequal educational opportunities).

SEX DISCRIMINATION AGAINST STUDENTS: Implications of Title IX of the Education Amendments of 1972¹

by Margaret C. Dunkle and Bernice Sandler

Title IX of the Education Amendments of 1972² mandates that sex discrimination be eliminated in federally assisted education programs. There has been considerable speculation about what changes will be required of educational institutions to comply with Title IX. Although a few issues (most notably competitive athletics) have generated wide interest, Title IX has significant implications for a variety of less publicized issues including recruiting, admissions, financial aid, student rules and regulations, housing rules, health care and insurance benefits, student employment, textbooks and curriculum, single-sex courses and women's studies programs.

Differential treatment of men and women exists in almost every segment and aspect of our society. Perhaps it is the most damaging, however, when it appears in and is transmitted by the educational institutions which are supposed to provide all citizens with the tools to live in a democracy. As the U.S. Supreme Court said in the 1954 *Brown* decision:

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In these days, it is doubtful that any child may reasonably be expected to succeed in life if . . . denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³

In the past twenty years it has become painfully clear that equal educational opportunity will become a reality only if it is supported by strong and vigorously enforced federal legislation. The long and difficult history of the attempt to eliminate discrimination on the basis of race promises to be repeated in the attempt to eliminate discrimination on the basis of sex.

In many instances, the courts have been less willing to prohibit sex discrimination than race discrimination in educational institutions.⁴ They have generally not interpreted the due process and equal protection guarantees of the Fifth and Fourteenth Amendments with the same strictness for sex discrimination as they have for race discrimination. Ratification of the Equal Rights Amendment would have the effect of eliminating these dual standards. Lacking constitutional remedies, statutory prohibitions against sex discrimination become especially important.

This article examines the overall implications of Title IX as well as the specific issues which affect virtually every school and college in the

country. It attempts to provide some insights into the scope and nature of practices which discriminate against students on the basis of sex, and the changes in these practices which might well be required for an institution to be in compliance with federal law. While discrimination against females was the major reason for the passage of the legislation, the law covers discrimination against *either* women or men on the basis of sex.

Until the fall of 1971, there was no federal legislation prohibiting sex discrimination among students at any level of education. Female students could be (and were) legally excluded from schools and colleges, admitted on a restrictive quota basis, denied admission to certain classes and subjected to a variety of other discriminatory practices. Females had no legal recourse when educational institutions denied them the opportunity that was regarded as the "birthright" of their brothers.

Amendments to the Public Health Service Act Prohibiting Sex Discrimination

The first federal law prohibiting sex discrimination among students became effective on November 18, 1971. Titles VII and VIII of the Public Health Service Act (PHSA) were amended to prohibit sex discrimination in admissions to federally funded health training programs.⁵ There are no exemptions from coverage.

Although the legislation itself speaks only of admission to programs, it appears that the final regulations will also cover treatment of students already enrolled in programs and treatment of employees working directly with applicants to or students in such programs.⁶ This broad interpretation is supported by the legislative history of the amendments which indicates that Congress intended to prohibit discrimination among individuals already enrolled in programs as well as applicants.⁷ It also appears that an institution's general admissions policies and practices are covered in cases where the federally funded health training programs can be selected as a major after students are admitted. Otherwise, there would not be a nondiscriminatory pool of applicants from which to select students.

The Office for Civil Rights (OCR) of the Department of Health, Education and Welfare

(HEW) is charged with enforcing the nondiscriminatory provisions of the PHSA. Noncompliance with the requirements of this legislation may lead to the delay of awards of PHSA Titles VII and VIII funds, revocation of current awards or debarment of an institution from eligibility for future awards. In general, the sex discrimination provisions of the PHSA are consistent with and foreshadow the coverage and provisions of Title IX.

Title IX of the Education Amendments of 1972⁸

Title IX of the Education Amendments of 1972 prohibits discrimination in federally assisted education programs⁹ against students and employees on the basis of sex.¹⁰ The key provision of Title IX reads:

No 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. . . .¹¹

In addition to the prohibition against sex discrimination in educational institutions, Title IX also amends a number of other laws. Section 906 amends various portions of the Civil Rights Act of 1964¹² and the Fair Labor Standards Act of 1938 to include executive, professional and administrative employees under the Equal Pay Act.¹³ Section 904 forbids covered educational institutions from denying an individual admission because of blindness or severely impaired vision.¹⁴

The sex discrimination provisions of Title IX are patterned after Title VI of the Civil Rights Act of 1964¹⁵ which prohibits discrimination against the beneficiaries of federal money on the basis of race, color and national origin, but not sex.¹⁶

Both Title VI and Title IX are enforced by the Office for Civil Rights of the Department of Health, Education and Welfare. The legal sanctions for noncompliance are identical: if an institution does not comply with the law, the government may delay awards of money, revoke current awards or debar institutions from eligibility for future awards. In addition, the Department of Justice may also bring suit at HEW's request.

Any educational institution which receives federal monies by way of a grant, loan or contract (other than a contract of insurance or guaranty) is

required to comply with the requirements of Title IX.¹⁷ This includes all schools: kindergartens, preschools, elementary and secondary schools, vocational schools, junior and community colleges, four-year colleges, universities and graduate and professional schools.¹⁸ Private, as well as public, institutions are subject to the requirements of Title IX if they accept federal financial assistance.

There are two overall exemptions to Title IX coverage which Congress specifically stated in the legislation:¹⁹

- An institution controlled by a religious organization is exempt to the extent that the application of the anti-discrimination provisions is not consistent with the religious tenets of the organization. Thus discrimination in such institutions on the basis of sex for reasons of custom, convenience or administrative rule is prohibited. This exemption was originally included in the legislation to exempt divinity schools. The burden of requesting and justifying this exemption lies with the educational institution.
- A military school is exempt if its *primary purpose* is to train individuals for the military services of the United States or the merchant marines.²⁰ This exemption apparently applies to military schools at any level and the U.S. military academies. It does not apply when military training is tangential to the primary purpose of the institution. An example of a tangential relationship would be offering Reserve Officers Training Corps (ROTC) courses.

In addition to these general exemptions, there is an exemption for *admissions* to certain types of institutions, most notably private undergraduate colleges and public single-sex undergraduate institutions. These exemptions are described *infra* at text accompanying notes 35–41. Any other exemptions made as a result of administrative decisions by the Department of Health, Education and Welfare are likely to come under strong criticism from both women's groups and members of Congress. In addition, the parallel wording of Title IX and Title VI would indicate that there is little, if any, legal justification for

administratively exempting something from coverage under Title IX (sex), while clearly covering it under Title VI (race, color, national origin). Civil rights advocates are likely to view attempts to dilute Title IX coverage as an effort to dilute Title VI coverage.

Individuals and organizations can challenge any practice or policy which they believe discriminates on the basis of sex by writing a letter of complaint to the Secretary of Health, Education and Welfare. They can file on their own behalf or on behalf of someone else (or some other group). Complaints can be filed on a class action basis, with or without specific aggrieved individuals being named.²¹ If the government finds discrimination in violation of Title IX, the statute requires that it first attempt to resolve the problem through informal conciliation and persuasion with the institution.²² If this process fails to remedy the discrimination, HEW may either hold formal hearings or refer the case to the Department of Justice for judicial action. If discrimination is found following HEW hearings, federal financial assistance can be terminated.²³

Title IX permits institutions to take affirmative action even in the absence of proven discrimination if, for one reason or another, there is limited participation by women or men in a federally assisted education program.²⁴ There is a distinction between *affirmative action* and *non-discrimination*. Nondiscrimination means simply altering practices which have been discriminatory (*e.g.*, ceasing to recruit only at male schools). Affirmative action means taking steps to *remedy* a situation based on sex which was caused by past discrimination either by the school or by society at large (*e.g.*, sponsoring programs specifically designed to attract female applicants).

It is not clear to what extent affirmative action can involve specific preferential treatment on the basis of race or sex. Where past discrimination by an institution has been *proven*, it is clear that the courts or enforcing agency can require an institution to give preference to remedy the discrimination. The government cannot, however, base such a finding *solely* on statistical evidence of an imbalance without a formal determination that the imbalance represents discrimination.²⁵ However, the question of how to encourage voluntary action for the benefit of one group consistent with the purpose of the anti-

discrimination legislation, but without proof of wrongdoing—while at the same time, *not* discriminating against members of other groups—has not finally been resolved.²⁶

Manifestations of Sex Discrimination

Many criteria, policies, practices and procedures which have traditionally been accepted by educational institutions perpetuate sex discrimination in both overt and subtle ways. In general, discrimination falls into two categories:

- **Overt** discrimination, which specifically excludes one sex or specifies different treatment or benefits based on sex. Examples would be admissions quotas for women, different standards of conduct for females and males and single-sex classes. In addition, *evaluating the same characteristics or conditions differently for women and men* would fall into this category. Such decisions are often unconsciously made because of stereotyped or inaccurate assumptions about the roles of women and men. Although these assumptions may be true for *some* women and men, they are not true for *all* women and men. Making decisions based on such class stereotypes can perpetuate discrimination.²⁷ For example, evaluating marital or parental status differently for each sex in determining eligibility for financial aid (because married men are “breadwinners” and “need” more money than married women) would fall into this category. A second subtle way in which overt discrimination might manifest itself is *when sex-neutral policies and procedures are not implemented*. That is, if an institution had a non-discriminatory *official* policy, but in *practice* followed a discriminatory policy, it would be violating Title IX.
- Discrimination as a result of criteria, policies, procedures or practices which appear to be fair, but which have a disproportionate impact on one sex or the other. An example would be prohibitions against admitting older stu-

dents (since women are less likely than equally qualified men to attend college at a young age) or granting preference to varsity athletes (since there are generally far fewer opportunities for women to compete in varsity athletics). Many policies and procedures which appear to be fair may unintentionally have a discriminatory impact on one sex or the other because one sex has been discouraged from participating in or discriminated against in certain activities. It is conceivable that an institution might argue that using such criteria is not an act of discrimination on *its* part and that it is not responsible for the consequences of past discrimination or exclusion by others.

A principle enunciated in a unanimous Supreme Court decision is relevant to this discussion. In *Griggs v. Duke Power Company*,²⁸ the Court said that any employment policy which has a disproportionate effect on minorities or other protected classes (even though it is fair on its face) and cannot be justified by business necessity, constitutes discrimination barred by Title VII of the 1964 Civil Rights Act. In addition, the Court said that it is the *effect* (rather than the *intent*) of a policy or procedure in operation that determines whether or not there has been discrimination. While the *Griggs* decision occurred in connection with employment discrimination, the same principle has been utilized by the courts in civil rights issues and can be expected to be applied to sex discrimination in education.

Recruiting Students²⁹

Although the recruitment of students is generally not an issue at the elementary and secondary level, it is of increasing concern to post-secondary institutions because the growing competition for qualified students is becoming more intense. The recruiting process includes information conveyed by written materials (brochures, catalogs, applications) and recruiters or admissions personnel (through campus visits, interviews and correspondence). This process can discriminate against women both overtly and subtly if care is not taken to assure that it is unbiased.

The way in which an institution recruits students can have a significant impact on the number of women who apply.³⁰ Affirmative recruiting to alter a pattern of limited participation by one sex or the other is legal under Title IX. Such affirmative recruiting makes the pool of qualified women applying more accurately reflect the potential pool of applicants and does not necessarily alter the way in which an institution applies its criteria for admission.

Sometimes recruitment policies or practices are overtly discriminatory. More often they are overtly benign, but in one way or another have the effect of discouraging women from applying.

Policies and practices which fairly explicitly exclude women include:

- Recruiting only (or predominately) at male institutions, or recruiting primarily at institutions which discriminate on the basis of sex in their own admissions procedures, without recruiting at institutions which do not discriminate.
- Relying heavily on alumni for recruiting (rather than alumnae). This can have an especially profound effect at formerly all-male schools which have admitted women only recently.
- Application forms which ask married female students if they have their husband's permission to attend school, while not asking the same question of married male students. Similarly, asking both sexes for their spouses' permission, but evaluating the responses differently for women and men would be discriminatory.
- Recruiters who discourage females from pursuing their applications, while not similarly discouraging comparable male applicants.

The more subtle manifestations of discrimination in recruiting have perhaps the most devastating effect on women. Oftentimes institutions and their representatives unconsciously perpetuate discrimination in their publications, application materials and recruiting techniques. All of these items together give a prospective student the "flavor" of an institution and an indication of the status of women on campus.³¹ They can either encourage women to apply or have a "chilling effect" on the number of women applicants. Such

factors subtly tell a woman student if she is as welcome as her equally qualified brother.

In addition to those listed below, the discriminatory policies and practices listed throughout this article can have a "chilling effect" by significantly discouraging women from applying:

- Having only or predominately male recruiters or admissions personnel.
- Having pictures in publications which show students as mainly male, while either not showing women at all or showing them primarily in "dating" or social situations.
- Describing male sex-typed programs (such as engineering, physics, pre-med programs) in ways which discourage women from applying.
- Describing female sex-typed programs (such as home economics, elementary education, nursing) in ways which unnecessarily encourage women and discourage men from applying. For example, describing students in these programs as SHE implies that they are fields for women only.
- Using the "generic" HE in catalogs and other publications.
- Listing or having other policies (such as residency requirements or age cut-offs) which might have a disproportionate impact on women.

Admission to Programs³²

The issue of sex discrimination in admissions is primarily of importance to post-secondary institutions, although it also has relevance for elementary and secondary vocational or special academic schools.³³ A thorough discussion of the admissions decision is critical for several reasons. If an individual is not admitted to an institution because of sex discrimination, equal treatment in the program becomes irrelevant. In addition, many of the considerations which affect the admissions decision are mirrored in later treatment of students. An understanding of factors which might influence the admissions decision aids in understanding the nature and operation of sex discrimination against students already admitted to a program.³⁴

*Exemptions from Admissions Provisions of Title IX*³⁵

Title IX specifically exempts certain types of institutions from nondiscriminatory admissions. Largely because of pressure from parts of the educational community, Congress exempted the following institutions from nondiscriminatory admissions:³⁶

- Private undergraduate institutions.
- Preschools and elementary and secondary schools (other than vocational schools).³⁷
- Single-sex public undergraduate institutions.³⁸

These institutions are exempt from the *admissions provisions* of Title IX only.³⁹ They are not exempt from the obligation to treat students (and employees) in a nondiscriminatory manner in all areas other than admissions.

Sex discrimination in admissions is specifically prohibited in the following types of institutions:

- Public coeducational undergraduate institutions.
- Vocational schools, including vocational high schools.
- Professional schools.⁴⁰
- Graduate schools.⁴¹

Overt Discrimination in Admissions

In covered institutions, overt quotas that limit the percentage or number of women (or men) violate Title IX. Similarly, an admissions policy based on the number or percentage of applicants from each sex would violate Title IX. For example, admitting 30 percent of female applicants and 30 percent of male applicants would tie admission to sex and could result in admitting members of one sex who were less qualified than some of the students of the other sex who were rejected. Also, ranking or evaluating applicants separately on the basis of sex would be a Title IX violation.

A more unconscious form of overt discrimination occurs when the same characteristics or conditions are evaluated differently for women and men. For example, because of class assumptions about the roles of women and men, a well intentioned admissions officer or counselor may discriminate on the basis of sex by:

- Evaluating marital status or potential marital status (whether single, divorced, married or separated) differently for women and men. For example, admitting married men, but not married women.
- Making pre-admission inquiries concerning whether a person is "Ms., Miss, Mrs. or Mr."
- Evaluating parental status differently for females and males. For example, admitting unwed fathers (while *not* admitting unwed mothers) or admitting men (but not women) with small children.
- Evaluating personality characteristics (such as "assertiveness") as a positive factor for one sex (males) and a negative factor for the other sex (females).
- Using different standards for admitting women and men because of assumptions about what are suitable and proper fields for women (*e.g.*, home economics, nursing, elementary education) and men (*e.g.*, science, medicine, auto mechanics).
- Refusing to admit men, but not women, with long hair.
- Admitting older men, but not older women.

Ostensibly Fair Criteria Policies, Practices and Procedures Which Have a Discriminatory Impact on One Sex

Many institutions believe that they have sex-blind (or sex-neutral) admissions criteria and procedures. However, a close examination of these ostensibly "neutral" criteria often reveals that a number are sex biased. For example, an institution might give preference to any "person" who has been a Rhodes scholar. (Since only men are eligible for Rhodes scholarships, this practice has a discriminatory impact on women.)

It is important to remember that many of the criteria evaluated by admissions officers and committees are not in themselves indicators of performance in a given program or institution. Rather, they are shortcut indicators of success in what is perceived to be a similar situation.

A distinction can be drawn between ultimate (direct) and intermediate (indirect) criteria or qualities:

- *Ultimate criteria* are those which are essential to performing a task satisfactorily. (For example, organizational ability, writing skills, motivation, discipline, creativity, research ability or aptitude in a particular field.) Unfortunately, however, these criteria are often difficult or impossible to measure directly.
- *Intermediate criteria*, on the other hand, are the shortcut approximate indicators which are used to roughly gauge the ultimate criteria or ability of a candidate. These are more easily evaluated than ultimate criteria and might include offices held in school, articles published, nature and extent of work experience, grades and test scores or attendance at a particular school.

Intermediate criteria are, of course, indispensable aids to narrowing the field of candidates. However, these criteria are by nature generalizations and as such may be both imprecise and arbitrary when used to measure the ability of a given individual. In addition, because of sex discrimination in society at large, women who have the desired *ultimate* qualities may not have had the opportunity to obtain the most desirable *intermediate* credentials. Therefore, blanket application of ostensibly neutral criteria could result in sex discrimination.

The Supreme Court has recognized, in *Griggs v. Duke Power Company*,⁴² that certain criteria can pose:

artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.⁴³

The Court found that:

Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job

and not the person in the abstract.⁴⁴
[emphasis added]

There seems little doubt that this reasoning applies equally to similar discrimination against students in federally assisted education programs.⁴⁵

Assuming that the ultimate criteria evaluated by a selection committee are rationally related to the educational goals of the institution, it is then imperative to examine the intermediate criteria to determine if they are:

- valid indicators of the ultimate qualities desired;
- free of sex bias (that is, not disproportionately excluding one sex or the other).

If an intermediate criterion is in some way sex biased, then the institution would be well advised to look for alternative measures. For example, an institution might consider "competitiveness" a desirable quality for students and use "participation in interscholastic or intercollegiate athletics" as an intermediate measure of competitiveness. Because athletic opportunities are severely limited for women in most institutions, such an intermediate criterion might eliminate women who have the desired ultimate quality (competitiveness). Because discrimination against women often makes it more difficult for them to obtain impressive credentials (intermediate criteria), institutions may find that it is sometimes more difficult to assess the degree to which women (as opposed to men) possess the desired ultimate qualities. As a beginning an institution could broaden its list of acceptable intermediate criteria.

Examples of "intermediate criteria" which might have the effect of disproportionately excluding women include the following:

- Membership in a single-sex honorary organization. (In some schools, there is only a men's honorary. In others, where there are two separate single-sex honoraries, the women's honorary is often smaller and/or has higher admissions standards, with the result that fewer women than men have this credential.)
- Similarly, using membership in single-sex professional organizations as a criterion can lead to bias. (For example, until 1974 Phi Delta Kappa, the education honorary, did not admit

women.)⁴⁶

- Having received an award available to one sex only. (It is not unusual for there to be fewer "female" than "male" awards and scholarships given. The result of this pattern is that some female students do not receive awards while *less qualified* male students do.)
- Having attended an institution which discriminates (or which discriminated in the past) in admission on the basis of sex. (For example, giving preference to individuals from specific private undergraduate institutions—which can maintain sex-based admissions quotas under Title IX—is likely to have the effect of disproportionately excluding women.)⁴⁷
- Having received an athletic letter, award or scholarship. (The lack of athletic opportunities for women makes this criterion especially suspect.)
- Giving preference to students who have held offices in clubs. (For example, in some schools the student body president is "always" male. An equally qualified female student is most likely encouraged to run for secretary or vice president.)
- Ability to attend school full-time as a measure of commitment. (Often women with children or women who work find that they are unable to attend school full-time, despite their interest.)
- Continuous schooling or employment as a sign of commitment. (Although many women interrupt their education or careers for child rearing, this is generally not an expression of lack of interest or commitment.)
- Evaluating late commitment to a profession or vocation as an indicator of lack of seriousness or dedication. (Many women resume schooling or make a new career commitment at a later age than their male counterparts.)
- Not admitting "older" students. (Women are more likely than men to discontinue their education so that

they might support a student-husband or raise children. In addition, women often have a more difficult time financing their education. At any given level of education, a majority of people who do not proceed to the next level are female. Consequently, the pool of qualified older applicants is likely to be disproportionately female.)⁴⁸

- Using military service as a measure of a broad background or good citizenship. (In addition to being exempt from the draft, the number of women in the military has been limited by a strict quota, and women admitted to the armed services have to be more highly qualified than men.)
- Evaluating part-time or summer employment as a measure of interest and accomplishment. (Because of the general pattern of employment discrimination, women are more likely to have had clerical and other so-called "feminine" jobs, rather than jobs that might be indicative of their interests or potential.)
- Evaluating work that is typically "male," such as military service, in a favorable light, while evaluating work that is typically "female," such as child rearing, in an unfavorable light.
- Relying heavily on letters of recommendation to gauge such things as commitment, ability to work with others, etc.⁴⁹ Such recommendations by counselors, teachers and employers may reinforce stereotyped attitudes of admissions personnel and introduce extraneous factors into the selection process. For example, a number of characterizations that are routinely used to describe female candidates ("charming," "delightful," "feminine," "pretty") are almost never used to describe male candidates and are, in fact, unrelated to academic ability. It is difficult to imagine the following "recommendations" applied to a man:
"Joan is extremely attractive, but she does not let it get in the way of her

work."

"Mary has one of the finest minds I've ever seen in a woman."

"Because Sally Jones is somewhat unattractive, she is not likely to marry and waste her professional training."

"Sarah is a delightful person whose good looks will adorn any department."

The Award of Financial Aid⁵⁰

The award of financial aid is often of prime importance at the post-secondary level.⁵¹ Indeed, an institution's decision to award (or not to award) financial aid to a student is often a major factor in determining which institution a student will attend. Because the award of financial aid also profoundly affects the treatment of students already enrolled in a program, the financial aid practices and policies of an institution are not exempt from the requirements of Title IX, even when the admissions policies are exempt.

The data indicate that women often meet discrimination in the amount and type of financial aid they receive.⁵² Discrimination in the award of financial aid can be either overt or subtle (such as using ostensibly fair criteria which perpetuate sex bias).

Some institutions now require women to meet higher (or different) standards than men in order to be eligible for financial aid. Other institutions have favored men over women by:

- Offering a woman a loan, while offering a comparably qualified and situated male a fellowship or assistantship.
- Offering the most prestigious scholarships, fellowships and assistantships to men while offering women the less prestigious awards.

Also, a number of admissions committees have traditionally evaluated the same characteristics differently depending on their sex. In addition to the examples mentioned previously in the discussion of admissions, the following might come under this category:

- Denying married women financial aid (while not similarly denying such aid to married men) or offering married women and men financial aid on a different basis. (At some institutions,

financial aid committees have automatically assumed that a married woman needs *less* assistance because her husband will support her, while a married man needs *more* assistance because he is the "head of the household." While this assumption may be correct in some instances, it is certainly not correct in all instances.)

- Offering women and men with dependent children different amounts of aid because of sex-based assumptions about their child care responsibilities.

There are also a number of ways in which overtly neutral criteria, policies or procedures discriminate against women in the award of financial aid. All of the "intermediate criteria" mentioned which might have the effect of discriminating against women in admissions (membership in single-sex honorary societies, continuous schooling, etc.) can also have the effect of discriminating against women in the award of financial aid. In addition, policies or procedures which make it difficult (or impossible) for part-time students to receive financial aid or which do not consider the cost of child care in determining need, disproportionately affect women since many more women than men find it necessary to attend school on a part-time basis and have primary child care responsibilities.

There is some question concerning to what extent single-sex fellowships will be allowed under Title IX.⁵³ Some people maintain that there should be no single-sex fellowships offered by or through an educational institution. They maintain that there is no more justification for single-sex scholarships than there is for scholarships limited to whites. Others maintain that institutions should be allowed to continue to offer single-sex scholarships that are part of a trust, will or bequest if they are "balanced" by an equal amount of money for the opposite sex.⁵⁴ Under this system, need would be determined regardless of sex, but single-sex scholarships could continue to be awarded, provided the *amount* of money individual students received was not affected by their sex. A number of people question whether such an option would be administratively feasible. In addition they argue that much of the benefit of receiving such scholarships is in the prestige connected with it, and that such a system would perpetuate past discrimina-

tion by allowing the most prestigious scholarships to continue to be for men only. A study of *Women in Fellowship and Training Programs* concluded that:

Until women achieve a higher participation rate in [fellowship, internship, and other training] programs, many qualified women will lack one of the more important credentials necessary for career upward mobility. They will always be less "qualified."⁵⁵

Rules and Regulations⁵⁶

There are a variety of rules, regulations and policies which differentiate on the basis of sex and are almost certainly violations of Title IX. It is highly unlikely that the following types of rules and regulations could be justified under Title IX for any reason:

- Different curfews or visitation hours for women and men.⁵⁷
- Appearance codes which set different standards based on sex (such as a requirement that boys have short hair,

while girls are permitted to have either short or long hair).

- Dress codes which set different standards for females and males (such as policies which permit males, but not females, to wear slacks).⁵⁸
 - Different standards of punishment or different types of punishment based on sex (such as punishing females, but not males, who swear, or using corporal punishment on men only).
 - Forbidding unmarried mothers (but not unmarried fathers) from participating in extracurricular activities or athletic teams, or debarring unwed mothers from eligibility for awards or prizes.⁵⁹
 - Restricting the options or participation (in classes, extracurricular activities, etc.) of persons (female or male) because of their actual or potential marital status.
 - Requiring that the prom queen, homecoming queen, etc. be a virgin.⁶⁰
- In addition, automatically assuming that the



Photo by Roz Gerstein

residency of a woman is the same as her husband's can have an especially significant effect in state-supported institutions where the tuition is higher for out-of-state than for in-state residents.⁶¹

A number of institutions have rules or regulations which might be challenged under Title IX if they have a disproportionate impact on women. For example:

- Rigid time limits for completing programs or degrees.
- Lack of opportunity to attend school on a part-time basis. (Because many women have primary responsibility for child care, they are often unable to attend on a full-time basis.)
- On-campus residency requirements.
- Unavailability of leaves of absence for child rearing.⁶²
- Policies which make it difficult to transfer credits from one program or institution to another. (Women are more likely than men to attend several institutions because of their husbands' job changes.)

Housing Rules and Facilities⁶³

While this is not an issue at most elementary and secondary schools, the housing facilities and the options available to men compared to women are of importance at a number of post-secondary institutions.

Section 907 of Title IX specifically addresses one aspect of this issue:

Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.⁶⁴

Although institutions are not required by Title IX to "integrate" their dormitories, they are prohibited from discriminating on the basis of sex in the options they offer their female and male students.⁶⁵

Lack of dormitory space for one sex cannot be used as a means of limiting the number of students of that sex who are admitted. Housing rules have sometimes been used to deny women admission to an institution. For example, an

institution may assign a smaller number of rooms to women, and then insist that all women live on campus (although male students are allowed to live off campus). If the institution uses the lack of dormitory space for women as a reason for limiting their admission, it violates Title IX.

Sex-based differences in housing options can take a number of forms:

- Allowing men, but not women, to live off campus (or having different standards, such as grade point averages, for women and men to live off campus).
- Offering one sex or the other a disproportionate share of the "most desirable" or most economical housing.
- Offering women and men differential opportunities to live in housing which permits drinking, the presence of pets, etc.
- Making dormitory suites, single rooms or large rooms differentially available to women and men.
- Providing different supportive services (such as maid service, laundry facilities, recreation rooms, dining facilities, snack bars) to women and men.
- Offering different options of residence hall governance based on sex.
- Offering different security provisions based on sex (such as guards, locks on doors, etc.)
- Offering different roommate selection procedures based on sex.
- Offering married students different housing options based on sex.
- Charging different housing fees based on sex.
- Listing or otherwise perpetuating or endorsing housing which discriminates on the basis of sex.⁶⁶

Requirements for Graduation⁶⁷

At present there are a surprising number of instances in which females and males are *required* to amass different credentials (or are able to amass the same credentials in different fashions) in order to graduate. These differences are especially pronounced in traditionally sex segregated physical education, home economics or shop classes. Examples of sex-based differentiation which no

doubt violate Title IX include:

- Requiring females to take home economics and requiring males to take shop or industrial arts. (Often, women cannot satisfy their requirements by taking shop and men cannot satisfy their requirements by taking home economics.)
- Having more required (as opposed to elective) courses for females than males. (For example, requiring women to take a course in home economics, with no similar requirement made of men.)
- Requiring female and male students to have a different total number of courses, credits or hours to graduate.
- Having different required courses for female and male physical education majors or requiring them to have different grade point averages to graduate (or to graduate with honors).
- Allowing men, but not women, to exempt required physical education courses by taking a skills test or participating in varsity athletics.
- Awarding academic credit to men, but not to women, who participate in interscholastic or intercollegiate athletics.

Physical Education and Equal Athletic Opportunities⁶⁸

Perhaps no issue concerning Title IX has generated as much heated debate and controversy as equality in sports and athletics. And perhaps nowhere else are the inequities as profound. Although money is by no means the sole measure of equality, gross inequities in the total amount of money spent on women's and men's sports can be used as a rough measure of discrimination. It is not unusual, for example, for the budget for men's athletics to be a hundred (or even a thousand) times greater than the budget for women's athletics.⁶⁹

Many complex and difficult legal and educational questions are raised in the process of attempting to discern what constitutes equality for women in sports.⁷⁰ There are a number of unanswered questions concerning precisely what

criteria and standards should be used to evaluate equal opportunity. In assessing whether it provides equal opportunity, an institution might examine its non-competitive programs, competitive (interscholastic or intercollegiate) programs, and (since physical education and athletic programs have traditionally been single-sex) employment patterns and administrative structures.⁷¹

In non-competitive and instructional programs, an institution might find bias in such areas as:⁷²

- Instructional opportunities and physical education classes.⁷³
- Sex-based requirements for physical education majors.
- Requirements for graduation.
- Intramural programs.
- Recreational opportunities.⁷⁴

Discrimination in competitive programs might occur in:⁷⁵

- The funding of programs (including the source of money, size of the budget and use of funds).
- The provision of facilities and equipment.⁷⁶
- The availability of medical and training services and facilities.
- Scheduling games and practice times.
- The availability of funds for travel and per diem allowances.
- Awarding athletic scholarships.
- Recruiting athletes.
- Media coverage.
- The selection of sports and levels of competition.
- The female/male composition of the team (single-sex versus mixed or co-educational teams).⁷⁷

Some institutions have been reluctant to change policies and practices mandated by athletic conference or association rules, even though they have a discriminatory impact on women. Such regulations, however, *do not* alter the obligation of an institution to provide equal opportunity to women and men under Title IX. For example, the differential association or conference requirements for each sex concerning eligibility for financial aid or for participation in intercollegiate sports do not absolve the institution from the obligation to treat the sexes equally.⁷⁸

Although HEW is reluctant to identify abso-

lute criteria for determining compliance in this area, a number of Title IX complaints alleging sex discrimination in athletic opportunity have already been filed.⁷⁹ In the absence of detailed standards for assessing athletic programs, HEW will no doubt resolve complaints on a case-by-case basis.

Health Care and Insurance⁸⁰

Most institutions offer their students some sort of compulsory or optional medical care and/or health insurance. These services and plans have come under considerable criticism, however, at a number of institutions for discriminating in one way or another against women. The areas most frequently cited as discriminatory involve pregnancy, gynecological care and family planning.⁸¹ In general, it is reasonable to expect the criteria for identifying discriminatory treatment of these services and benefits among students to be consistent with already established criteria for making similar determinations among employees.

The principal of treating pregnancy for job-related purposes in the same manner as any other temporary physical disability is clearly stated in the employment area.⁸² In the past, pregnant students have often been treated differently because of moral judgments about their pregnancy, rather than because of concern for their health.

Differential treatment of pregnant students may take a number of forms. For example, the following types of insurance coverage treat pregnancy differently from other temporary disabilities.

- Excluding pregnancy altogether.
- Providing more limited coverage of pregnancy than of other temporary disabilities.
- Covering pregnancy only for women who are married and/or who have either a joint or "high option" policy.

Similarly, policies which cover vasectomies, but not sterilization for women, might be called into question under Title IX.

In addition, the following rules and policies concerning the treatment of pregnant students will undoubtedly be challenged under Title IX because they treat pregnancy differently from other physical disabilities:

- Expelling pregnant students.⁸³
- Requiring pregnant students to enroll in special classes or to be tutored at home.⁸⁴
- Requiring pregnant students to leave school a certain number of months before childbirth or forbidding them from returning to school for a certain number of months after childbirth.⁸⁵
- Requiring pregnant students to have a doctor's certificate to either remain in or return to school, while not making similar requirements of students with other physical disabilities.
- Requiring pregnant students to notify the institution of the expected date of childbirth, without similarly requiring individuals with other temporary disabilities to notify the institution of the planned dates for surgery or absence.
- Treating pregnant students differently, depending on their marital status.

The inability or unwillingness of institutional health care facilities to provide gynecological services has become an issue on a number of campuses. The absence or inadequacy of these services is likely to be raised under Title IX.

The lack or inadequacy of family planning and contraceptive services has also been a concern of students at many institutions. Title IX would neither require that an institution provide such services nor prohibit them from doing so, even if they were used by a different proportion of students of one sex than the other. If such services are provided, however, they cannot be offered for one sex only.

Employment Opportunities⁸⁶

Many institutions either offer their students some sort of employment or assist them in finding employment. Because of increased awareness of both Title IX and employment legislation, a number of institutions now include a section on student employment in their affirmative action plan.

Students employed by an educational institution are protected by the same antidiscrimination legislation and regulations which cover other employees: Executive Order 11246, Title

VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. These laws prohibit any differences on the basis of sex (and, in most instances, on the basis of race, color, religion and national origin as well) in hiring, upgrading, salaries, fringe benefits, training and all other conditions of employment.⁸⁷

Sex bias in student employment can manifest itself in a number of ways. For example, at a coeducational ivy league university, a woman who applied for a job in the university greenhouse was told that she could not be hired to work there because "girls kill the plants." In addition, the following are among the practices which would violate these laws and regulations:

- Routinely assigning women students to secretarial jobs and men to the (often higher paying) grounds and building crew.
- Refusing to hire women students (or discouraging them from applying) for particular jobs.⁸⁸

Student placement services which accept job opportunities limited to one sex not only violate Title IX, but other laws as well. However benign the intent, this breakdown virtually always limits the job opportunities of women students. For example, relatively low paying jobs (such as secretarial work and teaching) are listed for women, while the better jobs (such as engineering and middle-management positions) are listed for men. Placement services (including student placement services) are likely to be challenged under Title IX if they:

- Accept job offers limited to one sex only.
- Allow recruiters on campus who refuse to interview women or otherwise discriminate against women.
- Allow employers to recruit on campus who routinely offer similarly qualified females and males different jobs or salaries.
- Refer only males to fields which are predominantly "male," while referring females to fields traditionally thought of as "feminine."

Appointment of Women to Commissions and Committees⁸⁹

Oftentimes administrators or teachers are

called upon to appoint students to commissions, committees or governing bodies of one sort or another. In the past, the bulk of these appointments (especially the most prestigious or powerful appointments) have been given to males. Under Title IX, institutions will have the obligation to assure that these appointments are made on a nondiscriminatory basis and that women are given a full and equal opportunity to participate in these capacities.

Implications of Title IX for "Private" Groups which Discriminate on the Basis of Sex⁹⁰

There has been considerable discussion concerning the degree to which Title IX covers private organizations or groups which may operate in or be assisted by educational institutions. For example, there has been some disagreement concerning the coverage of Little League teams, honorary organizations, professional organizations, community recreation groups and social sororities and fraternities. The legislative history of Title IX provides little guidance concerning Congressional intent in this area.

Some people argue that the regulations should bar any institution from assisting in any way any person or agency which discriminates on the basis of sex. The proponents of this point of view stress that this approach would be consistent with the interpretation with regard to racial discrimination under Title VI of the 1964 Civil Rights Act.⁹¹ They note that excluding females from such activities as Little League, professional organizations and honorary societies could cause real damage to women. They also point to the paradox of allowing a group which discriminated on the basis of sex to use institutional facilities (or otherwise receive support from the institution), while denying the same privileges to a group which discriminated on the basis of race.⁹²

Others maintain that private groups which discriminate should not be covered at all by Title IX, since in general they operate after school hours. However, because these groups are covered under Title VI *vis à vis* race discrimination, this argument is extremely weak.

Still others take the position that whether or not a private group which discriminates on the basis of sex should be allowed to receive support

from an institution should depend on the substantiality of the relationship between the institution and the private group, the extent to which the group provides aid or services to the students and employees of the institution, and the degree to which the activities of the group are related to the institution's education programs or activities.⁹³ This argument maintains that whether or not a group is covered should depend on how closely its activities are related to the activities of the institution. Opponents of this position point out that it is in conflict with the precedents set under Title VI and that, if the government adopted this position, it would be bowing to pressure. Moreover, this position could lead to inconsistent situations. For example, it is possible that a discriminatory Little League team might be permitted to use college facilities, but be denied the similar use of elementary school facilities under this interpretation.

Although the Title IX regulations clarify the criteria for determining compliance in this area to some degree, a number of the specific complaints brought because of discrimination in such organizations are likely to be resolved on a case-by-case basis.

Educational Consortia and Cooperative Programs⁹⁴

A number of institutions either require or permit students to participate in cooperative programs or educational consortia (for example, student teaching assignments or credit for work experience). The requirements of Title IX forbidding sex discrimination cover such cooperative efforts. That is, an educational institution cannot assist another institution or organization in discriminating against its students, even if that organization is not covered by Title IX. The institution bears the obligation to assure nondiscrimination against its students, much as a federal contractor must assure that its subcontractors not discriminate under Executive Order 11246. If an institution is not able to assure nondiscrimination against its students, it would appear that it must withdraw from the cooperative program or activities.

Extra-Curricular Activities⁹⁵

There is little question that extra-curricular

activities are an integral part of the education program offered by an institution and, as such, are subject to the nondiscriminatory provisions of Title IX. An institution which sponsored, supported or endorsed single-sex (or otherwise discriminatory) extra-curricular activities, clubs or programs would be vulnerable to charges of discrimination under Title IX.

Textbooks and Curricula⁹⁶

Textbooks from *Dick and Jane* to medical school anatomy texts have come under fire for portraying women in a biased, stereotyped manner. In a study of government texts,⁹⁷ Jennifer Macleod and Sandra Silverman identify three ways in which these books perpetuate discrimination:

- Women are rarely mentioned in the texts. The authors of the study found that the texts failed to discuss individual women, to quote women, to include a reasonable number of women in illustrations and to use women's case histories as examples.
- Illustrations and texts were often condescending and perpetuated stereotyped roles. The authors found numerous examples of undesirable stereotypes concerning women and women's roles. For example, women in the texts were "often defined as their husbands' wives rather than as individuals in their own right; sometimes women [were] dehumanized as sex objects."⁹⁸
- Finally, the texts ignored much of the subject matter dealing with women. For example, they rarely mentioned famous women, women's suffrage or the women's movement.

A number of studies of texts used at all levels draw similar conclusions.⁹⁹ For example, the Association of Women in Science (AWIS) forced publishers Williams and Wilkins to recall *The Anatomical Basis of Medical Practice* because of its portrayal of women. This text contained a variety of passages that AWIS labeled discriminatory. For example:

- If you think that once you have seen the backside of one female, you have seen them all, then you haven't sat in a sidewalk cafe in Italy where girl watch-

ing is a cultivated art. Your authors, whose zeal in this regard never flags, refer you to Figures 111-50 and 53 as proof that female backs can keep an interest in anatomy alive.

Thus the "little bit" of difference in a woman's built-in biology urges her to ensnare a man. Such is the curse of estrogen.¹⁰⁰

Differential treatment of women and men is generally more easily identified in textbooks than in most other curricula materials. Similar discrimination, however, may occur in the classroom in a variety of more subtle ways. For example, students at Western Michigan University have cited the following examples of teacher comments which discriminate against women:

- A biology teacher during a class field trip passed a junk car lot and said, "Well, there's women's biggest contribution to the world."
- Another professor told a woman student, "Don't worry, with your body, you'll get whatever you want."
- And still another professor made this remark, "Now that there are perma-press shirts, dishwashers and garbage disposals, etc., women aren't needed."¹⁰¹

Although there is little question that a wide variety of textbooks and curricula are in one way or another sex biased and perpetuate discrimination, it is not clear precisely what strategy HEW will adopt to remedy this discrimination.

Some persons argue that HEW should take immediate and direct steps to eliminate this sort of stereotyping. However, there is a strong reluctance on the part of many government officials to intervene in issues involving textbooks and curricula. Both HEW and many educators fear that strong enforcement in this area might jeopardize the autonomy and academic freedom of local education agencies and institutions. They believe that such programmatic decisions should be made at the local, not the federal, level. In addition, they feel that the statutory mandate to overcome discrimination does not override the guarantees of free speech under the First Amendment.¹⁰²

Others advocate the position that, although the government should not make such judgments directly, it should require institutions to have

internal procedures and mechanisms for reviewing materials and curricula.¹⁰³ They think that the government should require institutions to establish internal mechanisms both to ensure that their curricula do not reflect discrimination and to resolve complaints alleging sex discrimination in the curricula. Advocates of this position maintain that, since it avoids having the federal government itself determine what is discriminatory, the First Amendment criticism mentioned earlier does not apply.

A third position is that the government should administratively delay any decision on this issue indefinitely. The probable eventual result of this tactic would be a suit by women's groups against HEW for not enforcing the provisions of Title IX. This would leave the resolution of this issue in the hands of the courts, which many people feel is a more appropriate vehicle for this decision than a government agency. Finally, some people argue that the government should overtly refuse to address the issue at all, perhaps even inviting a "sweetheart suit" to resolve the issue in the courts.¹⁰⁴

Whatever strategy the government adopts, the issue of sex discrimination that is perpetuated by stereotyping in textbooks and curricula promises to be both controversial and unavowable in the long run. A number of Title IX complaints in this area have already been filed.¹⁰⁵

The Counseling of Students¹⁰⁶

While there is little question that it is important for an institution to provide its students with unbiased counseling, there is considerable disagreement concerning how this might most appropriately be accomplished. Sex bias in counseling is perhaps even more difficult to identify and rectify than bias in textbooks or curricula. The arguments both for and against government intervention in counseling parallel those discussed in the preceding section. Because of the subtle nature of discrimination in this area, the government is even less likely to intervene in counseling programs than in the area of textbooks and curricula.

Although counseling programs alone cannot take the blame or credit for the career and personal choices students make, they typically

mirror the attitudes of the institution towards women. Often sex bias is transmitted by well-meaning counselors who pass on stereotypes about men and women. They may be unaware of the growing body of research which is shedding new light on motivation and achievement in women. Often counselors are trained only to work with the "traditional" student, a label which often does not apply to older women returning to complete their education or women with child care and family responsibilities.¹⁰⁷

No matter what stand HEW takes on direct (or indirect) intervention to alleviate sex bias in counseling, voluntary steps by schools would be consistent with both the spirit and letter of Title IX. For example, they might develop programs to train their counselors to be more sensitive to their own biases and those in the materials they use.

A similar issue is posed by bias in the tools that counselors might use: interest inventories, catalogs, tests, occupational materials, etc. These instruments can perpetuate stereotypes which limit the options of women and men. For example, in 1972 the American Personnel and Guidance Association passed a resolution calling for the revision of the widely-used Strong Vocational Interest Blank because it perpetuated discrimination against women. Although the APGA focused on the Strong, the pattern is consistent from one instrument to another.¹⁰⁸ It is likely that advocacy groups will use the momentum for change generated by Title IX to encourage schools, colleges and testing companies to reassess and revise counseling tools to assure that they do not perpetuate sex bias.

Single-Sex Courses and Programs³⁹

A number of educational institutions at all levels have one or more courses which are open to one sex only. For example, many high schools offer home economics to females only and industrial arts to males only. In almost all instances such practices violate Title IX.¹¹⁰ This prohibition has significance for a variety of courses: health, physical education, business, vocational, technical, industrial arts, home economics, music, as well as continuing and adult education courses.

Often the argument used for refusing to admit one sex or the other is the lack of duplicate

facilities (such as bathrooms, dressing rooms or locker rooms). While bathroom and locker room space may have to be reallocated or shared by both sexes on an alternating basis (similar to the arrangements in airplanes and trains), the lack of duplicate facilities cannot be used as a reason for excluding one sex or the other. In any event, Title IX does not require women and men to undress in front of one another or to share the same bathroom at the same time.¹¹¹

Because of different interest patterns between women and men, it is likely that some classes will continue to be made up either entirely or primarily of members of one sex. Women's groups are urging institutions to assure that classes or programs which enroll primarily men not receive preference over those which enroll primarily women in such areas as facilities and equipment, scheduling of classes or teacher competence.

Some women's groups are stressing that institutions be on guard not to offer courses which might have the effect of discriminating against women. For example, if an institution offered coaching instruction only for predominately male sports, it might leave itself vulnerable to criticism and charges of illegality.

Vocational Education Programs¹¹²

Many of the vocational education programs and courses in schools have been (and still are) sex segregated.¹¹³ Tracking, as well as overt discrimination, will no doubt be strongly challenged under Title IX. Given that Title IX specifically prohibits sex discrimination in admissions to *all* vocational schools, including vocational high schools, these programs will come under strong legal (as well as moral) pressure to open their doors and programs to women and men on an equal basis. Indeed, because of both constitutional challenges and Title IX, a number of schools have already changed their policies and programs.

Women's Studies Programs and Courses¹¹⁴

It is reasonable to expect the number of women's studies courses and programs to increase as the press for equality for female students increases. There are now more than 4000 such courses in existence and they will no doubt continue to flourish.¹¹⁵ These programs are likely

to be challenged under Title IX, however, if they exclude men.¹¹⁶

For a variety of reasons (including the reticence of the government to intervene in matters involving curricula), HEW is not likely to mandate that an institution have a women's studies program or women's studies courses. However, in the event that a Title IX complaint is filed, the government is likely to consider the existence of a women's studies program (or courses) as a sign of commitment to the education of women or as remedial or affirmative action.¹¹⁷

Women's Centers¹¹⁸

A number of colleges and some high schools have "women's centers" of one sort or another which provide supplementary services for the women in the institution.¹¹⁹ It is well within the scope of Title IX to have a center focusing on women. However, under Title IX, it is not likely that a center could exclude men from using its services or participating in its activities. In general, this should not pose a threat to women's centers, because the few men who would use the center are likely to be sympathetic to women's issues.

Flexible Programs¹²⁰

Opportunities to pursue a degree in a "non-traditional" manner or at a "nontraditional" pace are often especially important to women. Most college programs were originally designed to meet the needs of young males who had few, if any, home or parental responsibilities. Consequently, they are often not tailored to meet the needs of any of the so-called "nontraditional" students—women, minorities, older students, etc.

For a variety of reasons (including academic freedom and the First Amendment issues raised earlier), it is doubtful that HEW would require that an institution offer flexible programs. However, if these programs are especially beneficial to women, HEW is likely to regard their presence as a positive factor in evaluating an institution's compliance with Title IX.

Continuing Education Programs¹²¹

The lack of opportunity for older students to attend school is a factor which is likely to have

a disproportionate impact on women. Because fewer qualified women than men go to college or graduate school, older women returning to college make up the largest single group of potential new students. Many institutions are finding that one of the easiest ways to increase their lagging enrollment without diluting academic standards is to develop programs and services which facilitate the reentry of these women into academia.

Although Title IX will probably not require an institution to provide such services, the government may look at the presence (or absence) in determining overall compliance with Title IX. Again, although many of these programs were specifically designed to meet the needs of women, it is doubtful whether men could be excluded from them under Title IX. In fact, a number of "Continuing Education for Women" programs already admit men.

Child Care Facilities¹²²

Although the trend is towards more equal sharing of work both in the home and in the labor force, most women still bear the principal responsibility for child rearing. Therefore, the lack of child care facilities almost always affects female students (and employees) disproportionately. In assessing compliance with Title IX, HEW is likely to view the presence of such facilities as a positive indication of the institution's concern for women.

There are a number of unanswered questions concerning the specific implications of Title IX of the Education Amendments of 1972. There is no question, however, that educational institutions now have a clear and strong federal mandate to eliminate sex discrimination against students, as well as employees.

Footnotes

¹ The authors wish to express their appreciation to Jeffrey H. Orleans formerly an attorney with the Department of Health, Education and Welfare and currently with the Equal Employment Opportunity Commission, for his helpful comments on drafts of the manuscript.

² Education Amendments of 1972 Sections 901-907, 20 U.S.C. Sections 1681-86 (1972).

³ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁴ In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Supreme Court unanimously ordered that black students

be admitted to the University of Texas Law School. In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), the Supreme Court unanimously ordered that the black student-plaintiff "receive the same treatment at the hands of the state as students of other races." Similarly, in *Brown v. Board of Education of Topeka*, 347 U.S. 843 (1954), the Supreme Court found that "separate educational facilities [on the basis of race] are inherently unequal." In contrast, six years after the *Brown* decision, in *Allred v. Heaton*, 336 S.W. 2d 251 (Tex. Civ. App., 1960), cert. denied, 364 U.S. 517 (1960), the Supreme Court let stand a lower court decision prohibiting a woman from being admitted to Texas A and M (then an all-male institution) to pursue a course of study which was not offered at any other publicly supported institution. Similarly, in *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) *aff'd. mem.*, 401 U.S. 951 (1971), the Supreme Court affirmed a lower court decision upholding the right of a state to maintain a women's college. In *Kirstein v. Rector & Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970), however, women were granted admission to the previously all-male college of the University of Virginia. For a general review, see Shaman, "College Admission Policies Based on Sex and the Equal Protection Clause," 20 *Buffalo L. Rev.* 609 (1971). No cases involving sex discrimination against students in educational institutions in areas other than admissions have been heard by the Supreme Court.

⁵ Public Health Service Act, Section 799a and Section 845, 42 U.S.C. Section 295h-9 and Section 298b-2 (as added by the Comprehensive Health Manpower Training and Nurse Training Acts of 1971). The Act covers, but is not limited to, schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, allied public health personnel and nursing. In addition, regulations issued in June 1972 (45 CFR Part 83) by the Secretary of Health, Education and Welfare specify that *all* entities (including hospitals) applying for awards under Titles VII and VIII of the Public Health Service Act are subject to the nondiscrimination requirements.

⁶ As of July 1974, final regulations for these amendments had not been issued. Draft regulations, proposed 45 CFR Part 83, were published in the *Federal Register* on September 20, 1973. 38 *Fed. Reg.* 26, 384-89.

⁷ The legislative history of Sections 799a and 845 of the Public Health Service Act, 42 U.S.C. Section 295h-9 and Section 298b-2, is found at 117 Cong. Rec. 23,222-64, 25,119-22, 25,181-86 (1971). It would be inconsistent with the intent of this legislation to admit students in a nondiscriminatory manner to a program which subsequently treated them discriminatorily. In addition, sex discrimination against students already enrolled in a program might significantly discourage qualified students from applying because of their sex.

⁸ Education Amendments of 1972 Sections 901-907, 20 U.S.C. Sections 1681-86 (1972). As of July 1974, final implementing regulations for Title IX had not been issued. For a copy of the *proposed* regulations

(45 C.F.R. Part 86), see 39 *Fed. Reg.* 22, 228-40 (June 20, 1974) or write to the Director, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201. The comment period for the proposed regulations ends October 15, 1974.

⁹ Federal financial assistance includes, but is not limited to, a grant or loan of federal funds (including funds for construction or repair of buildings or facilities; scholarships, loans, grants, wages or other funds extended to an institution for payment to, or on behalf of, students; or scholarships, loans, grants, wages or other funds extended directly to a student for payment to an institution); a grant of federal real or personal property, including surplus property; provision of the services of federal personnel; or the sale or lease of federal property at a nominal cost.

¹⁰ For an excellent section-by-section analysis of Title IX and a suggested legal framework in which to evaluate separate or different treatment of the sexes in educational activities, see Alexandra Polyzoides Buek and Jeffrey H. Orleans, "Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972," 6 *Conn. L. Rev.* 1 (1973) [hereinafter cited as Buek and Orleans].

¹¹ Education Amendments of 1972 Section 901(a), 20 U.S.C. Section 1681 (1972).

¹² Specifically, Title IV of the 1964 Civil Rights Act was amended to include sex as a category of discrimination in school assignment in determining whether the U.S. Attorney General may bring action upon receiving a complaint of discrimination involving admission or continued attendance at a public institution. Title IX of the 1964 Act was amended to include sex as a category of discrimination under which the Attorney General may intervene in an action commenced in any federal court seeking relief from denial of equal protection of the laws.

¹³ Also, coverage under the Fair Labor Standards Act was extended to individuals employed in preschools and outside salespersons.

¹⁴ As of July 1974, no regulations had been issued to enforce this provision.

¹⁵ Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (1964).

¹⁶ (1) Certain schools are exempt from Title IX, while there are no such exemptions under Title VI; (2) Title VI has certain exemptions from its coverage of employment discrimination, while Title IX does not; (3) Title IX is restricted to federally assisted *education* programs, while Title VI covers *all* federally assisted programs.

¹⁷ The obligation of an institution to comply with the provisions of Title IX is in no way obviated or alleviated by any state or local law or other requirement which allows or requires discrimination. Similarly, rules or regulations of any organization, club or athletic league or association do not alter an institution's Title IX obligations. See Subpart A, Section 86.6 of the proposed regulations.

18 If an educational institution is composed of more than one school, college or department which are administratively separate units, admissions to each unit are viewed separately under Title IX. See text accompanying notes 35-41 *supra*.

19 The reader is reminded that there are no similar exemptions under the amendments to the PHSA for federally financed health training programs subject to those provisions.

20 Since the passage of Title IX, the Maritime Administration has changed its admission policies so that women are now admitted to the U.S. Merchant Marine Academy at Kings Point, New York.

21 Although HEW attempts to keep the names of complainants confidential, women are increasingly filing complaints through third parties or advocacy groups because they fear harassment. Although such harassment is prohibited, it is often very subtle and consequently difficult to document.

22 20 U.S. 1682.

23 These procedures are expected to be described in some detail in the final implementing regulations for Title IX. See Subpart F of the proposed regulations.

24 This is consistent with the regulations to Title VI of the 1964 Civil Rights Act as amended in July 1973. 45 CFR Part 80.

25 Title IX, 20 U.S.C. 1681(b), provides that:

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 or percentage of persons of that sex participating in or receiving the benefits of any federally supported program activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

26 The Supreme Court has recently avoided the issue of deciding whether, in the absence of proven discrimination, the Equal Protection clause of the Fourteenth Amendment permits an institution to use different criteria for admitting white and minority students. See *DeFunis v. Odegaard*, 94 S.Ct. 1704 (1974).

27 In a number of employment cases, the courts have ruled that individuals must be considered on the basis of their individual capabilities, not on the basis of characteristics attributed to the group to which they belong. See, for example, *Weeks v. Southern Bell Telephone and Telegraph*, 408 F.2d 228 (5th Cir. 1969) and *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).



Photo by Roz Gerstein

28 401 U.S. 424 (1971).

29 See Subpart C, Section 86.23 of the proposed regulations.

30 A number of institutions are now making special efforts and developing special materials to recruit women, especially for traditionally "male" fields. For example, at Stanford University female students in the graduate business program recruit women undergraduates. Similarly, Rensselaer Polytechnic College has a woman on its admissions staff who, among other things, encourages prospective women students to speak with females already enrolled. In addition, recruiters are beginning to recruit more actively at female high schools and colleges.

31 See Margaret Dunkle, "Grading the College of Your Choice," *Ms.*, June 1974, 101.

32 See Subpart C, Sections 86.14-86.22 of the proposed regulations.

33 In this section, the authors have drawn heavily from the unpublished paper "Expanding Opportunities for the Admission of Women to Graduate and Professional Schools Through Implementation and Enforcement of Title IX" by Gary R. Bachula, which was written while he was a student at Harvard Law School (May 7, 1973). Also see David Leslie, "Emerging Challenges to the Logic of Selective Admissions Procedure," *3 Journal of Law and Education* 203 (1974)

34 Similarly, an understanding of bias in admissions aids in understanding discriminatory procedures and policies which may also exist in terms of selection of students for special programs either within the school or outside the school where the institution plays a role in the selection process (for example, summer science programs).

35 Recruitment policies and procedures are exempt from the nondiscrimination provisions of Title IX to the same extent that admissions policies are exempt.

36 For a discussion of the legislative history of these exemptions, see Buek and Orleans, *supra* note 10, text accompanying notes 12-18, 47-51.

37 Single-sex elementary and secondary schools have been challenged on Constitutional grounds. Compare *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972). Subpart C, Section 86.34(b) of the proposed regulations provides that:

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

- (1) any institution of vocational education operated by such recipient; or
- (2) 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.

38 If single-sex public institutions decide to admit both sexes, they have up to seven years to admit female

and male students on a nondiscriminatory basis provided that their plans are approved by the Commissioner of Education.

39 There is some speculation that the passage of the Equal Rights Amendment would either abolish or significantly limit these admissions exemptions. It seems fairly certain that the exemptions for public single-sex undergraduate institutions and nonvocational public elementary and secondary schools would be negated by the passage of the Equal Rights Amendment. The effect of the amendment on the exemption for *private* undergraduate institutions (both single-sex and coeducational) is less clear and would depend on court interpretation of the degree of "state action" involved. For a further discussion of this issue, see Monica Gallagher, "Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges," *18 St. Louis Univ. L. J.* 41 (1973).

40 The question of the applicability of Title IX to discriminatory admissions in *private undergraduate schools which provide professional or vocational training* is, at this point, not clear. Some argue that, since Title IX clearly covers vocational and professional education, these programs must have nondiscriminatory admissions. Others argue that the admissions exemption for private undergraduate schools exempts these programs. The proposed regulations for Title IX take the latter position.

41 Single-sex graduate, professional and vocational schools at all levels have until July 1979 to achieve nondiscriminatory admissions, provided their plans are approved by the Commissioner of Education.

42 *Supra* note 28.

43 401 U.S. at 431.

44 401 U.S. at 436.

45 For a more detailed discussion of this, see Buek and Orleans, *supra* note 10, text accompanying notes 72-84.

46 Phi Delta Kappa changed its policy of excluding women after the Women's Equity Action League (WEAL) filed charges of sex discrimination under Title IX against 25 institutions that sponsored chapters of the honorary.

47 See Subpart C, Section 86.22 of the proposed regulations.

48 Despite myths that older women are poor risks as students, studies show that their dropout rate is lower and their grades higher than "typical" students. See Melissa Lewis Richter and Jane Banks Whipple, *A Revolution in Education: Ten Years of Continuing Education at Sarah Lawrence College*, Sarah Lawrence College, Bronxville, N.Y., 1972.

49 Letters of recommendation, particularly for admission to graduate and professional schools, need to be evaluated in the context of the "protege" system. Often faculty members "sponsor" students, training them in the formal and informal systems of their future professions. For a variety of reasons, women typically have less interaction with faculty and are therefore less likely than males to benefit from this system and to have

strong letters of recommendation. Regarding alumni/ae recommendations for minority students, see *Merideth v. Fair*, 298 F. 2d 696 (5th Cir. 1962).

50 See Subpart D, Section 86.35 of the proposed regulations.

51 The reader is reminded that Title IX applies to the education activities and programs of entities receiving federal funds. Financial aid which is administered by a group outside the institution and which the institution in no way endorses, approves, lists or perpetuates is not covered by the antidiscrimination requirements of Title IX. However, Title IV of the Education Amendments of 1972 prohibits lenders who use the Student Loan Marketing Association from discriminating on the basis of sex, color, creed or national origin.

52 See Elizabeth W. Haven and Dwight H. Horsch, *How Students Finance Their Education: A National Survey of the Educational Interests, Aspirations and Finances of College Sophomores in 1969-70*, College Entrance Examination Board, New York, 1972; and Helen S. Astin, "Career Profiles of Women Doctorates," in Poggi and Calderwood (eds.), *Academic Women on the Move*, Russell Sage Foundation, Hartford, Conn., 1973.

53 Subpart D, Section 86.35 of the proposed regulations prohibits single-sex scholarships, fellowships and other financial assistance *except* if the single-sex financial assistance is (1) "established under a foreign will, trust, bequest, or similar legal instrument or by a foreign government" or (2) "provided as part of separate athletic teams for members of each sex." Both of these exceptions are coming under heavy criticism from women's groups.

54 A public agency cannot administer a will which discriminates on the basis of race. See *Pennsylvania v. Board of Trustees*, 353 U. S. 230 (1957).

55 Cynthia L. Attwood, *Women in Fellowship and Training Programs*, Association of American Colleges, Washington, D.C., 1972, at 14.

56 See Subpart D, Section 86.31 of the proposed regulations.

57 *But compare Robinson v. Board of Regents of Eastern Kentucky University*, 475 F. 2d 707 (6th Cir. 1973), *cert. denied*, 94 S. Ct. 2382 (1974), with Buek and Orleans, *supra* note 10, text accompanying notes 19-25.

58 Although it is clear that Title IX covers this issue, there is some debate concerning the appropriate test to be used to determine compliance. Some people argue that there should be identical rules for any aspect of appearance for men and women. (For example, if long hair is permitted for females, it must be permitted for males as well.) Others argue for the "community standards" approach, where allowable dress might differ according to sex, provided that the community standards concerning dress were applied with equal diligence for both sexes. Opponents of the "community standards" approach argue that it would merely perpetuate discrimination by allowing the community to sanction differential standards for men and women. In addition, they cite the difficulty in fairly determining just what "community standards" are.

59 Since it is impossible to identify unwed fathers with any certainty and consistency, even a policy which ostensibly applied to all "unwed parents" is probably impermissible under Title IX.

60 In the fall of 1973, seventeen year old Sharon Boldman was ruled off the Urbana (Ohio) High School homecoming queen ballot by her school principal who said, "Only virgins can run for homecoming queen." Ms. Boldman was the mother of an infant daughter born out of wedlock.

61 A policy basing a woman's tuition rate on her husband's residency status was voided in *Samuel v. University of Pittsburgh et al.*, _____ F. Supp. _____ (W.D. Pa., No. 71-1202, April 10, 1974).

62 The parallel provision for employment can be found in Office for Civil Rights, U.S. Department of Health, Education and Welfare, *The Higher Education Guidelines, Executive Order 11246*, at 13 (37 Fed. Reg. 24686 *et seq.*, Nov. 18, 1972):

If employees are generally granted leave for personal reasons, such as for a year or more, leave for purposes relating to child care should be considered grounds for such leave and should be available to men and women on an equal basis.

63 See Subpart D, Sections 86.31(b)(6) and 86.32 of the proposed regulations.

64 Education Amendments of 1972 Section 907, 20 U.S.C. (1972).

65 See Subpart D, Section 86.33 of the proposed regulations.

66 See Subpart D, Section 86.32(c) of the proposed regulations.

67 See Subpart D, Section 86.31 of the proposed regulations.

68 See Subpart D, Sections 86.38, 86.35(d) and 86.34(a) of the proposed regulations.

69 Subpart D, Section 86.38(f) of the proposed regulations states that "Nothing in this section shall be interpreted to require equal aggregate expenditures for athletics for members of each sex."

70 For a discussion of the legal implications of sex discrimination in athletics in educational institutions, see Rubin, "Sex Discrimination in Interscholastic High School Athletics," 25 *Syracuse L. Rev.* 535 (1974).

71 For a detailed discussion of discrimination in sports in educational institutions, see Association of American Colleges, Project on the Status and Education of Women, *What Constitutes Equality for Women in Sports? (Federal Law Puts Women in the Running)*, Washington D.C., April 1974.

72 In general, the proposed regulations require complete "integration" for noncompetitive and instructional programs. See Subpart D, Sections 86.38 and 86.34 of the proposed regulations.

73 Subpart D, Section 86.34(a) of the proposed

regulations specifically prohibits single sex classes or courses, including health and physical education courses.

74 Employees might also challenge recreational opportunities which differentiate on the basis of sex as discriminatory fringe benefits.

75 On May 20, 1974 Republican Senator John Tower of Texas introduced a bill (as an amendment to the Elementary and Secondary Education Act) to amend Title IX so that it would "not apply to an intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity." The effect of this amendment would have been to exclude virtually all intercollegiate (but not interscholastic) athletic activities from Title IX coverage. The Tower amendment was deleted from the bill in the House-Senate conference committee.

76 Subpart D, Section 86.38(e) of the proposed regulations states that "A recipient which operates or sponsors separate teams for members of each sex shall not discriminate on the basis of sex therein in the provision of necessary equipment or supplies for each team or in any other manner."

77 Subpart D, Section 86.38(a) of the proposed regulations allows "separate teams for members of each sex where selection is based on competitive skill."

78 See Subpart A, Section 86.3(c) of the proposed regulations.

79 For example, the University of Wisconsin, the University of Michigan and the University of Minnesota have had Title IX complaints alleging discrimination in athletics filed against them.

80 See Subpart D, Sections 86.36 and 86.37, and Subpart E, Section 86.46 of the proposed regulations.

81 See Association of American Colleges, Project on the Status and Education of Women, *Health Services for Women: What Should the University Provide?* Washington, D.C., June 1972.

82 The *Guidelines on Discrimination Because of Sex*, the Equal Employment Opportunity Commission, states:

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions

as they are applied to other temporary disabilities. [29 CFR 1604.10]

Also see note 85 *infra*.

83 See *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971).

84 There would be no bar under Title IX to permitting pregnant students to attend separate classes or to be tutored at home, provided the same options were open on the same basis to students with other temporary physical disabilities. See, however, the legislative history at 188 Cong. Rec. 2747 (daily ed. Feb. 28, 1972).

85 In January 1974, the Supreme Court ruled that school boards violated the due process clause of the Fourteenth Amendment by maintaining and enforcing mandatory maternity leave policies requiring teachers to leave their jobs four and five months before childbirth. *Cleveland Board of Education et al. v. LaFleur et al.*, 94 S. Ct. 791 (1974). But in *Geduldig v. Aiello et al.*, ___ U.S. ___ (1974), the Court ruled that it was not unconstitutional for a state disability insurance program to exclude pregnancy from coverage.

86 See Subpart D, Section 86.35 and Subpart E of the proposed regulations.

87 For a free copy of a chart prepared by the Project on the Status and Education of Women that outlines *Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions*, write to the Public Information Office, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201. See also Bernice Sandler, "Sex Discrimination, Educational Institutions, and the Law: a New Issue on Campus," 2 *Journal of Law and Education* 613 (1973).

88 A job can be limited to one sex only if sex can be proven to be a "bona fide occupational qualification" (bfoq). The courts have interpreted this exemption very narrowly: for example, acceptable bfoq's are "lingerie fitter" and "rest room attendant" (provided the attendant is in the rest room while it is in use).

89 See Subpart D, Section 86.31 of the proposed regulations.

90 *Id.*

91 Section 804(b) of the Higher Education Act of 1965, P.L. 89-329 ("Waggoner Amendment") provides that:

Nothing contained in this Act or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institutions.

Under Title VI, no institution/recipient of federal

assistance may assist any person or agency in practicing racial discrimination, whether or not its activities are related to the activities of the recipient. HEW's policy under Title VI has been consistent no matter what form "support" takes. For example, recipients may not do such things as allow a racially segregated social organization, student activity or professional fraternity to use a school facility to conduct its activities.

92 Race discrimination has been held to be unlawful in *Sigma Chi v Regents of University of Colorado*, 258 F. Supp. 515 (D.C. Colo. 1966); *Webb v. State University*, 129 F. Supp. 910 (N.D.N.Y. 1954), appeal dismissed.

93 This is the interpretation articulated in the introduction to the proposed regulations by the Secretary of HEW.

94 See Subpart D, Section 86.31(c) of the proposed regulations.

95 See Subpart D, Section 86.31 of the proposed regulations.

96 The proposed regulations deliberately do not mention the issue of sex stereotyping and discrimination in textbooks and curricula. See the introduction to the proposed regulations by the Secretary of HEW.

97 Jennifer Macleod and Sandra Silverman, *You Won't Do: What Textbooks on U.S. Government Teach High School Girls*, KNOW, Inc., Pittsburgh, 1973.

98 *Id.* at 24.

99 For further information, see Saario, Jacklin and Tittle, "Sex Role Stereotyping in the Public Schools," 43 *Harv. Ed. Rev.* 386 (1973).

100 Letter from Estelle R. Ramey to Membership of Association for Women in Science, August 1, 1972.

101 Association of American Colleges, Project on the Status and Education of Women, *On Campus With Women*, No. 7, Washington, D.C., December 1973, at 9.

102 The proposed regulations adopt this position. See the Introduction to the proposed regulations by the Secretary of HEW.

103 The January 1974 unpublished draft of the Title IX regulations adopted this position.

104 That is, a suit in which the parties agree to initiate litigation in order to obtain a judicial determination of their respective rights.

105 For example, at the University of Wisconsin, a group of women medical students has filed charges of sex discrimination under Title IX, claiming that a professor's remarks showed disrespect for women medical students. The women supported their claims with tape recordings.

106 Although the proposed regulations do not address the issue of sex discrimination in counseling in any detail, Subpart D, Section 86.34(c) requires non-discriminatory appraisal and counseling materials.

107 See John Pietrofessa and Nancy K. Schlossberg, "Perspectives on Counselor Bias. Implications for Counselor Education," 4 *Counseling Psychologist* 44 (1973) and I.K. and D.M. Broverman, F.E. Clarkson, P.S.

Rosenkrantz and S.R. Vogel, "Sex Role Stereotypes in Clinical Judgements of Mental Health," 34 *Journal of Consulting and Clinical Psychology* 1 (1970).

108 Pietrofessa and Schlossberg at 49.

109 See Subpart D, Section 86.34 of the proposed regulations.

110 Single-sex courses, programs and activities may be permitted in a few limited instances if they can be justified for affirmative action purposes. However, indications are that this exception will be construed very narrowly. It is not clear to what extent and in what circumstances special programs or internships for women only will be permitted.

111 See Subpart D, Section 86.33 of the proposed regulations.

112 See Subpart A, Section 86.14 and Subpart D, Section 86.34 of the proposed regulations.

113 For documentation of the degree of sex segregation in vocational schools and programs see Nancy Frazier and Myra Sadker, *Sexism in School and Society*, Harper & Row, New York, 1973; *A Look at Women in Education: Issues and Answers for HEW—Report of the Commissioner's Task Force on the Impact of OE Programs on Women*, Office of Education, Department of Health, Education and Welfare, Washington, D.C., 1972, at 5; Gail Byran, *Discrimination on the Basis of Sex in Occupational Education in the Boston Public Schools*, Boston Commission to Improve the Status of Women, 1973, at 6; Marcia Federbush, *Let Them Aspire!*, Committee to Eliminate Sexual Discrimination in the Public Schools, Ann Arbor, 3rd ed., 1973, at 16-17; and Paula Latimer, *Survey of Sex Discrimination in the Waco Independent School District*, Waco, Texas, 1973.

114 See Subpart D, Section 86.31 of the proposed regulations.

115 For a listing of about 4,000 women's studies courses and instructors, see Feminist Press, *Who's Who and Where in Women's Studies*, Old Westbury, New York, 1974.

116 See Subpart D, Section 86.34(a) of the proposed regulations.

117 See Subpart A, Section 86.3 of the proposed regulations.

118 See Subpart D, Section 86.31 of the proposed regulations.

119 For a listing of approximately 500 women's centers see Association of American Colleges, Project on the Status and Education of Women, *Women's Centers: Where Are They?* Washington, D.C., June 1974.

120 See Subpart D, Section 86.31 of the proposed regulations.

121 For a listing of such programs, see the publication by the Women's Bureau, U.S. Department of Labor, *Continuing Education Programs and Services for Women*, Washington, D.C., 1971.

122 See Subpart D, Section 86.31 of the proposed regulations.

Chapter 622: One State's Mandate

by Regina Healy and Diane Lund

On August 5, 1971, the Governor of the Commonwealth of Massachusetts signed a measure which outlawed discrimination on account of sex in the public schools of the state.¹ In this age of antidiscrimination agencies and affirmative action programs, the form which the new statute took may appear anomalous to some in its simplicity:

. . . No child shall be excluded from or discriminated against in admission to any public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of . . . sex²

Chapter 622, as it has come to be known, was the first anti-sex discrimination legislation of its kind in the country. The questions asked most often about it are why this form of legislation was chosen and how the law is working in practice. This article attempts to supply some answers to those inquiries.

History of Chapter 622

The concept of Chapter 622 was developed during a 1970 meeting of a group of feminists³ whose particular concern was whether state legislation could be an effective means of improving the economic position of women. Many of the people in attendance were connected with legal services offices or other agencies serving the poor. All were aware of the statistical position of women in

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Boston: a 1968 sample of Boston households indicated that 31.7 percent of all families were headed by women;⁴ and all studies of AFDC recipients, male-female income levels, comparative earning power and the like established that families headed by females were likely to be poor.

Hence the issue was whether something could be done through legislation to make it more likely for a woman heading a family unit to earn enough to support herself and her family. The operation of public schools was a logical starting point in this consideration. The group shared information about Massachusetts high schools which only admitted boys and which were the only schools in the community to offer preparatory programs in skilled trades such as carpentry, plumbing and electrical work. The consequences for a child's vocational aspirations of being assigned to a cooking class or a woodworking class solely on the basis of sex were discussed. The outcome of all this talk was general agreement on a proposal for action: *a successful effort to enlarge educational opportunities for girls would be one likely way of ultimately increasing the earning power of women.* Thus the idea of Chapter 622 evolved.

Legislative Form

The form of the legislation clearly was of prime importance. In retrospect the choice made seems to have been a particularly fortunate one. At the time, however, the phraseology of the bill was dictated more by a pragmatic view of the political realities than by any thoughtful weighing of the comparative virtues of the alternatives. The realities are easy to enumerate: the proponent group had no connections to the educational bureaucracy in the Commonwealth, and therefore

no hope of obtaining official sponsorship for the proposal; the deadline for filing legislation was close, making it unlikely that substantial community involvement with the bill could be obtained prior to its filing; the Commonwealth, as usual, had no money to spend; and no one was solidly informed about the educational processes which were intended to be affected by the bill.

All of these considerations argued for generalities rather than specifics, and for generalities, moreover, which would address the problem at no apparent cost to anyone. It seemed politic under these circumstances to make what would appear to be an acceptably modest beginning: a simple statutory guarantee that sex should not be a determinant of access to educational programs.

The model for such a law was already available to the drafters of Chapter 622. The chapter of the General Laws dealing with compulsory school attendance⁵ had a section describing which schools a child required to go to school had a right to attend.⁶ That section included language, added just prior to the Civil War,⁷ which protected a child against being excluded from a public school on account of his or her race, color or religious opinions.

Further, a subsequent section of the chapter⁸ created an individual right of action to redress an unlawful exclusion from school. The wrongdoing town was made liable to pay money damages.⁹ This almost ideal legislative scheme offered the added attraction of support for the assertion that the current proposal was no more than an extension of the protections already guaranteed to other groups under Massachusetts law. However, the existing provisions, dealing only with exclusion from school, were not broad enough. The law did not address the problem of assigning children to practical skills courses on the basis of sex, differing levels of expenditure, unequal physical facilities and distinctions drawn when job interviews were being held or scholarships awarded.

The drafters of Chapter 622 provided the essential broader protection by means of a key phrase: "No child shall be excluded from or discriminated against in . . . obtaining the *advantages, privileges and courses of study* of such public school. . . ." (emphasis added). This language offers possibilities for comprehensive interpretation but it does so in an unobtrusive

fashion. Although a vehemently opposed legislator might have used those terms to conjure up mixed lavatory scenes as an argument against passage, the wording of the bill did not invite this tactic.¹⁰

The proposed legislation in this no-cost, equal opportunity sheepskin attracted the interest, and ultimately the vigorous sponsorship, of the Speaker of the Massachusetts House of Representatives, David M. Bartley. Ann Gannett and Mary Fantasia, two women members of the House, joined him as co-sponsors.¹¹ The Speaker's support undoubtedly was a key factor in the passage of the bill. He utilized the resources of his office to conduct a survey which elicited one hundred and sixty five responses from schools across the Commonwealth and documented the existence of single-sex schools, single-sex courses and unequal athletic programs.¹² This material was presented at the public hearing on the bill together with testimony describing the plight of Massachusetts families headed by women whose educational experience prepared them for dependency rather than self-sufficiency:

The proposed legislation would require a local public school to admit children without regard to their race, color, sex, religion or national origin. Once admitted the school would be further prohibited from discriminating on the basis of race, color, sex, religion or national origin in the offering of advantages, privileges, and courses of study.

The shortcomings of the present statute fall into two main categories. First, while discrimination on the basis of race, color and religion in admission to public schools is prohibited, discrimination on the basis of sex and national origin is not. The second problem with the present law is that once admitted, there is no prohibition against discriminating against a child in the courses of study and other opportunities available to him. Thus while girls are admitted to coeducational schools, they are often denied the opportunity to train for jobs which will support them and their possible future families. The presumption that these families will be supported by a male wage

earner is no longer valid. ABCD figures show that 31.7 percent of all Boston families are female headed.

In many vocational schools in Massachusetts, boys learn electronics and carpentry while girls learn only homemaking. While homemaking is a very useful skill, it should not be the only alternative open to students. One third of all female workers in the United States work in service and sales occupations with median income ranging from \$1,297 for private household workers to \$3,103 for sales workers. In fact the U.S. Department of Labor states that even if free day care were available, more than two thirds of all AFDC mothers would be unable to support their families even at a public welfare level. Under the proposed legislation all those who meet the standards set by school committees would be able to acquire much needed skills without regard for their race, color, sex, religion or national origin.¹³

The logic thus given to the legislation proved to be persuasive. The bill encountered no significant opposition in either house and was enacted with little furor and no fanfare.¹⁴

We have suggested that the access-to-education model used for Chapter 622 was chosen for political reasons. While this is true, it is not the whole truth. Political considerations determined the outcome of the initial choice between programmatic legislation, intended to induce systemic change by making funds available for new ways of doing things, and minimum-standards legislation, intended to produce systemic change by mandating it. The proponents of the bill did not have the backing, expertise or influence to put through legislation calling for the expenditure of state monies. But within the parameters of the minimum-standard option, the decision on the enforcement mode, while requiring some recognition of practical realities, did not turn on them.

In broad terms, the alternatives for enforcing the minimum-standard legislation were: (1) enforcement through the internal procedures of the extant education system; (2) antidiscrimination agency enforcement; and (3) enforcement initiated, processed, and if necessary, litigated

through individual complaint. It seems probable that a similar set of options exists in all states, and thus that our analysis of each is generally relevant.

State Education Enforcement

In Massachusetts, enforcement of laws related to education has most often fallen under the responsibility of the internal workings of the various levels of the state educational bureaucracy (e.g., State Board of Education, State Commissioner of Education).¹⁵ However, the sanction of withholding funds,¹⁶ the method designated for enforcement action, is not usually relied upon in actual practice.¹⁷ Even if withholding funds were more frequently practiced, its effectiveness is questionable since local communities in the Commonwealth bear the major burden of financing their schools and some could probably scrape along without state aid if they chose to in order to avoid compliance.¹⁸ Although there have been two statewide directives in recent years which have aroused controversy and local resistance,¹⁹ they have not resulted in the sanction of fund withholding. Local schools most often reach a mutually agreeable compromise resolution with the educational bureaucracy.²⁰

Additionally, if there is a large gap between the legislative vision behind a minimum-standard law and the operational realities existing in the schools, the law may never cast any noticeable shadow upon local schools. In such cases, the state educational agency simply chooses not to enforce the legislature's directive.²¹ The drafters' concern with the potential gap between the mandate and state agency enforcement activities led them to decide against proposing to make a state educational agency responsible for enforcement.

Antidiscrimination Agency Enforcement

The choice to lodge enforcement responsibility in a state antidiscrimination agency may not be available in every state;²² when it is, the alternative requires thoughtful consideration. One traditional rationale for giving jurisdiction to a state agency in this kind of circumstance is the assumed greater power the state has to effectively deal with violations of the law. The implication, of course, is that the protected individual or group, acting alone, is relatively powerless. This reason-

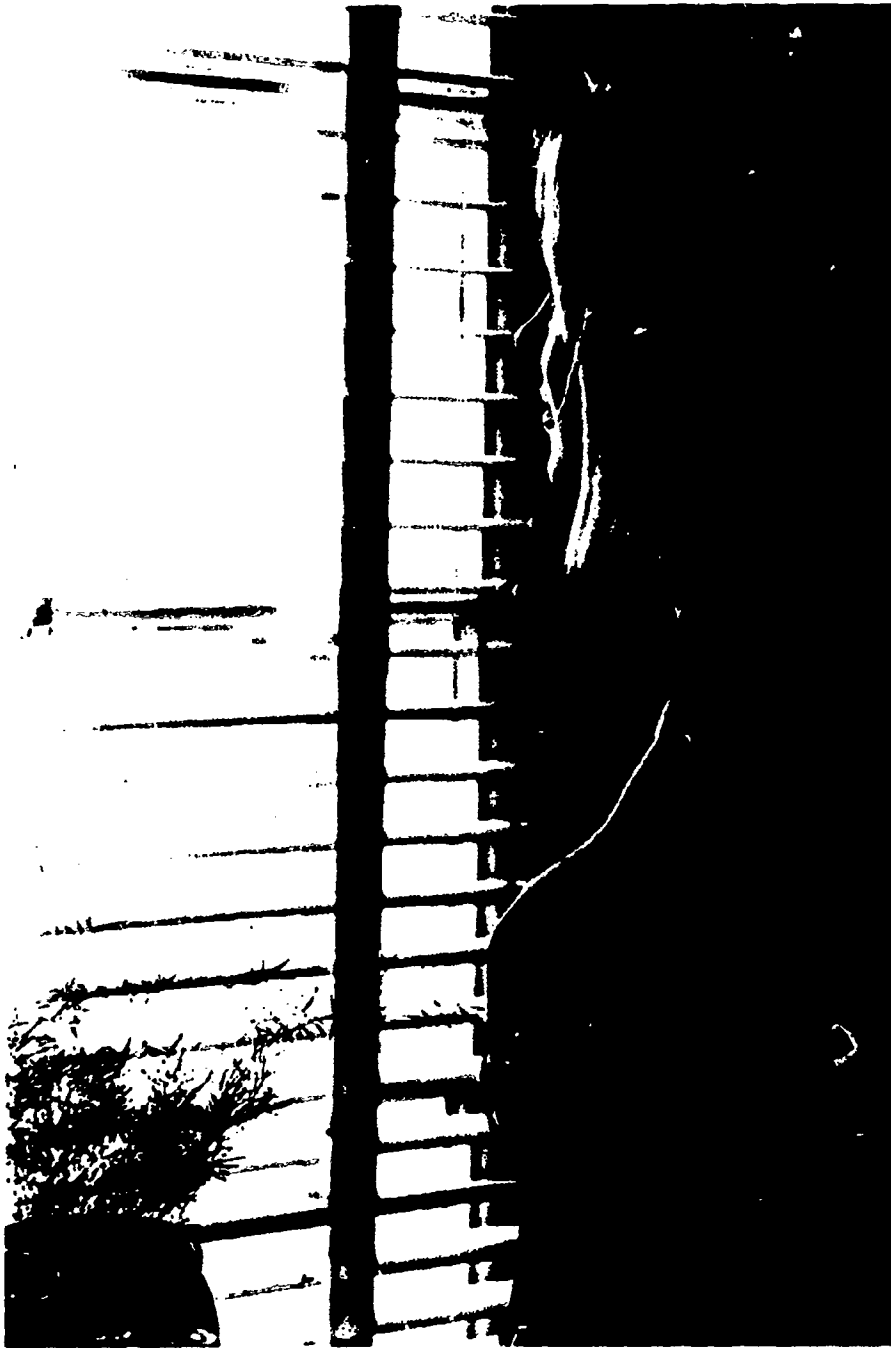


Photo by Deborah Feingold

ing, however, is not necessarily accurate when applied to sex discrimination in the public educational context.

It must also be recognized that agency enforcement calls for the use of state resources. Unless new money is requested in connection with the bill proposing to give jurisdiction to the state antidiscrimination agency, implementation of the law, once the legislation is enacted, will require some shifting of priorities within the agency. It is possible that no shifts will be made if the agencies' new responsibilities are unwanted.²³ Finally, locating enforcement responsibilities in a state

agency gives that agency control over the development of the content of the law.

After considering these factors, the advocates of Chapter 622 decided that a proposal to add to the responsibility of the Commonwealth's antidiscrimination agency would not be popular at that particular time.

Individual Enforcement

A personal bias toward individualism and the value of self-help activities led the proponents of Chapter 622 to opt for individual enforcement

power, despite the possibility of alienating the state educational bureaucracy which would more usually assume primary enforcement duties in education matters. However, while the primary control of enforcement would be individual and local, it seemed likely that the new law would still give rise to oversight obligations on the part of the state education agencies.²⁴ Thus an election to bypass the internal state enforcement process did not cut us off from the state resource altogether and, in fact, appeared to leave the possibility open that two modes of enforcing the Chapter might evolve.²⁵

The striking variety of developments since the enactment of Chapter 622 has convinced us that the individual enforcement mechanism chosen gave rise to one of the great strengths of the law. The absence of any governmental control over the content of the legislation created a rather uncertain, speculative climate. Therefore, the interpretation of the law was open-ended, providing greater possibilities for applying it creatively.

Chapter 622 came into being at a time when interest in and concern about sex-role stereotyping and the public schools was just beginning to be expressed,²⁶ and of course we cannot document our assertion that the law has been the primary cause of the changes which have occurred in the Commonwealth since 1971. But it stands to reason that it has been a decisive factor, simply because it gives children and their parents the leverage to deal directly with their schools in a way which is likely to obtain immediate results. We have experienced this ourselves in certain instances where we have helped with the resolution of a Chapter 622 claim. For the most part these have been straight-forward factual situations, usually involving access to a practical arts course which the school administration has traditionally limited to students of one sex. Telephone calls or letters to the school principal, the superintendent of schools and the town council invariably produce a policy change in these cases.

Broad Consequences

The law has had many more consequences which support the case for an individually-enforced, broadly phrased right-of-access format. Students' efforts to use the law to enroll in sex-restricted courses have always turned out to be

successful. These cases are usually resolved at an early stage, without the need for significant expenditures of time or effort.²⁷ For the most part these cases have focused on junior high level home economics and shop courses which historically have been segregated by sex in Massachusetts.

A subject of almost equal interest has been access to equal opportunities in athletics. A girl who attends a school in which there is no competitive program for girls in her particular sport, and in which there is an existing boys' program, is able to use Chapter 622 to gain the opportunity to try out for the boys' team. Another community use of the law has been in conjunction with the sexual integration of Boston Latin School and Girls' Latin School.²⁸

Chapter 622 has also been used as a springboard to system surveys. In town after town in Massachusetts, teachers, parents, students and administrators have joined forces to study their school system in order to determine what kinds of sex-role stereotyping activities are taking place. Frequently system studies are seen as the first phase of long-range corrective programs. A good example is the committee which the Lexington School Committee voted into existence and charged as follows:

. . . [T]o report to the School Committee no later than on what differences exist between the educational services and opportunities offered to boys and those offered to girls attending the Lexington public schools. One or more representatives of the following groups shall be invited to serve on the Committee: secondary school administrative staff; elementary school administrative staff; secondary school teaching staff; instructional materials specialists; physical education specialists; Lexington School Committee; Lexington N.O.W.; W.E.A.L. (Women's Equity Action League); Lexington League of Women Voters; CCLPS; parent teacher groups. The committee shall include in its report information on vocational courses for which state reimbursement is received; the program to be offered at the Minuteman Regional School; courses on practical skills; counseling

and guidance services; the physical education program; the athletics program; instructional materials; and any other areas in which differences are found to exist.²⁹

The general interest in these committees, but particularly the willingness of school administrators to participate, is traceable in large part to the existence of Chapter 622. A local system is concerned with satisfying its *own* community with respect to the elimination of discriminatory practices, and it makes obvious sense to involve the community in the initial process of responding to the legislative mandate. This consequence strikes us as being one of the most positive products of the legislation.

A similar interest in outside viewpoints has been shown in other responses of educators to Chapter 622. They want to know what the supporters of the legislation were seeking to achieve. This is a normal and sensible reaction on their part, and one which provides a realistic opportunity for developing a cooperative relationship between the administrators of the educational system and the group seeking to change the schools. Each side has something to offer. In the case of Chapter 622, an ongoing process has resulted, with the administrators and the advocates working together toward agreement upon the scope of the law and the responses which should be made to it.

State Response and Involvement

Much of the impact which Chapter 622 has had upon Massachusetts schools and educators is directly due to the efforts of volunteers who worked to see that the law was implemented. These people gave advice and guidance to individuals who wanted to avail themselves of the protections of the law. They served as catalysts in the process of creating new groups of advocates and talked about Chapter 622 to anyone who would listen. They aroused local school committees, PTA's, teacher groups and Leagues of Women Voters. And they maintained continuous pressure upon the state agencies which could act in ways which would expand the potential of Chapter 622.

The most desirable way the state could respond appeared to be an active acceptance of the responsibility for oversight of the law.³⁰ This

would require the state to assume the role of a compliance officer, defining the type of behavior which would conform with the law, assisting local school systems in their efforts to comply and imposing sanctions when voluntary compliance could not be obtained. Progress has been made toward this goal. New groups of people have been involved in the implementation of Chapter 622, adding further dimensions and perspectives to the law which might not have been achieved otherwise.

State Guidelines

In Massachusetts a concerted and persistent effort³¹ to make the state acknowledge its duty to provide guidance on Chapter 622 to the local school systems finally produced an Ad Hoc Committee whose members, appointed by the Commissioner of Education, were asked to "develop policy guidelines for the implementation and enforcement of this legislation."³²

The committee was composed of proponents of the law, representatives of groups affected by the law, students, teachers and local and state administrators. The guidelines which were developed by this committee took the natural step of moving beyond the guarantee of access in Chapter 622 to considering the kinds of intentional and unintentional barriers to access which can exist in an educational setting. The proposed guidelines described the ways of removing these barriers. In addition they called for internal monitoring procedures in an effort to ensure that deviations from desired norms would not pass unnoticed. The topics covered by the committee guidelines³³ included admissions policies, entry into courses, guidance practices, course content and materials used, and extracurricular and athletic activities.

In March 1974, the Commonwealth's Board of Education agreed to accept and promulgate the guidelines drafted by the Ad Hoc Committee, but with one major change. The committee guidelines were designed to serve the functions of advising local school systems of the law and the terms of appropriate compliance with it, and of giving notice to the local agencies that the Board of Education was requiring and would enforce compliance with the legislative mandate contained in Chapter 622. The Board chose to accept the guidelines only for their *advisory* use, and voted to

delay for another year consideration of enforcement mechanisms to operate within the Department of Education.

As might be expected, the original proponent groups raised strong objections to the nonmandatory character of the Board's guidelines (which the Board chose to call Recommendations). More surprisingly, new voices joined in, most notably those of some directors of public school athletic programs. These people saw the strong committee guidelines as a tool to convince conservative school committees that increased athletic expenditures were necessary. The original form of the guideline on athletics set as a goal the equalization of expenditures "for male and female students, proportionate to their membership in the student body" in each category of athletic activity.³⁴ Because it is unlikely that a town is going to reduce the budget for boys' activities, assuming a constant level of participation, the probable consequence of an equalization requirement will be a larger athletic budget, with the new money going to girls' sports.

Another objector to the nonmandatory Recommendations was the Massachusetts Commission Against Discrimination, which identified certain areas in which the Recommendations appeared to conflict with existing anti-discrimination laws administered by the agency. Teachers, administrators and guidance counselors within individual school systems also expressed reservations about the diminished impact which recommendations would have and noted the possibility of confusion. Some members of the Ad Hoc Committee filed a formal objection to the Board's action. Despite all this activity, as of this writing, the guidelines remain Recommendations and continue to be phrased in nonmandatory terms.

This disappointment is somewhat offset by the fringe benefits of the controversy: the event has served to swell the ranks of proponents of Chapter 622 and has encouraged the spread of information regarding the implications of the law and its accompanying individual right to sue. Significant public attention has focused on the Board of Education's commitment to review in a year the operation of the Recommendations and consider then whether to convert them into regulations.

Internal advances are also being made in the

Department of Education as a result of Chapter 622 and the momentum generated by the work of the Ad Hoc Committee. The goal is a system for providing advice and assistance to local school systems concerned with providing equal educational opportunities for boys and girls. Funds for two staff positions have been included in the Department of Education budget for fiscal 1975. One person already at work is surveying system-wide practices and designing methods for initiating change. However, it still will be necessary to arouse a school system's interest in taking advantage of the help being offered by the state, and thus it still will be necessary for students and parents to remain actively interested in whether and how the law is being implemented.

Within the two years following its enactment then, Chapter 622 has been put to good use by public school students and parents. Appropriate institutional responses are occurring as well. Commitment to furthering the policies which underlie the law has been engendered to a degree that makes us confident that Chapter 622 will continue to make a difference in the operation of the public schools of the Commonwealth of Massachusetts. There is one further question to answer: what results has Chapter 622 achieved in vocational education in Massachusetts?

Vocational Education

The ultimate goal of the drafters of Chapter 622—to expand occupational opportunities for women by expanding training opportunities for girls—still remains more of a hope than a reality. There are indications that vocational education practices are becoming less rigid, but not all vocational educators have recognized and publicized the new options which the law makes available to students interested in being educated for employment.³⁵ One new regional vocational-technical school, scheduled to open in fall 1974, is making active efforts to attract girls. Its facilities are planned with the expectation that at least forty percent of its enrollment will be female, a figure which is comparable to the percentage of females in the area work force.³⁶

Making vocational programs available to girls, however, is only the beginning. It is here that the affirmative efforts called for by the Ad Hoc Committee are truly needed. Girls who are inter-

Photo by Roz Gerstein



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ested in preparing themselves for jobs need to know that new fields are now open to them and that these opportunities are challenging, satisfying, remunerative and well within their capabilities. Beyond the tasks of specific guidance as to occupational choice is a great need that general information be provided to adolescent girls concerning the economic facts of life and what a female's realistic expectations about financial support ought to be.

Broadening Education Options

The passage of Chapter 622 has turned our attention³⁷ to the possibility of varying the scheduling of vocational education for females, since it currently appears to be out of phase with

the actual needs of women in varying economic and family situations. We are thinking that publicly-supported occupational training for women when they need it—that is, when they are ready to permanently enter the labor force—is an option which needs greater consideration and exploration. The fact that we are now aware of the potential for changing the vocational education structure in order to better serve the needs of girls and women (and we are bringing this to the attention of others) illustrates another way in which Chapter 622 is having a continuous and ever-widening impact upon education in the state.

The consequences which Chapter 622 has had for vocational education in Massachusetts confirm our conclusion that legislation of this type

ought to be viewed, and valued, as a first step in a long and expanding process. Undoubtedly an access law is an essential beginning point. Those who wish to propose an access law should recognize that its major function will be to stimulate a great number and variety of spinoff activities. These efforts in turn will lead to a closer scrutiny of the educational structure itself to see whether it is equally well suited to the needs of both sexes. A formulation which permits individual enforcement seems to us most likely to produce these results. If an individual enforcement law can be used to generate a statewide agency response, the development of basic policies will proceed more quickly and the law will be likely to have more impact sooner. Even without the expanded implications, however, legislation such as Chapter 622 contains in itself the potential to produce real change in the schools, and to do so on behalf of those with unfulfilled and growing needs.

Footnotes

¹ Mass. Acts & Resolves, 1971, ch. 622, amending Mass. Gen. Laws ch. 76. Sections 5 and 16.

² The full text of the law, following the 1971 amendment, protects against discrimination "on account of race, sex, color, religion or national origin." Both sex and national origin were added to the list of protected characteristics by the 1971 legislation.

³ The idea for the meeting originated with author Healy and Martha Davis, both of whom were then working at Massachusetts Law Reform Institute, an OEO-sponsored agency responsible for statewide legal services projects.

⁴ *1968 Statistics on Boston's Population*, Action for Boston Community Development, Inc., Boston, Mass.

⁵ Mass. Gen. Laws ch. 76.

⁶ This provision, which appears as Section 1 of the chapter, was probably intended to fix and limit rights rather than to extend them; that is, its purpose is to identify the pupils which the local municipality must provide educational services for, and by doing so, to make it clear that no one outside the described geographical boundaries has any entitlement.

⁷ Mass. Acts & Resolves, 1855, ch. 256.

⁸ Mass. Gen. Laws ch. 76. Section 16.

⁹ In only two of the fully reported cases arising under Section 16 of Chapter 76 has the plaintiff prevailed. In the first of these, *Morrison v. City of Lawrence*, 181 Mass. 127, 63 N.E. 400 (1902); 186 Mass. 456, 72 N.E. 91 (1906), the student was accused by the principal of the high school of inciting other students to write articles for a local newspaper which were critical of

the principal. The newspaper was published by the student's father. Eventually the student was expelled and an action was brought to recover damages. The jury found in the student's favor but the Supreme Judicial Court ordered a new trial on the ground that the trial judge erroneously refused to instruct the jury to disregard evidence of the costs of attending school elsewhere (since the student did not show these to be personally incurred by him). At the second trial the jury returned a verdict for the sum of \$750 and this time defendant's exceptions were overruled on appeal. *Carr v. Inhabitants of Dighton*, 229 Mass. 304, 118 N.E. 525 (1918), involved suspension of three children in a family on account of head lice, followed by an unsuccessful effort by their parent to obtain a hearing. The jury found for the plaintiffs, apparently concluding on the particular facts that the exclusion from school was not made in good faith, and awarded each child \$100. The verdicts were upheld on appeal.

¹⁰ A variation of the bathroom argument was made in the subsequent legislative session when bills designed to save all-male Boston Latin School from Chapter 622 were being considered. The contention was that the Latin School building couldn't accommodate females because there weren't enough of the "right kind" of facilities. See note 28 *infra*.

¹¹ In 1971 the 240-member Massachusetts House of Representatives (the largest in the country) contained four women.

¹² Of the schools responding, 19 reported themselves as admitting only boys and 4 as admitting only girls. 57 of the responding schools refused to permit boys to take home economics courses. 52 of them refused to permit girls to take shop courses. 86 of the 117 coeducational schools furnishing information to the survey reported that they provided more athletic opportunities for boys than for girls whereas 9 of these had more athletic opportunities for girls than for boys.

¹³ Testimony of Regina Healy before the Joint Committee on Education of the Massachusetts legislature, March 2^d, 1971.

¹⁴ Both of Boston's major newspapers reported the Governor's action in signing the Bill into law. The *Herald* report included a statement from Speaker Bartley's office that the legislation was designed primarily to open to girls vocational opportunities traditionally limited to boys, followed by the Associate Commissioner for Vocational Education's comment that he didn't expect the law to have a major impact since "it will simply confirm what many schools are already doing." *Boston Herald*, Aug. 10, 1971.

¹⁵ The controlling statutory provision is found in Mass. Gen. Laws ch. 15, section 1G, the section describing the responsibilities of the State Board of Education. One paragraph of that section reads:

The board shall see to it that all school committees comply with all laws relating to the operation of the public schools and in the event of noncompliance the commissioner of education shall refer all such cases

to the attorney general of the commonwealth for appropriate action to obtain compliance.

A second string to the Board's bow is provided by an earlier paragraph in the same section:

The board may withhold state and federal funds from school committees which fail to comply with the provisions of law relative to the operation of the public schools or any regulation of said board authorized in this section.

State educational agency enforcement does appear to be an appropriate means of obtaining compliance with statewide policies on the part of operating educational systems which are subject to local control. Mass. Gen. Laws ch. 40, Section 1 requires every town at its annual meeting to elect specified town officers, including members of the school committee. The duties of a school committee, as prescribed by Mass. Gen. Laws ch. 71, Section 37, are "to have general charge of all the public schools. . . ."

16 Mass. Gen. Laws ch. 15, Section 1G, quoted in note 15 *supra*.

17 The Massachusetts Board of Education has used its withholding power in its efforts to enforce the state's racial imbalance law. *School Committee of Springfield v. Bd. of Education*, Mass. Adv. Sh. 1543 [1972]; see also *School Committee of Boston v. Bd. of Education*, Mass. Adv. Sh. 161 [1973] at 161-162.

18 For example, the 1973 school budget for the Town of Lexington called for a total outlay of \$11,919,667. Actual expenditures for the year amounted to \$11,353,981.06. State reimbursements came to \$2,311,887.82, or approximately 20% of the total. Thus 80% of the cost of its schools was being paid by the town's inhabitants through real estate taxes.

19 These involved a Board mandate that kindergartens be operated in all communities and a legislated requirement that public schools make lunches available to their students.

20 Limited waivers of both the kindergarten requirement and the school lunch requirement were given upon an adequate showing of hardship.

21 An apparent example of this is the requirement, frequently alluded to by physical education teachers but unheeded otherwise, that "[p]hysical education shall be carried on daily for all pupils in the public schools" Mass. Gen. Laws ch. 71, Section 3.

22 No agency of this type exists in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Dakota, South Carolina or Virginia. Tennessee has a commission which has no enforcement powers and Florida, North Carolina and Texas have agencies with extremely limited jurisdictions.

23 The Massachusetts legislature is currently considering a bill (H.3305) to give the Massachusetts Commission Against Discrimination broader jurisdiction over complaints of discrimination in the public schools which will be concurrent with the jurisdiction of the courts to

hear Chapter 622 complaints. The MCAD is itself actively seeking this responsibility, and personnel changes in the agency since 1970 (not the least of which is the appointment of author Healy as a Commissioner) make it probable that these additional powers, if given, would be energetically exercised.

24 See the paragraphs of Mass. Gen. Laws ch. 15, Section 1G quoted in note 15 *supra*

25 This is the position toward which post-enactment responses to Chapter 622 appear to be moving, as suggested *infra*.

26 The first broadly circulated report on sexism and public school policies and practices appears to have been *Dick and Jane as Victims*, a study of children's readers done by women in Princeton, New Jersey (who later organized themselves as Women on Words and Images), first published in 1972. Studies of school systems were done that same year in Ann Arbor ("An Action Proposal to Eliminate Sex Discrimination in the Ann Arbor Public Schools," March 1972), and New York City ("Report on Sex Bias in the Public Schools"). Following these, a number of women's groups, teacher groups and individuals came out with collections of materials, studies and action plans for eliminating sex-role stereotyping in the schools. A good listing of these is found in *Sexism in Education* (3d ed., Sept. 25, 1972), Emma Willard Task Force on Education, University Station Box No. 14229, Minneapolis, Minnesota 55414. [See also "Kalamazoo: A Model for Change" by Carol Ahlum in this issue.]

27 There have been exceptions in which considerable pressure has been required in order to move recalcitrant school officials as well as occasions in which the victory won has been somewhat hollow. An example of the latter occurred with the Natick, Massachusetts school system, when the principal of a junior high school, following a girl's complaint about nonaccess to a shop course, agreed to admit her and to inform all the girls in her class about the existence of these Chapter 622-mandated opportunities. He did so by means of the following bulletin, quoted here in full:

WILSON JUNIOR HIGH SCHOOL NATICK, MASSACHUSETTS 01760

January 31, 1973

Dear Parents,

Your daughter has requested to take Woodworking and Art Metal this second semester instead of Home Economics. Although there is already a class of boys taking the industrial arts course, we will attempt to put in a few girls.

We want you to realize that your daughter will be given the same course as the boys. It will involve learning the various skills needed in working with wood and with metal. Some power machines will also be used.

We have not had seventh grade girls in this class before and we want your full understanding of what is

expected. If you honestly feel that your daughter will benefit more from this class in Woodworking and Art Metal than in Home Economics, please check number "1" below. If you want your daughter to stay in Home Economics, check number "2".

Yours truly,

Harve B. Lemaire
Principal

CHECK ONE PLEASE RETURN ON
THURSDAY, FEBRUARY 1, 1973

1. I understand that my daughter will have to follow the same course as the boys. I agree that she should take Woodworking and Art Metal.
2. I have decided that my daughter should stay in Home Economics.

.....
Signature of Parent

28 Until September 1972, only boys were permitted to attend Boston Latin School, the city school system's elite school for the academically talented. Girls with similar abilities were educated at Girls' Latin School. The Boston Latin building can accommodate 3,000 students while the Girls' Latin facility is sufficient for only 1,500 students, and thus each year a fewer number of girls were given this educational opportunity. Since girls did as well, or better, on the entrance exam for the Latin Schools, the smaller number of female admittees to the program was obtained by requiring girls to achieve a higher exam score than boys. For the precise facts of the Latin Schools, and a ruling as to the constitutionality of these admissions practices, see *Bray v. Lee*, 337 F. Supp. 934, 937 (D. Mass. 1972), in which the Court held that "the use of separate and different standards to evaluate the examination results to determine the admissibility of boys and girls to the Boston Latin schools constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment, the plain effect of which is to prohibit prejudicial disparities before the law. . . . I further find that on the basis of the record of this case female students seeking admission to Boston Latin School have been illegally discriminated against solely because of their sex, and that discrimination has denied them their constitutional right to an education equal to that offered to male students at the Latin School."

The *Bray* decision doesn't reach the question of whether Boston could maintain the Latin Schools as single-sex schools if the admissions policies were the same for both sexes. Chapter 622, which became effective while *Bray* was pending, would prohibit this solution because of the inequities between the physical facilities and the programs offered at the two schools. Recognizing this, the supporters of an all-male Boston Latin mounted a vigorous campaign to exempt the Latin Schools from the operation of Chapter 622. In the 1972 legislature a number of bills intended to accomplish this were introduced. Fairly typical was the one sponsored by the Boston Student Advisory Council, which proposed to add a "grandfather clause" providing that "[a]ny school

which on January first, nineteen hundred and seventy one, was operated as a school segregated on the basis of sex may continue to operate on such basis." The battle over these bills was a long and hard one. The Headmaster of Boston Latin circulated an appeal to the parents of his students to communicate their support for the exemption to the Chairman of the Joint Education Committee, telling them "We're at Armageddon. The future of the Boston Latin School is in your hands." Although the Education Committee stood firm, and reported the exemption bill (H.3699) out unfavorably, the House overturned the adverse report by a vote of 141 to 75. Fortunately, the Senate failed to concur. Even then the debate was not over, since the avenue of home rule legislation (affecting only Boston) was still open if Boston's City Council and Mayor would approve. Following a stormy City Council hearing, a bill was approved which would permit the Latin Schools to continue separately upon a showing of equality in admissions standards and in the quality of the educational programs and proof of educationally sound reasons for the segregation. This effort was not approved by Mayor Kevin White, an action which was tantamount to a veto. As a result girls crossed the threshold at Boston Latin School in September 1972.

29 Minutes, Lexington School Committee, March 14, 1974, on file at the School Administration Building, Lexington, Massachusetts.

30 See note 15 *supra*.

31 Although a few individuals had doggedly persevered on this course since Chapter 622's passage needed impetus was provided by a statewide conference on Chapter 622 held March 24, 1973. The idea for this conference came from Mayor Kevin White's Office of Human Rights. Major credit for making it a reality must be given to Geraldine Pleshaw, a member of the Office for Human Rights staff and ultimately the Chairwoman of the Ad Hoc Committee described *infra* at note 32. A central recommendation of the conference, followed up on by its organizers, was that guidelines for Chapter 622 should be issued by the state.

32 Letter to invited participants from Gregory I. Anrig, Commissioner of Education, dated June 22, 1973.

33 "Recommendations Pertaining to Access to Equal Educational Opportunity," March 11, 1974, prepared by the Ad Hoc Committee for Chapter 622 and considered by the Massachusetts Board of Education at its March 26, 1974 meeting.

34 *Id.* Paragraph 6.c.

35 Much of the recruitment material used by existing schools has not been revised, and in some instances the course listings continue to be labeled "for boys," "for girls" or "for boys and girls."

36 Greater Lowell Regional Vocational-Technical High School, located in Lowell, Massachusetts.

37 We have received a grant from the National Institute of Education to produce a case history of Chapter 622 as an effort to redirect vocational education in Massachusetts through the use of the legislative process.

Kalamazoo: A Model for Change

by Carol Ahlum

The superintendent of schools in Kalamazoo, Michigan has made one of his performance objectives the elimination of sexism in the Kalamazoo schools and has directed all school personnel to take this goal as one of *their* objectives. The superintendent does not view these goals as rhetorical: all administrators and teachers are required to keep descriptive records about their plans and progress in eliminating sexism.

Beginning in fall 1973, Kalamazoo's elementary school teachers countered sex stereotyping in a newly purchased Houghton Mifflin reading program by using a supplementary book-length collection of revisions to their teachers' guides, entitled *Recommendations for Eliminating Sex Discrimination in the Reading Program*. This collection was devised by an administration committee of teachers, administrators and parents.

Since spring 1973, all books and audio-visual materials are being evaluated by the Kalamazoo School Instructional Media Department before purchase to ensure the acquisition of nonsexist and nonracist materials. The guidelines used in this evaluation were developed by the system itself under the direction of the Media Director in charge of the system's libraries and the audio-visual department.

These developments in the city of Kalamazoo are unique in public education. How did it happen and why? I spent a week in Kalamazoo talking with both educators and citizens to find out.

Carol Ahlum is a staff member of The Feminist Press. For the past two years she has been compiling feminist high school resource materials and teaching in-service courses for teachers about sexism in schools.

CSSD History

At a school board meeting in the fall of 1971, a former school board member was rebuffed when she proposed that the board seriously consider the existence and implications of sex discrimination in the Kalamazoo schools. The speaker was told that if sex discrimination was indeed a problem she should return with documentation. Members of the strong women's movement in the city accepted the challenge and returned to the next school board meeting with a slideshow on sexism in the elementary reading series (Scott, Foresman) then in use in the Kalamazoo schools. This presentation and the presence and support of over thirty women prompted the school board to create the Committee to Study Sex Discrimination in the Kalamazoo Schools (CSSD) in December 1971. The board also appointed a chairperson who in turn sought out interested people to join the ranks of CSSD.

From its beginning CSSD saw its goal as introducing mechanisms into the system whereby school personnel themselves would develop their own strategies for eliminating sex discrimination. After eighteen months of studying major aspects of the school system (personnel, physical education, elementary textbooks, selected high school courses, student-oriented issues), CSSD task forces produced five well-documented reports that included comprehensive short and long-range recommendations to the school system.

After the completion of each report, the

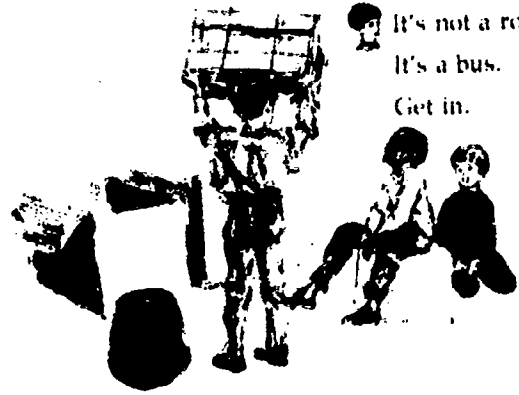
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Dan? Ben? Where are you?
 Here we are, Tony
 We are in the rocket



18



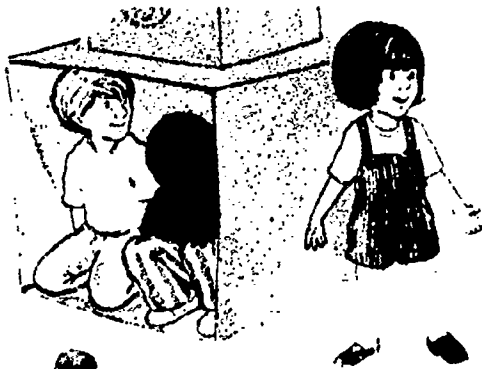
It's not a rocket.
 It's a bus.
 Get in.

Where can we go?

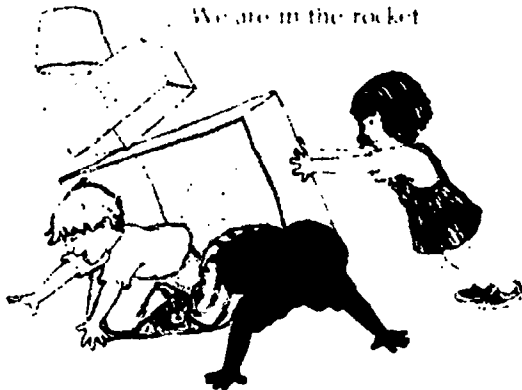


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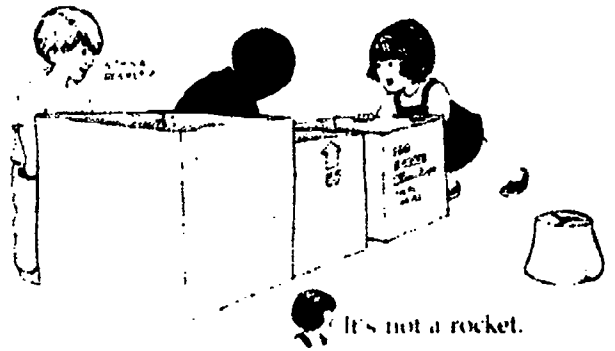
From *Tigers*, Houghton Mifflin Reading Program. Copyright © 1971 by Houghton Mifflin Company. Used by permission.



Dan? Ben? Where are you?
 Here we are, Jenny
 We are in the rocket

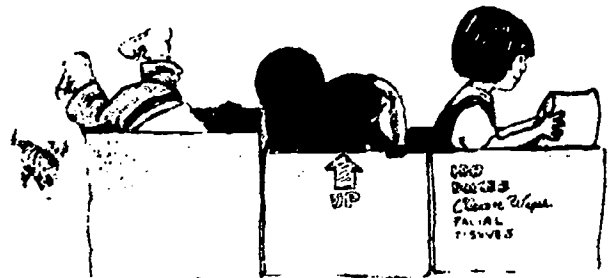


18



It's not a rocket.
 It's a bus.
 Get in.

Where can we go?



19

From *Tigers*, Houghton Mifflin Reading Program. Copyright © 1974 by Houghton Mifflin Company. Used by permission.

task force leader and other CSSD members initiated a meeting with the superintendent and the school administrator directly responsible for each educational area under examination. They discussed the findings of the reports and possible mechanisms for implementation of the recommendations.

Of course, CSSD hoped that its reports and especially its recommendations would lead the school system to initiate needed changes. But it also recognized that reports and recommendations alone do not bring about actual change. As one committee member told me, the system acts when it is forced to.

The group now has a core of about twenty members, mostly mothers of school age children, and in over two years CSSD has involved up to two hundred people in some aspect of its work. Two women administrators from the school system are associated with the committee, initially as designated liaisons between the school system and CSSD, and subsequently as participating committee members.

Direct Action

Despite the fact that CSSD was officially created and sanctioned by the school board, the relationship was at times a tense and difficult one. In May 1973 the school board decided to purchase a Houghton Mifflin elementary reading program to replace the Scott, Foresman program. Explaining that the proposed new series exhibited the same blatant sex stereotyping as the series then in use, CSSD asked the board to exert its consumer power to say "no" to any publisher who produced and promoted sexist educational materials. Since there were no available nonsexist elementary readers, the committee suggested that the board buy supplementary materials to enable the system to devise its own nonsexist reading program. This had been one of CSSD's original recommendations in the report of the elementary textbook task force, released to the school board in February 1973.

CSSD warned the school board in writing that if it proceeded with the purchase, CSSD would file a complaint of sex discrimination under Title IX of the Educational Amendments of 1972, the one federal law that prohibits sex discrimination in public elementary and secondary schools. When the school board failed to alter its decision

to purchase the Houghton Mifflin reading program, CSSD filed the complaint (consisting of a one page letter and a four page analysis of sex stereotyping in the Houghton Mifflin readers) with Casper Weinberger, Secretary of the Department of Health, Education and Welfare. The complaint contends that the projected five-to-seven year use of blatantly sex-stereotyped readers will detrimentally affect Kalamazoo children.

Using classic examples of feminist analysis of children's books, the complaint reported that the reading program: 1) does not recognize the actions and achievements of women (only a few famous women are mentioned, while famous men are included throughout); 2) does not show the same respect for women and girls as it does for men and boys (the pronoun "he" is introduced in the first preprimer; "she" in the third); and 3) assigns abilities, traits, interests and activities on the basis of male or female stereotypes (men are portrayed in a variety of work roles, while women are portrayed in the typical three: teacher, nurse and mother). HEW has not acted on the Title IX complaint because the proposed guidelines have not been finalized.

While the outcome is far from clear, the mere filing of the complaint has been significant for nonsexist education generally and for the Kalamazoo schools specifically. The Kalamazoo CSSD has emerged as a nationally recognized feminist citizens' group that has begun to hold its school system accountable for the problem of school sexism. As the CSSD chairperson said, CSSD filed the complaint "to be supportive of other sisters [and] to give others a model of what can be done."

Response and Implementation

The pressure of the complaint has spurred the school administration to develop mechanisms for eliminating school sexism. The creation of the Materials Review Committee (MRC) is one example of administrative reaction. Set up at the suggestion of the central administration and sanctioned by the school board for the purpose of reviewing the new reading program for sex bias, this group consists of teachers, administrators and four CSSD feminists. It met during the summer of 1973 and produced the book-length collection of revisions to the teachers' guide mentioned at the

beginning of this article. The introduction to this collection explains that the MRC "recognized that nothing could be done with students' editions [i.e., the basal readers] but endeavored to achieve appropriate representation of and balance in the portrayal of sex roles in the teachers' guides, especially in those portions of the lesson plan in which exercises were to be read and written on the chalk board by the teacher."

The Houghton Mifflin Publishing Company has certainly been affected by the complaint. John Ridley, editor-in-chief of the company's reading and language arts department, flew to Kalamazoo last summer to hear MRC's criticisms of sex bias in the reading program firsthand. This editor perceived the potential economic consequences of school systems' using their consumer power to pressure publishers to eliminate sex stereotyping from educational materials. The Kalamazoo Media Director, a co-chairperson of the MRC, reported that Mr. Ridley left Kalamazoo with plans to educate his own staff about sex-role stereotypes in children's textbooks. Houghton Mifflin will also incorporate a number of the MRC's revisions in its yearly cosmetic changes of the teachers' guide.

One elementary principal, specifically as a result of his participation on the MRC, has become one of the district's staunchest converts to the goal of nonsexist education. He explained to me that he had accepted the appointment to the committee with a joking attitude; he had not considered sex bias a significant issue. In speaking about the influences that changed his attitude, the principal pointed to the committee's interchange of ideas during its item-by-item examination of the teachers' guide and its development of non-stereotyped alternatives. Understanding the process that influenced his own attitude change, he decided to create a similar learning environment for his teaching staff. When Kalamazoo elementary principals were directed to meet with teachers in school-wide in-service meetings to discuss sex stereotyping and introduce the prescribed revisions to the teachers' guide in fall 1973, this principal used the record of nonsexist children's songs, *Free to be You and Me* by Marlo Thomas, to initiate discussion. With the help of the school librarian, he then worked with teachers in small groups to discuss item-by-item a sample of the prescribed revisions; he hoped through this process to replicate his own experience.

The Director of Secondary Curriculum is also, as a result of CSSD's recommendations, acting on her awareness of sexism. As a black woman who has been incorporating nonracist attitudes and materials into curricula, she explained that sexism has "existed far too long." She welcomed CSSD's work because it motivated her to implement changes that she knew were essential but which she had not yet taken the time to work on. Since last spring, she has met with her staff of instructional specialists and they in turn have begun the task of working with high school teachers to counter sexist attitudes and curriculum in their classrooms. By the spring of 1974, she was conducting department in-service meetings that systematically involved all high school teachers in workshops on sexism.

Home Economics

Admitting that until recently sexist elements in the secondary curriculum have escaped her scrutiny, the Director of Secondary Curriculum pointed to blatant discrimination in relation to home economics courses. In September 1973 the chairperson of CSSD found her junior high school daughter *assigned* to a girls' home economics class. Indeed, CSSD discovered that in three out of five junior high schools seventh grade home economics was sex segregated by design. CSSD quickly arranged a meeting with school personnel, including the superintendent and the Vocational Education Specialist, to inform them that classes sex segregated by design are illegal under Title IX and also under the Michigan Public Accommodations Act; once again CSSD asked the school system to comply voluntarily with the law.

In this instance, the system agreed. Letters were soon sent to parents announcing home economics classes open to both sexes. In addition, the Director of Secondary Curriculum set up a committee of home economics teachers to develop a new curriculum that will not only admit both sexes but also *attract* both female and male students to elect home economics courses. This administrator understands that junior high school students will not readily choose courses that until now have been considered only for the opposite sex. A new curriculum and the re-education of teachers are the significant mechanisms being used in Kalamazoo to implement a nonsexist home

economics program. It will also have a new name, probably "human ecology."

Ongoing Activities

As the Kalamazoo schools receive national recognition as a model school system moving toward nonsexist education, the citizens' group which has worked for over two years toward this development maintains that the changes now occurring are only a beginning. In a recent statement to the school board, while applauding the initiative of the Kalamazoo school administrators, CSSD calls for the establishment of a systematic, long-term program:

The committee recognizes that the

administration and staff have achieved a higher level of awareness over the past two years and that certain steps have been taken to begin the process of eliminating sex discrimination in our school system. We take considerable pride in the fact that it is the *Kalamazoo* public school system which is considered as the model for schools across the country, being nationally recognized for its leadership in bringing about the elimination of sex discrimination in public education. However, the pervasiveness of institutionalized sexism and its damaging effects on our young people mean that



Photo Courtesy of Educational Development Center, Inc.

those beginning steps already taken must be expanded into a thoughtfully planned program to eliminate sex discrimination in our schools, with evaluation and accountability as important a part of this program as any other.

At last word, CSSD has not obtained the commitment asked for in the above statement. Indeed, at a fall 1973 school board meeting, CSSD was officially dismissed as a school board committee. However, the superintendent still maintains that the school system recognizes the importance of the committee's work and that he will continue to be as attentive to CSSD as to any community group interested in working with the schools on mutual goals.

The MRC, another board committee, also seems officially to be disbanded; it has not met since it released the revision handbook to the teachers' guide. Some school administrators consider the job completed; they maintain that the MRC has eliminated sex bias from the reading program. On the other hand, while agreeing that the MRC substantially eliminated sexism from the teachers' guide, CSSD recognizes that the MRC has only *begun* to do the same for the entire reading program. And then, of course, materials in all other curriculum areas, aside from elementary reading, need attention.

Regardless of its lack of official status, and

now as a community group, CSSD continues its work. In January 1974, CSSD filed a second Title IX complaint, this time maintaining that "the absence of interscholastic sports for girls in the junior and senior high schools . . . in the months of January, February and March 1974 constitutes discrimination under an education program receiving Federal financial assistance within the meaning of . . . Title IX." This complaint set in motion still another round of negotiations between the school system and CSSD.

As CSSD focuses on specific issues, its work continues to be multi-level and multi-issue. It has been collaborating with the Kalamazoo City Teachers Association in the development and teaching of in-service workshops for teachers on sexism in schools. A number of these workshops have already been held in the Kalamazoo Valley Intermediate School District (nine school systems). And at the school system level, CSSD is negotiating with the superintendent for the writing of a practical but systematic program that will direct the Kalamazoo schools to make nonsexist education a reality. The Committee to Study Sex Discrimination in the Kalamazoo schools is holding the system accountable for its already-stated performance objectives and now wants to see timetables and goals for how and when these objectives will be developed into a visible and measurable program of nonsexist education.

Resource Materials

The teachers' guide entitled *Recommendations for Eliminating Sex Discrimination in the Reading Program* (\$4.00) and the five CSSD task force reports (\$5.00) are distributed by the Kalamazoo Public Schools, 1220 Howard Street, Kalamazoo, Michigan 49001.

The "Guidelines for A Positive, Non-Stereotyped Portrayal of Human Roles in Print and Non-Print Materials" is available from Lee Jameson, Media Director, Kalamazoo Public Schools, 1220 Howard Street, Kalamazoo, Michigan 49001.

The final report by CSSD on the Houghton Mifflin readers documenting the Title IX complaint will soon be published by the Women's Commission of Michigan. The Women's Commission is also preparing a publication entitled "Sex Stereotyping in Textbooks." Women's Commission, 230 North Washington Avenue, Lansing, Michigan 48933.

For further information about the work of CSSD, contact: Jo Jacobs, 732 Garland, Kalamazoo, Michigan 49001 (616) 345-5853.

Notes and Commentary

This section of Inequality in Education features reports on research, litigation, government action, and legislation concerning education and the law. Readers are invited to suggest or submit material for inclusion in this section

SEX DISCRIMINATION

HIGHER ADMISSIONS STANDARDS FOR GIRLS FOUND DISCRIMINATORY

Berkelman v. San Francisco Unified School District, No. 73-1686 (9th Cir., July 1, 1974) (Clearinghouse No. 6583).

In examining the admissions policies of San Francisco's elite academic high school, the Court of Appeals for the Ninth Circuit addressed two issues:

- (1) May such a school apply higher admission standards to females than to males in order to maintain an equal sex ratio?
- (2) May such a school base admissions on previous academic achievement when the result is a significantly lower acceptance rate for black, Spanish-surnamed and poor students?

San Francisco maintains eleven public high schools. Seven are comprehensive, three meet various special needs and Lowell High School, enrolling approximately 15 percent of the district's high school students, offers a college preparatory curriculum. Although admission to Lowell is based upon previous grade-point averages, the cutoff point for females has traditionally been higher than for males. (It was estimated that if the same cutoff point were used for both sexes, 60 percent of those admitted would be female.) Despite a special minority admissions program, with a lower cutoff point, the percentages of black, Spanish-surnamed and poor students admitted were substantially below the percentages of these students in the entire system. The plaintiffs

also asserted that, relative to Lowell, students at other high schools were deprived in terms of teachers, financial resources, stigmatization, lower teacher expectations leading to self-fulfilling student performance, and the absence of intellectual stimulation and motivation generated by the higher achieving students at Lowell.

Holding that the challenged policies were within the proper exercise of school district discretion, the district court rejected plaintiffs' allegations of racial, ethnic, economic and sexual discrimination, as well as the allegation that the existence of a separate academic high school is in itself unconstitutional. (The latter claim was abandoned by plaintiffs during the appeal.)

In reviewing the allegation of sex discrimination, the court of appeals cited Supreme Court decisions in *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973), for the proposition that sex classifications must be examined with more care than is usually applied under the traditional "rational relation" test, without determining whether the "strict judicial scrutiny" applicable to "suspect classifications" is appropriate. [The court did not mention *Kahn v. Shevin*, 94 S.Ct. 1734 (1974), and *Geduldig v. Aiello*, 94 S.Ct. 2485 (1974), which raise strong questions about the current Supreme Court view of sex classifications.] Under this framework, the court of appeals found that the difference in admissions standards could not be justified. It found no support for the assertion that an equal ratio is required for good education. The evidence that females get better grades in early school years but that males catch up in high school was declared inconclusive. The court noted that if the program at Lowell were conducted within a comprehensive high school and not in a separate building, the differential admission standards would violate Title IX of the 1972 Education Amendments outlawing sex discrimination in ed-

ucation. (20 U.S.C. Sec. 1681 *et seq.*)

The holding on female admissions is similar to the decision in *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972), outlawing a higher cutoff point for females on an admissions test for Boston's elite academic high schools. In that case, however, the separate standards were used to maintain male enrollment at twice the size of female enrollment because of the smaller capacity of the separate female facility.

In looking at the claims of racial and ethnic discrimination, the court first found no evidence of discriminatory intent. That, nevertheless, did not end its inquiry:

However, if an admission standard operates in fact to exclude a disproportionate number of black and Spanish-American students from Lowell, the court has a duty to test the constitutionality of that standard. Where a nonsuspect classification (past academic achievement) is alleged to operate to the detriment of a disadvantaged class or classes (black and Spanish-American students), neither "strict" nor "minimal" scrutiny provides useful guidance as a standard of review. The task is to examine the school district's assertion that the standard of past academic achievement *substantially furthers* the purpose of providing the best education possible for the public-school students in the district. (Emphasis added.)

The program and policies at Lowell were held to meet this test. The court said that Lowell provides opportunities to students with special qualifications and needs which financially could not be provided at every school and that the admissions policy substantially furthered that purpose. It stated that students enrolled at the comprehensive high schools were not denied a quality education nor stigmatized or subjected to psychological harm because of policies regarding Lowell.

The court then disposed of the claim of discrimination against poor students by declaring that low-income persons have no greater status under the equal protection clause than racial minorities.

In accepting the school district's justification and stating that "the classification here is based

upon past achievement impartially measured," the opinion does not look into the possibility of some school district responsibility for lower achievement records of black, Spanish-surnamed and poor students. In particular, it does not address plaintiffs' claim that the education offered at elementary and junior high schools with predominantly black, Spanish-surnamed and poor students is inferior. Compare *Gaston County v. United States*, 89 S.Ct. 1720 (1969) (literacy qualifications for voting improperly carried forward past discrimination in operation of school system). In accepting the argument for the value of such a program in best meeting the needs of high-achieving students, the opinion also fails to discuss plaintiffs' contention that performance at the one comprehensive high school where large numbers of students eligible for Lowell choose to remain is actually higher than at Lowell.

Plaintiffs are represented by Susanne Martinez and Kenneth Hecht, Youth Law Center, 693 Mission St., 2nd Floor, San Francisco, Calif. 94105 (415) 474-5865.

CLASSIFICATION

COURT REJECTS MOTION TO DISMISS FOR MOOTNESS IN HANDICAPPED EXCLUSION CASE

Colorado Association for Retarded Children v. Colorado, C.A. No. C-4620 (D. Colo., filed Dec. 22, 1974), motion to dismiss for mootness denied June 14, 1974.

[A summary of the complaint and an earlier ruling refusing to dismiss for failure to state a claim appears in 15 *Inequality in Education* 88.]

Plaintiffs are handicapped children who have been excluded from school or are threatened with exclusion. In this statewide class action, they allege Fourteenth Amendment violations, and seek access to free public education and procedural safeguards. Defendants moved to dismiss for mootness based upon an amendment to Colorado law which advanced the deadline for local systems to implement plans for educating all handicapped students from July 1, 1976 to July 1, 1975.

The three-judge court rejected the mootness claim for two reasons. First, it noted that the

legislature had previously established deadlines which were not fulfilled or which were delayed:

In the light of the irregular and delayed implementation of legislation in the essential area of education for handicapped children, we are of the view that this case is not moot. The mere enactment of legislation without actual implementation does not render substantial legal questions moot.

Second, the court relied upon "plaintiffs' claims for compensatory relief for past exclusions of handicapped children from school programs." Thus, plaintiffs sought "relief beyond that mandated in the [state law]."

For related cases, see *Harrison v. Michigan*, 350 F. Supp. 846 (E.D. Mich., 1972) (case moot), and *Panitch v. Wisconsin*, C.A. No. 72-C-461 (E.D. Wis., Feb. 19, 1974) (rejecting mootness claim).

CORPORAL PUNISHMENT

STUDENT'S AND PARENT'S CONSTITUTIONAL RIGHTS RECOGNIZED IN VIRGINIA CORPORAL PUNISHMENT CASE

Mahanes v. Hall, C.A. No. 304-73-R (E.D.Va., May 16, 1974).

The rights of both students and parents in the administration of corporal punishment have gained significant recognition in a Virginia federal district court decision.

While stating that there was no indication that corporal punishment served any useful purpose in the learning process or in improving discipline, Judge Robert R. Mehrige, Jr. held that the Virginia statute authorizing its use did not on its face violate the Eighth Amendment prohibition against cruel and unusual punishment. Nevertheless, the court declared that the ten-year-old student's right to due process under the Fourteenth Amendment was denied by the absence of notice and a fair hearing prior to the administration of the punishment. The decision thus marks the first time that a student's constitutional rights have been recognized in a corporal punishment case.

The Judge further held that the failure to obtain consent for the punishment from the student's mother violated her parental rights. In requiring actual consent, the ruling goes beyond the opinion in *Glaser v. Marietta*, 351 F.Supp. 555 (W.D.Pa. 1972), which held that corporal punishment cannot be administered when a parent has specifically requested that it not be used.

A jury awarded the student \$200 in damages. The judge added \$10 for the student's mother.

Attorney for the plaintiffs is Sy DuBow, American Civil Liberties Union of Virginia Foundation, Suite 402, Heritage Building, 10th and Main Streets, Richmond, Virginia 23219 (804) 649-3415.

USE OF CORPORAL PUNISHMENT MAY BE CRUEL AND UNUSUAL

Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974).

In another corporal punishment case, a district court's granting of a motion to dismiss the complaint was reversed by the Eighth Circuit.

Plaintiffs allege that corporal punishment as administered in Gentry, Arkansas public schools is cruel and unusual punishment and, as in *Mahanes*, that it is administered in violation of due process and parental constitutional rights.

Noting that dismissal is proper only when plaintiffs' allegations present on their face some insuperable bar to relief, the court of appeals stated that infliction of excessive amounts of corporal punishment may constitute cruel and unusual punishment. It was therefore unnecessary to determine whether corporal punishment is unconstitutional per se in order to find that plaintiffs had stated a claim upon which relief could be granted. Further, the court held that the school superintendent and individual school board members are proper parties under the Civil Rights Act (42 U.S.C. Sec. 1983) and can be sued for allegedly instituting and maintaining a policy which fosters the administering of cruel and unusual punishment.

Plaintiffs are represented by W. Rudy Moore, Wade, McAllister, Wade and Burke, P.O. Box 1000, Fayetteville, Arkansas 72701 (501) 521-1411.

STUDENT RIGHTS

STUDENT CANNOT BE PUNISHED FOR MISCONDUCT OF PARENT

St. Ann v. Palisi, 495 F. 2d 423 (5th Cir. 1974).

The Fifth U.S. Circuit Court of Appeals has found a school regulation permitting students to be punished for the misconduct of their parents towards teachers unconstitutional, on substantive due process grounds. The case involved a mother who struck an assistant principal during an argument about the three-day suspension of her son. The next day, both of her children were suspended pursuant to the Parish School Board Regulation XIX which provided, *inter alia*:

Should the principal or teacher be called to account or reprov'd in an offensive manner . . . by a parent or guardian, the child or ward of such parent or guardian shall, by reason of such conduct, be liable to suspension or other punishment. Said suspension or other punishment shall not be made until after the parent or guardian has refused to make proper amends.

The principal recommended that the suspensions be for an indefinite period.

Ms. St. Ann sued in federal court for an



Photo by Deborah Feingold

injunction against implementation of Regulation XIX and monetary damages. The district court dismissed the suit, upholding the regulation as within the school's discretion in order to maintain discipline. In a 2-1 decision, the court of appeals vacated the dismissal order as to the minor children (but affirmed as to individual claims by Ms. St. Ann) and remanded the case for a determination on monetary damages.

The court held that the regulation impinged on "a fundamental element in the American scheme of liberty," the traditional notion that one is punished only for his own acts or omissions and not someone else's. While this concept is not mentioned in the Constitution, the court found support for its position in various Supreme Court cases.¹ The court ruled that the infringement could only be justified by a weighty showing. "Having established a significant encroachment upon a basic element of due process, the state, in order to justify this encroachment, must satisfy a *substantial* burden." [495 F. 2d at 423; emphasis in original; footnote omitted.]

The court concluded that the system failed to satisfy this standard. Although school officials argued that the regulation promoted discipline and decorum in the schools, the court observed that the board's repeal of the regulation after the judgment below indicated that it was "not completely indispensable . . ." The court stressed the "existence of reasonable alternative means" for fulfilling the system's policy objective.

Non-students upon school property can be controlled or excluded by local regulations. Persistent violators may be enjoined or prosecuted under state law. Those who attack school officials are subject to state civil and criminal penalties just as Mrs. St. Ann was in the instant altercation. These are traditional and effective remedies for school officials who are disturbed by non-students. All these remedies place restraint on the offending individuals, not on the innocent members of the family. School officials can be relatively certain that news of such remedies will reach the school children, and perhaps the children will realize that the remedy did not arise from the arbitrary use of power but from the

traditional precepts of justice in our society [495 F. 2d at 428].²

Judge Roney dissented on several grounds. He observed that civil law is "replete with the concept of vicarious liability;" that the transfers were not "punishment in a criminal vein;" that the rule was a rational means of promoting discipline; and that it was unlikely that a teacher could work effectively with a student following such an incident.

¹ *Scales v. U.S.*, 367 U.S. 203 (1961). (Only "active" members having a guilty knowledge and intent are criminally responsible for the illegal advocacy of their organization); *Wieman v. Updegraff*, 344 U.S. 183 (1952). (Disallowed a loyalty oath which did not discriminate

between innocent and knowing membership in subversive organizations); *Elfbrandt v. Russell*, 384 U.S. 11 (1966). ("A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."); *Levy v. Louisiana*, 391 U.S. 68 (1968). (It is invidious discrimination to deny illegitimate children the right to recover for the wrongful death of their mother "when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother"); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). (Illegitimate children can recover under workman's compensation laws; "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing").

² The court stated that even under a rationality standard, the constitutionality of the regulation was "a matter of serious concern."



Photo by Roz Gerstein

Judicial Standards for Determining Sex Discrimination

by Paul Weckstein

School policies often result in differing treatment of males and females. Sometimes the difference is clearly intended, as when homemaking is required for females and shop for males. Often, however, such intention is either lacking or unclear, as when a school refuses financial aid to its part-time students, the majority of whom are women. In litigating claims of sex discrimination, an understanding of the analytical framework and standards of proof likely to be utilized by courts is helpful, whether proceeding under the equal protection clause of the Fourteenth Amendment or under Title IX of the 1972 Education Amendments (42 U.S.C. Sec. 1681 *et seq.*), which bans sex discrimination in education.¹

A. Title IX²

By forbidding discrimination on the basis of sex in any educational program receiving federal financial assistance, the statutory language of Title IX offers a more specific recognition of the illegality of sex discrimination than the words of the equal protection clause. The regulations proposed by HEW pursuant to the Act [39 Fed. Reg. 22227-40 (June 20, 1974)] go further in spelling out the nature of the prohibited discrimination by addressing specific activities such as admissions and employment. When validly issued and approved, these regulations will have the force and effect of law, and violations of the regulations will be treated by courts as violations of the statute.³

Recent precedent can be found in *Lau v. Nichols*, 94 S.Ct. 786 (1974). The Supreme Court reached its finding that the San Francisco school system's failure to provide English language in-

struction to students of Chinese ancestry who do not speak English was a violation of Title VI of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000d *et seq.*), which bans racial discrimination in programs receiving federal financial assistance. The Court did so by determining that the lack of instruction violated HEW's implementing regulations. The Title IX statute and regulations should also have some effect on judicial interpretation of sex discrimination claims under the equal protection clause.⁴

Some vagueness remains, however, because in the statute and throughout the proposed regulations the forbidden action is cast as discrimination "on the basis of sex." Does this language invalidate any policy which results in different treatment? Must there be, instead, proof of actual intent to discriminate? Or, is there some appropriate standard which is intermediate between these two approaches?⁵

In interpreting "on the basis of sex," particularly in terms of applicability to policies which seem neutral on their face but which have a disproportionate effect on one sex, lawyers can look to employment cases under Title VII of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000e *et seq.*). Title VII similarly uses the phrases "because of" and "on the basis of." Most courts have held that once a plaintiff makes a *prima facie* showing that the law or policy produces a statistically significant disparity of *results* between racial, religious, sexual or ethnic groups, the burden shifts to the defendant to demonstrate that the law or policy is related to actual job requirements. *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972); *United States v. Jacksonville Terminal Co.*, 451

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F.2d 418, 455-57 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Moody v. Albermarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). While these cases all involved racial discrimination, the same standards are applicable under Title VII to sexual discrimination. *Leisner v. New York Telephone Co.*, 358 F. Supp. 359 (S.D. N.Y. 1973). Further, in striking down a no-marriage rule for stewardesses as not being a bona fide occupational qualification, the court in *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971), stated:

The scope of Section 703(a)(1) is not confined to explicit discrimination based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Even with this framework, any evidence of discriminatory intent clearly strengthens a case. See *Baker v. Columbus Municipal School District*, 462 F.2d 1112, 1113-15 (5th Cir. 1972). The search for such intent should not be confined to bald statements of prejudice but should seek out the assumptions underlying school policies.⁶

Another approach is to look to the standards applicable to Title VI of the 1964 Civil Rights Act, the forerunner of Title IX, which forbids discrimination "on the ground of" race, color or national origin. The test under Title VI has been held to be the same as the test under equal protection analysis. *Ward v. Winstead*, 314 F. Supp. 1225, 1235 (N.D. Miss. 1970), *appeal dismissed*, 400 U.S. 1019, 91 S.Ct. 587, 27 L.Ed.2d 630 (1971); *Goodwin v. Wyman*, 330 F. Supp. 1038, 1041 (S.D.N.Y. 1971), *aff'd*, 406 U.S. 964, 92 S.Ct. 2420, 32 L.Ed.2d 664 (1972); see *Stanley v. Brown*, 313 F. Supp. 749 (W.D. Va. 1970). Given the uncertainty clouding the interpretation of sex classifications under the equal protection clause⁷ and the indications that there are some special reasons for the parallel treatment of Title VI and the equal protection clause⁸, however, it seems useful to look for alternative approaches to Title IX interpretation, such as the Title VII analysis, *supra*.⁹

B. Equal Protection

1. Are Sexual Classifications Inherently Suspect?

Recent Supreme Court decisions have created a great deal of uncertainty as to the standard of review of sexual classifications under the equal protection clause.

In *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), the Court held that a mandatory statutory preference given to men over women when, as members of the same entitlement class (*e.g.*, siblings), they apply for appointment as administrator of an estate is a sexual classification which violates the equal protection clause. The Court enunciated its standard (404 U.S. at 76, 92 S.Ct. at 254):

A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L. Ed. 989 (1920).

The justification advanced for the preference was the time saved by the automatic method for determining the administrator. The Court stated, however, that while the objective of reducing the workload of probate courts is "not without some legitimacy," the state would not be allowed to advance its administrative convenience through a sex classification which eliminated the need for hearings on the merits.

In *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764 (1973), the "uniformed services" attempted to defend, on the grounds of administrative efficiency, a policy under which males were permitted to claim their wives as dependents automatically, while females had to show that their husbands were actually financially dependent upon them. Four justices held that sex is an inherently suspect classification subject to strict judicial scrutiny, citing *Reed* as giving "at least implicit support for such an approach." 94 S. Ct. at 1768. The justices also looked to the history of sex discrimination and to Congressional intent. Citing Title VII, the Equal Pay Act of 1963 (29 U.S.C. Sec. 206(d)), and the Equal Rights Amend-

ment, the justices stated (93 S. Ct. at 1771):

Thus, Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

The justices held that administrative convenience is not a sufficient justification under a standard of strict scrutiny. Three justices concurred in the judgment, but deemed it unnecessary to reach the question of whether sex is a suspect classification. Justice Stewart simply stated that the policy created an "invidious discrimination in violation of the Constitution," citing *Reed*. 94 S. Ct. at 1773.

One interpretation of the *Reed* and *Frontiero* decisions was that the Supreme Court had in effect left a void in the analysis of sex classifications, to be filled in temporarily by lower courts. This was the view of a three-judge court in New Jersey, which filled that void by declaring, "We are persuaded by the opinion of Mr. Justice Brennan in *Frontiero* that sex is 'inherently suspect.'" *Wiesenfeld v. Secretary of Health, Education and Welfare*, 367 F. Supp. 981, 990 (D.N.J. 1973). The court rejected the notion that *Reed* and *Frontiero* (especially the "fair and substantial relation" language in *Reed*) signaled a general shift in which sex classifications will be treated under some intermediary standard, with greater scrutiny than under the traditional "rational relation" test, albeit less than under the "compelling interest" test. Instead, the court interpreted *Reed* and *Frontiero* as indicating that the proper standard for scrutinizing sex classifications will not be enunciated by the Supreme Court until it is faced with a classification which could be sustained under the rational relation test but not under a close judicial scrutiny test. The district court here held that it was faced with such an issue: a Social Security statute which provided "mother's insurance benefits" to widows but not to widowers was rationally related to the legitimate purpose of rectifying past discrimination by ensuring that the system's limited funds would go to widows, who are less likely than widowers to have their own sources of income. After reaching its holding that sex is inherently suspect and citing language from the plurality opinion in *Frontiero*, comparing sex with race as a classification, the court stated

(1991):

While affirmative legislative or executive action may satisfy a compelling governmental interest to undue [sic] the past discrimination against such suspect groups as racial minorities, *such action cannot meet the higher equal protection standard if it discriminates against some of the group which it is designed to protect.* Because Section 402(g) discriminates against women such as Paula Wiesenfeld who have successfully gained employment as well as against men and children who have lost their wives and mothers, we find this section violates the Fifth Amendment. [emphasis added]

The court granted summary judgment to the plaintiff, whose wife had died in childbirth.

Other cases which have treated sex as an inherently suspect classification are *United States v. York*, 281 F. Supp. 8, 14 (D. Conn. 1968) (striking down statute which had effect of longer sentences for some women than for men convicted of the same misdemeanors); *Monell v. Department of Social Services of City of New York*, 357 F. Supp. 1051, 1053 (S.D.N.Y. 1972) (denying motion to dismiss and motion for summary judgment in mandatory pregnancy-leave case); *Ballard v. Laird*, 360 F. Supp. 643, 647-48 (S.D. Cal. 1973), *prob. juris. noted, sub. nom. Schlesinger v. Ballard*, 94 S. Ct. 1405 (1974) (striking down statute which maintained differential policies for mandatory military discharge); *Daugherty v. Daley*, 370 F. Supp. 338, 340 (N.D. Ill. 1974) (striking down statutes prohibiting the purchase of drinks by male patrons for female employees); *Andrews v. Drew Municipal Separate School District*, 371 F. Supp. 27, 35-36 (N.D. Miss. 1973) (striking down policy barring employment of unwed parents); *Held v. Missouri Pacific Railroad Company*, 373 F. Supp. 996, 998 (S.D. Tex. 1974) (denying motion to dismiss and motion for preliminary injunction in claim of sex discrimination in lack of promotion and subsequent discharge). See also *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972), striking down a mandatory maternity-leave policy; after citing *Reed v. Reed*, the court stated (443):

The plaintiff herein has asserted

the basic right to employment free of invidious discrimination. Under this contention the court must ask not only whether the classification challenged here is rationally related to a legitimate objective of the defendants, but whether, in addition, it promotes any "compelling governmental interest" as that standard is set forth in *Shapiro v. Thompson*, 394 U.S. 618, 627, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

Two recent Supreme Court cases raise strong questions as to whether lower courts still have the leeway to declare sex a suspect classification.

Kahn v. Shevin, 94 S.Ct. 1734 (1974), appears to be the kind of Supreme Court case of which the *Wiesenfeld* opinion spoke. The Court upheld a Florida statute which granted a property tax exemption to widows but not to widowers. After pointing out that among full-time workers the 1972 median income for women was 57.9 per cent of that for males, a figure six points lower than the 1955 ratio, and that the disparity is worse for widows, the Court used the *Reed* standard to determine that the policy rested upon "some ground of difference having a fair and substantial relation to the object of the legislation," which was found to be the remedying of the financial effects of past discrimination. *Id.* at 1737. The Court distinguished *Frontiero* by noting that the sole legislative purpose in that case was administrative convenience. The Court also referred to the traditionally large leeway allowed to states in the area of taxation. Nevertheless, by finding that a classification passes muster under a standard of less than strict scrutiny (regardless of whether one views the *Reed* standard as a traditional or an intermediate one), without going on to examine it with strict scrutiny, the Court implicitly suggests that it does not believe that strict scrutiny is the appropriate standard for sex classifications.

Justices Brennan, Marshall and White dissented, referring to the plurality opinion in *Frontiero* that sex is a suspect classification. Justice Brennan, joined by Justice Marshall, stated that the statute did serve the compelling interest of rectifying the disproportionate financial burden which loss of a spouse imposes upon women. Nevertheless, he declared that the statute could not withstand strict scrutiny, since that interest

could have been equally served by a more narrowly drawn statute excluding women of substantial means. This is similar to the analysis in *Wiesenfeld*.

In *Geduldig v. Aiello*, 94 S.Ct. 2485 (1974), the Supreme Court ruled that California's decision not to include coverage of normal pregnancy disability under its disability insurance system was not an invidious discrimination in violation of the equal protection clause. The Court declared that the policy did not discriminate against any definable class and simply did not explore the standards appropriate to sex classifications, addressing the issue only in a footnote (2492):

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The permitted justification for the policy was that to include pregnancy coverage would either end the program's self-supporting nature or require a large increase in rates or a large decrease in benefits for covered disabilities.

The dissenters, Justices Brennan, Douglas and Marshall, read the majority opinion as a further retreat from *Reed* and *Frontiero*. Indeed, it too seems to imply that the Court is unlikely to treat sex as a suspect classification. This can be seen by predicting the Court's response if the exclusion had been for sickle-cell anemia, which affects blacks almost exclusively. The fact that not all blacks contract it would not prevent the Court from using a standard of strict judicial scrutiny in assessing the justification for the policy.

The reading of *Kahn* and *Geduldig* as pointing to a view of sex classifications as not

being suspect should be tempered by the Court's failure to address the issue in explicit terms. Further, Justice Douglas, who wrote the Court opinion in *Kahn*, was a member of the plurality which declared sex a suspect classification in *Frontiero*. Justice White, who joined the majority opinion in *Geduldig*, was also a member of that plurality.

2. Intermediate Standards of Review

Should a court refuse to treat sex as a suspect classification, it might still be argued that an intermediate standard is appropriate, *Wiesenfeld* notwithstanding. It is true that *Reed* and *Frontiero* in some ways display a reluctance to reach the issue of whether sex is a suspect classification more than they evidence a clear attempt to enunciate new standards. This might be seen in the fact that the Supreme Court based its ruling on mandatory maternity leave on due process grounds even though both lower courts used equal protection analysis. *Cleveland Board of Education v. LaFleur*, 94 S.Ct. 791 (1974). It might also explain the decision not to treat the maternity-benefits policy in *Geduldig* as a sex classification at all. At the same time, the "fair and substantial relation" language in *Reed*, the decision in *Frontiero*, the inability to explain some of the Justices' votes in terms of rational relation versus strict scrutiny, and the use of a standard of "significant relationship" in *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972) (holding that claims that workmen's compensation statutes denying equal recovery rights to unacknowledged illegitimates served state interests in legitimate family relations and in minimizing problems of proof were too *unsubstantial* to maintain the classification), all point to a somewhat stricter standard of review than mere rational relation, for equal protection in general and for sex classifications in particular. This reading can be found in several cases.

In *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973), the court held that the South Carolina Senate could not refuse to employ women as pages. Citing *Reed*, the court declared (231):

A classification based upon sex is less than suspect; a validating relationship must be more than minimal. What

emerges is an "intermediate approach" between rational basis and compelling interest as a test of validity under the equal protection clause.

In *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1973), the court found it unnecessary to determine whether sex classifications are suspect in holding that female students cannot be barred from participating with males in non-contact interscholastic athletic competition where there are not equal facilities for separate female competition. Referring to the "fair and substantial" language in *Reed* as the proper standard, the court stated (1300):

It has been pointed out that in applying this standard, the Supreme Court's definition of what constitutes a rational relationship has become more rigorous, and that the Court has become "less willing to speculate as to what unexpressed legitimate state purposes may be rationally furthered by a challenged statutory classification." *Green v. Waterford Board of Education, supra*, 473 F. 2d at 633.

We recognize that because sex-based classifications may be based on outdated stereotypes of the nature of males and females, courts must be particularly sensitive to the possibility of invidious discrimination in evaluating them, and must be particularly demanding in ascertaining whether the state has demonstrated a substantial rational basis for the classification. . . . This is especially true where the classification involves the interest of females in securing an education.

Similarly, the court in *Haas v. South Bend Community School Corporation*, 289 N.E.2d 495 (Ind. 1972), used the "fair and substantial relation" standard to hold that a state athletic association rule barring mixed competition was unconstitutional as applied to non-contact sports, given that most high schools lacked women's teams.

The court in *Heath v. Westerville Board of Education*, 345 F.Supp. 501 (S.D.Ohio 1972), used the "fair and substantial relation" standard to strike down a mandatory pregnancy resignation policy. It phrased the test somewhat differently in

another part of the opinion (506):

In our opinion this conclusion is mandated by *Reed v. Reed, supra*, which at the very least stands for the proposition that the courts must not allow the state or its agencies to perpetrate old sexual stereotypes, in the guise of benign, protective statutes, where the state is unable to demonstrate a rational, non-arbitrary basis *in fact* for its regulation. [emphasis added]

At another point, the court seems to move closer to strict scrutiny (505): "Sexual stereotypes are no less invidious than racial or religious ones."

The court in *Hutchison v. Lake Oswego School District*, 374 F.Supp. 1056 (D.Ore. 1974), uses a range of formulations quite similar to those in *Heath* in order to strike down a policy barring the application of accumulated sick leave to maternity absence. The court also employs a balancing test in dispensing with defendants' attempts to justify the policy on financial grounds (1064): "The plaintiff has met her burden of demonstrating that the balance of hardships weighs in her favor."

A somewhat different formulation was used in issuing a preliminary injunction against the enforcement of a regulation forbidding mixed competition in non-contact sports. *Morris v. Michigan State Board of Education*, 472 F.2d 1207 (6th Cir. 1973). Citing *Reed*, the court held (1209) that sex classifications are "subject to scrutiny . . . to ascertain whether there is a rational relationship to a valid state purpose."

In *Healy v. Edwards*, 363 F.Supp. 1110 (E.D.La. 1973), *prob. juris. noted*, 94 S.Ct. 1405 (1974), the court also used an apparently intermediate standard in striking down a statute exempting women from mandatory jury duty. Citing *Reed* and *Frontiero*, the court stated (1113):

The minimum requirement of Equal Protection, then is that dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated *with respect to the objectives of the legislation*. [emphasis in original]

The court held that *Frontiero* and *Reed* had effectively eroded *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), which had

upheld a similar statute.

Finally, an explicitly intermediate standard was used in *Berkelman v. San Francisco Unified School District*, No. 73-1686 (9th Cir., July 1, 1974)¹⁰, in declaring unconstitutional the use of higher admissions standards for females in order to maintain an equal sex ratio in San Francisco's academic high school. Although the opinion was issued after *Kahn* and *Geduldig*, it cites only *Reed* and *Frontiero*.

This intermediate standard provides a handle in understanding how both Title VII and Title IX might affect an equal protection claim. The Title VII framework, under which a *prima facie* showing of statistical disparity of *results* is enough to shift the burden to the defendant to demonstrate actual job-relatedness, is likewise an intermediate standard requiring greater judicial scrutiny than under the traditional mere rational-relationship test. That framework has been extended to equal protection analysis in order to cover public employees. *Baker v. Columbus Municipal Separate School District*, 329 F.Supp. 706, 721 (N.D.Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972); *cf. Fowler v. Schwarzwald*, 351 F.Supp. 721, 724 (D.Minn. 1972). It has also been extended to reviews of testing of students for classification in schools. *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D.Cal. 1972); *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967), *aff'd*, 408 F.2d 175 (D.C.Cir. 1969).

It might be argued that, absent a ruling that sex is a suspect classification, the shifting-the-burden framework is not applicable to sex discrimination under the equal protection clause, because the suspectness of racial classifications has been the implicit rationale behind those cases which have applied the framework to equal protection analysis. See *Larry P.*, *supra*, at 1309, which states, *inter alia*, that "shifting the burden is a reflection of the strong judicial and constitutional policy against racial discrimination." Nevertheless, the emergence of new standards, bearing a similarity to the shifting-the-burden standard under *Reed*, *Frontiero* and their offspring, together with Congressional action in employment and education, should point to the applicability of shifting the burden in sex classifications.

One case has explicitly held that the extension of the Title VII framework to equal protec-

tion analysis should cover sexual as well as racial classifications in employment, thus finding that evidence of disparate effects of police height and weight requirements is enough, without demonstrating discriminatory intent, to require a showing of actual job-relatedness. *Smith v. City of East Cleveland*, 363 F.Supp. 1131, 1137-38 (N.D. Ohio 1973). The court then related this standard to the emerging standard under *Reed* and *Frontiero*, which it characterized (1139):

. . . as representing, first, a willingness to review those stereotype rationalizations for classifications to determine whether they rest on some ground which has a demonstrably fair and substantial relation to the object of legislation and, second, a willingness to reject administrative cost as a proper justification for permitting restrictions against women in employment.

Under this standard, the court held that the height and weight requirements rested on an unsupported generalization.

Similarly, the existence of Title IX should guarantee that judicial scrutiny of sex classifications in education under the equal protection clause will not be satisfied by any conceivable rational relationship, regardless of how tenuous. The court in *Bucha v. Illinois High School Association*, 351 F. Supp. 69 (N.D. Ill. 1972), while holding that rules forbidding mixed competition and placing restrictions on girls' interscholastic competition were "a matter of degree and professional judgment" (74) and were supported by

physical and psychological differences, implicitly recognized this when it ruled that Title VII sex discrimination cases were inapplicable (75):

In enacting Title VII Congress has made the legislative judgment that employment is too important an interest to be protected solely by the equal protection clause of the Constitution. . . . Neither the State of Illinois nor the federal Congress has enacted a statute applicable to high school sports that conceivably resembles Title VII's concern with equal employment opportunity. Until either legislature does so, the traditional equal protection standard will govern in this case.

Thus, with the passage of Title IX, *Bucha* can no longer be cited for the proposition that educators' usually broad discretion can be sustained upon a traditional showing of rational relationship where sex classifications are created.

Other indications of the effect of the Congressional intent manifested in Title IX upon equal protection decisions can be seen in the quote from *Frontiero, supra*, on the relevance of other Congressional mandates in determining the scope of equal protection, and a reference to Title IX in *Berkelman, supra*.¹¹ The *Berkelman* court, while noting that admission to public secondary schools is exempted from Title IX coverage, declared:

On the other hand, Congress's reasons for prohibiting sex discrimination in educational programs in general bears directly upon this case. Congress re-



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cognized that, because education provides access to jobs, sex discrimination in education is potentially destructive to the disfavored sex. 118 Cong. Rec. 5804. Lowell High, as a conduit to better university education and hence to better jobs, is exactly that type of educational program with regard to which Congress intended to eliminate sex discrimination when it passed Title IX.

Courts may also take cognizance of the HEW implementing regulations for Title IX in reviewing equal protection claims. HEW guidelines under Title VI have been given "great weight" by courts assessing the requirements of equal protection in cases of racial discrimination. *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840, 88 S. Ct. 77, 19 L. Ed. 2d 104 (1967); *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965).¹²

To the extent that an intermediate standard of review is proper, then, the discussion of burden of proof, intent, effects, etc., under Title IX, *supra*, is also applicable to equal protection claims.¹³

3. The Rational-Relation Test

Under a traditional standard of restrained review, many sex discrimination claims would of course be much more difficult to sustain. Some cases have applied such a standard after stating that *Reed v. Reed* implicitly held that sex is *not* a suspect classification (further evidence that *Reed* and *Frontiero* did not mark the enunciation of a clear standard). *Bucha v. Illinois High School Association*, *supra*, at 74; *Robinson v. Board of Regents of Eastern Kentucky University*, 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 94 S. Ct. 2382 (1974) (safety a sufficient justification to sustain curfew regulations applicable only to women). *See also Ritacco v. Norwin School District*, 361 F. Supp. 930 (W.D. Pa. 1973) (unsuccessful challenge to separate teams for non-contact sports); *United States v. Yingling*, 368 F. Supp. 379 (W.D. Pa. 1973) [Selective Service laws making males exclusively subject to draft justified by finding (386) that "for the most part physical strength is a male characteristic"].

On the other hand, sexual classifications

have occasionally been struck down by courts purporting to use a traditional rational-relation test. *Bennett v. Dyer's Chop House, Inc.*, 350 F. Supp. 153 (N.D. Ohio 1972) (exclusion of women from restaurant during certain hours a denial of equal protection); *Reed v. Nebraska School Activities Association*, 341 F. Supp. 258 (D. Neb. 1972) (preliminary injunction against enforcement of a rule barring female participation on male golf team). Nevertheless, a traditional standard would probably allow differential treatment as long as it is supported by a generalization applicable to most people even when not applicable to the particular plaintiffs. In such cases, a stricter standard of review is critical.

4. Conclusion

In evaluating this analysis, readers should keep in mind its speculativeness due to the uncertainty concerning the present Supreme Court view of sex classifications and to the fact that many courts are more interested in the particular fact situation than in articulating a clear, *a priori* standard. The latter phenomenon is highlighted by the way in which courts have struck down rules prohibiting mixed competition in high school athletics when there is no option for all-female competition and when the activity is a non-contact sport, but have tended to be less critical of such rules when either factor is missing. Similarly, some courts have examined sex classifications without articulating their standard of review. *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184 (E. D. Va. 1970)¹⁴ (where the University of Virginia is more prestigious and offers more courses of study than other state colleges, denial of admission to women on the same basis as men is a violation of equal protection clause); *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971)¹⁵ (no violation of equal protection in denying women admission to all-male college when state maintained all-female college and several coeducational colleges and when all-male college was neither more prestigious nor offered more courses); *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972)¹⁶ (denial of equal protection to maintain higher admissions standards for females to Boston's elite academic high schools because of smaller building capacity).



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Footnotes

¹ Although Title IX's compliance provisions only address HEW enforcement, an individual alleging harm presumably could also seek judicial relief. This is allowed under Title VI of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000d *et seq.*), banning racial discrimination in programs receiving federal financial assistance. *See Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967); *Lau v. Nichols*, 94 S.Ct. 786 (1974). Title VI was the model for Title IX and similarly does not provide explicitly for such relief.

² For a detailed summary of Title IX, *see* Margaret C. Dunkle and Bernice Sandler, "Sex Discrimination: Against Students: Implications of Title IX of the Education Amendments of 1972," in this issue, p. 12.

³ *United States v. Short*, 240 F.2d 292, 298 (9th Cir. 1956); *Berends v. Butz*, 357 F. Supp. 143, 151 (D. Minn. 1973); *Westmoreland v. Laird*, 364 F.Supp. 948, 951 (E.D.N.C. 1973), *aff'd*, 485 F.2d 1237 (4th Cir. 1973).

⁴ *See* pp. 63-65, *infra*.

⁵ Several regulations do avoid this question by more specifically delineating the action which the school must or must not take. For example, Section 86.32 states that while a recipient of federal funds may provide separate housing for male and female students, such housing must be proportionate in quantity to the applicants of each sex for housing and must be comparable in quality and cost.

⁶ *See* the quotes from *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1973), and *Heath v. Westerville Board of Education*, 345 F.Supp. 501 (S.D. Ohio 1972), at pp. 62-63, *infra*.

⁷ *See* pp. 59-65, *infra*.

⁸ *See United States v. Jefferson County Board of*

Education, 372 F.2d 836 (5th Cir. 1967), *air'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed.2d 104 (1967); *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965).

⁹ The statement in *Lau v. Nichols*, *supra* at 788, that the concern is with effect and not intent is only minimally helpful in assessing judicial standards under Title VI, since the Court's statement was based on an HEW regulation which explicitly focuses on effects.

¹⁰ Described in "Higher Admissions Standards for Girls Found Discriminatory," in this issue, p. 53.

¹¹ *Ibid.*

¹² There is special reason, however, for reading Title VI requirements into equal protection standards which may not be applicable to Title IX: unless Title VI and equal protection standards parallel each other, recipients can, under Title VI language, circumvent one by meeting the other.

¹³ *See also Hobson v. Hansen*, *supra* at 497:

The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

¹⁴ Described in Susanne Martinez, "Sexism in Public Education: Litigation Issues," in this issue, p. 5.

¹⁵ *Ibid.*, note 8, p. 10.

¹⁶ *Ibid.*, p. 5.